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DONTE JOHNSON

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

I

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS WRIT OF HABEAS CORPUS.

COMES NOW, Defendant, DONTE JOHNSON, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., and hereby submits this Supplemental Brief in support of Defendant's Writ of Habeas Corpus.

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This supplement is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 12 day of October, 2009.

Respectfully submitted by:

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STATEMENT OF THE CASE

On September 2, 1998 the Honorable Judge Michael Douglas was informed that the Grand Jury had returned a true bill indicting the defendant. On September 16, 1998 a superceding indictment was filed under case number C153154. On September 17, 1998 the defendant was formally arraigned before the Honorable Jeffery Sobel. The defendant waived his right to a trial within sixty days. The matter was set for trial on July 5, 1999.

On June 29, 1999, the defense informed the trial court that they would not be ready for trial and requested a continuance. The trial date was vacated. On July 13, 1999 the trial court entertained the defendant's motion to compel disclosure of existence and substance of expectation or actual receipt of benefits or preferential treatment for cooperation with the prosecution. This matter was concluded.

On October 14, 1999, the State informed the trial court that Charla Severs would not be prosecuted as an accomplice and would not be prosecuted for perjury. The trial court had appointed Mr. Chip Siegel to represent Ms. Severs. On November 18, 1999, the State agreed to provide the inducements of the witnesses pursuant to the defense's motion to compel the disclosure of existence of benefits or cooperation with prosecution. The motion was denied as long as the State continued to provide all evidence pursuant to the motion. On December 20, 1999, defense counsel requested a continuance of the trial date. The defense's motion to continue was granted. A new jury trial was set for June 8, 2000.

On March 2, 2000, the district court denied the defendant's motion for change of venue, denied the defendant's motion to dismiss the State's notice of intent to seek the death penalty because Nevada's death penalty statute is unconstitutional, denied the defendant's motion for inspection of police officer's personnel files, denied defendant's motion to prohibit prosecution

from committing misconduct during argument, denied defendant's motion in limine to prohibit any reference to the first phase as the guilt phase, denied defendant's motion to apply heightened standard of review and care because the state is seeking the death penalty, denied defendant's motion to exclude autopsy photographs, (the court would consider the photographs individually at trial) denied defendant's motion in limine to preclude the introduction of victim impact evidence, denied motion to bifurcate the penalty phase, denied defendant's motion in limine to prevent the state from telling a complete story, and denied defendant's pro per motion to disqualify the district court without prejudice (so the special public defender's office could re-file the issue and pursue the matter).

On April 18, 2000, the district court denied the defendant's motion to suppress evidence seized during a warrantless search. On May 23, 2000, defense counsel advised the court that there had been an agreement that the parties would not use co-conspirators statements or the co-defendants statements.

On June 5, 2000, voir dire commenced. On June 5, 2000, defense counsel stated that they had a challenge for cause of one of the prospective jurors, which the court overruled. Opening statements occurred on June 6, 2000. On June 8, 2000, the court again denied the defense's request for a change of venue. On June 8, 2000, the defense rested without calling any witnesses. On June 8, 2000, jury instructions were read and closing arguments occurred. On June 9, 2000, the jury began deliberation and returned guilty verdicts as to Count one, burglary while in possession of a firearm; Count two, conspiracy to commit robbery and/or kidnapping and/or murder; Counts three-six, Robbery with use of a deadly weapon; Count seven-ten, first degree kidnapping with use of a deadly weapon; Counts eleven-fourteen, murder with use of a deadly weapon.

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On June 13, 2000, the district court denied a motion to sever or bifurcate the penalty phase. On June 14, 2000, defense counsel requested the court grant a short continuance so he could work on his closing argument. Defense counsel was admonished. On June 15, 2000, the penalty phase instructions and closing arguments were heard. On June 16, 2000, the jury declared that they were unable to reach a verdict as to punishment.

On June 20, 2000, defense counsel requested that the jury verdict forms and special verdict forms be made court exhibits. The court ordered the verdict forms be made special exhibits. On July 20, 2000, the court denied the defense's motion for imposition of a life without the possibility of parole sentence. On July 20, 2000, defense counsel requested that the other two judges from the three judge panel read the trial transcript of the guilt phase. The court advised that it would make the trial transcripts available to the judges.

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

Mr. Johnson appealed his convictions and ultimate death sentences. On December 18, 2002, the Nevada Supreme Court filed it's Order of Affirmance in part, vacated in part, and remanded. The Supreme Court affirmed Mr. Johnson's convictions and his sentences other than his death sentences. The Supreme Court vacated his death sentences and remanded for a new penalty hearing. The Nevada Supreme Court overruled Mr. Johnson's death sentences based upon

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the United States Supreme Court's decision in Ring v. Arizona, 536 U.S.584, 122 Sup Ct.2428, 153 L.Ed.2d 556, (2002) ruling that three judge panels are unconstitutional.

On remand, the Special Public Defender was appointed to represent Mr. Johnson at his penalty phase. In April 2005, a jury was impaneled and heard the bifurcated penalty phase. On April 27, 2005, the jury heard closing arguments regarding the first portion of the bifurcated penalty phase. The jury found that there was at least one aggravating circumstance as to all four victims and determined that the mitigating circumstances did not outweigh the aggravating circumstances.

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

On May 5, 2005, the jury returned a verdict sentencing Donte Johnson to death for the first degree murder with use of a deadly weapon of Jeffery Biddle, Tracey Corrinage, Matt Mowen, and Peter Talamentez. Mr. Johnson filed a timely notice of appeal. On Decembr 28, 2006 the Nevada Supreme Court affirmed Mr. Johnson's appeal. 122 Nev. 1344,148 P.3d 767, (Dec. 2006).

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STATEMENT OF THE FACTS

In the summer of 1998, Mr. Justin Perkins, had some friends that lived at 4825 Terra Linda, Clark County Nevada.[1] On August 13, 1998, at approximately 7:30-8:00 p.m, Mr. Perkins went to the Terra Linda home and visited with Matt Mowen, Tracey Gorringe, and Jeff Biddle. (Vol. 4, April 22, 2005, A.M. Pp 7-9)

The friends were playing video games and lounging around. (Vol. 4, April 22, 2005, A.M. Pp 9) There was a VCR, playstation and television in the entertainment center. (Vol. 4, April 22, 2005, A.M. Pp 10) Before Mr. Perkins left, he was offered some muscle relaxers, which he refused. (Vol. 4, April 22, 2005, A.M. Pp 11) At approximately 9 p.m. Mr. Perkins left. (Vol. 4, April 22, 2005, A.M. Pp 11) Remaining at the house was Matt Mowen, Jeff Biddle, and Tracey Gorringe. (Vol. 4, April 22, 2005, A.M. Pp 11)

At approximately 6 p.m., on August 14, Mr. Perkins went back to the Terra Linda home. When Mr. Perkins entered the home, he observed Matt Mowen, Tracy Gorringe and Jeff Biddle laying face down with duct tape binding their wrists and ankles. (Vol. 4, April 22, 2005, A.M. Pp 14) Mr. Perkins went to a neighbors home where he requested assistance in contacting authorities. (Vol. 4, April 22, 2005, A.M. Pp 16) Mr. Perkins was informed by a police officer that a fourth victim was also inside. (Vol. 4, April 22, 2005, A.M. Pp 18)

Officer David West and Sargent Randy Sutton were the first responding officers to the crime scene. (Vol. 4, April 22, 2005, A.M. Pp 31-33) The officers had to concern themselves with sweeping the home for possible suspects and any other victims. (Vol. 4, April 22, 2005, A.M. Pp 33) There was no sign of forced entry. (Vol. 4, April 22, 2005, A.M. Pp 41)

Four deceased victims were located inside the Terra Linda residence. (Vol. 4, April 22,

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

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2005, A.M. Pp 33)The four victims were identified as Jeffrey Biddle, Tracey Gorringe, Matthew Mowen, and Peter Talamentez. (Vol. 4, April 22, 2005, A.M. Pp 108) At the feet of Tracey Gorringe, was a box of black and mild cigars. (Vol. 4, April 22, 2005, A.M. Pp 111) The cigar box was processed for fingerprints. (Vol. 4, April 22, 2005, A.M. Pp 111) Donte Johnson's fingerprint was located on the black and mild box located in the Terra Linda residence. (Vol. 4, April 22, 2005, A.M. Pp 114)

According to detective Thomas Thowsen, the perpetrators had been motivated in looking for narcotics and money. (Vol. 4, April 22, 2005, A.M. Pp 43) The home had been thoroughly ransacked. (Vol. 4, April 22, 2005, A.M. Pp 43) No paper currency was located in the entire home. (Vol. 4, April 22, 2005, A.M. Pp 44) Detective Thowsen surmised from observing the entertainment center that the thieves had taken a VCR and Play stations.

