DONTE JOHNSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 45456

RESPONDENT'S ANSWERING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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Case No. 45456

RESPONDENT'S ANSWERING BRIEF

Appeal from Sentence of Death
Eighth Judicial Court, Clark County

STATEMENT OF THE ISSUES

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

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

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

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

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

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

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

8. Whether Defendant was 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.

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

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

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

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

ARGUMENT

I

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

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

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

> If you were selected the foreperson of this jury and under the laws and the facts, you believe that 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, p. 5431.

> If you were selected as a juror in this case, the facts and circumstances presented to you, the instructions of law that Judge Gates would give you 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?

22 ROA, p. 5592.

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

> The form of my question wasn't put in whether or not she could consider it. 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 function*.

22 ROA, p. 5431.

The scope of jury voir dire is within the sound discretion of the trial court and will be given considerable deference by this court. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996); Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978). The State's voir dire was reasonably designed to question whether the prospective jurors were capable of carrying out their duty in a death penalty case. This duty may include service as a jury foreman and almost always includes individual polling of the jurors. Notably, the Defense does not contend that any juror was stricken or excused because of their

failure to answer the State's question properly.[1] The State's questions regarding service as foreman and signing the verdict form did not pledge the prospective jurors to any particular course of action nor did it indoctrinate them regarding potential issues in the case. Such inquiry does not qualify as "stake-out" questions because nothing is based on any particular facts from Defendant's case. There is no merit to Defendant's contentions.

II

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

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

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

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[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

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

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

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

> and record of the individual offender and the circumstances of the particular 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.

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

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

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

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

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

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

IV

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

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

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

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

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

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

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

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

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

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

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V

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

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

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

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[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.

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

VII

DEFENDANT'S DUE PROCESS RIGHT WAS NOT COMPROMISED BY THE PROSECUTION IN ITS OPENING STATEMENT

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

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

> 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.

28 ROA, p. 6965.

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

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

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

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

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

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

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

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

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

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

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

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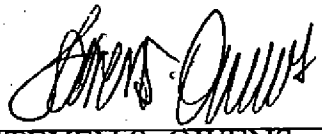
CONCLUSION

For the foregoing reasons, this Honorable Court should deny Defendant's appeal and affirm his sentence of death.

Dated this 4th day of April, 2006.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 
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CERTIFICATE OF COMPLIANCE

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

Dated this 4th day of April, 2006.

Respectfully submitted,

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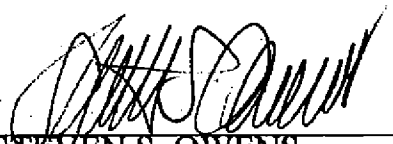
BY 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 4th day of April, 2006.

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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

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

APPELLANT'S REPLY BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

ARGUMENT

I.

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

The trial court deprived DONTE JOHNSON 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. The death verdict should be set aside and a new penalty trial ordered.

One of the most important aspects of any criminal trial is selection. The Sixth and Fourteenth Amendments guarantees of the right to an impartial jury applies to the penalty phase of a capital case as well as the guilty phase. See, Morgan v. Illinois, 504 U.S. 719, 728-29 (1992). In the present case the prosecutor was allowed to ask prospective jurors:

> "If you are selected as the foreperson of this jury and under the laws and facts, you believe 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 APP 5431)

This question was an improper "stake-out" questions designed to both discover how a juror might vote and cause prospective jurors to pledge themselves to a future course of action. The allowing of this improper voir dire questioning allowed the prosecutor to empanel a pro-death jury rather than a panel of impartial, indifferent jurors to which DONTE JOHNSON was entitled.

In U.S. v. Fell, 372 F.Supp.2d 766 (D.Vt. 2005) the Vermont Court referred to U.S. v. Johnson, 366 F.Supp.2d 822 (N.D. Iowa 2005) with approval in its detailed discussion of both case-specific questions

and "stake-out" questions. The Fell Court noted:

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

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

DONTE JOHNSON has noted that the question challenged here does not have the same form as case-specific questions. Rather, the prosecutor's question asked the prospective jurors to speculate on their actions should they be selected as foreperson of the jury if, "under the laws and facts", they 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)

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

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

II.

