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5 DONTÉ JOHNSON,

6 Appellant,

7 v.

8 THE STATE OF NEVADA,

9 Respondent.

Case No. 45456

FILED

APR 05 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY S. Young
DEPUTY CLERK

11 **RESPONDENT'S ANSWERING BRIEF**

12 **Appeal From Judgment of Conviction**
13 **Eighth Judicial District Court, Clark County**

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11 **RESPONDENT'S ANSWERING BRIEF**

12 **Appeal from Sentence of Death**
13 **Eighth Judicial Court, Clark County**

14 **STATEMENT OF THE ISSUES**

15
16 1. Whether the trial court erred in ruling that the prosecutor did not ask
17 "stake-out" questions during voire dire.

18 2. Whether the prosecutor committed prejudicial misconduct by referring to
19 the victims as boys and kids in part, but not all, of closing argument.

20 3. Whether the trial court erred by allowing the State to adduce testimony
21 and physical evidence regarding Defendant's juvenile convictions in the penalty
22 hearing.

23 4. Whether Defendant's due process right to a fair trial was impaired by the
24 prosecution's closing argument.

25 5. Whether Defendant's death sentence was imposed under prejudice and
26 arbitrary factors when, at the penalty hearing, the brother of victim Tracy Gorringer,
27 upon viewing the photograph of the crime scene displayed on a screen during the
28 prosecution's closing argument, groaned, passed out on to the floor, and was helped
from the courtroom.

1 6. Whether the prosecutor misstated facts in rebuttal argument and whether
2 it was prejudicial to Defendant.

3 7. Whether Defendant's due process right was compromised by the
4 prosecution in its opening statement.

5 8. Whether Defendant was deprived of his constitutional right to confront
6 witnesses against him when the trial court allowed the State to introduce into
7 evidence Defendant's inmate reports during the penalty phase.

8 9. Whether Defendant was denied a fair penalty hearing by the cumulative
9 effect of alleged errors.

10 STATEMENT OF THE CASE

11 On December 18, 2002, this Honorable Court Affirmed Donte Johnson's
12 (hereinafter "Defendant") convictions, pursuant to a jury verdict, of four counts each
13 of first degree murder with use of a deadly weapon, robbery with use of a deadly
14 weapon, and first degree kidnapping with use of a deadly weapon, and one count of
15 burglary with use of a deadly weapon, but reversed the death sentence because it was
16 imposed by a three-judge panel of district court judges and not a jury. Johnson v.
17 State, 118 Nev. 787, 59 P.3d 450 (2002).

18 On April 12, 2005, the district court granted the State's motion to admit former
19 testimony. 32 Record on Appeal ("ROA"), Criminal Court Minutes p. 56.

20 On April 18, 2005, the district court granted Defendant's motion to bifurcate
21 the penalty phase of the penalty hearing. 32 ROA, Criminal Court Minutes p. 59.

22 Defendant's Jury trial commenced on April 19, 2005. On April 28, 2005, the
23 jury returned with the verdict that the aggravating circumstance outweighs any
24 mitigating circumstance or circumstances in all four (4) murder counts. 28 ROA, p.
25 6946, 6949, 6955; 32 ROA, Criminal Court Minutes p. 63-64.

26 On May 5, 2005, the jury returned a verdict of death on all four (4) murder
27 counts. 32 ROA, p. 7892-7893, 7874-7876; 31 ROA, p. 7747.

28 On June 6, 2005, Defendant was sentenced to death on each of the four (4)
murder counts. 32 ROA, Criminal Court Minutes p. 70. The Warrant and Order of

1 Execution were signed and filed in open court as was the Order to Stay Execution. 32
2 ROA, p. 7911-14, 7909-10, 7919-20.

3 The Judgment of Conviction was filed on June 6, 2005. 32 ROA, 7915-18.
4 Defendant filed a timely Notice of Appeal on June 30, 2005. 32 ROA, p. 8055-56.

5 STATEMENT OF THE FACTS

6 The State presented overwhelming evidence: several witnesses, including his
7 former girlfriend, testified that Johnson bragged about the killings; he possessed
8 items taken from the victim's home where the crimes occurred; and DNA
evidence connected him to the crime.

9 Johnson v. State, 118 Nev. 787, 797, 59 P.3d 450, 457 (2002).

10 Defendant's summation, in his Statement of Facts, of the testimony of the
11 execution-style quadruple murders presented in the 2005 penalty hearing is
12 substantially accurate.

13 ARGUMENT

14 I

15 **THE TRIAL COURT CORRECTLY RULED THAT** 16 **THE PROSECUTOR DID NOT ASK "STAKE-OUT"** 17 **QUESTIONS DURING VOIRE DIRE**

18 Defendant erroneously claims that the State's generalized voir dire, containing
19 no specific facts from Defendant's case, constituted impermissible "stake-out"
20 questions. Defendant cites United States v. Fell, 372 F.Supp. 2d 766, 770 (Vermont
21 2005) in which that court determined "stake-out" questions as those that "ask a juror
22 to speculate or pre-commit to how that juror might vote *based on particular facts*."
23 (emphasis added). Defendant also cites United States v. McVeigh, 153 F.3d 1166,
24 1207 (1998) where that court determined "when a defendant seeks to ask a juror to
25 speculate or pre-commit to how that juror might vote *based on particular facts*, the
26 question strays beyond the purpose and protection of Morgan." (emphasis added).

1 However, the questions asked by the State were not based on any particular
2 facts about Defendant's case. The State asked the following generalized voir dire
3 questions:

4 If you were selected the foreperson of this jury and under the laws and the facts,
5 you believe that the death penalty was appropriate, could you sign your name as
6 the foreperson of this jury to the verdict of death that would put Donte Johnson
to death?

7 22 ROA, p. 5431.

8 If you were selected as a juror in this case, the facts and circumstances
9 presented to you, the instructions of law that Judge Gates would give you
10 regarding the penalty phase, if you and the entire deliberative body of the jury
were of the minds that the death penalty was the appropriate punishment in this
case and you were selected the foreperson, could you sign your name to the
verdict form that puts the defendant Donte Johnson to death?

11 22 ROA, p. 5592.

12 Defense counsel objected on grounds that the law only requires the juror
13 consider the four forms of punishment. 22 ROA, p. 5431. The judge overruled the
14 objection after the State explained as follows:

15 The form of my question wasn't put in whether or not she could consider it.
16 The question presupposes in the form of the question that based upon the law
and facts she thought the death penalty was appropriate *could she carry out her*
17 *function.*

18 22 ROA, p. 5431.

19 The scope of jury voir dire is within the sound discretion of the trial court and will be
20 given considerable deference by this court. Witter v. State, 112 Nev. 908, 921 P.2d
21 886 (1996); Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978). The State's voir
22 dire was reasonably designed to question whether the prospective jurors were capable
23 of carrying out their duty in a death penalty case. This duty may include service as a
24 jury foreman and almost always includes individual polling of the jurors. Notably, the
25 Defense does not contend that any juror was stricken or excused because of their
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1 failure to answer the State's question properly.¹ The State's questions regarding
2 service as foreman and signing the verdict form did not pledge the prospective jurors
3 to any particular course of action nor did it indoctrinate them regarding potential
4 issues in the case. Such inquiry does not qualify as "stake-out" questions because
5 nothing is based on any particular facts from Defendant's case. There is no merit to
6 Defendant's contentions.

7 8 II

9 THE PROSECUTOR DID NOT COMMIT 10 PREJUDICIAL MISCONDUCT BY REFERRING TO 11 THE VICTIMS AS BOYS AND KIDS IN PART, BUT 12 NOT ALL, OF CLOSING ARGUMENT

13 The Defense filed a motion in limine to preclude the court and the prosecutors
14 from referring to the victims as "boys" or "kids" as apparently had been the repeated
15 practice at two prior penalty hearings. 20 ROA, p. 4824-26. The State did not oppose
16 the request (20 ROA, p. 4942-43) and the court so ordered. 20 ROA, p. 5002.
17 Defendant raised an objection to the State's reference to the victims as kids and boys
18 and the district court sustained the objection. 27 ROA, p. 6716. Defendant waived
19 this issue as to the subsequent brief reference to the victims as kids or boys as he did
20 not object. 27 ROA, p. 6723.

21 In a brief introduction of the case to the prospective jurors, the prosecutor
22 respected the pre-trial order by referring to the victims as "young men" and correctly
23 reciting their ages as being seventeen, nineteen and twenty years old. 25 ROA, p.
24 6118-19; 6234. During opening statement, the prosecutor numerous times correctly
25 referred to the victims as "young men" and again stated their actual ages. 26 ROA pp.
26 6386, 6387, 6392, 6394, 6396, 6398, 6403. Only in rebuttal argument did a
27 prosecutor slip up and inadvertently refer to the victims as "boys" or "kids." Such

28 ¹ For example, Juror 001 was ultimately excused for cause, not because she refused to serve as foreman or sign her name
to the verdict form, but because the State's line of questioning made her realize that she could not consider the death
penalty under any circumstances at all. 22 ROA, p. 5431

1 terms are not deceiving or prejudicial in nature, but are accurate descriptions relative
2 to the age of most other adults. While even inadvertent use of such terminology was a
3 technical violation of the agreed-upon pre-trial order, it did not violate defendant's
4 constitutional rights.

5 When the defense objected, the prosecutor acknowledged the mistake and said
6 he would refer to them as "young men." 27 ROA, p. 6716. Although the error was
7 later repeated the prosecutor appears to correct himself mid-sentence: "... where the
8 young boys or young man is watering his lawn" 27 ROA, p. 6719. In the very
9 same argument, the prosecutor also refers to the victims as "folks," "individuals,"
10 "young man," and "people." 27 ROA 6715, 6719.

11 The passing references to the victims as "boys" or "kids" was not intentional;
12 nor was it an attempt to appeal to the passions of the jury. The photographs of the
13 victims and the testimony clearly indicated to the jury that three (3) of the victims
14 were young men (just over 18 years old) and one (1) of the victims was just under 18
15 years old. The jury was not confused into believing that the victims were merely ten
16 (10) years old as Defendant argues. There was no bad faith on the part of the
17 prosecutor and the Defense has failed to demonstrate any prejudice. The jury did not
18 sentence Defendant to death because of brief references to the victims as boys or kids.
19 Contrary to Defendant's assertions, the jury sentenced him to death because he is a
20 cold-blooded murderer.

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III

THE TRIAL COURT DID NOT ERR BY ALLOWING THE STATE TO ADDUCE TESTIMONY AND PHYSICAL EVIDENCE REGARDING DEFENDANT'S JUVENILE CONVICTIONS IN THE PENALTY HEARING

The decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996), cert. denied, 520 U.S. 1126, 117 S.Ct. 1268 (1997). Evidence of the defendant's character and specific instances of conduct is admissible in the penalty phase of a capital case, but the evidence must be relevant and the danger of unfair prejudice must not substantially outweigh its probative value. Pellegrini v. State, 104 Nev. 625, 630-1, 764 P.2d 484, 488 (1988); see NRS 48.035(1), 175.552(3). In addition, a defendant's character and record are relevant to the jury's determination of the appropriate sentence for a capital crime. Id.

During the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, *defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible*. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced. The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of penalty hearing.

NRS 175.552(3). (emphasis added).

In Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), we held that evidence that a defendant had committed an unrelated homicide for which he had not been convicted may be admitted during the penalty phase of the defendant's trial, not to establish the existence of an aggravating circumstance, NRS 200.033(2), but rather as "other matter which the court deems relevant to sentence." NRS 175.552.

Crump v. State, 102 Nev. 158, 161, 716 P.2d 1387, 1388 (1986). (citations omitted).

This statute clearly indicates and we so hold that NRS 175.552 is not limited to those nine aggravating circumstances outlined in NRS 200.033. Furthermore, the United States Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), ruled that the relevant factors to be considered by a jury in imposing a penalty for a capital crime are "the character

1 and record of the individual offender and the circumstances of the particular
2 offense." Therefore, we conclude that the district court did not err in admitting
evidence of the appellant's character even though such evidence did not consist
of aggravating circumstances.

3 Hardison v. State, 104 Nev. 530, 535, 763 P.2d 52, 56 (1988) (citing Allen v. State, 99
4 Nev. 485, 488, 665 P.2d 238, 240 (1983)).

5 "The evidence of prior felony convictions admitted against Rogers fell within
6 the hearsay exception of prior convictions. NRS 51.295. As such, it was admissible
7 regardless of NRS 175.552." Rogers v. State, 101 Nev. 457, 466, 705 P.2d 664, 670
8 (1985).

9 Defendant's request to bifurcate the penalty hearing was granted. Evidence of
10 Defendant's juvenile record was not introduced until after the jury had already
11 determined that the aggravating circumstances outweighed the mitigating
12 circumstances. Essentially, the jury was in the position of a sentencing judge that has
13 access to a presentence report and prior convictions in the second part of the
14 bifurcated penalty hearing. Defendant's prior violent behavior clearly falls within
15 "any other matter which the court deems relevant to sentence" of NRS 175.552(3).
16 Although the trial court permitted introduction of defendant's juvenile record, the
17 court did not permit the State to introduce evidence of defendant's involvement in the
18 murder of Darnell "Snoop" Johnson at the Thunderbird hotel or the shootout at the
19 Super 8 hotel at the Longhorn Casino as had been admitted at the first penalty hearing.
20 In making such evidentiary rulings, the exercise of judicial discretion clearly worked
21 to defendant's advantage.

22 This Court has previously sanctioned the admission of juvenile bad acts in a
23 penalty hearing. In Domingues, the juvenile incidents of squeezing a girlfriend's
24 breasts with so much force that fingers touched and throwing a basketball with full
25 force into the girlfriend's face were properly admitted at a penalty hearing to show the
26 defendant's propensity to commit violent acts. Domingues v. State, 112 Nev. 683,
27 697, 917 P.2d 1364, 1374 (1996). Likewise, in Domingues evidence was properly
28 admitted that the defendant caused problems at his high school and was eventually

1 expelled, that he was arrested for trespassing on school grounds, that he ignored and
2 fled from an officer's attempt to arrest him pursuant to a juvenile detention order, and
3 that he frequently walked the streets in violation of curfew. Id.

4 Defendant's reliance on Roper v. Simmons, 543 U.S. 551 (2005) is misplaced.
5 Roper simply held that it is unconstitutional to impose the death penalty on murderers
6 under the age of eighteen, and says nothing about the admissibility of a juvenile
7 conviction at a penalty hearing. To the extent that Roper relied upon studies
8 indicating juveniles lack maturity and are less culpable, such argument potentially
9 goes only to weight and not the admissibility of such evidence. Defendant fails to cite
10 to any authority that juvenile convictions cannot be admitted at a penalty hearing.
11 The district court did not abuse its discretion in admitting Defendant's juvenile
12 convictions in the penalty hearing.

13 IV

14 15 **DEFENDANT'S DUE PROCESS RIGHT TO A FAIR** 16 **TRIAL WAS NOT IMPAIRED BY THE** **PROSECUTION'S CLOSING ARGUMENT**

17 Defendant's sister, Johnnisha Zamora, testified that she and Defendant grew up
18 in South Central Los Angeles. 26 ROA, p. 6621. She, as well as other family
19 members, testified about how difficult life was growing up in South Central Los
20 Angeles. Ms. Zamora testified that she is now doing fairly well and she made it out of
21 the neighborhood. 26 ROA, p. 6621-6622.

22 Defendant's assertions that the State argued facts outside the record is belied by
23 the record. The theory of the defense was that Defendant should not be given the
24 death sentence because of his horrible childhood. It was fair comment by the State to
25 say that others in Defendant's situation did not commit a quadruple homicide.

26 The standard of review for prosecutorial misconduct rests upon the defendant
27 showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker
28 v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109

1 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to
2 have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803
3 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements
4 so contaminated the proceedings with unfairness as to make the result a denial of due
5 process. Darden v. Wainwright, 477 U.S. 168, 181 (1986). The defendant must show
6 that the statements violated a clear and unequivocal rule of law, he was denied a
7 substantial right, and as a result, he was materially prejudiced. Libby v. State, 109
8 Nev. at 911, 859 P.2d at 1054. "The level of misconduct necessary to reverse a
9 conviction depends on how strong and convincing is the evidence of guilt." Rowland
10 v. State, 118 Nev. at 38, 39 P.2d at 118 (2002). In determining whether a defendant
11 has been deprived of a fair trial as a result of prosecutorial misconduct, this Court will
12 inquire as to "whether the prosecutor's statements so infected the proceedings with
13 unfairness as to make the results a denial of due process." Greene v. State, 113 Nev.
14 157, 169, 931 P.2d 54, 62 (1997), overruled in part on other grounds by Byford v.
15 State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). "Furthermore, a defendant is
16 entitled to a fair trial, not a perfect one, and accordingly, '[a] criminal conviction is
17 not to be overturned on the basis of a prosecutor's comments standing alone, for the
18 statements or conduct must be viewed in context.'" Rudin v. State, 120 Nev. 121, 86
19 P.3d 572, 582 (2004) (quoting Greene, *supra*, and United States v. Young, 470 U.S. 1,
20 11 (1985)).

21 In this case, the prosecutor's remarks clearly do not justify overturning the
22 conviction. As the United States Supreme Court has noted, "a criminal conviction is
23 not to be lightly overturned on the basis of a prosecutor's comments standing alone,
24 for the statements or conduct must be viewed in context; only by so doing can it be
25 determined whether the prosecutor's conduct affected the fairness of the trial." United
26 States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Should this Court
27 determine that improper comments were made by the prosecutor, "it must
28 be...determined whether the errors were harmless beyond a reasonable doubt."

1 Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). It is not enough
2 that the prosecutor's remarks are merely undesirable. See Darden v. Wainwright, 477
3 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The relevant inquiry is whether the
4 prosecutor's statements so infected the proceedings with unfairness as to make the
5 results a denial of due process. Darden v. Wainwright, 477 U.S. at 181.

6 In addition, before this Court could reverse this case because of prosecutorial
7 misconduct, defendant must prove that the errors were of constitutional dimension and
8 so egregious that they denied the defendant his fundamental right to a fair jury trial.
9 Williams v. State, 113 Nev. 1008, 1018, 945 P.2d 438, 444 (1997); see also Ross v.
10 State, 106 Nev. 924, 803 P.2d 1104 (1990).