During investigation, the police began investigating information connected to the "Everman home". (Vol. 4, April 22, 2005, A.M. Pp 27) The Terra Linda home and Everman home were approximately eight-tenths of a mile apart. (Vol. 4, April 22, 2005, A.M. Pp 27)

On August 18, detectives made contact with three young males of interest, Mr. Todd Armstrong, Bryan Johnson and Ace Hart. (Vol. 4, April 22, 2005, A.M. Pp 49-50) Mr. Armstrong lived at 4815 Everman.[2] The legal owner of that address was his mother.(Vol. 4, April 22, 2005, A.M. Pp 52) Mr. Armstrong was friends with Ace Hart and Bryan Johnson. In early August of 1998, Donte Johnson, Terell Young and Charla Severs (Donte Johnson's girlfriend) moved into the Everman house.

Donte Johnson was known as "Deko" and John White.(Vol. 4, April 22, 2005, A.M. Pp 53) Consent to search the Everman residence was provided by Todd Armstrong. (Vol. 4, April

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[2] During the penalty phase detective Thowsen was permitted to summarize the testimony of Mr. Armstrong and several other witnesses. (Pp 52)

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22, 2005, A.M. Pp 53)

Donte Johnson and his girlfriend occupied the master bedroom.(Vol. 4, April 22, 2005, A.M. Pp 56) Todd Armstrong allegedly occupied a different bedroom because there was a water bed there.(Vol. 4, April 22, 2005, A.M. Pp 56) Ace Hart stayed in a bedroom and Terell Young stayed in the living room.(Vol. 4, April 22, 2005, A.M. Pp 56) The defendant had been seen with a .380 caliber pistol, a six shot revolver, and a .22 caliber rifle that looked like a sawed off shotgun. (Vol. 4, April 22, 2005, A.M. Pp 57) Mr. Armstrong observed these weapons in a black and green duffle bag. (Vol. 4, April 22, 2005, A.M. Pp 57) The duffle bag was located during the search of the Everman home. (Vol. 4, April 22, 2005, A.M. Pp 57)

Also located during the search of the Everman home was a VCR and Playstation. (Vol. 4, April 22, 2005, A.M. Pp 58) Detectives believed the VCR and Playstation located at the Everman home, originated from Terra Linda and were taken during the robbery. (Vol. 4, April 22, 2005, A.M. Pp 58-59)

At first, Donte Johnson was only going to stay at Everman two or three days but stayed longer. (Vol. 4, April 22, 2005, A.M. Pp 62) Todd Armstrong claimed Donte Johnson was not told to leave because he was scared of him. (Vol. 4, April 22, 2005, A.M. Pp 62) Mr. Armstrong had the only key to the residence. (Vol. 4, April 22, 2005, A.M. Pp 64-65) He claimed that the defendant could climb through a broken bathroom window to get into the home. (Vol. 4, April 22, 2005, A.M. Pp 65)

Somewhere between the seventh and tenth of August, Matt Mowen came to the Everman home. (Vol. 4, April 22, 2005, A.M. Pp 65) When Matt Mowen arrived, Mr. Armstrong, the defendant and Terell Young were present. (Vol. 4, April 22, 2005, A.M. Pp 65) Matt Mowen made a comment that he had been following a musical group, called Fish Tour and had made a

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lot of money selling acid. (Vol. 4, April 22, 2005, A.M. Pp 66)

Mr. Johnson apparently looked around as he had formed an idea when he heard Matt Mowen's comment. (Vol. 4, April 22, 2005, A.M. Pp 66) Over the next several days, Mr. Johnson asked Todd Armstrong where Mowen lived. (Vol. 4, April 22, 2005, A.M. Pp 67) Mr. Johnson and Mr. Armstrong were in a vehicle accompanied by Ace Hart, when Mr. Hart pointed out where Mr. Mowen lived. (Vol. 4, April 22, 2005, A.M. Pp 68) Ace Hart pointed out the Terra Linda home between the tenth and twelfth of August. (Vol. 4, April 22, 2005, A.M. Pp 69)

During the search of the Everman home, duct tape was located in the master bedroom. (Vol. 4, April 22, 2005, A.M. Pp 71) Also located during the search was a .22 caliber rifle and black jeans. (Vol. 4, April 22, 2005, A.M. Pp 72) Police also noted freshly dug portion of dirt which caused them to located a blue pager and two motel keys. (Vol. 4, April 22, 2005, A.M. Pp 74-75) The pager was later identified as belonging to Peter Talamentez. (Vol. 4, April 22, 2005, A.M. Pp 74-75)

According to the summary of the evidence provided by Detective Thowsen, on the morning of August 14, Todd Armstrong awoke in the master bedroom and observed Donte Johnson and Terell Young caring the duffle bags containing guns, duct tape, a VCR and a play station. (Vol. 4, April 22, 2005, A.M. Pp 76-77)

When Mr. Johnson and his co-defendant's approached the home one of the individuals was watering the lawn and was ordered inside the home. (Vol. 4, April 22, 2005, A.M. Pp 80) Mr. Armstrong claimed that Donte Johnson admitted to killing one of the men because he was "mouthing off". (Vol. 4, April 22, 2005, A.M. Pp 78-79)

Mr. Armstrong said that Donte Johnson confessed to having to kill the other three individuals after killing the man who thought he was "joking around". (Vol. 4, April 22, 2005,

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A.M. Pp 83-84) Donte Johnson was laughing according to Mr. Armstrong. (Vol. 4, April 22, 2005, A.M. Pp 84)

Bryan Johnson was a friend of Ace Hart and Todd Armstrong[3]. (Vol. 4, April 22, 2005, A.M. Pp 85) Mr. Johnson lived at the Everman home for a brief period. (Vol. 4, April 22, 2005, A.M. Pp 88) According to Mr. Bryan Johnson, he observed Donte Johnson smoke black and mild cigars. (Vol. 4, April 22, 2005, A.M. Pp 91) Bryan Johnson previously testified that he heard Donte Johnson confess to the killings. Bryan Johnson stated that Donte explained that he had to kill one of the individuals who was Mexican because he felt like the robbery was a joke. (Vol. 4, April 22, 2005, A.M. Pp 91-95) He then shot the other individuals. Mr. Bryan Johnson said that Donte Johnson explained that the blood squirted up like it was Niagra Falls. (Vol. 4, April 22, 2005, A.M. Pp 96) Donte mention ed the fact that he had some of the blood on his pants. (Vol. 4, April 22, 2005, A.M. Pp 97)

Ms. Lashawnya Wright is the girlfriend of co-defendant, Sikia Smith(also known as tiny bug). (Vol. 4, April 22, 2005, A.M. Pp 97) Ms. Wright previously testified, she did not testify in the penalty phase.[4] (Vol. 4, April 22, 2005, A.M. Pp 97) On August 13, Ms. Wright entertained Terell Young and Donte Johnson at her apartment. (Vol. 4, April 22, 2005, A.M. Pp 98-99) When Donte and Terell Young left, Donte was caring a duffle bag with duct tape and gloves. (Vol. 4, April 22, 2005, A.M. Pp 99) Prior to leaving the apartment, the two were discussing a "lick," a slang word for robbery. (Vol. 4, April 22, 2005, A.M. Pp 100) When they returned fourteen hours, later Sikia Smith appeared to be scared. (Vol. 4, April 22, 2005, A.M. Pp 101) Ms. Wright

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

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

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explained that Sikia Smith sold .380 caliber handgun on approximately August fifteenth or sixteenth of 1999. (Vol. 4, April 22, 2005, A.M. Pp 104)

Allegedly, when Mr. Johnson saw the Review Journal newspaper he stated, "we made the front page." (Vol. 4, April 22, 2005, A.M. Pp 105) He appeared excited. (Vol. 4, April 22, 2005, A.M. Pp 106) Four empty bullet casings were located at the Terra Linda address. (Vol. 4, April 22, 2005, A.M. Pp 109) Mr. Richard Goode tested all four shell casings and determined that they were all fired by the same weapon. (Vol. 4, April 22, 2005, A.M. Pp 109)