IT WAS 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

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

> "...He may have been the one who said what these boys had and it may have been the triggering event. Are we going to blame Todd Armstrong for this? Did he suggest that they go over and execute these kids,.....
>
> MS. JACKSON: Your Honor, I'm going to object. Counsel has referenced to these decedents as kids and as boys. We made a specific ruling on that before we started.
>
> MR. STANTON: I will refer to them as 'young men', Your Honor. All right. Sustained." (27 ROA 6715-16)

Again the Prosecutor referred to the victims as boys:

> "...walk that videotape back beyond the four walls of Terra Linda where the young boys or young man is watering his lawn. (27 ROA 6719)
>
> . . .
>
> Again,...not sympathy, compassion he goes over and systematically executes, bending down to each one of these boys....." (27 ROA 6720)

In the Opening Brief, DONTE JOHNSON argued to this Court that the actions of the prosecutor were intentional misconduct that created prejudice in the minds of the jury against him. He cited, U.S. v. 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).

The record reflects the following:

Again the Prosecutor referred to the victims as boys:

> "...walk that videotape back beyond the four walls of Terra Linda where the young boys or young man is watering his lawn. (27 ROA 6719)
>
> . . .
>
> Again,...not sympathy, compassion he goes over and systematically executes, bending down to each one of these boys....." (27 ROA 6720)

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

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

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

The prosecutor's deliberate contravention of the District Court's

Order was a calculated effort to evoke sympathetic responses from jurors to the prejudice of DONTE JOHNSON.

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

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

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

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

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

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 it 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

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

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

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

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

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

V.

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

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

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

Here, when Gorringe groaned and fell after the prosecutor, in his closing argument, displayed an enlarged crime scene photograph on the 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 Gorringe was seated. On the right side, almost all Afro-Americans, was the family of DONTE JOHNSON. (27 ROA 6663)

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

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

The commotion/interruption/incident was an arbitrary and prejudicial factor which requires reversal of DONTE JOHNSON'S sentence.

VI.

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

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

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

> "The fatal - the ultimately fatal conversation when Matt Mowen comes over and in the presence of the defendant and 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)

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

The prosecutor then stated:

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

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

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

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

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.

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 contact 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

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

Here, the prosecutor told the jury that JOHNSON threatened to kill a young woman and ordered a "hit" on a man named Scales. Clearly, these statements were highly prejudiced, exacerbating any fears the jury might have about future violence should it not impose a sentence of death. 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 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. Russeau, 171 S.W.3d 871, 880 (Tx.Crim.App 2005) (citing Crawford, 541 U.S. 36, 51 (2004). (at 21)

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 while incarcerated.

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

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

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

The State cited 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), and Gaxiola v. State, 119 P.3d 1225 (Nev. 2005) for support of its position that inmate reports are not testimonial. These cases are completely inapplicable on their facts. The rulings of the Courts therein cannot be applied here.

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

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

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

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

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

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

In Walsh, this Court found that affidavits under NRS 50.315 are testimonial. This Court should find the inmate reports challenged here are testimonial statements; and that their admission into evidence violated the confrontation clause. This case should be 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, inadmissable 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.12d 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

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

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.

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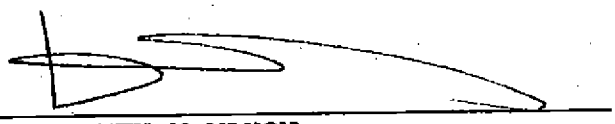
CERTIFICATE OF COMPLIANCE

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

DATED the 23rd day of May, 2006.



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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 23rd day of May, 2006, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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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
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

06-26545

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. Washington[2] 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

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

[2]541 U.S. 36 (2004).

[3]122 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 112, December 28, 2006).

[4]Johnson, 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 Gorringe 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]

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[5]Id. at 806, 59 P.3d at 463.

[6]536 U.S. at 609.

[7]Johnson, 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

[8]An 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 Gorringe, 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 Crawford[9] 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

[9]541 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. Simmons[10] 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

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[10]543 U.S. 551 (2005).

[11]Id. at 568.

[12]Id. 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

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

[14]See 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

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[15]See 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).

[16]Witter 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 context[19] 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

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

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

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

[20]See 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. State[22] 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.

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

[22]101 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]

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[23]The 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

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. . . *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).

[24]Miller 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.

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[25]Rice 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.