11 In Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988), this Court reasoned that if a
12 guilty verdict was free from doubt, even aggravated prosecutorial remarks will not
13 justify reversal. Id. at 107, 754 P.2d at 837. In order for prosecutorial misconduct to
14 constitute reversible error, it must be prejudicial and not merely harmless. Id. Error is
15 harmless if this Court concludes, "without reservation that the verdict would have
16 been the same in absence of error." Witherow v. State, 104 Nev. at 724, 765 P.2d at
17 1156.

18 The State's comments regarding South Central Los Angeles do not rise to the
19 level of prosecutorial misconduct.

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2 **DEFENDANT'S DEATH SENTENCE WAS NOT IMPOSED**
3 **UNDER PREJUDICE AND ARBITRARY FACTORS WHEN, AT**
4 **THE PENALTY HEARING, THE BROTHER OF VICTIM**
5 **TRACY GORRINGE, UPON VIEWING THE PHOTOGRAPH OF**
6 **THE CRIME SCENE DISPLAYED ON A SCREEN DURING THE**
7 **PROSECUTION'S CLOSING ARGUMENT, GROANED, PASSED**
8 **OUT ON TO THE FLOOR, AND WAS HELPED FROM THE**
9 **COURTROOM**

10 The district court clarified for the record that it did not see Nick Gorringer
11 crying or visibly upset. 27 ROA, p. 6664. There was no evidence that the jury knew
12 who Nick Gorringer was or who he was related to because he did not testify. 27 ROA,
13 p. 6660. There was no evidence that the jury even saw Nick Gorringer fall down. In a
14 hearing outside the jury's presence the judge commented that, "All I know is some
15 guy fell off the seat over there and he was picked up by some guards and taken out . . ." 27
16 ROA, p. 6664.

17 The district court gave a cautionary instruction to the jury to disregard the
18 commotion. 27 ROA, p. 6665. "There is a presumption that jurors follow jury
19 instructions." Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997). The
20 situation is unlike the Defendant in Holloway who was shocked by a stun belt in front
21 of the jury even though he had done nothing to warrant it. Holloway v. State, 116
22 Nev. 732, 6 P.3d 987 (2000). Activation of the belt during the prosecutor's argument
23 reinforced the image of defendant as an extremely violent man with whom authorities
24 had to take exceptional security precautions. Id. No such inference would have been
25 drawn by the jury in the present case just because an observer in the courtroom
26 unknown to the jury fell off the bench and had to be assisted out. Defendant has
27 failed to demonstrate that his sentence of death was imposed under the passion,
28 prejudice or any arbitrary factor.

VI

**THE PROSECUTOR DID NOT MISSTATE FACTS IN
REBUTTAL ARGUMENT AND HIS STATEMENTS
WERE NOT PREJUDICIAL TO DEFENDANT**

During argument, the prosecutor stated that the victims had made lots of money from "selling pizzas and drugs." 27 ROA, p. 6713. This statement was immediately objected to by defense counsel who challenged the accuracy of any evidence about pizza. *Id.* Even the judge commented, "I don't recall pizza, Counsel" in front of the jury. 27 ROA, p. 6713. The prosecutor did not press the point but left it to the collective memory of the jury of what the testimony had been. *Id.* The actual testimony appears to have been only that the victims made money selling "acid."² 25 ROA, p. 6321-25. From this apparently mistaken reference to pizza, the Defense argues that the prosecutor was arguing facts not in evidence and was trying to portray the victims in a more favorable light.

Defendant's contention would be more credible if the prosecutor had merely stated that Matthew Mowen had made money selling pizzas. However, the prosecutor clearly included the prejudicial portion that victim Matthew Mowen made money selling drugs. Additionally, the jury was instructed that arguments of counsel are not evidence:

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be .

...

28 ROA, p. 6943.

There is no suggestion that the jury was misled by the prosecutor's comment. Any reference to pizza was of no significance considering the undisputed testimony that

² The reference to selling pizzas apparently came from the trial although it may not have been repeated for the new jury who heard the second penalty hearing. 7 ROA, p. 1749.

1 the victims sold drugs. Defendant's contention lacks merit as there was not a material
2 misstatement of fact that prejudiced Defendant.

3 VII

4 5 **DEFENDANT'S DUE PROCESS RIGHT WAS NOT** 6 **COMPROMISED BY THE PROSECUTION IN ITS** 7 **OPENING STATEMENT**

8 A prosecutor has a duty to refrain from stating facts in opening statement that
9 he cannot prove at trial. Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991); Riley v.
10 State, 107 Nev. 205, 808 P.2d 551 (1991); Garner v. State, 78 Nev. 366, 374 P.2d 525
11 (1962). If a prosecutor overstates in his opening statement what he is able to prove at
12 trial, misconduct does not lie unless the prosecutor makes these statements in bad
13 faith. Rice v. State, 113 Nev. 1300, 949 P.2d 262 (1997).

14 During opening statements the prosecutor made a one-sentence reference about
15 a telephone threat against a young woman, and a one-sentence reference about a
16 contract to kill someone named "Scale":

17 You will hear about a phone call he made, threatening to kill a young
18 woman, a civilian. You will hear about a letter he wrote where he put a
19 hit out on Scale.

20 28 ROA, p. 6965.

21 Defense counsel immediately asked to approach the bench and no other mention was
22 ever made of the two alleged incidents in front of the jury. These brief references
23 came in the midst of a nine-page opening statement detailing numerous incidents of
24 bad conduct of the defendant including his first armed robbery at age fourteen,
25 possessing a handgun on school property, an armed robbery of a bank at age sixteen,
26 selling crack cocaine, a felony conviction for shooting Derrick Simpson in the face
27 and the back which later resulted in his death, and throwing a fellow inmate off a
28 second floor tier at the jail. 28 ROA, pp. 6958-6967.

1 At the close of the prosecutor's opening statement, the district court gave a
2 cautionary instruction to the jury that statements made by attorneys in their opening
3 statements are not evidence:

4 Ladies and gentlemen I want to caution you that opening statements, as
5 well as closing statements of the attorneys, are intended to help you in
6 understanding the evidence and applying the law. I want to emphasize to
7 you that the statements that the attorneys make in their opening
8 statements is not evidence and should not be given evidentiary value.

8 28 ROA, p. 6967. "There is a presumption that jurors follow jury instructions." Lisle
9 v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997).

10 Outside the presence of the jury, a discussion was held about notice to the
11 defense of the two incidents at the jail regarding the telephone threat and the contract
12 to kill Scale. 28 ROA, pp. 6984-6993. Defense counsel admitted knowing about
13 some of the bad acts that occurred during defendant's incarceration, but denied
14 knowledge about the two incidents in question. The prosecutor quoted from both the
15 original notice of evidence in aggravation as well as an amended notice that advised
16 the State would use evidence of defendant's conduct while incarcerated. Id. A
17 detailed description of the incidents appeared in the disciplinary records found in the
18 possession of defense counsel. 28 ROA, p. 6989. To settle the dispute, the parties
19 came to an agreement that the prosecution would err on the side of caution and not use
20 the evidence and in exchange the defense would not allege the prosecutor was being
21 underhanded or acting in bad faith. 28 ROA, p. 6992.

22 The State had a good faith basis for believing that evidence of the telephone
23 threat and hit on Scale would be presented as evidence. The references were brief and
24 harmless in light of the numerous other bad acts and criminal conduct of the defendant
25 which the jury heard. Defendant was not prejudiced and the district court gave a
26 satisfactory cautionary instruction.

VIII

**DEFENDANT WAS NOT DEPRIVED OF HIS
CONSTITUTIONAL RIGHT TO CONFRONT
WITNESSES AGAINST HIM WHEN THE TRIAL
COURT ALLOWED THE STATE TO INTRODUCE
INTO EVIDENCE DEFENDANT'S INMATE
REPORTS DURING THE PENALTY PHASE**

The State notified the defense in 1999 and again in 2004 that it intended to admit the records in question at the penalty hearing. 29 ROA, 7116. The State even redacted some of the infractions objected to by the defense because they were not prepared to address them, including any mention of the telephone threat or hit on Scale as addressed in the argument above. *Id.* Nonetheless, the defense still made a Crawford objection to admission of the records. 29 ROA, 7114. Notably, the defense does not identify any particular testimonial statement or reported infraction found within the jail records that would violate Crawford. Aside from admission of the records as an exhibit, the defense does not identify any prejudicial testimony or argument made to the jury that referred to the contents of the jail records.

Courts have held that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), in which the Supreme Court held that admission of testimonial hearsay *at trial* violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, "does not alter the pre-Crawford law that the admission of hearsay testimony *at sentencing* does not violate confrontation rights." United States v. Chau, 426 F.3d 1318, 1323 (11th Cir. 2005), citing United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005), cert. denied, -- U.S. ---, 126 S.Ct. 671 (2005); see also Gaxiola v. State, 119 P.3d 1225 (Nev. 2005).

The State also submits that the inmate reports do not fall under the requisite *testimonial* definition to fall within Confrontation Clause protection. The reports are nontestimonial hearsay and therefore exempt from Confrontation Clause scrutiny altogether.

1 Where nontestimonial hearsay is at issue, it is wholly consistent with the
2 Framers' design to afford the States flexibility in their development of hearsay
3 law—as does *Roberts*, and as would an approach that exempted such statements
4 from Confrontation Clause scrutiny altogether. Where testimonial evidence is
5 at issue, however, the Sixth Amendment demands what the common law
6 required: unavailability and a prior opportunity for cross-examination. We
7 leave for another day any effort to spell out a comprehensive definition of
8 “testimonial.” Whatever else the term covers, it applies at a minimum to prior
9 testimony at a preliminary hearing, before a grand jury, or at a former trial; and
10 to police interrogations. These are the modern practices with closest kinship to
11 the abuses at which the Confrontation Clause was directed.

12 Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374 (2004).

13 Most of the hearsay exceptions covered statements that by their nature *were not*
14 *testimonial* – for example, *business records* or statements in furtherance of a
15 conspiracy. We do not infer from these that the Framers thought exceptions
16 would apply even to prior testimony.

17 Crawford v. Washington, 541 U.S. 36, 56, 124 S.Ct. 1354, 1367 (2004). (emphasis
18 added).

19 Thus, the Confrontation clause Crawford analysis is inapplicable when business
20 records such as the inmate reports herein are at issue. See People v. Brown, 9 Misc.3d
21 420, 801 N.Y.S.2d 709 (2005); Commonwealth v. Verde, 444 Mass. 279, 827 N.E.2d
22 701 (2005); People v. Hinojos-Mendoza, -- P.3d --, 2005 WL 2561391 (Colo. App.
23 2005).

24 Furthermore, as the district court pointed out (29 ROA, p. 7119-7120), it is not
25 reasonable to believe that the inmate reports were made for the purpose of use in a
26 later trial and this bifurcated hearing was essentially a sentencing hearing wherein
27 hearsay has always been allowed.

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IX

**DEFENDANT WAS NOT DENIED A FAIR PENALTY
HEARING BY THE CUMULATIVE EFFECT OF
ALLEGED ERRORS**

There were no prejudicial errors in the penalty hearing as argued above. Clearly, nothing prejudicial enough to overturn the sentence of death occurred during the penalty hearing. Defendant is not entitled to a perfect penalty hearing, only a fair one which he received. While death may be "different," reviewing courts should not place the bar so high that achieving a valid death verdict becomes impossible. Defendant laughed about the murders and bragged about them. 25 ROA, p. 6340. The death penalty was designed for cold-blooded murderers with a calloused heart such as Defendant.

While the first death verdict by a three-judge panel had to be reversed based on subsequent changes in the law, a jury of the defendant's peers has now also heard the evidence and returned a death verdict against defendant. This was achieved even though the trial judge ignored the law in bifurcating the penalty hearing at the defense request where the defendant's family testified in the first half but the victims' family were not permitted to testify until the second half. In an effort to be extra cautious in his rulings and ensure the case would not be reversed on appeal, the trial judge excluded testimony about defendant's involvement in the "Snoop" Johnson murder and a related shooting at the Longhorn casino and also restricted the State's victim impact testimony. Any errors in defendant's second penalty hearing are harmless in light of the many evidentiary rulings in his favor.

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Dated this 4th day of April, 2006.

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1 **CERTIFICATE OF COMPLIANCE**


2 I hereby certify that I have read this appellate brief, and to the best of my
3 knowledge, information, and belief, it is not frivolous or interposed for any improper
4 purpose. I further certify that this brief complies with all applicable Nevada Rules of
5 Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the
6 brief regarding matters in the record to be supported by appropriate references to the
7 record on appeal. I understand that I may be subject to sanctions in the event that the
8 accompanying brief is not in conformity with the requirements of the Nevada Rules of
9 Appellate Procedure.

10 Dated this 4th day of April, 2006.

11 Respectfully submitted,

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 45456

FILED

MAY 25 2006

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APPELLANT'S REPLY BRIEF

(Appeal from Remanded Penalty Hearing and Sentence
of Death in the Eighth Judicial District Court)

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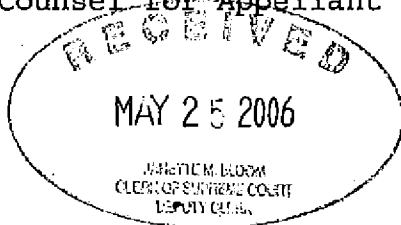
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1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3 DONTE JOHNSON,

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.

Case No. 45456

8
9 APPELLANT'S REPLY BRIEF

10 (Appeal from Remanded Penalty Hearing and Sentence
11 of Death in the Eighth Judicial District Court)

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- 2. SENT A LETTER ORDERING A HIT ON A MAN
KNOW AS SCALES, WHEN,
- 3. HE COULD NOT, THEREAFTER ADDUCE
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1 and "stake-out" questions. The Fell Court noted:

2 "There is a crucial different between questions that seek
3 to discover how a juror might vote and those that ask
4 whether a juror will be able to fairly consider potential
5 aggravating and mitigating evidence." (at 771)

6 Here, the prosecutor's question to 17 prospective jurors was not asked
7 for any legitimate or allowable purpose. Instead, the question was
8 a blatant attempt to determine the kind of verdict the jurors would
9 return, and to cause the jurors to commit themselves to a future
10 course of action.

11 DONTÉ JOHNSON has noted that the question challenged here does
12 not have the same form as case-specific questions. Rather, the
13 prosecutor's question asked the prospective jurors to speculate on
14 their actions should they be selected as foreperson of the jury if,
15 "under the laws and facts", they believed the death penalty was
16 appropriate, "could you sign your name as the foreperson of this jury
17 to the verdict of death that would put Donte Johnson to death." (22
18 ROA 5431)

19 The prosecutor's question was an improper "stake-out" question
20 seeking to cause prospective jurors to pledge themselves to a future
21 course of action and "indoctrinate them regarding potential issues
22 before the evidence has been presented and they have been instructed
23 on the law." See, Richmond v. Polk, 375 F.3d 309, 330 (2005); citing
24 State v. Richmond, 495 S.E.2d 677, 683 (1998).

25 There can be no argument that this question, repeated over and
26 over, was a "stake-out" question asked for the purpose of empaneling
27 a pro-death jury rather than the constitutionally mandated panel of
28 impartial, indifferent jurors DONTÉ JOHNSON was entitled to have
determine his sentence. The death verdict should be set aside.

1 II.

2 IT WAS INTENTIONAL MISCONDUCT FOR THE
3 PROSECUTOR TO REFER TO THE VICTIMS AS "BOYS"
4 AND "KIDS" WHEN HE WAS EXPRESSLY PROHIBITED
5 FROM DOING SO BY THE DISTRICT COURT'S PRE-TRIAL RULING

6 The prosecutor intentionally and deliberately violated the
7 District Court's pre-trial ruling precluding him from referring to the
8 victims as "boys" when in rebuttal he argued:

9 "...He may have been the one who said what these boys had
10 and it may have been the triggering event. Are we going to
11 blame Todd Armstrong for this? Did he suggest that they go
12 over and execute these kids,.....

13 MS. JACKSON: Your Honor, I'm going to object. Counsel has
14 referenced to these decedents as kids and as boys. We made
15 a specific ruling on that before we started.

16 MR. STANTON: I will refer to them as 'young men', Your
17 Honor. All right. Sustained." (27 ROA 6715-16)

18 Again the Prosecutor referred to the victims as boys:

19 "...walk that videotape back beyond the four walls of Terra
20 Linda where the young boys or young man is watering his
21 lawn. (27 ROA 6719)

22 Again,...not sympathy, compassion he goes over and
23 systematically executes, bending down to each one of these
24 boys....." (27 ROA 6720)

25 In the Opening Brief, DONTE JOHNSON argued to this Court that the
26 actions of the prosecutor were intentional misconduct that created
27 prejudice in the minds of the jury against him. He cited, U.S. v.
28 Young, 470 U.S. 1, 10 (1985) for the principle that a prosecutor may
not improperly appeal to a jury to act in ways other than as
dispassionate arbitrators of the facts. (Opening Brief, page 28, lns
9-13)

The State argues that JOHNSON waived the issue as to the second
improper reference to the victims as boys as he did not object.
(Answering Brief, page 5).

1 The record reflects the following:

2 Again the Prosecutor referred to the victims as boys:

3 "...walk that videotape back beyond the four walls of Terra
4 Linda where the young boys or young man is watering his
lawn. (27 ROA 6719)

5
6 Again,...not sympathy, compassion he goes over and
systematically executes, bending down to each one of these
7 boys....." (27 ROA 6720)

8 After the jury left the Courtroom defense counsel asked to put
9 on the record that there had been an Order by the Court that the
10 victims not be referred to as "boys" or "kids". The Court admonished
11 the Prosecutor who, after the admonishment, did it two more times.
12 The Court observed that defense counsel did not object and she
13 responded that she had not wanted to draw attention to it, which was
14 why the Motion was filed in advance of trial. (27 ROA 6723)

15 To believe the prosecutor's repeated reference to the victims as
16 boys or kids was an inadvertent slip requires an assumption that his
17 rebuttal argument was not prepared prior to being given to the jury,
18 but was contemporaneously composed. Possible, of course, but
unlikely.

19 In addition, the prosecutor argues the improper reference did not
20 violate DONTE JOHNSON'S constitutional rights, there was no bad faith,
21 and no prejudice. DONTE JOHNSON would point out to this Court that
22 there was also no authority cited by the State in support of its
23 arguments. This Court should not consider the State's argument as the
24 State failed to cite authority to support it. See, Senegal v. IGT,
25 116 Nev. 565, 2 P.3d 258 (2000); Cunningham v. State, 94 Nev. 128,
26 139, 579 P.2d 936, 937 (1978).

27 The prosecutor's deliberate contravention of the District Court's
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1 Order was a calculated effort to evoke sympathetic responses from
2 jurors to the prejudice of DONTE JOHNSON.