On August 17, 1998, at approximately 10:40 Trooper Robert Honea conducted a traffic stop on a vehicle. (Vol. 4, April 22, 2005, A.M. Pp 117) Later, it was determined that Donte Johnson was the driver of the vehicle and Terell Young (Red) was the passenger. During the stop, Donte Johnson used the name Donte Fletch. (Vol. 4, April 22, 2005, A.M. Pp 117) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of both defendants. (Vol. 4, April 22, 2005, A.M. Pp 117-118)(Also see pages 83-86 of April 29th, 2005, Volume 9)

During the search of 4825 Terra Linda, police noted that Peter Talamentez had a loaded handgun on his person. (Vol. 6, April 26, 2005, A.M. Pp 7) Police also located white baggies with methamphetamine at Terra Linda. (Vol. 6, April 26, 2005, A.M. Pp 11-12)

Although police had indications that Mr. Armstrong was involved he was never arrested or charged with the instant offenses. (Vol. 6, April 26, 2005, A.M. Pp 23-24) There was evidence that he told the defendant there was money and illegal mushrooms inside the residence. (Vol. 6, April 26, 2005, A.M. Pp 25) When officers arrived at the Everman residence on August 18th, they located Charla Severs, Donte Johnson and Duane Anderson (A.K.A Scale). (Vol. 6, April 26, 2005, A.M. Pp 2) The defendant denied living at the residence. (Vol. 6, April 26, 2005, A.M. Pp

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The previous testimony of Charla Severs was read to the jury. (Vol. 6, April 26, 2005, A.M. Pp 29-30) Ms. Severs had a moniker "Lala". (Vol. 6, April 26, 2005, A.M. Pp 30) In 1998, Ms. Severs and Donte Johnson were involved in a dating relationship. (Vol. 6, April 26, 2005, A.M. Pp 31-32) Ms. Severs noted that none of the defendants had jobs in the month of July. (Vol. 6, April 26, 2005, A.M. Pp 41) Donte Johnson smoked black and mild cigars according to Ms. Severs. (Vol. 6, April 26, 2005, A.M. Pp 41) Donte Johnson would sell crack cocaine and she had observed Donte put the narcotics in a black and mild box one time and gave it to "DJ". (Vol. 6, April 26, 2005, A.M. Pp 46)

Ms. Severs had seen the defendant with a duffle bag that had guns in it. (Vol. 6, April 26, 2005, A.M. Pp 51-52) Ms. Severs explained that Matt Mowen came by the Everman residence approximately two days prior to the murders looking for some crack cocaine but she did not hear him make any mention of how he made money following a musical group. (Vol. 6, April 26, 2005, A.M. Pp 61-64) After Matt Mowen left, Ms. Severs heard Mr. Armstrong say that there was ten thousand dollars and a lot of mushrooms in the home and they should rob the home. (Vol. 6, April 26, 2005, A.M. Pp 65)

On the day of the murders, Donte was wearing a black pair of jeans. (Vol. 6, April 26, 2005, A.M. Pp 67-68) "Red" is carrying the duffle bag with guns inside when they left. (Vol. 6, April 26, 2005, A.M. Pp 70-71) When Donte returned, he kissed Ms. Severs on the cheek which woke her up. Donte Johnson allegedly stated, "you have to go to sleep after you kill somebody". (Vol. 6, April 26, 2005, A.M. Pp 74) Ms. Severs said that Donte Johnson confessed that he killed the Mexican because he was talking "mess". (Vol. 6, April 26, 2005, A.M. Pp 77-78) Mr. Johnson also said that hekicked the Mexican before shooting him in the back of the head. Mr.

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Johnson allegedly stated the victims made noises when they were shot and blood squirted out of their heads. (Vol. 6, April 26, 2005, A.M. Pp 77-78) Mr. Johnson had been concerned people would hear the gunshots, so he turned the music up very loud. (Vol. 6, April 26, 2005, A.M. Pp 80)

The next day, Ms. Severs said she talked to Donte Johnson, who confessed to killing all four victims by shooting them in the back of the head. (Vol. 6, April 26, 2005, A.M. Pp 81-84) Donte relayed to Ms. Severs that the first two individuals did not have any money or drugs so they called the other two victims over to the house. (Vol. 6, April 26, 2005, A.M. Pp 86)

Ms. Severs admitted that she originally lied to the police to help Donte. (Vol. 6, April 26, 2005, A.M. Pp 93) Ms. Severs also lied to the grand jury to help Donte. (Vol. 6, April 26, 2005, A.M. Pp 95) Ms. Severs had previously stated that Todd Armstrong had gone to the murder scene with the other defendants. (Vol. 6, April 26, 2005, A.M. Pp 104) She claimed that Todd Armstrong had set everything up. (Vol. 6, April 26, 2005, A.M. Pp 104) However, she later claimed that Mr. Armstrong did not go to the murder scene and she did it just to get him in trouble. (Vol. 6, April 26, 2005, A.M. Pp 105)

Ms. Severs originally told the Grand Jury that the defendant did not have black jeans on. She knew that there was blood on them and she didn't want to get him in trouble. (Vol. 6, April 26, 2005, A.M. Pp 107) Ms. Severs told Channel 8 news that Donte did not go to the murder scene and in fact she had gone to the murder scene. (Vol. 6, April 26, 2005, A.M. Pp 113)

Eventually, Ms. Severs was arrested on a material witness warrant and a warrant for possession of a stolen vehicle. Ms. Severs was promised that if she stayed out of trouble the case for possession of a stolen vehicle would be dropped against her. (Vol. 6, April 26, 2005, A.M. Pp 119) Ms. Severs admits she has approximately five aliases. (Vol. 6, April 26, 2005, P.M. Pp 37)

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When Ms. Severs was arrested and placed in the Clark County Detention Center she hoped her testimony would gain her release. (Vol. 6, April 26, 2005, P.M. Pp 8) Ms. Severs admitted that she committed perjury in front of the Grand Jury even though she had told the Grand Jury at least three times that she promised to tell the truth. (Vol. 6, April 26, 2005, P.M. Pp 28) Ms. Severs was never charged with perjury for her lies to the Grand Jury. (Vol. 6, April 26, 2005, P.M. Pp 29)

Todd Armstrong smoked crack cocaine on a daily basis. (Vol. 6, April 26, 2005, P.M. Pp 18-19)

When the defendants came home from Terra Linda after the robbery, Ms. Severs explained that Mr. Armstrong was upset there was no cocaine or money in the house and Mr. Armstrong expected some. (Vol. 6, April 26, 2005, P.M. Pp 32-33) In fact, Mr. Armstrong said where is my cocaine. (Vol. 6, April 26, 2005, P.M. Pp 33)

Mr. Berch Henry works for the DNA laboratory with the Las Vegas Metropolitan Police Department. (Vol. 6, April 26, 2005, P.M. Pp 58) Mr. Henry had analyzed the work conducted by Mr. Thomas Wahl. (Vol. 6, April 26, 2005, P.M. Pp 59) A cigarette butt located at the Terra Linda residence had the DNA of Donte Johnson identified on it. (Vol. 6, April 26, 2005, P.M. Pp 70-71) There is no way to tell when the DNA was left on the cigarette butt. (Vol. 6, April 26, 2005, P.M. Pp 71) A pair of black Calvin Klein jeans was tested and the DNA was determined to originate from Tracey Gorringe. (Vol. 6, April 26, 2005, P.M. Pp 72-73)

An autopsy of the victims provided evidence that the barrel of the murder weapon was within about an inch of the skin of the victims. (Vol. 6, April 26, 2005, P.M. Pp 90) All four victims died as a result of a single gunshot wound. (Vol. 6, April 26, 2005, P.M. Pp 92-104)

Mr. Talamentez also had a laceration behind his left ear and an abrasion to his nose. (Vol.

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6, April 26, 2005, P.M. Pp 106) These injuries were caused by blunt force trauma. The toxicology report of all victims demonstrated the presence of methamphetamine, amphetamine, and cocaine. (Vol. 6, April 26, 2005, P.M. Pp 113-114) Mr. Matthew Mowen also had alcohol in his system. (Vol. 6, April 26, 2005, P.M. Pp 114) At the conclusion of the medical examiners testimony, the State rested.