[26]Id. 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 Gorringe, brother of victim Tracey Gorringe, 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

[27]116 Nev. 732, 6 P.3d 987.

an effect on Johnson.[28] In fact, it did not involve Johnson at all. Although Nick Gorringe 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.

---

[28]Id. at 740, 6 P.3d at 993.

[29]Johnson 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.

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[30]During 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:

_____, J.
Becker

_____, J.
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. Washington[2] to admit the reports into evidence.

_____, C.J.
Rose

We concur:

_____, J.
Maupin

_____, J.
Douglas

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[1]122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 112, December 28, 2006).

[2]541 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
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BY
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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IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 45456

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES: **PAGE NO**

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 45456

STATEMENT OF THE ISSUES

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. DONTE 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

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

7. WHETHER 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.

8. WHETHER APPELLANT 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

9. WHETHER 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

STATEMENT OF THE CASE

On December 18, 2002 this Court affirmed Appellant DONTE JOHNSON'S conviction pursuant to a jury verdict of four counts each of First Degree Murder with use of a Deadly Weapon; Robbery with the use of a Deadly Weapon; and First Degree Kidnapping with the use of a Deadly Weapon; one count of Burglary with use of a Deadly Weapon; but reversed the death sentence and remanded the case for a new penalty hearing before a new jury.

On February 21, 2003 the Honorable Lee A. Gates set the matter for a penalty hearing. (32 ROA, CRIMINAL COURT MINUTES PAGE 045)

On April 12, 2004, following statements of the parties the Court granted the prosecution's motion to admit former testimony. (32 ROA, CRIMINAL COURT MINUTES PAGE 047)

On April 28, 2004, at motion calendar the trial court ruled that the juvenile records of DONTE JOHNSON would be excluded finding them to be more prejudicial than probative. (32 ROA, CRIMINAL COURT MINUTES PAGE 048)

On May 3, 2004 the trial court reversed its prior ruling on juvenile records stating it would allow the juvenile records to be used. On May 3, 2004, the State having no opposition, the trial court granted DONTE JOHNSON'S Motion in Limine to Preclude the State from referring to the victims as "boys". (32 ROA, CRIMINAL COURT MINUTES PAGE 050-052)

On or about April 6, 2004 the State filed a Second Amended Notice of Evidence in Support of Aggravating Circumstances. (19 ROA 4677-84) The Motion listed 18 separate evidentiary items. The trial court scheduled an evidentiary hearing regarding item 15: allegations that Appellant, while in the Clark County Detention Center, with another

inmate threw a third individual over a railing.

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

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

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

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

> Aggravating circumstance or circumstances have been established unanimously and beyond a reasonable doubt as to Counts XI, XII, XIII, and XIV (4 verdict forms):
>
> > That the Defendant has been convicted of more than one offense of murder in the first or second degree.
>
> Mitigating circumstance or circumstances which have been established as to Counts XI, XII, XIII and XIV (4 verdict forms):
>
> > The youth of the Defendant at the time of crime;
> >
> > Instruction #10: Mitigators #3, #5, #6, #7, #8, and #10.
>
> As to Counts XI, XII, XIII, and XIV (4 verdict forms):
>
> > The Aggravating circumstances outweigh any

mitigating circumstance or circumstances.

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

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

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

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

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

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

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

STATEMENT OF FACTS

NATURE OF THE CASE

This is DONTE JOHNSON'S direct appeal from the four (4) sentences of death, pursuant to a jury verdict as to Counts XI, XII, XIII, XIV, in the third penalty hearing in his case. (31 ROA 7747; 32 ROA 7875-76, 7874)

PRE-TRIAL MOTIONS IN ISSUE

A.

On April 28, 2004 Appellant DONTE JOHNSON filed a Motion in Limine requesting the trial court enter an order precluding the prosecutor from repeatedly referring to victims in the case as boys; noting that in the previous two penalty hearings the Court and the prosecutor referred to the victims in the case as "boys" in excess of twenty (20) times. That allegedly one of the victims, Peter Talamantez, was under the age of eighteen (18), the three (3) other victims were young men and that the use of the term "boys" conjured up a 10 to 12 year old playing. Further, that such a usage arose juror passions, citing Evans v. State, 28 P.2d 498, 117 Nev. 609 (2001). On May 04, 2004. Then the prosecution filed a response which stated it had no opposition to the Motion in Limine. (20 ROA 4824-26, 4942-43) In open court on May 3, 2004 Prosecutor Guyman advised the Court that they agreed to the Motion and would refer to the victims as young men. Prosecutor Stanton was present. (20 ROA 5002) However in rebuttal Stanton argued:

> "...He may have been the one who said what these boys had and it may have been the triggering event. Are we going to blame Todd Armstrong for this? Did he suggest that they go over and execute these kids,.....
>
> MS. JACKSON: Your Honor, I'm going to object. Counsel has referenced to these decedents as kids and as boys. We made

a specific ruling on that before we started.