3 JOHNSON notes that the State's conclusion: "contrary to
4 Defendant's assertions, the jury sentenced him to death because he is
5 a cold-blooded murderer" is without citation to the record, or
6 authority. See, Senegal, supra.

7 In Rose v. Clark, 478 U.S. 570 (1988), Justice Stevens in
8 concurring wrote:

9 "An automatic application of the harmless error review in
10 case after case, and for error after error, can only encourage
11 prosecutors to subordinate the interest in respecting the
12 constitution to the ever present and always powerful interest in
13 obtaining a conviction in a particular case."
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III.

THE DECISION OF THE TRIAL COURT TO ALLOW THE
STATE TO ADDUCE TESTIMONY AND PHYSICAL EVIDENCE
REGARDING APPELLANT'S JUVENILE CONVICTIONS
DEPRIVED APPELLANT OF A FAIR PENALTY HEARING

The first decision of the Trial Court to exclude DONTE JOHNSON'S juvenile records as being more prejudicial than probative was sound. When the Court later decided to allow the State to adduce testimony and records of DONTE JOHNSON'S juvenile conviction it erred. As a consequence of the admission of these records, DONTE JOHNSON was denied due process of law as guaranteed by the United States and Nevada Constitution, Sixth Amendment, Fourteenth Amendment.

NRS 175.522(3) allows the introduction of "other matter" evidence at a penalty hearing in the sound discretion of the trial judge. The evidence must be relevant and must be more probative than prejudicial. See, NRS 48.035(1). Here, the Judge's change of mind allowing the introduction of evidence regarding DONTE JOHNSON'S juvenile convictions was unreasonable.

A trial court is at liberty to exclude relevant evidence if it determines that its probative value is substantially outweighed by the danger of unfair prejudice. See, Halbower v. State, 93 Nev. 212, 562 P.2d 485 (1977).

In Krause, Inc. v. Little, 117 Nev. 929, 34 P.3d 566 (2001) this Court stated that to merit exclusion the evidence must unfairly prejudice an opponent typically by appealing to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence. (at 935, citation omitted.) In Roper v. Simmons, 543 U.S. 551 (2005) the Court found that juvenile offenders were less culpable than adults. However, it cannot be said

1 that the jury herein could intellectually evaluate DONTE JOHNSON'S
2 juvenile record without the emotional evaluation. The admission of
3 testimony and exhibits regarding DONTE JOHNSON'S juvenile record was
4 so highly prejudicial as to deprive DONTE JOHNSON of a fair penalty
5 hearing.

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IV.

DONTE JOHNSON'S DUE PROCESS RIGHT TO A
FAIR TRIAL WAS IMPAIRED BY THE
PROSECUTION'S IMPROPER CLOSING ARGUMENT

Contrary to the State's position in its Answering Brief (page 9) it was not fair comment for the prosecutor to argue to the jury:

"I would submit to you that if you find that his upbringing outweighs this quadruple homicide, that is disrespectful to members of South Central L.A. who didn't commit a quadruple homicide. Common sense tells us that many, many, many people in a similar upbringing haven't done what Donte Johnson has done. If you were to find that his childhood is entitled to a greater wait (sic) of this quadruple homicide, it's like telling people --" (27 ROA 6656-6657)

and this Court should so find.

The argument was designed to inflame the jury, invoke social pressure, and coerce the jury into imposing a sentence of death.

A jury, in a sentencing hearing, is to determine the proper sentence for the defendant before them based upon his past conduct. Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985). Here, however, the prosecutor, as in Collier, Id., improperly compared DONTE JOHNSON and his actions to others as well as improperly discussing matters not in evidence. The prosecutors invocation of facts outside the record and improper comparison of DONTE JOHNSON to others deprived him of the individual consideration essential in capital case. Lockett v. Ohio, 438 U.S. 586 (1978).

In its Answering Brief, the State cites 14 cases as support for its position that before this Court could reverse because of prosecutorial misconduct JOHNSON must prove the errors were of constitutional dimension and so egregious that they denied him his fundamental right to a fair jury trial. This argument lacks both validity and force. The authorities cited by the State, with the

1 exception of Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) are
2 inapplicable to the facts herein.

3 First, the cases cited by the State are relevant only to
4 challenges on convictions on the ground of prosecutorial misconduct.
5 The case at bar does not involve a conviction, but a challenge to a
6 sentence of death. Secondly, unlike the cases cited by the State,
7 defense counsel here did object to the prosecutors improper argument,
8 a sidebar conference was held outside the presence of the court
9 reporter. (27 ROA 6656-6657)

10 Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) was cited
11 by the State for its holding by this Court that when a guilty verdict
12 is free from doubt, even aggravated prosecutorial remarks will not
13 justify reversal. (Ans. Brf. p. 11) Clearly this ruling is not
14 applicable to a sentencing hearing. However, Flanagan, Id. is
15 applicable to the case at bar as this Court noted therein

16 "At the sentencing phase, it is most important that the
17 jury not be influenced by passion, prejudice, or any other
18 arbitrary factor. Hance v. Zant, 696 F.2d 940, 951 (11th
19 Cir. 1983). 'With a man's life at stake, a prosecutor
20 should not play on the passions of the jury.' Id." (at
21 107, 754 P.2d 837)

22 The prosecutor has a duty to confine argument to the jury within
23 proper bounds. See, United States v. Young, 470 U.S. 1, 8 (1985).
24 Here, the misconduct of the prosecutor rendered the sentencing hearing
25 fundamentally unfair. This case should be remanded for a new penalty
26 hearing.
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1 V.

2 APPELLANT'S DEATH SENTENCE WAS IMPOSED UNDER
3 PREJUDICE AND ARBITRARY FACTORS WHEN, AT
4 THE PENALTY HEARING, IN THE PRESENCE OF THE
5 JURY, THE BROTHER OF TRACY GORRINGE, UPON
6 VIEWING THE PHOTO OF THE CRIME SCENE
7 DISPLAYED ON A SCREEN DURING THE
8 PROSECUTOR'S CLOSING ARGUMENT, GROANED,
9 PASSED OUT ON TO THE FLOOR, AND WAS
10 HELPED, CRYING FROM THE COURTROOM

11 The fact that the District Court Judge did not see Nick Gorringer
12 crying or visibly upset is not the crucial fact. The crucial fact is
13 that the jury saw Gorringer fall, saw him crying, and being helped from
14 the courtroom after the display of the enlarged crime scene photo.
15 Genuine or spurious, the extreme behavior demonstrated to the jury
16 requires reversal of the sentence of death. As in Holloway v. State,
17 116 Nev. 732, 6 P.3d 987 (2000) the startling occurrence was a
18 prejudicial and arbitrary factor requiring reversal of the death
19 sentence.

20 The State claims that Lisle v. State, 113 Nev. 540, 558, 937 P.2d
21 473, 484 (1997) supports the presumption that juries follow jury
22 instructions and the District Court Judge gave the jury a cautionary
23 instruction to disregard the commotion. The District Court in
24 Holloway, Id., also addressed the jury about the activation of the
25 stun belt to no avail.

26 Here, when Gorringer groaned and fell after the prosecutor, in his
27 closing argument, displayed an enlarged crime scene photograph on the
28 screen the courtroom audience was divided into two distinctly
different groups. On the left side, all Caucasian, were the families
of the victims. This is where Gorringer was seated. On the right
side, almost all Afro-Americans, was the family of DONTÉ JOHNSON. (27
ROA 6663)

1 After the fall/collapse Gorringer was crying as he was helped out
2 of the courtroom by Matthew Mowen's father and the bailiff. This also
3 was in the presence of the jury. The District Court declared a
4 recess. (27 ROA 6663-6664)

5 Simply logic compels an assumption that the jury panel that
6 observed the actions of Gorringer had no confusion regarding his
7 affiliation with the victims.

8 The commotion/interruption/incident was an arbitrary and
9 prejudicial factor which requires reversal of DONTÉ JOHNSON'S
10 sentence.
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1 VI.

2 IT WAS IMPROPER FOR THE PROSECUTOR TO
3 MISSTATE FACTS IN REBUTTAL ARGUMENT

4 In rebuttal argument the prosecutor argued facts not in evidence,
5 discounted the defense objection and the Court's statement of opinion.
6 This was misconduct as well as lack of respect to the Court.

7 In the State's rebuttal closing argument the prosecutor stated
8 that he wished to talk about a couple of sets of facts regarding the
9 murders and thereafter stated:

10 "The fatal - the ultimately fatal conversation when Matt
11 Mowen comes over and in the presence of the defendant and
12 Terrell Young, makes the statement that they have lots of
13 money that they made selling pizzas and drugs following the
14 band Phish....." (27 ROA 6713)

15 Defense counsel objected stating that the only mention of "pizza"
16 was made by the prosecutors. The detective said "acid". The money
17 was made selling acid. There was no evidence at all that pizzas were
18 sold. The Court stated that it did not recall pizza. (27 ROA 6712-
19 6713)

20 The prosecutor then stated:

21 "I'll leave it to the collective memory of you as the jury
22 of what occurred." (27 ROA at 6713)

23 In the Opening Brief (page 36) JOHNSON asserted that it was
24 misconduct for a prosecutor to argue facts not in evidence citing
25 Witherspoon v. State, 104 Nev. 721, 765 P.2d 1153 (1988); Collier v.
26 State, 101 Nev. 473, 705 P.2d 1126 (1985); and Williams v. State, 103
27 Nev. 106, 110, 734 P.2d 700, citing SCR 181(3) 1985, SCR 195(3),
28 198(2) 1985.

29 The State in its Answering Brief denies any merit to JOHNSON'S
30 argument. However, it cites no authority in support of its position.
31 See, Senegal v. IGT, 116 Nev. 565, 2 P.3d 258 (2000).

1 The prosecutor, in misstating the fact, sought to portray the
2 victims in a more positive light and his response to the challenge was
3 prejudicial to DONTE JOHNSON.
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VII.

APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL
WAS COMPROMISED BY THE PROSECUTORS WHO IN
OPENING ARGUMENT OF THE SENTENCING PHASE:

1. TOLD THE JURY THAT WHILE INCARCERATED DONTÉ JOHNSON DID NOT STOP HIS CRIMINAL CONDUCT AND, IN FACT, MADE A TELEPHONE CALL TO A YOUNG WOMAN IN WHICH HE THREATENED TO KILL HER, AND FURTHER,

2. SENT A LETTER ORDERING A HIT ON A MAN KNOWN AS SCALES, WHEN,

3. HE COULD NOT, THEREAFTER ADDUCE EVIDENCE TO SUPPORT THE ALLEGATIONS DUE TO THE PROSECUTORS FAILURE TO PROVIDE ADEQUATE NOTICE TO THE DEFENSE.

The prosecutor did not notice JOHNSON that he would argue that JOHNSON, while incarcerated, had threatened to kill a young woman and put out a contract to kill a man named Scale. (28 ROA 6984-90) Clearly, when, in opening statement to the jury he argued:

"Eventually, in prison, while incarcerated, his criminal conduct still didn't stop. You will hear about his behavior since his incarceration, how he can't comply with the rules and how rules are terribly important when you are a corrections officer at the detention center or at Ely State Prison. It's imperative that the inmates comply with the rules.

You will hear about a phone call he made, threatening to kill a young woman, a civilian.

You will hear about a letter he wrote where he put a hit out on Scale. You heard that name in the trial, Mr. Anderson, named Scale." (emphasis added) (28 ROA 6965)

The prosecutor has a duty to refrain from stating facts in his opening statement that he cannot prove at trial. Riley v. State, 107 Nev. 205, 212, 808 P.2d 551, 555 (1991) cert. denied, 514 U.S. 1052, 115 S.Ct. 1431, 131 L.Ed.2d 312 (1995).

Evidence of other offenses is universally regarded as prejudicial and is therefore admitted into evidence only for certain specified purposes, NRS 48.045(2), and only then when its probative value

1 outweighs its prejudicial effects." Theriault v. State, 92 Nev. 185,
2 189, 547 P.2d 668, 671 (1976).

3 Here, the prosecutor told the jury that JOHNSON threatened to
4 kill a young woman and ordered a "hit" on a man named Scales.
5 Clearly, these statements were highly prejudiced, exacerbating any
6 fears the jury might have about future violence should it not impose
7 a sentence of death. It cannot be said that the prejudice caused by
8 the prosecutor's assertions did not contribute to the death sentence
9 imposed.

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VIII.

DONTE JOHNSON WAS DEPRIVED OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM GUARANTEED BY BOTH THE UNITED STATES AND NEVADA CONSTITUTIONS WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO ADDUCE INTO EVIDENCE JOHNSON'S INMATE REPORTS FROM THE CLARK COUNTY DETENTION CENTER WITHOUT FIRST DEMONSTRATING THAT THE WITNESSES WERE UNAVAILABLE TO TESTIFY AND THAT JOHNSON HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE THEM

The detention center inmate reports, containing testimonial statements, were inadmissible under the confrontation clause, as the State did not show that the declarants were unavailable to testify and DONTE JOHNSON never had an opportunity to cross-examine them. DONTE JOHNSON'S sentence of death should be reversed.

In Crawford v. Washington, 541 U.S. 36, 69 (2004) the Court held "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the constitution actually prescribes: confrontation. The Court stated: "we leave for another day any effort to spell out a comprehensive definition of testimonial."

The Court did note that a statement is "testimonial" if it is a solemn declaration made for the purpose of establishing some fact. Id. at 51.

In King v. State, 2006 Tex.App. Lexis 2100 (March 16, 2006) the Court stated:

The legal ruling of whether a statement is testimonial under Crawford is determined by the standard of an objectively reasonable declarant standing in the shoes of the actual declarant. Generally speaking, a statement is 'testimonial' if it is a solemn declaration made for the purpose of establishing some fact. Rousseau, 171 S.W.3d 871, 880 (Tx.Crim.App 2005) (citing Crawford, 541 U.S. 36, 51 (2004). (at 21)

In Rousseau v. Texas, 171 S.W.3d 871 [Tx.Crim.App] (2005), a

1 capital murder case, the court of criminal appeals of Texas affirmed
2 the defendants conviction but reversed as to punishment, remanding for
3 a new punishment hearing on the ground that "incident reports" and
4 "disciplinary reports" admitted under the business records exception
5 to the hearsay rule; contained statements which appeared to have been
6 written by correction officers and which purported to document
7 numerous and repeated disciplinary offenses on the part of Rousseau
8 while incarcerated.

9 Further, in writing the statements, the corrections officers
10 relied upon their own observation or the observation of others. The
11 individuals who supposedly observed the offenses did not testify at
12 trial.

13 The Texas Court held that the reports were testimonial statements
14 and, as such, were inadmissible under the confrontation clause,
15 because the State did not show that the declarants were unavailable
16 to testify and Rousseau never had an opportunity to cross-examine any
17 of them. The Texas Court stated that

18 "Indeed, the statements in the reports amounted to
19 unsworn, ex parte affidavits of government employees and
20 were the very type of evidence the clause was intended to
prohibit." (at 881)

21 The State cited United States v. Chau, 426 F.3d 1318, 1323 (11th
22 Cir. 2005), citing United States v. Roche, 415 F.3d 614, 618 (7th Cir.
23 2005), and Gaxiola v. State, 119 P.3d 1225 (Nev. 2005) for support of
24 its position that inmate reports are not testimonial. These cases are
25 completely inapplicable on their facts. The rulings of the Courts
26 therein cannot be applied here.

27 In both Chau and Roche the defendants were charged with drug-
28 related crimes. Both pled guilty. Both challenged the sentence

1 imposed by the Court. Both alleged confrontation clause violations
2 during the sentencing hearing before the respective courts. Both
3 appeals were denied. Neither decision is applicable to the instant
4 matter.

5 In Gaxiola, Id., this Court held that the admission of the child
6 victim's statements to third parties did not violate the defendant's
7 right to confrontation since the child testified at trial. Plainly,
8 neither the facts nor the holdings of this Court therein has any
9 applicability to this case.

10 Here, the detention center inmate reports at issue contained
11 written statements made by correction officers of their own
12 observations, or the observations of others. Clearly they are
13 "testimonial; made for the purpose of establishing some fact."

14 The State also argues that when business records are at issue
15 confrontation clause analysis is inapplicable; citing, People v.
16 Brown, 801 N.Y.S.2d 709 (2005); Commonwealth v. Verde, 827 N.E.2d 701
17 (2005); and People v. Hinojos-Mendoza, ___ P.3d ___, 2005, Colo.App.
18 Lexis 1206, 2005 WL 256 1391 (Colo.App. 2005).

19 In Brown, Verde, and Hinojos-Mendoza, the reviewing courts held
20 that Crawford, Id., did not apply to technicians that analyzed DNA
21 (Brown) or drugs (Verde, Hinojos-Mendoza). In fact, in Verde and
22 Hinojos-Mendoza the courts criticized this Court's holding in City of
23 Las Vegas v. Walsh, 121 Nev.Adv.Op. 85, 124 P.3d 203 (12-15-2005).

24 In Walsh, this Court found that affidavits under NRS 50.315 are
25 testimonial. This Court should find the inmate reports challenged
26 here are testimonial statements; and that their admission into
27 evidence violated the confrontation clause. This case should be
28 reversed and remanded.

IX.

THE CUMULATIVE EFFECT OF PREJUDICIAL ERROR CREATED
IN LARGE PART, BY PROSECUTOR MISCONDUCT,
AS WELL AS THE RECEPTION OF INADMISSIBLE
EVIDENCE, AND ERRONEOUS RULINGS OF
THE DISTRICT COURT DEPRIVED JOHNSON OF HIS
CONSTITUTIONAL RIGHT TO A FAIR PENALTY HEARING

DONTE JOHNSON asserted that misconduct by the prosecutor, inadmissible evidence, and erroneous rulings by the trial court deprived him of a fair trial citing: Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002); Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); Garner v. State, 78 Nev. 366, 373, 374 P.2d 525 (1962); State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948); McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984); Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986). The State in response says there were no prejudicial errors and that "the death penalty was designed for cold-blooded murderers with a calloused heart such as defendant." (Answering Brief, page 18)

As in previous arguments 2 and 6 the State failed to cite any authority for its positions. The State's opinion, without supporting authority, that there were no prejudicial errors should be disregarded and not considered by this Court. The State's opinion that the death penalty was designed for cold-blooded murderers with a calloused heart is also without supporting authority and should also be disregarded by this Court; as should the State's description of DONTE JOHNSON as such. See, Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000).