The defense case in mitigation.

The defense called Moises Zamora. Mr. Zamora is married to Dante Johnson's sister, Johnnisha Zamora. (Vol. 6, April 26, 2005, P.M. Pp 118) Mr. Zamora knew Donte Johnson by his real name, John White. (Vol. 6, April 26, 2005, P.M. Pp 118) Mr. Zamora is half Hispanic and explained that the defendant did not treat him any differently because of his background. (Vol. 6, April 26, 2005, P.M. Pp 120-122) Mr. Zamora felt that Donte accepted him like a brother. (Vol. 6, April 26, 2005, P.M. Pp 122) Mr. Zamora briefly lived with Donte Johnson and described him like a family member who he loved. (Vol. 6, April 26, 2005, P.M. Pp 123-124)

Donte Johnson has a child named Allen. Allen's communication with his father while he has been incarcerated, was very important to him. (Vol. 6, April 26, 2005, P.M. Pp 127)

The defense called Arthur Cain, Mr. Johnson's uncle. (Vol. 6, April 26, 2005, P.M. Pp 132) Mr. Cain described Donte's mother, Eunice as "slow" and she attended special ed classes in school. (Vol. 6, April 26, 2005, P.M. Pp 139) People often teased Donte Johnson's mother because she was "slow". (Vol. 6, April 26, 2005, P.M. Pp 139) They referred to her as "retarded or stupid". (Vol. 6, April 26, 2005, P.M. Pp 139) Eunice eventually married John White (the defendant's father). (Vol. 6, April 26, 2005, P.M. Pp 140) Mr. Cain became aware that Eunice had begun to use alcohol and drugs. (Vol. 6, April 26, 2005, P.M. Pp 142) He was also aware that there was physical violence between Mr. White and Eunice. (Vol. 6, April 26, 2005, P.M. Pp

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142) Eventually, Donte Johnson was taken from his mother and went to live with his grandmother, "big momma". (Vol. 6, April 26, 2005, P.M. Pp 145)

Eunice and Cain testified for the defense. (Vol. 6, April 26, 2005, P.M. Pp 151) Eunice described Donte Johnson as her oldest child. (Vol. 6, April 26, 2005, P.M. Pp 152) Eunice stated that she drank alcohol when she was pregnant with Donte. (Vol. 6, April 26, 2005, P.M. Pp 152) Eunice described her husband as violent and that her children would see her being beaten by him. (Vol. 6, April 26, 2005, P.M. Pp 156) Donte would try to defend his mother but he was too little. John White actually knocked Eunice's teeth out. (Vol. 6, April 26, 2005, P.M. Pp 156) John White also attempted to throw her out of a window at the Frontier and Donte ran for help, which she believed saved her. (Vol. 6, April 26, 2005, P.M. Pp 157)

Eunice explained that she was having a problem taking care of her children because she was smoking PCP at the time. (Vol. 6, April 26, 2005, P.M. Pp 161) She would get high when her kids were present. (Vol. 6, April 26, 2005, P.M. Pp 162) Her children were taken from her and sent to foster care but eventually ended up living with her mother. (Vol. 6, April 26, 2005, P.M. Pp 163)

Johnnisha Zamora is the younger sister of Mr. Johnson. (Vol. 6, April 26, 2005, P.M. Pp 166) Johnnisha remembers her mother would smoke drugs in front of the children and her father would beat her mother in front of the children. (Vol. 6, April 26, 2005, P.M. Pp 168) Sometimes when her mother would see a ghost, the children would be locked in the closet while she was screaming. There were no lights inside the closet. (Vol. 6, April 26, 2005, P.M. Pp 169) At one point, the children were forced to live in a shed. (Vol. 6, April 26, 2005, P.M. Pp 170) There were approximately five or six of them living in a shed with no toilet, running water, or furniture. (Vol. 6, April 26, 2005, P.M. Pp 171-173) Johnnisha observed John White beating Donte Johnson and

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Donte not understanding why he was being beaten. (Vol. 6, April 26, 2005, P.M. Pp 177)

When the Donte went to live with his grandmother, his grandfather did not spend time with Donte. (Vol. 6, April 26, 2005, P.M. Pp 180) Johnnisha and Donte observed a lady who was found dead with a "pole shoved up her private." (Vol. 6, April 26, 2005, P.M. Pp 182) Donte and Johnnisha observed a police shootout where a man was killed upstairs. (Vol. 6, April 26, 2005, P.M. Pp 183)

When the children would walk to school they would be chased almost everyday by bullies. (Vol. 6, April 26, 2005, P.M. Pp 184) They observed a lot of street violence.(Vol. 6, April 26, 2005, P.M. Pp 184) The bullies would throw rocks and beat them up. (Vol. 6, April 26, 2005, P.M. Pp 185) Johnnisha testified that she loved her brother. (Vol. 6, April 26, 2005, P.M. Pp 192)

The defendant's other sister, Eunisha White testified for the defense. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 3) Ms. White observed her mother being abused by her father. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 5) She observed Mr. White strangle her mother with his hands and on one occasion grab her by the neck and hold her over a balcony. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 6) Ms. White remembered having to live in the shack with lots of other people. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 9) Eventually, the children went to live with their grandmother, but even then, sometimes they went without food. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 13-14)

Ms. Keonna Atkins was the cousin of Donte Johnson. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 18) Ms. Atkins remembers how they would be chased by bullies. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 50-51) On one occasion, there was a burglary and a perpetrator came through the window and groped Ms. Atkins. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 52) The perpetrator confronted the children which upset Donte (he was seven or eight years old). (Vol. 7, April 27, 2005, 11:17 A.M. Pp 51-52)

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Donte's grandmother, Jane Edwards testified that she attempted to take care of approximately ten children in her home, including Donte. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 62-64)

The defendant's son, Allen White, told the jury that he loved his father and read a letter to the jury that he had written to his father. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 73-75)

On April 27, 2005 the jury heard closing arguments regarding the first portion of the penalty phase.(Vol. 7, April 27, 2005, P.M.) The jury found that there was at least one aggravating circumstance as to all four victims.(Vol. 7, April 27, 2005, P.M.) The jury began the second portion of the penalty phase on April 28, 2005. On April 28, 2005 opening arguments were heard regarding the second portion of the penalty phase

The State called Los Angeles police officer Jimmy Grayson (second portion of the penalty phase). On June 8, 1993, Officer Grayson was involved in the investigation of a bank robbery at Sen Fed Bank in Marina Del Ray, California. (Vol. 8, April 28, 2005, P.M. Pp 38-40) There were four suspects in a ryder van. There was a police pursuit of the getaway van and Donte Johnson was identified as the driver. (Vol. 8, April 28, 2005, P.M. Pp 41-42) During the bank robbery one of the robbers stood near the door with a sawed off shotgun. (Vol. 8, April 28, 2005, P.M. Pp 43) Ms. Sandra Gatlin worked for Sen Fed Bank on June 8, 1993, as assistant bank manager. (Vol. 8, April 28, 2005, P.M. Pp 59-60) She remembered how she felt fear and described that some of the robbers jumped the counters where the tellers were working. (Vol. 8, April 28, 2005, P.M. Pp 61-62)

Donte Johnson received a total of four years commitment to the California youth authority for the bank robbery. (Vol. 8, April 28, 2005, P.M. Pp 36) Once Donte Johnson was released from custody, he was on parole. (Vol. 8, April 28, 2005, P.M. Pp 38) However, Donte Johnson

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became an absconder and his parole was suspended and a warrant issued. (Vol. 8, April 28, 2005, P.M. Pp 38)

On May 4, 1998, Officer Charles Burgess responded to a shooting call at the 2100 block of east Fremont. (Vol. 9, April 29, 2005, Pp 20) When Officer Burgess arrived he noticed Derrick Simpson lying motionless on the road. (Vol. 9, April 29, 2005, Pp 21) He had suffered from gunshot wounds. (Vol. 9, April 29, 2005, Pp 22) Officer Burgess asked the victim what had occurred and he stated "that a black male named Deko shot him". (Vol. 9, April 29, 2005, Pp 23) The State introduced a judgement of conviction in which Donte Johnson was adjudicated guilty of battery with use of a deadly weapon connected with the shooting. (Vol. 9, April 29, 2005, Pp 28)