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

Again the Prosecutor referred to the victims as boys:

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

. . .

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

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

B.

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

JURY SELECTION

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

began. (minute order p. 059)

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

> "There is also a process that is involved in a capital case where other than just a generalized jury instruction that is given by the court, there is no other instructions about who is selected as a foreperson of the jury. You have no additional duties as far as votes go, but they have one duty that's very important and that is they are actually the person that signs the verdict form in this case.
>
> If you were selected the foreperson of this case and you believed under the law and the facts that the death penalty was appropriate could you sign your name as foreperson?
>
> No." (22 ROA 5431)

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

> "The form of my questions wasn't put in whether or not she could consider it. 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 function."
>
> The Court overruled the objection. (22 ROA 5431)

The prosecutor continued:

> "Prosecutor: Let me back up again.
>
> If you are selected as the foreperson of this jury and 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFENSE CASE IN MITIGATION

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

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

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

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

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

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

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

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

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

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

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

> "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 --"

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

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

The jury was recalled and the Court stated:

> THE COURT: Ladies and gentlemen - let the record reflect the presence of all the parties, all the attorneys and all members of the jury.
>
> Right before we broke, there was a little commotion over there. Anyway, the jury is ordered to disregard that. As I told you before, you are to base your decision on the evidence adduced here in trial from the witnesses, the 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.
>
> Proceed." (27 ROA 6664-65)

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

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

> "The fatal - the ultimately fatal conversation when Matt Mowen comes over and in the presence of the defendant and 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)

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

The prosecutor then stated:

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

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

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

The prosecutor also told the jury:

> "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)

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

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

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

(28 ROA 6984-6987)

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

> "'Testimony, records of corrections officers jail personnel from the Clark County detention center pertaining to Donte Johnson's conduct while incarcerated at the Clark County Detention Center.' All copies have been provided to Defense counsel, names of the witnesses are provided in the records.
>
> That's 1-2, the notice, amended notice you wanted specifically item 15 states, as follows:
>
> > 'Testimony, records of corrections officers slash jail personnel slash prison personnel from the Clark County Detention Center and Nevada Department of Prisons while Donte Johnson was incarcerated at the Clark county Detention Center and within the Nevada Department of Corrections. This evidence will include but is not limited to a (sic) incident that occurred February 24, 2001, wherein Defendant, along with another inmate, threw Oscar Arias over a railing at the Clark County Detention Center.'
>
> . . .
>
> There is a second one dated November 2nd, 1999, nearly six years ago, Judge, in which there was a detailed 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.
>
> . . .
>
> I am representing to this Court the older incident I mentioned, threatening a female civilian. Certainly showed a good faith basis as bore out by two notices of evidence we provided to defense that it was admissible." (28 ROA 6988-90)

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

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

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

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

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

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

Corrections Officer Alex Gonzalez testified to an incident at the

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

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

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

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

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

ROA 7119-7120)

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

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

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

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

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

ARGUMENT

I.

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

The prosecutor's question to prospective jurors, that if they were selected as foreperson, could they sign the verdict of death that would put DONTE JOHNSON to death was an impermissible "stake-out question" designed to cause prospective jurors to pledge themselves to a future course of action and indoctrinate them regarding potential issues before the evidence had been presented and before being given instructions on the law. The trial court deprived DONTE JOHNSON of his due process right to a fair trial by a panel of impartial, indifferent jurors by allowing "stake out" questions. The death verdict should be set aside and a new penalty trial given.