Further, and even more offensive, is the State's slant on death penalty jurisprudence, i.e., "while death may be different, reviewing courts should not place the bar so high that achieving a valid death

1 verdict becomes impossible." (Answering Brief at page 18) JOHNSON
2 suggests that when a man's life is at stake, a prosecutor should not
3 "play on the passions of the jury." Flanagan v. State, 104 Nev. 105,
4 107, 754 P.2d 836 (1988). A prosecutor's duty in a criminal
5 prosecution is to seek justice; Berger v. U.S., 295 U.S. 78, 88
6 (1935); not to achieve a death verdict. DONTÉ JOHNSON'S penalty
7 hearing was fatally flawed. The sentence should be reversed.

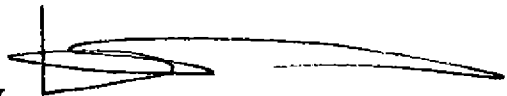
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CONCLUSION

Wherefore, it is respectfully requested that the Court reverse the sentence of DONTE JOHNSON and remand the matter to District Court for a new penalty hearing.

Dated this 23rd day of May, 2006.

DAVID M. SCHIECK
CLARK COUNTY SPECIAL PUBLIC DEFENDER

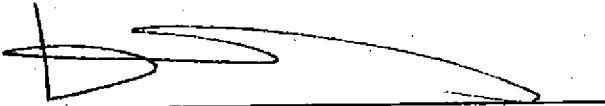


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1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and to
3 the best of my knowledge, information, and belief, it is not frivolous
4 or interposed for any improper purpose, I further certify that this
5 brief complies with all applicable Nevada Rules of Appellate
6 Procedure, in particular NRAP 28(e), which requires every assertion
7 in the brief regarding matters in the record to be supported by
8 appropriate references to the record on appeal. I understand that I
9 may be subject to sanctions in the event that the accompanying brief
10 is not in conformity with the requirements of the Nevada Rules of
11 Appellate Procedure.

12 DATED the 23rd day of May, 2006.

13
14 
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KATHLEEN FITZGERALD
of The Special Pub

NSC Case No. 65168 - 7283

122 Nev., Advance Opinion 113
IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45456

FILED

DEC 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richardson*
CHIEF DEPUTY CLERK

Appeal from a death sentence after a new penalty hearing.
Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Affirmed.

David M. Schieck, Special Public Defender, and Alzora B. Jackson and Lee Elizabeth McMahon, Deputy Special Public Defenders, Clark County,
for Appellant.

George Chanos, Attorney General, Carson City; David J. Roger, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

Appellant Donte Johnson was convicted by a jury in 2000 of four counts of first-degree murder with the use of a deadly weapon, among other crimes, and was sentenced to death by a three-judge panel. On direct appeal, this court affirmed his conviction, but vacated his death

sentence and remanded for a new penalty hearing because the three-judge sentencing procedure violated the United States Supreme Court's holding in Ring v. Arizona.¹

Johnson's new penalty hearing began in April 2005 before a jury and was bifurcated into separate phases: a death-eligibility phase and a selection phase. The jury sentenced Johnson to death. He appeals.

Among the issues on appeal is whether the Confrontation Clause of the Sixth Amendment to the United States Constitution and the Supreme Court's holding in Crawford v. Washington² apply to the selection phase of a bifurcated capital penalty hearing. Applying our holding in Summers v. State,³ we conclude they do not. Neither this issue nor the others Johnson raises warrant reversal. Therefore, we affirm.

FACTS

The facts underlying Johnson's conviction are set forth in detail in this court's 2002 opinion.⁴ In this opinion, we recount only those facts necessary to an understanding of the issues presented.

On the night of August 13 or early morning of August 14, 1998, Johnson (whose real name is John White), along with two other

¹Johnson v. State, 118 Nev. 787, 801-04, 59 P.3d 450, 460-61 (2002) (citing Ring, 536 U.S. 584 (2002)).

²541 U.S. 36 (2004).

³122 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 112, December 28, 2006).

⁴Johnson, 118 Nev. at 791-93, 59 P.3d at 453-54.

men, entered a Las Vegas home intending to commit robbery. While inside, Johnson murdered 20-year-olds Tracey Gorringer and Matthew Mowen, 19-year-old Jeffery Biddle, and 17-year-old Peter Talamantez by binding them with duct tape and shooting them execution-style in the head. Stolen during the robbery were a VCR, a video game, a personal beeper, a set of keys, and about \$200 in cash.

Johnson was arrested four days later and charged with four counts of first-degree murder with the use of a deadly weapon, four counts of first-degree kidnapping, four counts of robbery with the use of a deadly weapon, and one count of burglary while in possession of a firearm. In 2000, a jury convicted him of all charges but could not agree during his penalty hearing on what sentence to impose. Another penalty hearing was later held before a three-judge panel, which sentenced Johnson to death for each of the four murders.

This court affirmed Johnson's conviction in 2002.⁵ But the fact that Johnson was sentenced to death based on findings by a three-judge panel, instead of a jury, violated the Supreme Court's holding in Ring.⁶ His death sentence was therefore vacated and his case remanded to the district court for a new penalty hearing.⁷

⁵Id. at 806, 59 P.3d at 463.

⁶536 U.S. at 609.

⁷Johnson, 118 Nev. at 804, 59 P.3d at 461.

Johnson's new penalty hearing—his third—began in April 2005 before a jury. The district court granted Johnson's pretrial motion to bifurcate it into separate phases: death-eligibility and selection.

I. Death-eligibility phase

Johnson's death-eligibility phase lasted four days. Both parties made opening statements to the jury.

State's case in aggravation

The State presented evidence of a single aggravating circumstance it pursued for each of the four murders—that Johnson had been convicted of more than one murder in the immediate proceeding pursuant to NRS 200.033(12).⁸

Certified copies of the jury verdict forms and transcripts from the original guilt phase were admitted into evidence to establish the quadruple murder by Johnson. The State also presented the testimony of four witnesses. Justin Perkins, a friend of the victims, testified how he discovered their lifeless bodies. Las Vegas Metropolitan Police Department (LVMPD) Detective Thomas Thowsen, who had investigated the four murders since they were first reported in August 1998, gave the bulk of the testimony. He recounted for the jury the criminal investigation and summarized evidence presented through various State witnesses

⁸An aggravator based on NRS 200.033(4) that was found by the three-judge panel during Johnson's previous penalty hearing was stricken during a pretrial hearing by the district court pursuant to this court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

during the guilt phase. He also read portions of the original trial testimony of these witnesses. LVMPD Forensic Crime Lab Manager Berch Henry testified about the DNA analysis linking Johnson to the murders, and Clark County Forensic Pathologist, Medical Examiner Dr. Gary Telgenhoff, summarized the autopsy findings regarding each victim.

Each of the victims, according to Dr. Telgenhoff, died from a single gunshot wound to the back of the head at "very close" range—"about an inch or so away from skin." The wrists and ankles of each victim were bound with duct tape, and none had any "defensive wounds." Unlike the other victims, Talamantez also had a laceration and abrasion on his nose "due to blunt force" consistent with being "pistol whipped."

Defense's case in mitigation

Johnson called only members of his family to testify during this phase. They testified that Johnson's mother, who by her own admission was "a little slow," abused alcohol and illegal drugs, including crack cocaine and PCP, when Johnson was a child. She even did so in his presence. She would sometimes leave Johnson and his sisters alone or lock them in a closet. Johnson's father abused his mother in front of Johnson and his sisters, once knocking her teeth out and attempting to throw her out of a hotel window. Johnson was also beaten.

At one point, Johnson, his two sisters, and several of his cousins were forced to live in a one-room shed for about a month. The shed had no running water, no carpet, and no furniture. The children had to go to the bathroom in a bucket and sleep on the floor with no covers. While living in the shed, the children sometimes did not comb their hair or

eat. Because they had no shower, the children often had to go to school with body odor. They were also hungry at times.

The police were eventually contacted, and the children, including Johnson, were taken into foster care. Johnson and his sisters were thereafter sent to live with their grandmother, who was also caring for about ten other children. Johnson's grandfather, according to Johnson's sister Johnnisha Zamora, did the best he could, but she could not recall any time he ever spent with Johnson.

Johnson's grandmother's house was in the Compton area of Los Angeles, where, as Johnson's sister Johnnisha explained, there was "a lot of violence." Johnson and his two sisters were often chased and beaten up at school. His sister Eunisha White testified that Johnson was short and that they were "picked on a lot by different people for no reason."

Johnson's family testified about the positive aspects of his personality and their love for him. A video and several family pictures were admitted into evidence. Johnson's eight-year-old son Allen White, who was in the third grade, read to the jury a letter he wrote to his father which stated in part: "I will love you in my heart, and you will love me in mine."

Special verdict

The State and the defense made closing arguments, and the State argued in rebuttal. The jury was also given instructions. The jury returned four special verdicts, finding the single aggravating circumstance pursued by the State. Seven mitigating circumstances were found: Johnson's youth at the time of the murders (he was 19 years old); he was

taken as a child from his mother due to her neglect and placed in foster care; he had "no positive or meaningful contact" with either parent; he had no positive male role models; he grew up in violent neighborhoods; he witnessed many violent acts as a child; and while a teenager he attended schools where violence was common.

The jury found the aggravating circumstance outweighed the mitigating circumstances and that Johnson was eligible for death.

II. Selection phase

The selection phase in Johnson's case lasted five days. Both the State and the defense made new opening statements to the jury.

State's case in support of a death sentence

Evidence regarding Johnson's prior bad acts was admitted during this phase of the hearing.

A Los Angeles Police Department lieutenant and a bank manager testified regarding Johnson's participation in an armed bank robbery in 1993, when he was about 15 years old. An LVMPD officer testified that in 1998 Johnson was implicated in the shooting of a man in Las Vegas. That man later died. The district court admitted documents into evidence charging Johnson with attempted murder and battery with the use of a deadly weapon relating to the incident, as well as Johnson's guilty plea and judgment of conviction for the battery charge.

A California Department of Corrections Parole Division officer testified about Johnson's juvenile record in California. The district court admitted Johnson's judgment of conviction for the 1993 armed bank

robbery into evidence, showing that he was sentenced to four years in the California Youth Authority (CYA) program. Johnson was paroled from the CYA program prior to the expiration of his four-year sentence, but he later absconded from parole.

LVMPD Officer Alexander Gonzalez testified that he worked at the Clark County Detention Center in February 2001 in the unit housing high-risk inmates. He described a fight between Johnson and another inmate, Oscar Irias. With help from a third inmate, Johnson threw Irias over a second-tier railing. Irias survived.

LVMPD Detective James Buczek participated in the quadruple murder investigation. He testified on behalf of Nevada Highway Patrolman Sergeant Robert Honea (who had testified in Johnson's 1998 trial). According to Detective Buczek, Sergeant Honea conducted a traffic stop involving Johnson on August 17, 1998, three days after the murders. Johnson was the driver, but identified himself as "Donte Fleck"; a passenger in the car was one of his accomplices in the robbery and murders. During the stop, Johnson and his passenger abandoned the car and fled on foot. A rifle loaded with 20 rounds of ammunition was located in the car, along with a clip of ammunition.

In addition to the prior bad act evidence, the State also admitted impact testimony from the families of Johnson's four victims.

Juanita Aguilar, the mother of Peter Talamantez, testified that Peter "was very smart, very caring. He could have done just about anything he wanted to, but at 17, you don't really think too much about what you want to be in the future because you're still out having fun."

Peter's murder had caused her severe depression. She lamented: "There's not one day I don't think about my baby."

Marie Biddle, the mother of Jeffery Biddle, testified that Jeffery liked to play sports, he was a "wonderful artist," and someday he either wanted to go into law enforcement or the Air Force. She told the jury that Jeffery's murder had "been very devastating."

Sandy Viau, the mother of Tracey Gorringer, testified that Tracey wanted to become an electrical engineer. She added, "He was a great athlete. He played baseball, he snowboarded, he skied, he water-skied, he roller-bladed, he rode motorcycles." She stated that after his murder, "I don't have any goals now. You know, it's one day at a time."

David Mowen, the father of Matthew Mowen, testified that Matthew was his only son and wanted to study medicine. "He was quite a young man. . . . He was one of those special individuals that, for whatever reason, he had that ability to connect with many, many different types of people." Of the impact of Matthew's murder, his father testified: "It's the same pain, the same misery, the same angriness that you have every single day. It doesn't get better." Matthew's younger sister Jennifer also testified that she looked up to her brother, who always gave her comfort and strength.

Defense's case for a sentence less than death and State's rebuttal

The defense again called members of Johnson's family, many of whom had already testified during the death-eligibility phase. These family members, including his young son, again testified about the positive aspects of Johnson's character and their love for him.

Much testimony was presented regarding Johnson's involvement with street gangs beginning when he was about 13 or 14 years old. Johnson joined the Six Duece Brims gang, affiliated with the larger Bloods gang, to stop the harassment of his family. A professor of sociology at the University of California at Berkeley testified about gangs and provided the jury with extensive sociological data.

Several specialists who had worked with Johnson also testified. Johnson's former parole agent for the CYA testified that he supervised Johnson after his release from the juvenile program and found Johnson to be "a small, quiet young man that seemed to be pleasant and workable." A therapist who worked with Johnson in 2000 at the Clark County Detention Center testified that Johnson "was a fairly consistent, decent person in that setting." And a psychologist and clinical neuropsychologist profiled Johnson's personality and summarized his life.

Two inmates testified that they saw inmate Irias fall over the second-tier balcony. Johnson's alleged accomplice in the incident, Reginald Johnson (no relation to the appellant), testified that he alone, without Johnson's participation, "assaulted [Irias] and helped him over the tier" because Irias was a child molester. Reginald's former counsel confirmed that Reginald admitted to her that he did it.

A retired California Department of Corrections officer testified about the life that would be expected for an inmate sentenced to a term of life without the possibility of parole in Nevada's Ely State Prison. To rebut this evidence, the State called the warden of the Southern Desert Correctional Facility.

Johnson made no statement in allocution.

Death sentences

The State made a closing argument, and Johnson's two counsel made closing arguments. The State argued in rebuttal. A new set of written instructions was given to the jury. The jury returned four separate verdicts imposing a sentence of death for each of the murders.

DISCUSSION

I. Do the Confrontation Clause and Crawford v. Washington apply to the selection phase of a bifurcated capital penalty hearing?

Johnson contends that the district court committed reversible error by admitting copies of his inmate disciplinary reports from the Clark County Detention Center during the selection phase of his penalty hearing. Those reports, he asserts, violated the Sixth Amendment's Confrontation Clause and Crawford⁹ because they contained testimonial hearsay statements by witnesses who were not shown to be unavailable and whom he had no opportunity to cross-examine. He maintains that he is entitled to a new penalty hearing. We disagree.

We held in Summers that the right to confrontation does not apply to evidence admitted in a capital penalty hearing. Our holding in Summers applies to the entirety of a capital penalty hearing, irrespective of whether the hearing is bifurcated into distinct phases as Johnson's hearing was. Even assuming that statements within the reports were testimonial under Crawford, pursuant to our reasoning in Summers, Johnson did not enjoy a Sixth Amendment right to confront their

⁹541 U.S. 36.

declarants. We conclude that the admission of the reports was not error and reversal is not warranted on this basis.

II. Did the district court abuse its discretion by admitting Johnson's juvenile records into evidence?

Johnson contends that the district court abused its discretion by admitting juvenile records during the selection phase of his penalty hearing. He primarily relies upon the Supreme Court's 2005 decision in Roper v. Simmons¹⁰ for support, arguing that the admission of these records was "highly prejudicial." We disagree.

The Supreme Court in Roper held that it was "cruel and unusual" to execute offenders who were under 18 years old when they committed their crimes.¹¹ The Court reasoned that juveniles by their very age and lack of development "cannot with reliability be classified among the worst offenders."¹² However, Roper did not prohibit the admission of juvenile records during a death penalty hearing. Because there is no question that Johnson was not a juvenile when he committed the murders, his reliance upon Roper is misplaced.

Rather, "[t]he decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will

¹⁰543 U.S. 551 (2005).

¹¹Id. at 568.

¹²Id. at 569.

not be disturbed absent an abuse of that discretion."¹³ Evidence of character is admissible during a penalty hearing so long as it is relevant and the danger of unfair prejudice does not substantially outweigh its probative value.¹⁴

Here, the evidence of Johnson's juvenile history primarily consisted of records and testimony regarding his participation in and conviction for the armed bank robbery in California in 1993 as a 15-year-old gang member and his subsequent successes and failures in the CYA program for juvenile offenders. This evidence also concerned his subsequent absconding from that program's parole a few years later.

Johnson's juvenile record was relevant to his character, revealing a pattern of escalating violent criminal behavior that began with his participation in an armed bank robbery and culminated in the quadruple murder he committed in this case. Although this evidence was prejudicial, it was not unfairly so. And it had significant probative value, showing not only his propensity for violence and gang involvement but also his amenability to rehabilitation—all relevant considerations in the

¹³McConnell, 120 Nev. at 1057, 102 P.3d at 616 (quoting McKenna v. State, 114 Nev. 1044, 1051, 968 P.2d 739, 744 (1998)).

¹⁴See Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); see also NRS 175.552(3).

In an unbifurcated penalty hearing, a cautionary instruction regarding the evidence's proper use must also be given. See McConnell, 120 Nev. at 1057, 102 P.3d at 616-17. Because Johnson's penalty hearing was bifurcated and the evidence in question only came in during the selection phase, such an instruction was neither given nor necessary.

determination of his sentence. Because this evidence was admitted only during the selection phase of his hearing, there are no concerns that it may have improperly influenced the jury's weighing of aggravating and mitigating circumstances. We conclude that the district court did not abuse its discretion in admitting these records, and Johnson's contention in this respect is without merit.¹⁵

III. Did the district court improperly allow the State to ask potential jurors "stake-out" questions during voir dire?

Johnson contends that the State asked sixteen potential jurors improper "stake-out" questions that caused them "to pledge themselves to a future course of action and indoctrinate[d] them regarding potential issues before the evidence had been presented." He maintains that these questions denied him an impartial jury. We disagree.

The purpose of "jury voir dire is to discover whether a juror 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.'"¹⁶ And its scope rests within the sound discretion of the district court, whose decision will be given considerable

¹⁵See Domingues v. State, 112 Nev. 683, 696-97, 917 P.2d 1364, 1373-74 (1996) (affirming the admission of a defendant's juvenile record during a capital penalty hearing).