On February 24, 2001, Officer Alexander Gonzales was working in the Clark County Detention Center in the disciplinary housing unit. (Vol. 9, April 29, 2005, Pp 47-48) Officer Gonzales claimed that he witnessed a fight wherein Mr. Reginald Johnson and Donte Johnson threw Oscar Irias over the second story tier. (Vol. 9, April 29, 2005, Pp 52-53) Officer Gonzales claimed that he could observe the fight through a window. (Vol. 9, April 29, 2005, Pp 55)

Oscar Irias had disciplinary problems including being written up for masturbating on a toilet and attacking his roommate for no apparent reason. (Vol. 9, April 29, 2005, Pp 65) It was also noted that Oscar was a psych patient with a violent temper. (Vol. 9, April 29, 2005, Pp 71) After being thrown over the tier, Oscar went into his cell and was shaken up but had no other significant injuries. (Vol. 9, April 29, 2005, Pp 75-76)

Prisoner George Cotton observed Oscar Irias fall from the second tier on February 24, 2001. (Vol. 10, May 2, 2005, Pp 8-11) Mr. Cotton heard someone yell help, help, and then saw Oscar fall and then jump up and run in his cell. (Vol. 10, May 2, 2005, Pp 15-16) Mr. Cotton

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indicated that Donte Johnson was not involved in the incident. (Vol. 10, May 2, 2005, Pp 18) Mr. Cotton has two convictions for robbery with use of a deadly weapon. (Vol. 10, May 2, 2005, Pp 19)

Prisoner Permaine Lytle also heard Oscar yell for help. (Vol. 10, May 2, 2005, Pp 30) He explained that the Officers were unable to see what had occurred from their vantage point. (Vol. 10, May 2, 2005, Pp 34) Mr. Lytle is currently serving life without parole consecutive to life without parole for first degree murder with use of a deadly weapon. (Vol. 10, May 2, 2005, Pp 35)

Mr. Reginald Johnson told the jury that he was solely responsible for the attack on Oscar Irias.(Vol. 10, May 2, 2005, Pp 44-48) Mr. Reginald Johnson explained, "I assaulted him and heped him over the tier." (Vol. 10, May 2, 2005, Pp 48) Mr. Reginald Johnson pled guilty for his role in the assault. (Vol. 10, May 2, 2005, Pp 48) Reginald Johnson told the jury he attacked Oscar because he did not like child molesters. (Vol. 10, May 2, 2005, Pp 49) Mr. Reginald Johnson denied that Donte Johnson had any involvement in the crime. (Vol. 10, May 2, 2005, Pp 50-60) Subsequently, Reginald Johnson and Oscar Irias were again placed together in a holding cell and Reginald Johnson beat him up for a second time. (Vol. 10, May 2, 2005, Pp 60) During Reginald Johnson's cross-examination, he became so heated the Court called a recess. (Vol. 10, May 2, 2005, Pp 63-64)

Reginald Johnson's attorney, Ms. Gloria Navarro testified that she is employed with the Clark County District Attorney's Office. (Vol. 10, May 2, 2005, Pp 84) Mr. Reginald Johnson informed her that Donte Johnson was not involved with the crime. (Vol. 10, May 2, 2005, Pp 85-86) Pursuant to an independent investigation, Ms. Navarro concluded that Officer Gonzales was unable to see the fight, as he had claimed. (Vol. 10, May 2, 2005, Pp 94) Ms. Navarro testified

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Reginald Johnson entered a plea of guilty because she guaranteed him that the charges against Donte would be dismissed with prejudice. (Vol. 10, May 2, 2005, Pp 111)

The State called several witnesses to provide victim impact statements. (Vol. 10, May 2, 2005, Pp 99) Juanita Aguilar provided victim impact regarding her son, Peter Talamentez. (Vol. 10, May 2, 2005, Pp 101-103) Marie Biddle provided an impact statement regarding her son Jeff. (Vol. 10, May 2, 2005, Pp 105-112) Sandy Viau provided victim impact regarding her son Tracey Corrinage. (Vol. 10, May 2, 2005, Pp 113-120) Jennifer Mowen provided victim impact regarding her brother, Matthew. (Vol. 10, May 2, 2005, Pp 121-124) Lastly, Mr. David Mowen provided victim impact regarding his son, Matthew. (Vol. 10, May 2, 2005, Pp 124-132)

The State then rested their case in the second part of the penalty phase. (Vol. 10, May 2, 2005, Pp 134)

Penalty Mitigation in the second portion of the penalty phase

Keonna Atkins testified again, for the defense. (Vol. 10, May 2, 2005, Pp 135) Ms. Atkins explained that during their youth, there were Blood and Crip gangs that were very violent in the area. (Vol. 10, May 2, 2005, Pp 137) There were shoot outs and gang members often harassed them. (Vol. 10, May 2, 2005, Pp 138) Donte Johnson became the protector of the family. (Vol. 10, May 2, 2005, Pp 141) Ms. Atkins learned that Donte had become a gang member because of a threat to rape her by Baby Sonny. (Vol. 10, May 2, 2005, Pp 143) Donte had become a member or "jumped in" to the six deuce brims. (Vol. 10, May 2, 2005, Pp 144) Ms. Atkins felt that Donte's participation in the gang had provided protection for her. (Vol. 10, May 2, 2005, Pp 146) Donte's sister also confirmed that he joined a gang to protect the family. (Vol. 10, May 2, 2005, Pp 158) Donte's sister also reported that Donte took care of her growing up and made sure others did not harm her. (Vol. 10, May 2, 2005, Pp 163-164)

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The defense recalled Moises Zamora who told the jury that he was a crip and Donte was a blood. (Vol. 10, May 2, 2005, Pp 172) Mr. Zamora explained he had similar experiences to Donte growing up in South Cental LA. (Vol. 10, May 2, 2005, Pp 173)

The defense called Martin Jankowski, a professor of sociology at the University California, Berkley and an expert in gangs. (Vol. 10, May 2, 2005, Pp 193-194) Professor Jankowski lived and worked with gangs for ten years. (Vol. 10, May 2, 2005, Pp 197) He also authored a book on gang culture entitled, "Islands in the Street". (Vol. 10, May 2, 2005, Pp 198) Professor Jankowski indicated that violence is in an integral part of the gang environment.(Vol. 10, May 2, 2005, Pp 205) Professor Jankowski offered insight into the gang culture throughout his testimony.

The defendant's first cousin, Donna Revomer explained that she was very frightened to walk in her neighborhood until Donte Johnson joined the gang. (Vol. 10, May 2, 2005, Pp 236) Her fear level improved after Donte joined the gang. (Vol. 10, May 2, 2005, Pp 237)

The defense recalled Donte's grandmother, Jane Edwards. (Vol. 10, May 2, 2005, Pp 239) The defense also recalled the defendant's son Allen White. (Vol. 10, May 2, 2005, Pp 243) Allen told the jury that he loved his father. (Vol. 10, May 2, 2005, Pp 244)

The defense called parole agent, Mr. Craig Clark from the California youth authority. (Vol. 10, May 2, 2005, Pp 153) Officer Clark explained the area in which Donte lived was filled with gang activity and that there was always a chance of being beaten up, ridiculed, or harassed by enemies. (Vol. 10, May 2, 2005, Pp 168) Officer Clark indicated that there were several gangs in the area that Mr. Donte Johnson was raised. (Vol. 10, May 2, 2005, Pp 169) Donte Johnson was always polite, cordial, and respectful to other members of the parole staff. (Vol. 10, May 2, 2005, Pp 179) In fact, Officer Clark like Donte Johnson. (Vol. 10, May 2, 2005, Pp 179)

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Ms. Nancy Hunterton administered a program at the Clark County Detention Center that was attended by Donte Johnson. (Vol. 10, May 2, 2005, Pp 194-195) The class was called life skills, and Donte participated in the class in approximately 2000. (Vol. 10, May 2, 2005, Pp 195)

Mr. James Esten was retired from the California department of corrections. (Vol. 10, May 2, 2005, Pp 216) Mr. Esten personally reviewed the records of Donte Johnson and toured Ely State penitentiary. (Vol. 10, May 2, 2005, Pp 221) Mr. Esten described the type of living conditions and prison environment that Donte would live in for life. Mr. Esten did not notice any significant write-ups on Donte Johnson while at Ely State penitentiary. (Vol. 10, May 2, 2005, Pp 254)