The Fourteenth Amendment denies the State the power to deprive any person of life, liberty, or property without due process of law. It also guarantees a right to a jury trial on all criminal cases which, were they to be tried in a federal court, would come within the Sixth Amendment guarantee. See, Duncan v. Louisiana, 391 U.S. 145 (1968). The Sixth and Fourteenth Amendment guarantee a defendant on trial for his life the right to an impartial jury. Morgan v. Illinois, 504 U.S. 719, 728 (1992). This right extends to the sentencing phase, where a capital defendant has the right to be sentenced by jurors who do not believe that "death should be imposed ipso facto upon conviction of a capital offense." Id. at 735. The principle of juror impartiality should be applied equally to the

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

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

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

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

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

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

> "There is also a process that is involved in a capital case where other than just a generalized jury instruction that is given by the Court, there is no other instruction about who is selected as a foreperson of the jury. You have no additional duties as far as votes go, but they have one duty that's very important and that is they are actually the person that signs the verdict form in this case.
>
> If you were selected the foreperson of this case and you believed under the law and the facts that the death penalty was appropriate could you sign your name as foreperson?"

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

The prosecutor responded:

> "The form of my questions wasn't put in whether or not she could consider it. 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 function."

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

> Prosecutor: Let me back up again.
>
> If you are selected as the foreperson of this jury and under the laws and facts, you believe 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 APP 5431)

Thereafter the prosecutors asked fifteen (15) additional prospective jurors the 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 6036-6037; No. 296, 25 ROA 6141; No. 305, 25 ROA 6173-6174; No. 309, 25 ROA 6198-6199; No. 311, 25 ROA 6221)

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

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

II.

IT WAS 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

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

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

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

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

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

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.

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 DONTE 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

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

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

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

> "...First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense 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)
>
> . . .
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra*, at 115, 71 L.Ed.2d 1, 102 S. Ct. 869 ('[Y]outh is more than a chronological fact. It is a time and condition 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)
>
> . . .
>
> The third broad difference is that the character of a 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

Crisis (1968).

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

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

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

IV.

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

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

In Collier v. State, 101 Nev. 473; 705 P.23 1126 (1988) this Court reversed the defendant's sentence of death, in great part, on the ground of prosecutorial misconduct. In Collier, Id. the prosecutor in arguing to the jury, improperly argued facts outside the record by comparing the defendant to one of Nevada's most notorious criminals. Further, the prosecutor argued community standards to the jury.

Here, the prosecutor argued:

> "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 6656-57)

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

The argument by invoking facts outside the record and improper

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

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

V.

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

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

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

In Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) during closing argument, an electronic stun belt that the defendant was wearing was activated and shocked him, completely disrupting the proceedings. The jury was excused. When the jury returned, the trial court explained that Hollaway was wearing a stub belt and had done 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 Gorringe groaned and fell.

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

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

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

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

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

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

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

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

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

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).

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

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 20 day of January, 2006.

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CERTIFICATE OF COMPLIANCE

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

DATED the 25 day of January, 2006.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

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

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APPELLANT'S APPENDIX TO THE OPENING BRIEF
VOLUME XXXI

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IN THE SUPREME COURT OF NEVADA

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

OPENING BRIEF APPENDIX

VOLUME	PLEADING	PAGE NO
7	ADDENDUM TO NOTICE OF EVIDENCE IN SUPPORT OF AGGRAVATING CIRCUMSTANCES (FILED 04/26/2000)	1733-1734
6	AFFIDAVIT OF JOSEPH S. SCISCENTO IN SUPPORT OF THE MOTION TO CONTINUE (FILED 12/14/1999)	1428-1433
19	AMENDED EX PARTE ORDER ALLOWING WITHDRAWAL OF ATTORNEY OF RECORD FOR MATERIAL WITNESS CHARLA SEVERS (FILED 08/24/2000)	4585
7	AMENDED JURY LIST (FILED 06/06/2000)	1823
8	AMENDED JURY LIST (FILED 06/08/2000)	2131
3	AMENDED NOTICE OF MOTION AND MOTION TO VIDEOTAPE THE DEPOSITION OF CHARLA SEVERS (FILED 10/08/1999)	659-681
31	APPELLANT'S OPENING BRIEF (FILED 02/03/2006)	7174-7225
19	CASE APPEAL STATEMENT (FILED 11/08/2000)	4651-4653
42	CASE APPEAL STATEMENT (FILED 03/06/2014)	8200-8202
31	APPELLANT'S REPLY BRIEF (FILED 05/25/2006)	7254-7283

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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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