¹⁶Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). We recognize that Byford v. State, 116 Nev. 215, 235-36, 994 P.2d 700, 714 (2000), supersedes Witter on the unrelated question of instructing jurors regarding deliberate and premeditated murder.

deference by this court.¹⁷ Here, the State asked prospective jurors about their ability to carry out their responsibilities in accordance with NRS 175.554. Johnson's counsel unsuccessfully objected. We conclude that this line of questioning was within the district court's discretion to permit, and Johnson's contention is without merit.

IV. Did prosecutorial misconduct deprive Johnson of a fair hearing?

Johnson contends that the prosecutor committed misconduct during the penalty hearing that deprived him of a fair hearing. Although we agree with Johnson that some remarks by the prosecutor were improper, the prejudice resulting from them was minimal, and they did not deprive him of a fair hearing.

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone."¹⁸ Remarks by a prosecutor must be read in context¹⁹ and, if improper, will constitute harmless error when there is overwhelming evidence of guilt and this court can determine that no prejudice resulted to the defendant.²⁰ Prejudice follows from a prosecutor's remarks when they have "so infected the proceedings with unfairness as to make the results a denial of due

¹⁷Witter, 112 Nev. at 914, 921 P.2d at 891.

¹⁸Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

¹⁹Butler v. State, 120 Nev. 879, 896, 102 P.3d 71, 83 (2004).

²⁰See Pellegrini v. State, 104 Nev. 625, 628-29, 764 P.2d 484, 487 (1988).

process."²¹ Johnson raises several allegations of prosecutorial misconduct during both phases of his penalty hearing. We will discuss each allegation separately below.

A. Alleged misconduct during the death-eligibility phase

Johnson raises three allegations of prosecutorial misconduct during the death-eligibility phase of the penalty hearing.

First, he contends that the following remarks by the prosecutor during closing arguments improperly compared him to others and "attempted to inflame the jury and invoke social pressure":

I would submit to you that if you find that his upbringing outweighs this quadruple homicide, that is disrespectful to members of South Central L.A. who didn't commit a quadruple homicide. Common sense tells us that many, many, many people in a similar upbringing haven't done what Donte Johnson has done. If you were to find that his childhood is entitled to a greater weight of this quadruple homicide, it's like telling people—

Johnson's counsel objected. We conclude that the prosecutor's remarks contained improper elements but did not result in prejudice.

This court held in Collier v. State²² that it was improper to urge the jurors that if they wished to be considered moral they had to give the community what it needed and give the defendant what he deserved.

²¹Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

²²101 Nev. 473, 479, 705 P.2d 1126, 1129-30 (1985).

Here, the prosecutor argued that if the jurors found in Johnson's favor it would be "disrespectful to the members of South Central L.A." How the public may react to their verdict, however, has no place in the jurors' deliberative process. And the jurors were so instructed in Jury Instruction 14: "A verdict may never be influenced by prejudice or public opinion."

Pursuant to Collier and Jury Instruction 14, we conclude that telling the jury that if it did not reach a particular verdict it would disrespect a group of people improperly injected public opinion into the deliberative process. Yet any prejudice to Johnson was minimal, given the correct jury instruction and the strength of the State's case against him.

Second, Johnson contends that the prosecutor violated a pretrial order by the district court when he referred to the victims as "boys" or "kids" during rebuttal argument. He is correct that the prosecutor violated the order, but we conclude he was not prejudiced.

The meaning of the terms "boys" or "kids" is relative in our society, depending upon the context of its use. And the terms do not inappropriately describe the victims in this case. One of the four victims was 17 years old; one was 19 years old; and two others were 20 years old. Referring to them as "young men" may have been the most appropriate collective description. But we conclude that the State's handful of references to them as "boys" or "kids" did not prejudice Johnson.²³

²³The State contends that Johnson only raised an objection to one of the references and the others were not preserved for review. We disagree. Johnson filed a pretrial motion in limine regarding these references, which was argued by the parties and ruled on by the district court. We conclude

continued on next page . . .

Third, Johnson contends that the prosecutor also improperly told the jury during rebuttal argument that prior to the crimes Johnson had overheard victim Matthew Mowen saying that he had made money touring with a rock band "selling pizzas and drugs." Johnson objected, arguing that there was no evidence that Mowen ever sold pizzas. Johnson asserts that the argument improperly portrayed "the victims in a more positive light." We agree with Johnson that the prosecutor's remark was improper, but we conclude that he cannot show any prejudice.

"A prosecutor may not argue facts or inferences not supported by the evidence."²⁴ Here, the State concedes that the evidence did not support its claim that Matthew once said that he made money "selling pizzas and drugs," instead of just "drugs." Thus, its reference to this as a fact was made in error. Nevertheless, the prosecutor's misstatement was immaterial and did not give the State any cognizable advantage. We conclude that Johnson suffered no prejudice.

B. Alleged misconduct during the selection phase

Johnson raises one claim of prosecutorial misconduct during the selection phase of the penalty hearing. He contends that the prosecutor made remarks during his opening statement that referred to

... continued

that this entire matter was properly preserved for our review. See Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

²⁴Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (quoting Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987)).

inadmissible evidence and were "highly prejudicial," depriving him of a fair trial. We disagree.

This court has stated that a prosecutor "has a duty to refrain from making statements in opening arguments that cannot be proved at trial."²⁵ But "[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith."²⁶

Here, the prosecutor summarized the evidence he planned to present during the selection phase of the hearing:

You will hear about a phone call [Johnson] made, threatening to kill a young woman, a civilian.

You will hear about a letter he wrote where he put a hit out on Scale. You heard that name in the trial, Mr. Anderson, named Scale.

Johnson's counsel objected, claiming that the State failed to give adequate notice that it would be introducing evidence of the alleged threatening phone call or letter. After reviewing the relevant documents, the district court found that the State had provided inadequate notice to Johnson and the evidence was inadmissible. Johnson does not contend that the remarks were made in bad faith, nor is there evidence to support such a contention. But the question of prejudice remains.

²⁵Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997), modified on other grounds by Richmond, 118 Nev. at 932, 59 P.3d at 1254.

²⁶Id. at 1312-13, 949 P.2d at 270.

The prosecutor referred to serious allegations against Johnson, which carried some degree of prejudice because they suggested that Johnson would continue his violent criminal conduct, even while in prison. Yet the remarks were isolated, consisting of three sentences during a five-day selection phase. And there is no indication that the prosecutor again referred to these particular bad acts. Moreover, immediately after the State's opening statement the district court admonished the jury that opening statements are "not evidence and should not be given evidentiary value." Given that the remarks were brief, were not made in bad faith, and occurred during a lengthy selection phase and the district court admonished the jurors, we conclude that any prejudice from these remarks was minimal.

V. Was Johnson's hearing unfair because a victim's brother groaned and passed out in the courtroom?

Johnson contends that his penalty hearing was rendered unfair because during the State's closing argument in the death-eligibility phase, Nick Gorringer, brother of victim Tracey Gorringer, was seated on a bench in the second row in the courtroom and either passed out or fell over when a picture of the crime scene was displayed. Johnson asserts that this incident is analogous to that in Hollaway v. State.²⁷ We disagree.

Unlike the facts of Hollaway, the incident in this case did not concern a stun belt or any type of device under the State's control causing

²⁷116 Nev. 732, 6 P.3d 987.

an effect on Johnson.²⁸ In fact, it did not involve Johnson at all. Although Nick Gorringer was a victim's brother, he was also a member of the public who had a right to observe the courtroom proceedings. He was not called as a witness, and no further incidents occurred. Moreover, the district court promptly excused the jurors and admonished them. We conclude that Johnson's reliance on Hollaway is misplaced and that any prejudice from this incident was minimal.²⁹

VI. Mandatory review

We are required pursuant to NRS 177.055(2)(c)-(e) to review every death sentence and independently consider three issues.

First, we consider whether the evidence supports the finding of the aggravating circumstance. NRS 200.033(12) provides in part that first-degree murder is aggravated when "[t]he defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree." Here, Johnson was convicted of four first-degree murders during the guilt phase of his 2000 trial, and this court affirmed those convictions. Overwhelming evidence supported this single aggravator found by the jury for each of the murders.

²⁸Id. at 740, 6 P.3d at 993.

²⁹Johnson also contends that he is entitled to relief because of cumulative errors that occurred during his penalty hearing. However, as discussed above, the errors that occurred during Johnson's hearing resulted in minimal prejudice to him. Even when these errors are considered cumulatively, we conclude that they do not entitle him to relief. See Hernandez, 118 Nev. at 535, 50 P.3d at 1115.

We consider next whether Johnson's death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor. Some unusual things happened during Johnson's penalty hearing. For example, as discussed above, one of the victim's brothers passed out in the courtroom when a photo of the crime scene was displayed. Also, a juror found what appeared to be a crack pipe in the jury box.³⁰ None of these unusual episodes, however, appears to have influenced the jury's verdict.

Finally, we determine whether Johnson's death sentence was excessive considering both the crime and the defendant. Johnson bound and shot four young men execution-style in the head during a late-night robbery of a Las Vegas home. These young men were dearly loved by their parents, siblings, and friends. In exchange for his murderous deeds, Johnson obtained about \$200 in cash, a VCR, a PlayStation, and a beeper. He also bragged about his victims' deaths, callously laughing as he told friends the following morning about how blood squirted out of one victim's head and the sound the victim made when shot.

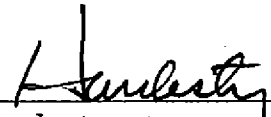
Johnson was only 19 years old when he committed these crimes, and he unquestionably had an impoverished childhood. But the murders he committed were unprovoked, vicious, and utterly senseless. We conclude that a sentence of death was not excessive.

³⁰During the selection phase, a juror discovered the apparent pipe lying on the floor of the jury box. The juror informed the courtroom bailiff, who prepared a report. The district court and counsel for both the State and Johnson were informed about this matter.

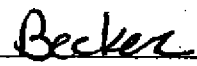
CONCLUSION

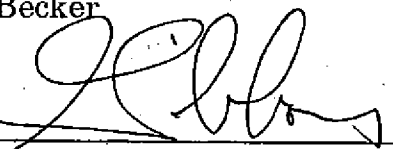
Johnson's penalty hearing was not without error, but it was fair. Applying our holding in Summers, we conclude that neither the Confrontation Clause nor Crawford applies to evidence admitted during the selection phase of a bifurcated penalty hearing. We conclude that Johnson's other issues do not establish reversible error.

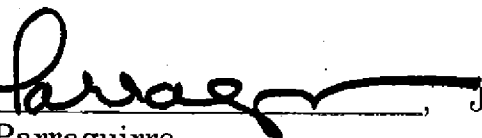
We affirm Johnson's death sentence.

_____, J.
Hardesty

We concur:

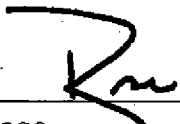
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Gibbons


_____, J.
Parraguirre


ROSE, C.J., with whom, MAUPIN, J., and DOUGLAS, J., agree, concurring:

For the reasons stated in my concurring and dissenting opinion in Summers v. State,¹ I believe that capital defendants have a Sixth Amendment right to confront the declarants of testimonial hearsay statements admitted throughout an unbifurcated capital penalty hearing. Where the hearing is bifurcated into death-eligibility and selection phases, however, I believe that the right to confrontation extends only to evidence admitted during the eligibility phase. Here, because the evidence at issue in Johnson's case—inmate disciplinary reports—was admitted during the selection phase only, I concur in the majority's conclusion that it was not error under the Confrontation Clause and Crawford v. Washington² to admit the reports into evidence.

 C.J.
Rose

We concur:

 J.
Maupin

 J.
Douglas

¹122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 112, December 28, 2006).

²541 U.S. 36 (2004).

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 45456

FILED

FEB 03 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

APPELLANT'S OPENING BRIEF

(Appeal from Remanded Penalty Hearing and Sentence
of Death in the Eighth Judicial District Court)

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DONTE JOHNSON DID NOT STOP HIS
CRIMINAL CONDUCT AND, IN FACT, MADE A
TELEPHONE CALL TO A YOUNG WOMAN IN
WHICH HE THREATENED TO KILL HER, AND
FURTHER,

2. SENT A LETTER ORDERING A HIT ON A MAN
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3. HE COULD NOT, THEREAFTER ADDUCE
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Case No. 45456

VS.

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1. WHETHER THE TRIAL COURT DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY A PANEL OF IMPARTIAL, INDIFFERENT JURORS WHEN IT ALLOWED THE PROSECUTOR TO ASK "STAKE-OUT" QUESTIONS DURING VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS

2. WAS IT INTENTIONAL MISCONDUCT FOR THE PROSECUTOR TO REFER TO THE VICTIMS AS "BOYS" AND "KIDS" WHEN HE WAS EXPRESSLY PROHIBITED FROM DOING SO BY THE DISTRICT COURT'S PRE-TRIAL RULING

3. WHETHER THE DECISION OF THE TRIAL COURT TO ALLOW THE STATE TO ADDUCE TESTIMONY AND PHYSICAL EVIDENCE REGARDING APPELLANT'S JUVENILE CONVICTIONS DEPRIVED APPELLANT OF A FAIR PENALTY HEARING

4. DONTÉ JOHNSON'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS
IMPAIRED BY THE PROSECUTION'S IMPROPER CLOSING ARGUMENT

5. WHETHER APPELLANT'S DEATH SENTENCE WAS IMPOSED UNDER PREJUDICE AND ARBITRARY FACTORS WHEN, AT THE PENALTY HEARING, IN THE PRESENCE OF THE JURY, THE BROTHER OF TRACY GORRINGE, UPON VIEWING THE PHOTO OF THE CRIME SCENE DISPLAYED ON A SCREEN DURING THE PROSECUTOR'S CLOSING ARGUMENT, GROANED, PASSED OUT ON TO THE FLOOR, AND WAS HELPED, CRYING FROM THE COURTROOM

1 6. WAS IT IMPROPER FOR THE PROSECUTOR TO MISSTATE FACTS IN
2 REBUTTAL ARGUMENT

3 7. WHETHER APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS
4 COMPROMISED BY THE PROSECUTORS WHO IN OPENING ARGUMENT OF THE
5 SENTENCING PHASE:

6 1. TOLD THE JURY THAT WHILE INCARCERATED DONTÉ JOHNSON DID NOT
7 STOP HIS CRIMINAL CONDUCT AND, IN FACT, MADE A TELEPHONE
8 CALL TO A YOUNG WOMAN IN WHICH HE THREATENED TO KILL HER,
9 AND FURTHER,

10 2. SENT A LETTER ORDERING A HIT ON A MAN KNOWN AS SCALES, WHEN,

11 3. HE COULD NOT, THEREAFTER ADDUCE EVIDENCE TO SUPPORT THE
12 ALLEGATIONS DUE TO THE PROSECUTORS FAILURE TO PROVIDE
13 ADEQUATE NOTICE TO THE DEFENSE.

14 8. WHETHER APPELLANT WAS DEPRIVED OF HIS FUNDAMENTAL
15 CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM GUARANTEED
16 BY BOTH THE UNITED STATES AND NEVADA CONSTITUTIONS WHEN THE TRIAL
17 COURT ALLOWED THE PROSECUTION TO ADDUCE INTO EVIDENCE JOHNSON'S INMATE
18 REPORTS FROM THE CLARK COUNTY DETENTION CENTER WITHOUT FIRST
19 DEMONSTRATING THAT THE WITNESSES WERE UNAVAILABLE TO TESTIFY AND THAT
20 JOHNSON HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE THEM

21 9. WHETHER THE CUMULATIVE EFFECT OF PREJUDICIAL ERROR CREATED
22 IN LARGE PART, BY PROSECUTOR MISCONDUCT, AS WELL AS THE RECEPTION OF
23 INADMISSIBLE EVIDENCE, AND ERRONEOUS RULINGS OF THE DISTRICT COURT
24 DEPRIVED JOHNSON OF HIS CONSTITUTIONAL RIGHT TO A FAIR PENALTY HEARING
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1 inmate threw a third individual over a railing.

2 On May 17, 2004 following the evidentiary hearing, the trial
3 court held that the State had presented clear and convincing evidence
4 that a crime had been committed and that DONTE JOHNSON acted in it.
5 The incident would be allowed into evidence. (32 ROA, CRIMINAL COURT
6 MINUTES PAGE 053)

7 On April 7, 2005 the trial court granted DONTE JOHNSON'S Motion
8 to Strike Aggravator Number 4. The Court also ruled that it would
9 allow information to be given to the jury regarding the death of
10 Derrick Simpton regarding whom DONTE JOHNSON had pled to Battery with
11 use of a Deadly Weapon in a separate case. (32 ROA, CRIMINAL COURT
12 MINUTES PAGE 056)

13 On April 18, 2005 the trial court granted DONTE JOHNSON'S Motion
14 to bifurcate penalty phase of trial. (32 ROA, CRIMINAL COURT MINUTES
15 PAGE 059)

16 Jury trial commenced on April 19, 2005. (32 ROA, CRIMINAL COURT
17 MINUTES PAGE 059) On April 28, 2005 the jury returned with the
18 following verdicts:

19 Aggravating circumstance or circumstances have been
20 established unanimously and beyond a reasonable doubt as to
Counts XI, XII, XIII, and XIV (4 verdict forms):

21 That the Defendant has been convicted of more
22 than one offense of murder in the first or second
degree.

23 Mitigating circumstance or circumstances which have been
24 established as to Counts XI, XII, XIII and XIV (4 verdict
forms):

25 The youth of the Defendant at the time of crime;

26 Instruction #10: Mitigators #3, #5, #6, #7, #8, and #10.

27 As to Counts XI, XII, XIII, and XIV (4 verdict forms):

28 The Aggravating circumstances outweigh any

1 mitigating circumstance or circumstances.

2 (32 ROA, CRIMINAL COURT MINUTES PAGE 064-064)

3 On May 5, 2005 the jury returned a verdict of death on all four
4 counts. (32 ROA, CRIMINAL COURT MINUTES PAGE 068)

5 On June 6, 2005 DONTE JOHNSON was sentenced to death on each of
6 the four counts. (32 ROA, CRIMINAL COURT MINUTES PAGE 070) The
7 Warrant and Order of Execution were signed and filed in open court as
8 was the Order to Stay Execution. (32 ROA 7911-14; 7909-10; 7919-20)

9 On June 8, 2005 DONTE JOHNSON filed a Motion for New Trial,
10 Motion for In-Camera Review of Potential Juror Misconduct, Request for
11 Evidentiary Hearing, and Request for an Order Preserving Evidence.
12 (16 ROA 3853-80)

13 On June 14, 2005 the Court held an Evidentiary Hearing on DONTE
14 JOHNSON'S Motion. Following the hearing the Court denied the Motion
15 for New Trial. (32 ROA, CRIMINAL COURT MINUTES PAGE 071-072)

16 On June 22, 2005 DONTE JOHNSON filed Post-Evidentiary Hearing
17 Supplemental Points and Authorities seeking a new trial. (32 ROA
18 8029-8048) There is nothing in the record that indicates the Court
19 took any action in response to this pleading.