Dr. Thomas Kinsora, a psychologist in clinical neuropsychology, testified on behalf of Mr. Donte Johnson. (Vol. 11, May 3, 2005, Pp 14) Dr. Kinsora explained that the environment that Donte Johnson grew up in and the factors of his environment played an important role in who he became. (Vol. 11, May 3, 2005, Pp 38) Dr. Kinsora explained that Donte Johnson had grown up in an impoverished area of Los Angeles, Donte had even been reduced to looking in trash cans for food. (Vol. 11, May 3, 2005, Pp 46) Dr. Kinsora noted that Donte Johnson's mother would regularly smoke crack cocaine in front of the children. (Vol. 11, May 3, 2005, Pp 47) Social services talked with Donte who complained that he was frequently beaten but didn't know why. (Vol. 11, May 3, 2005, Pp 48)

Dr. Kinsora also noted that Donte was a very small child and he had no father figure or male role model at home. (Vol. 11, May 3, 2005, Pp 66-67) Therefore, Donte felt responsible for protecting the women at home and this was difficult based upon his stature. (Vol. 11, May 3, 2005, Pp 67) At thirteen years old, Donte Johnson witnessed a friend stabbed to death with a screwdriver by a rival gang member. (Vol. 11, May 3, 2005, Pp 69) At age fifteen, he had a friend

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shoot himself in the head in front of Donte because he felt that he had disappointed the gang. (Vol. 11, May 3, 2005, Pp 69) In 1992, Donte witnessed a girl in his neighborhood shot in the face by a Crip gang member as she exited a bus. (Vol. 11, May 3, 2005, Pp 70)

Dr. Kinsora compared South Central Los Angeles to a war zone equivalent of something you would see in a third world country . (Vol. 11, May 3, 2005, Pp 76) Dr. Kinsora explained that Donte committed the bank robbery because an older member of the gang had ordered him to do so and Donte did not want to appear afraid and let the gang down. (Vol. 11, May 3, 2005, Pp 78)

Dr. Kinsora stated "I don't think there is any brain damage in talking to him and reading some of his writings." (Vol. 11, May 3, 2005, Pp 86) The doctor concluded that there is no organic brain disorder. (Vol. 11, May 3, 2005, Pp 101)

Dr. Kinsora admitted that he relied upon a report prepared by Tina Francis a defense mitigation expert. (Vol. 11, May 3, 2005, Pp 112) On page 31 of Tina Francis' report it reflects that Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas than in Los Angeles. (Vol. 11, May 3, 2005, Pp 125) There was an objection by the defense throughout this testimony, that Dr. Kinsora should not be examined over issues in Tina Francis' report. (Vol. 11, May 3, 2005, Pp 126) The Court permitted the prosecutor to cross-examine Dr. Kinsora on Tina Francis' report because he claimed he had relied upon it. (Vol. 11, May 3, 2005, Pp 129) Eventually, the court precluded the state from introducing any more evidence from Tina Francis' report. (Vol. 11, May 3, 2005, Pp 130) At the conclusion of Dr. Kinsora's testimony, the defense rested their mitigation case.

The State called a rebuttal witness, Ms. Cheryl Foster. (Vol. 11, May 3, 2005, Pp 133) Ms. Foster is the warden of Southern Desert Correction Center. (Vol. 11, May 3, 2005, Pp 134)

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Ms. Foster testified extensively regarding the inner workings of the Nevada Penitentiaries.

The defendant informed the Court he did not want to provide allocution. (Vol. 11, May 3, 2005, Pp 196) Thereafter, the jury was once again instructed on the law and closing arguments were heard.

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

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

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

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

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of

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the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington ,466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. In Nevada, the Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the U.S. Supreme Court in Strickland v. Washington, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 Nev. 1996).

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In meeting the prejudice requirement of ineffective assistance of counsel claim, Mr. Johnson must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine confidence in the outcome. Kirksey v. State, 112 Nev. at 980. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,783 P.2d 430 Nev. 1989); Olausen v. State, 105 Nev. 110,771 P.2d 583 Nev. 1989).

The Nevada Supreme Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See Jones v. Barnes, 463 U.S. 745, 751-54, 77 L.Ed. 2d 987, 103 S. Ct. 3308 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); Leaks v. United States, 841 F. Supp. 536, 541 (S.D.N.Y. 1994), aff'd, 47 F.3d 1157 (2d Cir.). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. Heath, 941 F. 2d at 1132.

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

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

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

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

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

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

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Love, 109 Nev. 1136, 1137.

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

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

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

Donte's mother, Eunice told the jury that she consumed alcohol when she was pregnant with Donte. (A.A. Vol. 6, April 26, 2005, P.M., Pp 152). In the instant case, counsel for Mr. Johnson failed to present or investigate the prospect that Mr. Johnson had suffered from Fetal Alcohol Disorder. Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. Often, persons with this type of disorder have a mix of these problems. The Center for Disease Control and Prevention has described some of the symptoms of Fetal Alcohol Spectrum Disorder as being shorter than average height, low body weight, and poor judgment and reasoning skills.

A review of the file reveals that counsel failed to obtain or conduct testing on Donte Johnson to determine whether he suffered from Fetal Alcohol disorder. Donte Johnson's mother

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testified she abused alcohol during her pregnancy. Donte Johnson was of very small stature according to the record. Donte Johnson has showed poor reasoning and judgement skills as displayed by the record. Donte Johnson is in the process of requesting funds from the county in an effort to have an expert appointed to determine whether Donte Johnson suffered from Fetal Alcohol Spectrum Disorder. It was ineffective assistance of counsel for counsel to fail to obtain an expert to make such a determination given the fact that the record provides evidence that Mr. Johnson displayed signs of Fetal Alcohol Disorder.

B. FAILURE OF COUNSEL TO OBTAIN A PET SCAN.

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

A Positron Emission Tomography Scan (PET Scan) is a nuclear medicine imaging technique which produces a three dimensional picture of the functional process in the body. PET Neuroimaging is based on an assumption that areas of high radioactivity are associated with brain activity. What is actually measured indirectly is the flow of blood to different parts of the brain, which is generally believed to be correlated, and has been measured using the tracer oxygen. It can also assist in examining links between specific psychological processes or disorders in brain activity ("A Close look into the Brain," Julich Research Center, 29 April 2009.)

In the instant case, the defense should have investigated in an effort to determine whether Mr. Johnson suffered from internal difficulties within the brain. A review of the file fails to reveal that counsel attempted to obtain an analysis of Mr. Johnson's brain. Mr. Johnson is currently requesting funding to conduct this testing.

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

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

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

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

Therefore, it was ineffective assistance of counsel not to introduce evidence of the co-defendants sentences in an effort to argue proportionality. Appellate counsel was also ineffective for failure to raise this issue on appeal.

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

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

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finding more than thirty (30) mitigators including one indicating the defendant's role in the instant case (see attached affadavit).

After discussing the matter with Mr. Figler, Mr. Johnson has made attempts to obtain the penalty phase verdict forms from the first jury trial. Unfortunately, the requested verdict forms provided by the court clerk were the guilt verdict forms from the first trial. Further efforts to obtain the mitigation form have yet to result in the location of the verdict form. However, once an investigator is appointed, the investigator can go through the entire court file in order to locate the mitigation form which the court clerks have not been able to locate (see attached affadavit).

At the third penalty phase, the jury did not find any where near thirty mitigating factors for Donte Johnson. In fact, they only offered eleven mitigators in the third penalty phase. (A.A. Vol. 7 April 27, 2005 Pp. 14, instruction No. 10) Hence, it was ineffective assistance of counsel in the third penalty phase for the failure to offer all of the mitigating factors found by the first jury (the first jury was unable to reach a verdict as to Donte Johnson's penalty).

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

> "The evidence is unequivocal that it is the defendant, Donte Johnson, that fired the fatal rounds into each one of the victims heads. To argue before you that the evidence is anything else, cite to me the facts". Mr. Whipple then states, "judge, I'll object (A.A. Vol. 7, April 27, 2005, P.M.)

Upon information and belief, Mr. Figler has told post-conviction counsel that he specifically recalls the jury in the first penalty phase finding a mitigator regarding the defendant's role in the crime. If counsel had been effective, in the third penalty phase, counsel would have introduced that citation in the record to dispel the prosecutor's statement that the evidence is unequivocal that Donte Johnson fired the fatal rounds into the victims head.