20 The Judgement of Conviction was filed on June 6, 2005 (32 ROA
21 7915-18) and the Notice of Appeal was timely filed on June 30, 2005.
22 (32 ROA 8055-56)

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1 a specific ruling on that before we started.

2 MR. STANTON: I will refer to them as 'young men', Your
3 Honor. All right. Sustained." (27 ROA 6715-16)

4 Again the Prosecutor referred to the victims as boys:

5 "...walk that videotape back beyond the four walls of Terra
6 Linda where the young boys or young man is watering his
7 lawn. (27 ROA 6719)

8 Again,...not sympathy, compassion he goes over and
9 systematically executes, bending down to each one of these
10 boys....." (27 ROA 6720)

11 After the jury left the Courtroom defense counsel asked to put
12 on the record that there had been an Order by the Court that the
13 victims not be referred to as "boys" or "kids". The Court admonished
14 the Prosecutor who, after the admonishment, did it two more times.
15 The Court observed that defense counsel did not object and she
16 responded that she had not wanted to draw attention to it, which was
17 why the Motion was filed in advance of trial. (27 ROA 6723)

18 B.

19 On April 7, 2004 the State filed its Second Amended Notice of
20 Evidence in Support of Aggravating Circumstances. Item Number Eleven
21 (11) was the juvenile records of DONTE JOHNSON. DONTE JOHNSON filed
22 an opposition on April 20, 2004. On April 28, 2004 the trial court
23 ruled that it would exclude the juvenile record as more prejudicial
24 than probative. On May 3, 2004 the trial court reversed its decision
25 and held that the juvenile record would be admitted. (19 ROA 4677-84;
26 4701-64; 20 ROA 4973; 5032)

27 JURY SELECTION

28 On April 18, 2005 the trial court granted DONTE JOHNSON'S Motion
to Bifurcate the Penalty Phase. On April 19, 2005 jury selection

1 began. (minute order p. 059)

2 In voir dire examination of prospective juror no. 001 and the
3 prosecutor asked and the prospective juror answered as follows:

4 "There is also a process that is involved in a capital case
5 where other than just a generalized jury instruction that
6 is given by the court, there is no other instructions about
7 who is selected as a foreperson of the jury. You have no
8 additional duties as far as votes go, but they have one
9 duty that's very important and that is they are actually
10 the person that signs the verdict form in this case.

11 If you were selected the foreperson of this case and you
12 believed under the law and the facts that the death penalty
13 was appropriate could you sign your name as foreperson?

14 No." (22 ROA 5431)

15 Defense counsel objected to the questions arguing the law only
16 required that she consider the four different forms, not could she
17 sign the verdict form. In response to the objection the prosecutor
18 stated:

19 "The form of my questions wasn't put in whether or not she
20 could consider it. The question presupposes in the form of
21 the question that based upon the law and facts she thought
22 the death penalty was appropriate could she carry out her
23 function."

24 The Court overruled the objection. (22 ROA 5431)

25 The prosecutor continued:

26 "Prosecutor: Let me back up again.

27 If you are selected as the foreperson of this jury and
28 under the laws and facts, you believed the death penalty
was appropriate, could you sign your name as the foreperson
of this jury to the verdict of death that would put Donte
Johnson to death? (22 ROA 5431)

Thereafter the prosecutors asked fifteen prospective jurors that
same question. (No. 25, 22 ROA 5592; No. 46, 24 ROA 6057; No. 59, 24
ROA 6082; No. 97, 23 ROA 5734; No. 108, 23 ROA 5754; No. 113, 23 ROA
5796; No. 132, 23 ROA 5846; No. 230, 24 ROA 5929; No. 242, 24 ROA
5961; No. 249, 24 ROA 5979; No. 262, 24 ROA 6014-6015; No. 278, 24 ROA

1 6036-6037; No. 296, 25 ROA 6141; No. 305, 25 ROA 6173-6174; No. 309,
2 25 ROA 6198-6199; No. 311, 25 ROA 6221).

3 FACTS ADDUCED TO JURY FROM TESTIMONY
4 AT PRIOR TRIAL RESULTING IN VERDICTS OF GUILT

5 The prosecutor called Justin Perkins to testify regarding his
6 discovery of the bodies of Matthew Mowen, Jeff Biddle, and Tracey
7 Gorringer at the Terra Linda residence around 6:00 p.m. or August 14,
8 1998. He learned a fourth body was also found in the home, that of
9 Peter Talamantez. The bodies were lying on the floor face down, tied
10 with duct tape at the wrists and ankles. (25 ROA 6268-6271)

11 Homicide Detective Tom Thowsen was called by the State to
12 summerize the testimony of the trial witnesses. He had been assigned
13 to the case and had responded to the crime scene at the 4825 Terra
14 Linda address on August 14, 1998. The neighbors after being contacted
15 by Jason Perkins called 911 and the paramedics LVMPD officers
16 responded and cleared the residence. They found a total of four
17 bodies. A number of items found at the scene were impounded including
18 four cartridge casings, cigarette butts, empty wallets, a black and
19 mild cigar box next to one of the bodies. The house had been
20 ransacked. There was no sign of forced entry. (25 ROA 6286-6305)

21 On August 18, 1998 police were called to the home of a Bryan
22 Johnson and learned that he had information concerning the homicide.
23 Todd Armstrong and Ace Hart were present. The officers immediately
24 separated the three (3) young men and took them to the homicide
25 office. Thowsen interviewed Todd Armstrong who later testified at
26 trial. In summarizing the testimony of Armstrong Thowsen said that
27 Armstrong, Ace Hart, Bryan Johnson were all friends. In August of
28 1998 Todd Armstrong lived in a house owned by his mother at 4815

1 Everman. Ace Hart lived with him. In early August DONTE JOHNSON,
2 Terrell Young, and DONTE JOHNSON's girlfriend Charla Severs moved into
3 the house and began living there. Thowsen said after interviewing
4 Armstrong they obtained a consent to search the Everman house from
5 him. They, with the SWAT unit, went to the Everman house. (25 ROA
6 6300-6310)

7 Armstrong told Thowsen that he had met DONTE JOHNSON through Ace
8 Hart who brought DONTE JOHNSON to the house. He didn't recall how
9 long DONTE JOHNSON had told them he was going to stay, only that it
10 was a very brief period, 2 or 3 days. He said that DONTE JOHNSON and
11 Charla Severs were occupying the master bedroom. Todd Armstrong was
12 occupying a different bedroom and Ace Hart had a bedroom. Terrell
13 Young was in the living room. Four or five days after DONTE JOHNSON
14 moved in Armstrong saw firearms. There was a .380 caliber pistol, a
15 medium sized six-shot revolver, a .22 caliber rifle and a sawed off
16 shotgun with a folding stock and a banana clip. DONTE JOHNSON kept
17 the weapons in a black and green duffle bag that was found at the
18 Everman residence during the search. A roll of duct tape was also
19 found. (25 ROA 6310-6313, 627)

20 The play station and VCR from the Terra Linda residence were also
21 found in the search of the Everman residence. A search of the yard
22 at Everman resulted in the location of 2 keys from the Thunderbird
23 motel and the blue pager that had belonged to Peter Talamantez. Todd
24 Armstrong told Thowsen that DONTE JOHNSON smoked black and mild cigars
25 all the time. (25 ROA 6313-6319)

26 Armstrong testified that he had told DONTE JOHNSON he would have
27 to leave because his mother was returning from Hawaii to the house.
28 DONTE JOHNSON did not leave. Armstrong had the only key to the house.

1 There was a broken window in the bathroom that DONTE JOHNSON could
2 climb through to get into the house. (25 ROA 6319-6321)

3 Armstrong testified that somewhere between the 7th and the 10th
4 of August Matt Mowen came to the house. Armstrong, DONTE JOHNSON,
5 Terrell Young and Charla Severs were present. Mowen said he had been
6 following the Phish tour (musical group) and that he had made a lot
7 of money selling acid. Armstrong said that DONTE JOHNSON kind of
8 looked around at the others. The next couple of days after Mowen made
9 the statement DONTE JOHNSON asked Armstrong, probably a dozen times,
10 where Matt Mowen lived. Armstrong said he did not know where Mowen
11 lived. At some point thereafter Armstrong and DONTE JOHNSON were in
12 an automobile with Ace Hart. Hart pointed out the house where Mowen
13 lived. This occurred between August 10th and 12th. (25 ROA 6321-
14 6325)

15 Todd Armstrong testified that he and Charla Severs were at home
16 when DONTE JOHNSON and Terrell Young left the house on the evening of
17 August 13. Armstrong awoke early the next morning when DONTE JOHNSON
18 and Young came home. DONTE JOHNSON was carrying the duffel bag
19 containing the guns and duct tape, Terrell Young was carrying a duffel
20 bag that had a VCR and a play station in it. DONTE JOHNSON went into
21 the master bedroom and came back out a short time later with Charla.
22 Everyone was in the living room and DONTE JOHNSON said they went over
23 there and he ended up killing one of the guys because he was mouthing
24 off, being obnoxious. He said he shot him in the head. DONTE JOHNSON
25 then said that since he killed one he had to kill everyone else. He
26 was high. He didn't want to kill Tracey but he just shot them all.
27 Armstrong said that DONTE JOHNSON said one of them made a grunt type
28 noise as he shot him. DONTE JOHNSON was laughing as he was telling

1 these things. Armstrong believed what DONTE JOHNSON said was true.
2 (25 ROA 6337-6340)

3 A pair of black pants were impounded from the bedroom of the
4 Everman house. DNA testing was done. (25 ROA 6341-6342)

5 Bryan Johnson, the friend of Ace Hart and Todd Armstrong, also
6 testified at trial. He had lived at the Everman house for a brief
7 time; October 1997 to June 1998. Johnson went to the Everman house
8 3 or 4 times a week after he moved out. He knew DONTE JOHNSON,
9 Terrell Young, and Charla Severs. He saw DONTE JOHNSON smoking black
10 and mild cigars. On Saturday August 15, 1998 Johnson went to the
11 Everman house to meet Armstrong and Hart. The three were going to go
12 the Stallion Mountain golf course for job interviews. (25 ROA 6344-
13 6347)

14 At the Everman house that morning DONTE JOHNSON said that they
15 drove to the Mowen residence on Terra Linda for money and drugs. He
16 said that when they got there a young man was outside. They told him,
17 at gunpoint, to go inside. Once inside the house they found two other
18 individuals and started to duct tape them asking where the money was.
19 Someone knocked at the door, was brought inside, and duct taped.
20 DONTE JOHNSON and Terrell Young both had guns. DONTE JOHNSON said he
21 took the last young man who came to the house into the back room and
22 shot him in the head. He said one of the individuals he shot made a
23 loud noise. He said blood squirted up, it looked like Niagara Falls.
24 Johnson believed DONTE JOHNSON. Further, DONTE JOHNSON said he got
25 blood on his pants. (25 ROA 6348-6353)

26 LaShawnya Wright, the girlfriend of Sikia Smith, testified that
27 when DONTE JOHNSON left the apartment with Terrell Young that day he
28 had with a duffle bag containing a rifle, some duct tape and some

1 brown gloves. In her apartment they had been talking about doing a
2 robbery. When the 3 returned the next afternoon they had a VCR and
3 a Nintendo. Smith had a .38 caliber automatic handgun out, later sold
4 it. Thowsen said that based upon the autopsy results and the crime
5 scene they believed the weapon used was a .380 caliber semi-automatic
6 handgun. Wright also testified that DONTE JOHNSON bought the Las
7 Vegas Review Journal and said, "we made the front page". He was
8 excited. (25 ROA 6365-6363)

9 The transcript of Charla Severs' testimony from the trial was
10 read to the jury. The testimony corroborated that of Todd Armstrong
11 and LaShawnya Wright. (27 ROA 6753-6845)

12 Berch Henry, LVMPD DNA laboratory manager reviewed the DNA
13 analysis in the case performed by analyst Thomas Wahl in 1998. the
14 sperm on the black jeans matched the DNA of DONTE JOHNSON as did that
15 of the cigarette butt frm the crime scene. The blood on the black
16 jeans matched the DNA of Tracy Gorringer. (26 ROA 6482, 6492, 6496)

17 Gary Telgenoff M.D. from the Coroner office reviewed the report
18 of the autopsies performed by Robert Bucklin M.D. on Jeff Biddle,
19 Tracey Gorringer, Matthew Mowen, Peter Talmantez. All 4 had sustained
20 a gunshot wound to the back of the head. All four had there wrists
21 and ankles taped with duct tape. Bucklin classified all four deaths
22 as homicides. (26 ROA 6501-16; 6518-21; 6522-26; 6527-34).

23 DEFENSE CASE IN MITIGATION

24 Moises Zamora, DONTE JOHNSON'S brother-in-law by marriage to
25 DONTE JOHNSON'S sister Johnnisha grew up in Los Angeles. He had a
26 good relationship with DONTE JOHNSON, loved him like a family member.
27 DONTE JOHNSON'S son Allen lived with Zamora and his family. Zamora
28 was the boy's legal guardian. (26 ROA 6540-42; 6547; 6550)

1 Arthur Cain, uncle of DONTE JOHNSON, was one of seven children.
2 He was four years older than his sister Eunice, who was DONTE
3 JOHNSON'S mother. Eunice was "slow", she was in Special Ed classes.
4 People called her names: dumb, retarded, stupid. She had difficulty
5 speaking. She married John White, DONTE JOHNSON'S father who was
6 abusive to her. Eunice had a lung problem from birth, which was
7 exacerbated when she began to smoke, drink, and use drugs. This was
8 before DONTE JOHNSON was born. She smoked cocaine which further
9 affected her lungs. Her children were taken away and stayed with his
10 mother, their grandmother. Four of his sisters had serious drug and
11 alcohol problems and his mother took all their children into her home.
12 (26 ROA 6554-55; 6561; 6565-68; 6573)

13 Eunice Cain, DONTE JOHNSON'S mother, testified that she drank
14 alcohol while pregnant with him. She had problems when she was born
15 and received a check because of the problems. She said she was a
16 little slow and had trouble speaking at times. She has asthma and
17 breathing problems. In school she was in special ed classes and had
18 problems with kids making fun of her. She met DONTE JOHNSON'S father
19 John White in the neighborhood. She was 16 or 17 at the time. He was
20 ten years older. He had to wait to marry her until she was old
21 enough. After the marriage he would beat her. (26 ROA 6574-79)

22 He beat her in front of the children. DONTE JOHNSON would try
23 to defend her but he was too little. DONTE JOHNSON is her only son,
24 her two other children are girls. White knocked her teeth out. He
25 tried to throw her out a window. He made a molotov cocktail, homemade
26 bomb. He came through the window and threw it on her. He would beat
27 her to get her to say her youngest daughter wasn't his. She started
28

1 smoking pcg and could not care for her children. It made her even
2 slower. She would get high with her sister Pam. Their children were
3 taken away from her and Pam. She never got them back, her mother
4 raised them. (26 ROA 6579-86)

5 Johnnisha Zamora, DONTE JOHNSON'S sister, testified to their life
6 as children. Their mother was on drugs and would leave them
7 sometimes. Her mother smoked drugs in front of them. Her father
8 would hit her mother in front of them. Her mother would see ghosts
9 and lock the children in a closet without light. They would hear her
10 screaming. Their mother would come and go. When was five or six they
11 lived in a shed. There were six children living in the shed, no
12 carpet, no furniture. The social services report stated that their
13 father would beat DONTE JOHNSON who did not know what he had done
14 wrong. DONTE JOHNSON missed the first year and a half of school.
15 They were placed temporarily in a foster home and then with their
16 grandmother. There were ten children in the grandmother's house. (26
17 ROA 6587-6606)

18 She described scenes of violence and shooting that she and DONTE
19 JOHNSON witnesses and how every day, to and from school they would
20 get beat up or have rocks thrown at them. There was no one to help
21 them. There were vacant, abandoned cars in the neighborhood occupied
22 by homeless drug addicts the children called "base heads". She,
23 herself, was shot in the leg by a drive-by shooter. She was also
24 stabbed in the head by an unknown person. (26 ROA 6605-6610)

25 Eunisha White, DONTE JOHNSON'S sister, Keona Atkins, DONTE
26 JOHNSON'S cousin, Jane Edwards, DONTE JOHNSON'S grandmother, Allen
27 White, DONTE JOHNSON'S son, were also called as witnesses and
28 testified to their affection for DONTE JOHNSON and the violence,

1 abuse, neglect, drug abuse of DONTE JOHNSON'S mother, that marred his
2 growing up. (27 ROA 6848-6863; 6863-6906; 6907-6915; 6917-6921)

3 DONTE JOHNSON'S sister Johnnisha was recalled to clarify the time
4 period the children were kept in the shed and although she did not
5 recall the length of time they spent there, she testified it occurred
6 over a period of months. (27 ROA 6915-17)

7 Following the mitigation testimony, Instructions were settled
8 outside the presence of the jury. Back in session the Court read the
9 instructions to the jury. In closing argument, the prosecutor stated:

10 "I would submit to you that if you find that his
11 upbringing outweighs this quadruple homicide, that is
12 disrespectful to members of South Central L.A. who didn't
13 commit a quadruple homicide. Common sense tells us that
14 many, many, many people in a similar upbringing haven't
done what Donte Johnson has done. If you were to find that
his childhood is entitled to a greater wait (sic) of this
quadruple homicide, it's like telling people --"

15 Defense counsel objected and a sidebar conference was held
16 outside the presence of the Court Reporter. (27 ROA 6656-6657)
17 Following the sidebar, the prosecutor continued his argument. There
18 was a disturbance in the courtroom and the Court declared a recess.
19 Outside the presence of the jury the Court asked defense counsel if
20 she wanted to put something on the record. Defense counsel said she
21 did, however, before she could address the Court the prosecutor
22 interrupted to inform the Court that during his argument Nick
23 Gorringer, brother of victim Tracey Gorringer, was in the Courtroom, in
24 the second row, during his argument when a photo of the crime scene
25 was displayed and Gorringer either passed out or fell over. The
26 prosecutor also stated that it was the first time Nick Gorringer had
27 been present in the courtroom, that he had seen him earlier,
28 downstairs, for the first time. (27 ROA 6659-60, 6663)

1 Defense counsel advised the Court that Gorringe had made a
2 groaning sound as he fell and was crying as Matthew Mowens' father and
3 the bailiff assisted him in leaving the courtroom. This occurred in
4 the presence of the jurors. Further, counsel argued to the Court that
5 the courtroom was clearly divided into 2 sides. DONTE JOHNSON'S
6 family, predominatingly African-American, were on the right side of
7 the courtroom. The families of the victims (Caucasians) were on the
8 left side of the courtroom. Under the circumstances counsel asserted
9 Appellant found it impossible to receive a fair trial and compared
10 the occurrence of what happened in Holloway. The Court disagreed but
11 noted the objection. (27 ROA 6660-64)

12 The jury was recalled and the Court stated:

13 THE COURT: Ladies and gentlemen - let the record
14 reflect the presence of all the parties, all the attorneys
and all members of the jury.