Additionally, there is no evidence in the file that counsel in the third penalty phase made

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an effort or actually interviewed the hold out juror(s) form the first hung jury. Had defense counsel properly investigated, and interviewed the jury from the first penalty phase, they would have recognized that jurors had found many more mitigators than the jury did in the third penalty phase.

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

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

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

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

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sentencing); Paine v. Massie, 339 F. 3d 1194, 1202-03 (10th Cir. 2003); Roberts v. Dretke, 356 F.3d 632, 639-41 (5th Cir. 2004); Jennings v. Woodford, 290 F.3d 1006, 1013 (9th Cir. 2002)(failure to provide experts with available medical records constitutes ineffective assistance); Silva v. Woodford, 279 F.3d 825, 841-42 (9th Cir. 2002); Wallace v. Stewart, 184 F.3d 1112, 1118 (9th Cir. 1999); Bloom v. Calderon, 132 F.3d 1267, 1271-72 (9th Cir. 1997); Clayborn v. Lewis, 64 F. 3d 1373, 1385-87 (9th. Cir. 1995); Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995).

Mr. Johnson is therefore entitled to an evidentiary hearing to prove his allegations of ineffective assistance of trial and appellate counsel for failure to investigate and present mitigation evidence in violation of the United States constitution amendments IV, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3,6, and 8; Art. IV, Sec. 21.

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

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

On August 17, 1998, at approximately 10:40 Trooper Robert Honea conducted a traffic stop on a vehicle. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117) Later it was determined that Donte Johnson was the driver of the vehicle and Terell Young (Red) was the passenger. During the stop, Donte Johnson used the name Donte Fletch. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of

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both defendants. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117-118). Defense counsel objects to the introduction of this evidence in the first part of the penalty phase, stating the evidence had never been subject to pre-trial scrutiny even though it was used in the first trial. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117)

Defense counsel claimed it was error to let the evidence into the first trial. The State was permitted to introduce this bad act because a gun was located in the back of the vehicle but it happened not to be the murder weapon. (A.A. Vol. 4, April 22, 2005, A.M. Pp 118)

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

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

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

"The duty placed upon the trial court to strike a balance between the prejudicial effect of

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

It is ineffective assistance of trial counsel in the first trial to permit the introduction of this bad act without a Petrocelli hearing and it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal from the first trial. Additionally, it was ineffective assistance of trial counsel not to attempt to preclude this evidence prior to the third penalty phase.

The State argued that the gun should be permitted because it appeared similar to a gun described by Charla Severs in that it looked sort of like a sawed off shotgun. However, the Court asked the prosecution if she ever identified the gun and she did not. (A.A. Vol. 4, April 22, 2005, A.M. Pp 119-120) The court did taken notice that it was not the murder weapon and Ms. Severs never identified the gun. (A.A. Vol. 4, April 22, 2005, A.M. Pp 121) The judge rules, "It's tenuous. Like I said, you can bring it in in the second part. In this part I don't agree." (A.A. Vol. 4, April 22, 2005, A.M. Pp 122) Hence, it was ineffective assistance of trial counsel to not realize that a pre-trial motion was necessary to preclude the evidence. Additionally, appellate counsel was ineffective for failing to raise this issue on appeal.

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

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, , a fair penalty hearing, and a

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right to be free from cruel and unusual punishment were violated by providing the State a mitigation report from Tina Francis which was used to impeach a defense expert. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

Appellate counsel was ineffective for failing to raise the following issue on appeal. The defense presented the expert testimony of Dr. Kinsora, who admitted that he had relied upon a report prepared by Tina Francis, the defense mitigation expert (A.A. Vol. 11, May 3, 2005, Pp.112). Dr. Kinsora was impeached with Tina Franscis' mitigation report regarding there being nothing in the report to suggest that Donte's mother used drugs or alcohol during her pregnancy (A.A. Vol. 11, May 3, 2005, Pp.113). Additionally, Dr. Kinsora was questioned regarding bad act evidence contained in Ms. Francis' report wherein Donte Johnson allegedly took a small caliber gun gave it to a co-defendant in another case because the co-defendant was angry with a cheerleader. (A.A. Vol. 11, May 3, 2005, Pp.121)

Dr. Kinsora was further examined regarding Donte's grandmother stating that he should be treated as an adult by the California authorities. (A.A. Vol. 11, May 3, 2005, Pp.122-123) Dr. Kinsora was cross-examined regarding Tina Francis' report reflecting that Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas than in Los Angeles. (A.A. Vol. 11, May 3, 2005, Pp.125) There was an objection by defense counsel regarding this portion of testimony. Defense counsel argued that these issues were the work product of Tina Francis. The court overruled the objection. (A.A. Vol. 11, May 3, 2005, Pp.126)

Eventually, the trial court began precluding the State from introducing any more evidence from Tina Francis' report (A.A. Vol. 11, May 3, 2005, Pp.130). Yet, the damage was done. The defense had permitted a mitigation experts information and report to be used against the defendant. It was ineffective assistance of counsel to cause the report to be prepared and for the

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State to be permitted to use evidence in the report against the defendant's expert.

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

In assessing a claim of ineffective assistance of trial counsel, the court is required to look at counsel's performance as a whole which includes commutative assessment of counsel's multiple errors and admissions during the penalty phase of trial. See eg. Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005) Citing Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) see also Harris Exrel. Ramseyer v. Wood, 94 F.3d 1432, 1438-39 (9th Cir. 1995). In the instant case, the defense should have never placed their own expert in a situation where he was cross-examined regarding facts in a mitigation experts report. Defense counsel should have reviewed the notes and discussed with Ms. Tina Francis the nature of any facts contained in the report. Appellate counsel was ineffective for not raising this issue on appeal as it was objected to during trial. It was ineffective assistance of counsel for the mitigation experts report to have been provided to the prosecution so that the State could use it against the defense's expert witness.

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

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

> "I also brought Mr. Esten in here for a very important reason, and that is to show you that there are no drugs in prison. We know for a fact that those individuals, that Mr. Johnson and those other individuals were simply loaded on drugs. There are no drugs in prison."(A.A. Vol. 12, May 4, 2005, Pp 47)
>
> ...
>
> "He was loaded on drugs when these homicides occurred, and in prison, there are no drugs. You saw the way they search the inmates as they come and go, there are no drugs in prison. That's another reason that society is protected." (A.A.

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Vol. 12, May 4, 2005, Pp 47-48)

...

> "The drugs that Mr. Johnson was on, those were mind altering drugs, and those drugs are not in prison, and that is another reason why we in society are protected, and that's why I brought Mr. Esten in here to talk to you." (A.A. Vol. 12, May 4, 2005, Pp 48)

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

> "There is one thing my learnered co-counsel that I beg to differ; he said there are no drugs in prison. I beg to differ. And you know how they get in prison? The guards, you know, how often do we pick up a paper and see where guards have brought drugs into prisons? Inmates can get them in their. You know, they are human beings and they make mistakes just like any body else." (A.A. Vol. 12, May 4, 2005, Pp 73)

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

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

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

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

During closing arguments the defense attorney explains that it didn't matter whether Donte Johnson laughed about the murders or not after one of the "kids" are killed. Defense counsel further stated, "Does it make it any worse? The poor kid is dead."(A.A. Vol. 12, May 4, 2005, Pp 54) Defense counsel was ineffective for referring to the victims as kids because on appeal, appellate counsel argued prosecutorial misconduct on the basis that the prosecutor referred to the victims as "kids". The Supreme Court noted,

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

In fact, pre-trial, Johnson filed a motion in limine regarding these references, which was argued by the parties and ruled on by the district court. Id.(Footnote 23). In the instant case, it was ineffective assistance of trial counsel to refer to the victims as "kids" even after trial counsel had filed a pre-trial motion to preclude the prosecution from arguing the same. Defense counsel found it appropriate to motion the Court to preclude these type of references and then complained on

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appeal that the State violated the court order. Yet, so did defense counsel. It was ineffective assistance of counsel to raise this issue and not follow the court's order.

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

Johnson's state and federal constitutional rights to due process, equal protection, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated because the trial attorneys provided ineffective assistance of counsel for successfully motioning the court for a bifurcated penalty hearing. U.S. Cont. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

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

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

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

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

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

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

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

The following are further examples of why Johnson's attorneys should not have requested a bifurcated hearing. During the settling of jury instructions for the second portion of the third penalty phase, the State and the defense stipulated that the jury would not be advised as to the definition of reasonable doubt because they were previously instructed on reasonable doubt in the first portion of the penalty phase (A.A. Vol. 12 May 4, 2005). It was ineffective assistance of trial and appellate counsel to not insure that the jury be advised of the reasonable doubt instruction at every part of a criminal case where jury instructions are provided to the jury. If the penalty phase

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had not been bifurcated, this would not have presented itself as an issue. When the jury retired to deliberate to determine the fate of Donte Johnson, they should have been instructed on the definition of reasonable doubt.