15 Right before we broke, there was a little commotion over
16 there. Anyway, the jury is ordered to disregard that. As
17 I told you before, you are to base your decision on the
18 evidence adduced here in trial from the witnesses, the
19 stipulation of the attorneys and the exhibits, and it is
not to be based on anything you see in or outside the room
that's not evidence adduced here from the witnesses or the
exhibits of the stipulation of the parties.

20 Proceed." (27 ROA 6664-65)

21 The following day, the prosecutor requested that Nick Gorringe
22 be allowed back in the courtroom. (28 ROA 7037)

23 In the State's rebuttal closing argument the prosecutor stated
24 that he wished to talk about a couple of sets of facts regarding the
25 murders and thereafter stated:

26 "The fatal - the ultimately fatal conversation when Matt
27 Mowen comes over and in the presence of the defendant and
28 Terrell Young, makes the statement that they have lots of
money that they made selling pizzas and drugs following the
band Phish....." (27 ROA 6713)

1 Defense counsel objected stating that the only mention of "pizza"
2 was made by the prosecutors. The detective said "acid". The money
3 was made selling acid. There was no evidence at all that pizzas were
4 sold. The Court stated that it did not recall pizza. (27 ROA 6712-
5 6713)

6 The prosecutor then stated:

7 "I'll leave it to the collective memory of you as the jury
8 of what occurred." (27 ROA at 6713)

9 On April 28, 2005 the jury returned the following verdicts:
10 aggravating circumstance or circumstances established unanimously and
11 beyond a reasonable doubt as to Counts XI, XII, XIII, and XIV. That
12 defendant has been convicted of more than one offense of murder in the
13 first or second degree. Mitigating circumstance or circumstances
14 which had been established as to Counts XI, XII, XIII and XIV: The
15 youth of the Defendant at the time of crime; Instruction #10,
16 Mitigators #3, #5, #6, #7, #8, and #10. As to Counts XI, XII, XIII,
17 and XIV, the aggravating circumstances outweigh any mitigating
18 circumstance or circumstances.

19 Following return of the verdict the prosecutor gave his Opening
20 Statement in the sentencing trial: beginning with DONTE JOHNSON'S
21 juvenile arrest at age 14 in 1992 for armed robbery; his placement in
22 a youth camp;; his release the same year; probation violation; his
23 January 1993 possession of a handgun on school property; his 1993
24 arrest for taking a vehicle without the owner's consent; and at 16 in
25 June 1993 his arrest for armed bank robbery and subsequent
26 incarceration in the California Youth Authority. (28 ROA 6959-6961)

27 The prosecutor also told the jury:

28 "Eventually, in prison, while incarcerated, his criminal
conduct still didn't stop. You will hear about his

1 behavior since his incarceration, how he can't comply with
2 the rules and how rules are terribly important when you are
3 a corrections officer at the detention center or at Ely
State Prison. It's imperative that the inmates comply with
the rules.

4 You will hear about a phone call he made, threatening to
5 kill a young woman, a civilian.

6 You will hear about a letter he wrote where he put a hit
7 out on Scale. You heard that name in the trial, Mr.
Anderson, named Scale." (emphasis added) (28 ROA 6965)

8 Defense counsel objected and a discussion at bench followed. (28
9 ROA 6965)

10 Following Opening Statements, outside the presence of the jury,
11 the Court invited defense counsel to place her objection on the
12 record. Defense counsel stated that she had not been noticed of the
13 evidence that while in the detention center DONTE JOHNSON allegedly
14 put a contract to kill out on a man named Scale, or the female that
15 was also threatened. She had investigated everything on the Amended
16 Notice of Evidence in Support of Aggravation; and was not prepared to
17 meet this evidence which had not been noticed. (28 ROA 6984-6986)

18 The prosecutor stated to the Court that it was an Amended Notice,
19 not superceding; that Amended meant in addition to any other evidence
20 they intended to introduce. The Court did not agree. The prosecution
21 then stated that in the original notice they clearly referenced they
22 would use DONTE JOHNSON'S infractions at the Detention Center. That
23 was in 1998 and that they provided copies to the original defense
24 lawyer and the new defense lawyers. Defense counsel stated that ths
25 was the first time she was made aware of the allegations. In previous
26 conversations with former prosecutor Guyman she understood that new
27 pleadings were being filed, she could be prepared to meet the
28 evidence. The Court asked to see the Amended Notice and recessed.

1 (28 ROA 6984-6987)

2 Back on the record, the prosecutor advised they had pulled the
3 original Notice of Evidence filed June 11, 1999 as well as the
4 specific Amended Notice filed April 7, 2004. he read item 15, page
5 6 from the original record as follows:

6 "Testimony, records of corrections officers jail
7 personnel from the Clark County detention center pertaining
8 to Donte Johnson's conduct while incarcerated at the Clark
9 County Detention Center.' All copies have been provided to
10 Defense counsel, names of the witnesses are provided in the
11 records.

12 That's 1-2, the notice, amended notice you wanted
13 specifically item 15 states, as follows:

14 'Testimony, records of corrections officers
15 slash jail personnel slash prison personnel from
16 the Clark County Detention Center and Nevada
17 Department of Prisons while Donte Johnson was
18 incarcerated at the Clark county Detention Center
19 and within the Nevada Department of Corrections.
20 This evidence will include but is not limited to
21 a (sic) incident that occurred February 24, 2001,
22 wherein Defendant, along with another inmate,
23 threw Oscar Arias over a railing at the Clark
24 County Detention Center.'

25
26 There is a second one dated November 2nd, 1999, nearly
27 six years ago, Judge, in which there was a detailed
28 explanations from a corrections officer that the Defendant
Johnson and another inmate were involved in putting a hit
out on another inmate. That's Scale, I referred to. There
is evidence about Scale in this trial.

29
30 I am representing to this Court the older incident I
31 mentioned, threatening a female civilian. Certainly showed
32 a good faith basis as bore out by two notices of evidence
33 we provided to defense that it was admissible." (28 ROA
34 6988-90)

35 The prosecutor then argued that they had provided notice six
36 years ago and that last year they made it clear; it was not limited
37 to the Oscar Arias' incident, but it would include others. Defense
38

1 counsel advised that the current prosecutor had not been on the case
2 when she was told by prosecutor Guyman that she would not need to
3 review 40 cartons of records; that they would use what was in the
4 Amended Notice of Aggravation. The Court stated it thought the
5 Amended Notice replaced the original. In the Amended Notice the State
6 said defense would get the records. Looking at the Notice one would
7 not be aware of the incidents complained of by the defense. The
8 defense should have been on notice and given a chance to defend. The
9 Court accepted the agreement of the parties that the State would not
10 use the incidents and the defense would not allege that the
11 prosecutors were doing anything underhanded. (28 ROA 6990-6992)

12 After the prosecutor's Opening Statement, and before the Opening
13 Statement of DONTE JOHNSON, the Court cautioned the jury that Opening
14 Statements and Closing Arguments were not evidence and should not be
15 given evidentiary value. (28 ROA 6967)

16 The State called Jimmy Grayson, a Los Angeles Police Department
17 Lieutenant, to testify in detail regarding the 1993 bank robbery
18 committed by DONTE JOHNSON and others when DONTE JOHNSON was 16 years
19 old. (28 ROA 6994-7014)

20 The State called Sandra Gatlin, who was the assistant manager of
21 the bank robbed by DONTE JOHNSON and others in 1993 to describe the
22 robbery. (28 ROA 7014-7019)

23 The State also called a California Parole Officer, Robert
24 Hoffman, who had received DONTE JOHNSON'S case from the California
25 Youth Authority ("CYA"). He testified about the documents in DONTE
26 JOHNSON'S file which were introduced into evidence. (28 ROA 7053-
27 7069)

28 Corrections Officer Alex Gonzalez testified to an incident at the

1 detention center where he said DONTE JOHNSON and inmate Reginald
2 Johnson pushed an inmate Oscar Arias over a railing on the top tier.
3 LVMPD Detective Jim Buczek was called to testify regarding the
4 testimony of Nevada Highway Patrol Trooper Sergeant Robert Honea from
5 DONTE JOHNSON'S trial. Honea had conducted a traffic stop on DONTE
6 JOHNSON for speeding on August 17, 1998. In searching the car he
7 located a short-barreled shotgun. DONTE JOHNSON and Terrell Young
8 fled from the car. (29 ROA 7104-7112).

9 Outside the presence of the jury, defense counsel advised the
10 Court that the defense objected to the introduction into evidence of
11 DONTE JOHNSON'S Clark County Detention Center records under Crawford
12 v. Washington, 541 U.S. 36, 69 (2004) as a violation of DONTE
13 JOHNSON'S due process right to confront and cross-examine witnesses.

14 Counsel also advised the Court that if the Court was inclined to
15 allow the documents into evidence the defense, at the least, wanted
16 the opportunity to cross-examine Officer Young about an occurrence.
17 The prosecutor responded that Crawford was inapplicable as the
18 evidence issues were business records of the type previously admitted
19 by DONTE JOHNSON and "what's good for the goose is good for the
20 gander." If the defense could introduce such records so could the
21 State.

22 The Court observed that was not true; the issue was whether
23 Crawford applies to a penalty hearing. Specifically is the evidence
24 testimonial; second, did it apply to a penalty hearing. (29 ROA 7114-
25 17)

26 Defense counsel believed the evidence to be testimonial. The
27 Court held that Crawford did not say that hearsay couldn't be used in
28 a penalty hearing for sentencing purposes and denied the motion. (29

1 ROA 7119-7120)

2 The State then presented its victim impact witnesses and rested.
3 DONTE JOHNSON presented witnesses in mitigation. the parties agreed
4 upon jury instructions. (29 ROA 7122-7156; 7157-7269; 7272-7545; 31
5 ROA 7550-7681; 7752-53)

6 On May 5, 2005 the jury returned a sentence of death on each of
7 the 4 counts. The Court directed the jury be polled. All jurors
8 affirmed their verdicts. (32 ROA 7892-7895)

9 On May 12, 2005, the date set for sentencing defense counsel
10 moved for a continuance to complete their review of several issues
11 that may be needed to complete the record. The Court granted the
12 three weeks requested. (32 ROA 7900-7906)

13 On June 8, 2005 DONTE JOHNSON filed a Motion for New Trial,
14 Motion for In-Camera Review of Potential Jury Misconduct, Request for
15 Evidentiary Hearing, and Request for an Order Preserving Evidence
16 (Filed Under Seal). (32 ROA 7923 - 7926)

17 On June 14, 2005 the Court entertained an Evidentiary Hearing on
18 DONTE JOHNSON'S Motion, DONTE JOHNSON'S presence was waived by
19 counsel. Following the hearing the motion was denied. (32 ROA 7952-
20 8027)

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1 penalty phase as well as the guilt phase. Id. at 729.

2 Voir Dire plays a critical function in assuring the criminal
3 defendant that his Sixth Amendment right to an impartial jury will be
4 honored. See, Rosales-Lopez v. United States, 451 U.S. 182, 188
5 (1981) (plurality opinion).

6 In U.S. v. Fell, 372 F.Supp.2d 766 (Vermont 2005) a capital case,
7 defense counsel sought to include case-specific questions during voir
8 dire. The Court held that defendant was entitled to ask prospective
9 jurors, in addition to the requisite general life-qualifying
10 questions, proposed case-specific questions provided the primary
11 purpose was to ensure jury impartiality guaranteed under the Sixth and
12 Fourteenth Amendments of the United States Constitution as opposed to
13 committing jurors to particular findings. The Court found the
14 proposed case-specific questions permissible as long as they were not
15 stake-out questions and would help identify various forms of juror
16 bias regarding their consideration of any aggravating and mitigating
17 factors as required by the Federal Death Penalty Act. The Court found
18 that the proposed case-specific questions were permissible as long as
19 they were not "stake-out" questions. The issue before the Court was
20 what case-specific questions should be allowed with respect to
21 aggravating and mitigating factors. In resolving the issue, the Court
22 followed the reasoning of U.S. v. Johnson, 366 F.Supp.2d 822 (N.D.
23 Iowa 2005).

24 In Johnson, supra, Chief Judge Bennett thoroughly discussed the
25 question. The Fell court agreed that case-specific questions were
26 permissible if they were not "stake-out" questions. The Court also
27 agreed with Johnson, id., that "stake-out" questions are those that
28 "ask a juror to speculate or pre-commit to how they juror might vote

1 based on any particular facts." Fell, id. at 770 citing Johnson
2 (internal citations omitted). See also, U.S. v. McVeigh, 153 F.3d
3 1166, 1207 (1998) where the court said "when a defendant seeks to ask
4 a juror to speculate or pre-commit to how that juror might vote based
5 on any particular facts, the question strays beyond the purpose and
6 protection of Morgan."

7 In the present case, the prosecutor sought to ask prospective
8 juror 001 the following questions at voir dire:

9 "There is also a process that is involved in a capital case
10 where other than just a generalized jury instruction that
11 is given by the Court, there is no other instruction about
12 who is selected as a foreperson of the jury. You have no
13 additional duties as far as votes go, but they have one
14 duty that's very important and that is they are actually
15 the person that signs the verdict form in this case.

16 If you were selected the foreperson of this case and you
17 believed under the law and the facts that the death penalty
18 was appropriate could you sign your name as foreperson?"

19 Defense counsel objected stating that the law only required the
20 prospective juror to consider the four forms {of punishment}; not that
21 she can sign the verdict form.

22 The prosecutor responded:

23 "The form of my questions wasn't put in whether or not she
24 could consider it. The question presupposes in the form of
25 the question that based upon the law and facts she thought
26 the death penalty was appropriate could she carry out her
27 function."

28 The trial court overruled the objection; and the prosecutor then said:

Prosecutor: Let me back up again.

29 If you are selected as the foreperson of this jury and
30 under the laws and facts, you believe the death penalty was
31 appropriate could you sign your name as the foreperson of
32 this jury to the verdict of death that would put Donte
33 Johnson to death? (22 APP 5431)

34 Thereafter the prosecutors asked fifteen (15) additional prospective
35 jurors the same question. (No. 25, 22 ROA 5592; No. 46, 24 ROA 6057;

1 No. 59, 24 ROA 6082; No. 97, 23 ROA 5734; No. 108, 23 ROA 5754; No.
2 113, 23 ROA 5796; No. 132, 23 ROA 5846; No. 230, 24 ROA 5929; No. 242,
3 24 ROA 5961; No. 249, 24 ROA 5979; No. 262, 24 ROA 6014-6015; No. 278,
4 24 ROA 6036-6037; No. 296, 25 ROA 6141; No. 305, 25 ROA 6173-6174; No.
5 309, 25 ROA 6198-6199; No. 311, 25 ROA 6221)

6 The prosecutor's question was an improper "stake-out" question
7 seeking to cause prospective jurors to pledge themselves to a future
8 course of action and "indoctrinate them regarding potential issues
9 before the evidence has been presented and they have been instructed
10 on the law." See, Richmond v. Polk, 375 F.3d 309, 330 (2005); citing
11 State v. Richmond, 495 S.E.2d 677, 683 (1998).

12 The Court erred in allowing the prosecutors to question sixteen
13 prospective jurors by asking them in effect if they could sign the
14 verdict that would put DONTE JOHNSON to death. The question was used
15 to empanel a pro-death jury rather than the constitutionally
16 guaranteed panel of impartial, indifferent jurors to which DONTE
17 JOHNSON was entitled. The death verdict should be set aside and a new
18 penalty trial given.

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1 II.

2 IT WAS INTENTIONAL MISCONDUCT FOR THE
3 PROSECUTOR TO REFER TO THE VICTIMS AS "BOYS"
4 AND "KIDS" WHEN HE WAS EXPRESSLY PROHIBITED
5 FROM DOING SO BY THE DISTRICT COURT'S PRE-TRIAL RULING

6 The prosecutors evident purpose in contravening the District
7 Court's order was to conjure up, in the minds of the jurors, images
8 of the victims as children. This Court should find the intentional
9 misconduct of the prosecutor created prejudice in the minds of the
10 jury against DONTE JOHNSON.

11 The law is well settled that a prosecutor may not improperly
12 appeal to the jury to act in ways other than as dispassionate
13 arbitrators of the facts. See, U.S. v. Young, 470 U.S. 1, 10 (1985).

14 Here, prior to trial defense counsel filed a motion in limine to
15 preclude the prosecution from referring to the victims in the case as
16 boys. In the motion, counsel noted that at the previous penalty
17 hearing, in front of the jury, the victims were referred to as "boys"
18 over twenty (20) times. That such a reference conjured visions of a
19 ten (10) to twelve (12) year old child. That the use of "boys" was
20 a subtle means to inflame the jury. (20 ROA 4824-26)

21 On May 3, 2004, the State having no opposition, the trial court
22 granted DONTE JOHNSON'S motion in limine to preclude the State from
23 referring to the victims as "boys". The instant prosecutor was
24 present. (20 ROA 4961; 5002)

25 The prosecutors deliberate contravention of the district court's
26 order by referring the four (4) young men as "boys" or "kids" was a
27 calculated effort to evoke sympathetic responses from jurors to the
28 prejudice of DONTE JOHNSON.

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III.

THE DECISION OF THE TRIAL COURT TO ALLOW THE
STATE TO ADDUCE TESTIMONY AND PHYSICAL EVIDENCE
REGARDING APPELLANT'S JUVENILE CONVICTIONS
DEPRIVED APPELLANT OF A FAIR PENALTY HEARING

The first decision of the Trial Court to exclude DONTÉ JOHNSON'S juvenile records as being more prejudicial than probative was sound. When the Court later decided to allow the State to adduce testimony and records of DONTÉ JOHNSON'S juvenile conviction it erred. As a consequence of the admission of these records. DONTÉ JOHNSON was denied due process of law as guaranteed by the United States and Nevada Constitution, Sixth Amendment, Fourteenth Amendment.

NRS 175.522(3) allows the introduction of "other matter" evidence at a penalty hearing in the sound discretion of the trial judge. The evidence must be relevant and must be more probative than prejudicial. See, NRS 48.035(1). Here, the Judge's change of mind allowing the introduction of evidence regarding DONTÉ JOHNSON'S juvenile convictions was unreasonable.

In Krause, Inc. v. Little, 117 Nev. 929, 34 P.3d 566 (2001) this Court in discussing the weighing of probative and prejudicial value of evidence stated that to merit exclusion the evidence must unfairly prejudice an opponent, typically by appealing to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence. At 935, citing Fed.R.Evid. 403 advisory committee's note. In the case at bar, the prejudicial effect of DONTÉ JOHNSON'S convictions so outweighed the probative value their admission constituted a clear abuse of discretion. See, Lucas v. State, 96 Nev. 428, 610 P.2d 235 (1984). The trial court is at liberty to exclude relevant evidence if it determines that its

1 probative value is substantially outweighed by the danger of unfair
2 prejudice. See, Halbower v. State, 93 Nev. 212, 562 P.2d 485 (1977).
3 Here the trial court's initial decision was to exclude the juvenile
4 convictions on the ground that its probative value was substantially
5 outweighed by the danger of unfair prejudice. The trial court abused
6 its discretion in allowing the evidence to be adduced at trial.

7 The prejudicial impact of the juvenile convictions and their
8 appeal to the emotional tendencies of jurors rather than the
9 intellectual ability to evaluate evidence is best explained by
10 reference to the decision of the Court in Roper v. Simmons, 543 U.S.
11 551 (2005) wherein the Court held that the Eighth Amendment forbids
12 the imposition of the death penalty on juvenile offenders under 18.

13 In Roper, supra, the Court noted three general differences
14 between juveniles under 18 and adults:

15 "...First, as any parent knows and as the scientific and
16 sociological studies respondent and his *amici* cite tend to
17 confirm, '[a] lack of maturity and an underdeveloped sense
18 of responsibility are found in youth more often than in
adults and are more understandable among the young. These
qualities often result in impetuous and ill-considered
actions and decisions.' (citations omitted)

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. . . .

20 The second area of difference is that juveniles are more
21 vulnerable or susceptible to negative influences and
22 outside pressures, including peer pressure. Eddings,
23 supra, at 115, 71 L.Ed.2d 1, 102 S. Ct. 869 ('[Y]outh is
24 more than a chronological fact. It is a time and condition
25 of life when a person may be most susceptible to influence
and to psychological damage'). This is explained in part
by the prevailing circumstances that juveniles have less
control, or less experience with control, over their own
environment. (citations omitted)

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. . . .

27 The third broad difference is that the character of a
28 juvenile is not as well formed as that of an adult. The
personality traits of juveniles are more transitory, less
fixed. See generally E. Erikson, *Identify: Youth and*

1 Crisis (1968).

2 These differences render suspect any conclusion that a
3 juvenile falls among the worst offenders....." (citations
omitted)

4 The Court found that juvenile offenders are less culpable than
5 adults. However, it cannot be said that a jury in a capital case, or
6 specifically the jury herein, could evaluate DONTE JOHNSON'S juvenile
7 record from the perspective articulated by the Court.

8 The admission of testimony and exhibits regarding DONTE JOHNSON'S
9 juvenile convictions was so highly prejudicial as to deprive DONTE
10 JOHNSON of a fair penalty hearing.

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1 IV.

2 DONTÉ JOHNSON'S DUE PROCESS RIGHT TO A
3 FAIR TRIAL WAS IMPAIRED BY THE
4 PROSECUTION'S IMPROPER CLOSING ARGUMENT

5 The proper purpose of the jury in a sentencing hearing is the
6 determination of the proper sentence for the defendant before them
7 based on his own past conduct. Here, the prosecutor improperly
8 compared DONTÉ JOHNSON to others and attempted to inflame the jury and
9 invoke social pressure. The argument was improper and designed to
10 prejudice and coerce the jury into finding that the mitigating
11 circumstances did not outweigh the aggravating circumstances; that a
12 sentence of death would later become apparent.

13 In Collier v. State, 101 Nev. 473; 705 P.2d 1126 (1988) this
14 Court reversed the defendant's sentence of death, in great part, on
15 the ground of prosecutorial misconduct. In Collier, Id. the
16 prosecutor in arguing to the jury, improperly argued facts outside the
17 record by comparing the defendant to one of Nevada's most notorious
18 criminals. Further, the prosecutor argued community standards to the
19 jury.

20 Here, the prosecutor argued:

21 "I would submit to you that if you find that
22 his upbringing outweighs this quadruple homicide,
23 that is disrespectful to members of South Central
24 L.A. who didn't commit a quadruple homicide.
25 Common sense tells us that many, many, many
26 people in a similar upbringing haven't done what
27 Donte Johnson has done. If you were to find that
28 his childhood is entitled to a greater wait (sic)
of this quadruple homicide, it's like telling
people --" (27 ROA 6656-57)

thus comparing DONTÉ JOHNSON unfavorably to others and attempting to
impose social pressure.

The argument by invoking facts outside the record and improper

1 comparisons deprived DONTE JOHNSON on the individual consideration
2 essential in capital cases. See, Lockett v. Ohio, 438 U.S. 586
3 (1978).

4 The prosecutor has a duty to confine argument to the jury within
5 proper bounds. See, United States v. Young, 470 U.S. 1, 8 (1985).
6 Here, the prosecutor failed to meet this requirement and his
7 misconduct was prejudicial to DONTE JOHNSON.

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1 V.

2 APPELLANT'S DEATH SENTENCE WAS IMPOSED UNDER
3 PREJUDICE AND ARBITRARY FACTORS WHEN, AT
4 THE PENALTY HEARING, IN THE PRESENCE OF THE
5 JURY, THE BROTHER OF TRACY GORRINGE, UPON
6 VIEWING THE PHOTO OF THE CRIME SCENE
7 DISPLAYED ON A SCREEN DURING THE
8 PROSECUTOR'S CLOSING ARGUMENT, GROANED,
9 PASSED OUT ON TO THE FLOOR, AND WAS
10 HELPED, CRYING FROM THE COURTROOM

11 The killings occurred in August 1998; almost 7 years prior to
12 this third penalty hearing; thus raising serious questions of
13 dissembling or planned theatrics on the part of the brother. Genuine
14 or spurious, the extreme behavior demonstrated to the jury requires
15 reversal of the sentence of death.

16 NRS 177.055(2)(c) requires this Court to review every death
17 sentence and consider in addition to any issues raised on appeal
18 whether the sentence of death was imposed under the passion, prejudice
19 or any arbitrary factor. DONTE JOHNSON contends that the jury's
20 sentence of death was improperly influenced by the actions/reactions
21 of Nick Gorringer and must be set aside and the case remanded for a new
22 penalty hearing.

23 In Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) during
24 closing argument, an electronic stun belt that the defendant was
25 wearing was activated and shocked him, completely disrupting the
26 proceedings. The jury was excused. When the jury returned, the trial
27 court explained that Hollaway was wearing a stub belt and had done
28 nothing to warrant its activation. In reversing the sentence of
death, this Court found that the incident remained an arbitrary and
prejudicial factor which required reversal of the defendant's
sentence. In the case at bar, like the Hollaway case, the prosecutor
was delivering his closing argument when Gorringer groaned and fell.

1 This completely disrupted the proceedings, requiring the jurors to
2 leave the courtroom. When they returned, as in Hollaway, supra, the
3 Court admonished the jury to disregard the commotion. The prosecutor
4 then finished his argument. As in Hollaway, supra, the jury returned
5 a sentence of death. The incident was an arbitrary and prejudicial
6 factor which requires reversal of DONTE JOHNSON'S sentence.

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VI.

IT WAS IMPROPER FOR THE PROSECUTOR TO
MISSTATE FACTS IN REBUTTAL ARGUMENT

In rebuttal argument the prosecutor both argued facts not adduced at trial and discounted the defense objection and the Court's opinion statement when he told the jury he would leave it to its collective memory. This misconduct was prejudicial.

It is black letter law that it is misconduct for a prosecutor to argue facts not in evidence. See, Witherspoon v. State, 104 Nev. 721, 765 P.2d 1153 (1988); Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). Here, the prosecutor in argument informed the jury that victim Matthew Mowen stated in the presence of DONTE JOHNSON and Terrell Young that they made selling pizzas and drugs following the band Phish. This was false. There was no testimony that Mowen's money was obtained from any source other than the sale of "acid".

The misconduct in arguing facts not in evidence was exacerbated by the prosecutor's response following the defense objection and the Court's statement that it did not recall pizza when the prosecutor then stated:

"I'll leave it to the collective memory of you as the jury of what occurred." (27 ROA 6713)

In effect, demonstrating a lack of respect or courteous regard for the Court and by implication suggesting to the jury the correctness of his argument.

A prosecutor's primary duty is not to convict but to see that justice is done; and lawyers (including prosecutors) may not state facts which are not in evidence, or use inflammatory argument. See, Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, citing SCR 181(3) 1985, SCR 195(3), 198(2) 1985. The improper rebuttal argument of the

1 prosecutor, portraying the victims in a more positive light, and the
2 cavalier response of the prosecutor to the challenge of that argument
3 prejudiced DONTE JOHNSON in the eye of the jury.
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VII.

APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL
WAS COMPROMISED BY THE PROSECUTORS WHO IN
OPENING ARGUMENT OF THE SENTENCING PHASE:

1. TOLD THE JURY THAT WHILE INCARCERATED DONTE JOHNSON DID NOT STOP HIS CRIMINAL CONDUCT AND, IN FACT, MADE A TELEPHONE CALL TO A YOUNG WOMAN IN WHICH HE THREATENED TO KILL HER, AND FURTHER,

2. SENT A LETTER ORDERING A HIT ON A MAN KNOW AS SCALES, WHEN,

3. HE COULD NOT, THEREAFTER ADDUCE EVIDENCE TO SUPPORT THE ALLEGATIONS DUE TO THE PROSECUTORS FAILURE TO PROVIDE ADEQUATE NOTICE TO THE DEFENSE.

You can't unring a bell. The jury had been told that DONTE JOHNSON threatened to kill a young woman and put out a contract on a man while incarcerated.

The prosecutor in the present case exceeded the permissible scope of an opening statement by referring to criminal acts alleged to have been committed by DONTE JOHNSON where the prosecution failed to properly notice the defense in violation of NRS 174.233 - NRS 174.295, NRS 48.045, and Nevada case law. As a consequence, he stated facts to the jury in his Opening Statement that he could not prove at trial. See, Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997). The allegations in the prosecution's Opening Statement were highly prejudicial.

The trial court's single instruction to the jury that Opening Statements and Closing Arguments were not evidence was insufficient to cure the prejudice resulting from the prosecution's Opening Statement. It cannot be said that the prejudice caused by the prosecutor's assertions did not contribute to the death sentence imposed.

VIII.

DONTE JOHNSON WAS DEPRIVED OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM GUARANTEED BY BOTH THE UNITED STATES AND NEVADA CONSTITUTIONS WHEN THE TRIAL COURT ALLOWED THE PROSECUTION TO ADDUCE INTO EVIDENCE JOHNSON'S INMATE REPORTS FROM THE CLARK COUNTY DETENTION CENTER WITHOUT FIRST DEMONSTRATING THAT THE WITNESSES WERE UNAVAILABLE TO TESTIFY AND THAT JOHNSON HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE THEM

The detention center inmate reports, containing testimonial statements, were inadmissible under the confrontation clause, as the State did not show that the declarants were unavailable to testify and DONTE JOHNSON never had an opportunity to cross-examine them. DONTE JOHNSON'S sentence of death should be reversed.

In Crawford v. Washington, 541 U.S. 36, 69 (2004) the Court held "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the constitution actually prescribes: confrontation. The Court stated: "we leave for another day any effort to spell out a comprehensive definition of testimonial."

The Court did note that a statement is "testimonial" if it is a solemn declaration made for the purpose of establishing some fact. Id. at 51.

In Russeau v. Texas, 171 S.W.3d 871 [Tx.Crim.App] (2005), a capital murder case, the court of criminal appeals of Texas affirmed the defendants conviction but reversed as to punishment, remanding for a new punishment hearing on the ground that "incident reports" and "disciplinary reports" admitted under the business records exception to the hearsay rule; contained statements which appeared to have been written by correction officers and which purported to document numerous and repeated disciplinary offenses on the part of Russeau

1 while incarcerated. Further, in writing the statements, the
2 corrections officers relied upon their own observation or the
3 observation of others. The individuals who supposedly observed the
4 offenses did not testify at trial.

5 The Texas Court held that the reports were testimonial statements
6 and, as such, were inadmissible under the confrontation clause,
7 because the State did not show that the declarants were unavailable
8 to testify and Rousseau never had an opportunity to cross-examine any
9 of them. The Texas Court stated that

10 "Indeed, the statements in the reports amounted to
11 unsworn, ex parte affidavits of government employees and
12 were the very type of evidence the clause was intended to
13 prohibit." (at 881)

14 In the instant case, defense counsel objected to the admission
15 of the detention center records, citing Crawford. The prosecutor
16 argued that Crawford was inapplicable as the evidence in issue were
17 business records as in Rousseau, Id. The Court allowed the documents
18 into evidence. (29 ROA 7114-7120)

19 Inmate reports and disciplinary reports are testimonial.
20 Therefore, this Court should find that their admission into evidence
21 violative of the confrontation clause and reverse DONTE JOHNSON'S
22 sentence of death and remand the case to the District Court.
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IX.

THE CUMULATIVE EFFECT OF PREJUDICIAL ERROR CREATED
IN LARGE PART, BY PROSECUTOR MISCONDUCT,
AS WELL AS THE RECEPTION OF INADMISSIBLE
EVIDENCE, AND ERRONEOUS RULINGS OF
THE DISTRICT COURT DEPRIVED JOHNSON OF HIS
CONSTITUTIONAL RIGHT TO A FAIR PENALTY HEARING

Death is different. And one of the ways in which death penalty trials are different in this jurisdiction is that they are prosecuted by experienced attorneys knowledgeable in substantive and procedural law, capable of litigating a case without crossing the bright line of misconduct if they so choose. Evidently in this case they did not choose to use proper methods.

Therefore, this Court should reverse DONTE JOHNSON'S sentence of death and remand the case to the District Court for a new penalty trial free of prejudicial error.

The prosecutor's duty in a criminal prosecution is to seek justice. Berger v. U.S., 295 U.S. 78, 88 (1935), overruled on other grounds, by Stirone v. United States, 361 U.S. 212 (1960), Darden v. Wainwright, 477 U.S. 168, 181 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). A death sentence may be reversed if the jury imposing the sentence was influenced or misled by improper evidence, arguments or instructions. See, Dawson v. Delaware, 503 U.S. 159, 163 (1992). Here, the State introduced both improper evidence and argument.

This Court has held that the constitutional right to a fair trial can be violated by the cumulative effect of errors even when the errors are harmless individually. Cf. Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002); Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

1 "An accused, whether guilty or innocent, is entitled to a fair
2 trial; and it is the duty of the court and prosecutor to see that he
3 gets it." See, Garner v. State, 78 Nev. 366, 373, 374 P.2d 525
4 (1962). In the case at bar, review of the proceedings demonstrates
5 misconduct, inadmissible evidence, improper rulings, and prejudicial
6 jury instructions. Quantity of error is significant, and accumulation
7 of error prejudiced Appellant's right to a fair penalty hearing. See,
8 Garner at 375; see also, State v. Teeter, 65 Nev. 584, 200 P.2d 657
9 (1948). The misconduct of the prosecutor was so prejudicial and/or
10 the error of the trial court was so extensive, DONTE JOHNSON did not
11 receive a fair trial. See, McGuire v. State, 100 Nev. 153, 677 P.2d
12 1060 (1984); see also, Sipsas v. State, 102 Nev. 119, 716 P.12d 231
13 (1986). The sentence of JOHNSON should be reversed.

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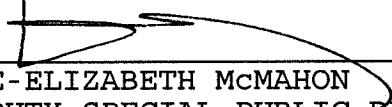
CONCLUSION

Wherefore, it is respectfully requested that the Court reverse the sentence of DONTE JOHNSON and remand the matter to District Court for a new penalty hearing.

Dated this 20th day of January, 2006.

DAVID M. SCHIECK

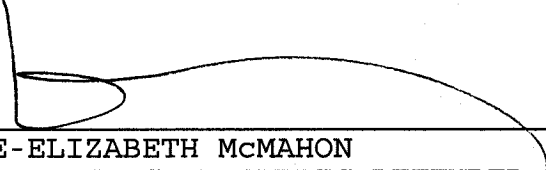
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1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief, and to
3 the best of my knowledge, information, and belief, it is not frivolous
4 or interposed for any improper purpose, I further certify that this
5 brief complies with all applicable Nevada Rules of Appellate
6 Procedure, in particular NRAP 28(e), which requires every assertion
7 in the brief regarding matters in the record to be supported by
8 appropriate references to the record on appeal. I understand that I
9 may be subject to sanctions in the event that the accompanying brief
10 is not in conformity with the requirements of the Nevada Rules of
11 Appellate Procedure.

12 DATED the 25 day of January, 2006.

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief
was made this 27 day of January, 2006, by depositing a copy in the
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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

S.C. CASE NO. 65168

Appellant,

Electronically Filed
Jan 09 2015 02:39 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

vs.

THE STATE OF NEVADA,

Respondent.

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

~~~~~  
APPELLANT'S APPENDIX TO THE OPENING BRIEF  
VOLUME XXXI  
~~~~~

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IN THE SUPREME COURT OF NEVADA

DONTE JOHNSON,

CASE NO. 65168

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

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3	7	REPORTER'S TRANSCRIPT OF MAY 18, 2000 PROCEEDINGS (FILED 05/30/2000)	1803-1804
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13	9&10	REPORTER'S TRANSCRIPT OF JUNE 7, 2000 JURY TRIAL-DAY 3- VOLUME III (FILED 06/08/2000)	2132-2528
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19	21	REPORTER'S TRANSCRIPT OF APRIL 20, 2005 TRIAL BY JURY- VOLUME II- P.M. (FILED 04/21/2005)	4864-4943
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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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