During the opening arguments in the penalty phase, the prosecutor stated, "During the second phase of this hearing, we will have the opportunity to present additional evidence about Donte Johnson's upbringing. That will be in the second phase of this proceeding. "(A.A. Vol. 5 April 25, 2005, 11:15 AM, Pp 24) Additionally, during the first portion of the penalty phase, defense counsel objects stating, "I need to object. They keep suggesting that there is something that the jury hasn't heard, and that is in violation of this Courts order, they have done it twice." (A.A. Vol. 7 April 25, 2005, Pp 80) The prosecution then states, "The jury had already been admonished in voir dire that there are two phases in the proceeding and that facts and evidence will be presented in both phases." (A.A. Vol. 7 April 25, 2005, Pp 80)

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

Additionally, the bifurcated hearing provided the prosecution the opportunity to comment during the second portion of the penalty phase on mitigators that the jury had found. (See May 4, 2005, Pp 35). Lastly, the bifurcated penalty phase gave the opportunity for the State to make two

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opening arguments, two closing arguments, and two rebuttal closing arguments. Whereas, if the case was not bifurcated, the prosecution would make one opening argument, one closing argument, and a rebuttal argument. Additionally, the State would not be given an opportunity to comment and question on mitigators already found by the jury.

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

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

In the instant case, jury instruction number three stated,

> The jury must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt. The jurors need not find mitigating circumstances unanimously (A.A. Vol. 7 April 27, 2005, P.M.,Pp 11).

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

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

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

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

Admittedly, the jury instructions do not state that a mitigating circumstance must be found unanimously. However, counsel for Mr. Johnson tried the instant case in 2005. The Nevada Supreme Court's decision in Jimenez v. Nevada was decided in 1996. Hence, counsel should have been aware of the Jimenez decision and insured that the jury was properly instructed that each individual juror could find the existence of a mitigator even though eleven other jurors disagreed. Appellate counsel was ineffective for failing to raise this issue on appeal. Trial counsel was ineffective for failing to offer such a jury instruction.

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

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

During the penalty phase of this matter, the prosecutor improperly elicited evidence of a misdemeanor conviction of Mr. Johnson's mitigation witness. Upon defense counsel's objection,

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the prosecutor argued that he was specifically eliciting the information regarding Mr. Zamora's prior arrest for impeachment purposes. The district court sustained the objection but provided no admonishment to the jury.

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

Prosecutor:	Your not a convicted felon
Mr. Zamora:	No
Prosecutor:	You don't have any felony convictions or misdemeanor convictions?
Mr. Zamora:	I have misdemeanor convictions.
Ms. Jackson:	Your honor that's not a proper question for impeachment.
The Court:	That is correct (A.A. Vol. 9, April 29, 2005).

NRS 50.095 states as follows:

"Impeachment by evidence of conviction of a crime.

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

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

This Nevada Supreme Court has held that, "[o]n appeal from denial of a writ of habeas corpus, where during preliminary hearing counsel for defendant asked witness for State if he had ever been arrested, and objection to question was sustained and counsel refused to cross-examine

witness unless counsel could attack witness's credibility, defendant was not denied right to confront witness because pursuant to the statute, credibility may be attacked only by showing conviction of felony, not by mere arrest." Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966), *cited*, Plunkett v. State, 84 Nev. 145, at 148, 437 P.2d 92 (1968), Azbill v. State, 88 Nev. 240 at 247, 495, P.2d 1064 (1972), Bushnell v. State, 95 Nev. 570 at 572, 599 P.2d 1038 (1979).

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

X. THE DEATH PENALTY IS UNCONSTITUTIONAL

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

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

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson, 428 U.S. at 296. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6P.3d at 996; Arave, 507 U.S. at 474; Zant, 462 U.S. at 877; McConnell, 121 Nev. At 30, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually and all first-degree murderers. As a result, in 2001, Nevada had the second most persons on death row per capita in the nation. James S. Liebman, A Broken System: Error Rates

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in Capital Cases, 1973-1995 (2000); U.S. Dept. Of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 2001; U.S. Census Bureau, State population Estimates: April 2000 to July 2001, http://cire.census.gov/pspest/date/states/tables/ST-eest2002-01.php. Professor Liebman found that from 1973 through 1995, the national average of death sentences per 100,000 population, in states that have the death penalty, was 3.90. Liebman, at App. E-11.

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

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

B. THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

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

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

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

The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. While the Nevada case law has ignored the difference in terminology, and had treated this provision as the equivalent of the federal constitutional prohibition against "cruel and unusual punishments, e.g. Bishop v. State, 95 Nev. 511, 517-518, 597 P.2d 273 (1979), it has been recognized that the language of the constitution affords greater protection than the federal charter: "under this provision, if the punishment is either cruel or unusual, it is prohibited. "Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death penalty may not have been considered "cruel" at the time of the adoption of the constitution in 1864, "the evolving standards of decency that make the progress of a maturing society. "Trop v. Dulles, 356 U.S. 86, 101 (1958) have led in the recognition even by the staunchest advocates of its permissibility in the abstract, that killing as a means of punishment is always cruel. *See* (Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring); *See* Walton v. Arizona, 110 S.Ct. 3047, 3066 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

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The death penalty is also unusual, both in the sense that is seldom imposed and in the sense that the particular cases in which it is imposed are not qualitatively distinguishable from those in which is it not. Further, the case law has so broadly defined the scope of the statutory aggravating circumstances that it is the rare case in which a sufficiently imaginative prosecutor could not allege an aggravating circumstance. In particular, the "random and motiveless" aggravating circumstance under NRS 200.033(9) has been interpreted to apply to "unnecessary" killings, e.g. Bennett v. State, 106 Nev. 135, 143, 787 P.2d 797 (1990), a category which includes virtually every homicide. Nor has the Court ever differentiated, in applying the felony murder aggravating factor, between homicides committed in the course of felonies and homicides in which a felony is merely incidental to the killing. CF. People v. Green, 27 Cal.3d 1, 61-62, 609 P.2d 468 (1980). Given these expansive views of the aggravating factors, they do not in fact narrow the class of murders for which the death penalty may be imposed, nor do they significantly restrict prosecutorial discretion in seeking the death penalty: in essence, the present situation is indistinguishable from the situation before the decision in Furman v. Georgia, 408 U.S. 238 (1972) when having the death penalty imposed was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 309 (Stewart, J., concurring). There is no other way to account for the fact that in a case such as Faessel v. State, 108 Nev. 413, 836 P.2d 609 (1992), the death penalty is not even sought and the defendant receives a second-degree murder sentence; in Mercado v. State, 100 Nev. 535, 688 P.2d 305 (1984), the perpetrator of an organized murder in prison receives a life sentence; and appellant, convicted of killing the woman he loved in a drug-induced frenzy, is found deserving of the ultimate penalty the state can exact.

The United States Supreme Court, unfortunately, has continued to confuse means with

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ends: while focusing exclusively upon the procedural mechanisms which are supposed to produce justice, it has neglected the question whether these procedures are in fact resulting in the death penalty being applied in a rational and even-handed manner, upon the most unredeemable offenders convicted of the most egregious offenses. The fact that this case was selected as one of the very few cases in which the death penalty should be imposed is a sufficient demonstration that these procedures do not work. Accordingly, this Court should recognize that the death penalty as currently constituted and applied results in the imposition of cruel or unusual punishment, and the sentence should therefore be vacated.

C. EXECUTIVE CLEMENCY IS UNAVAILABLE.

Johnson's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that ever of the 38 states that has the death penalty also has clemency procedures. Ohio Adult parole Authority v. Woodward, 523 U.S. 272, 282 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldrige, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2006 (December 2007 NCJ 220219).

Johnson is informed and believes and on that basis alleges that since the reinstatement of

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

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

In support of this claim, Mr. Johnson alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

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

2. The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson,

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burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

3. The death penalty is accordingly permitted in Nevada for all first-degree murders, and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

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

5. Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by

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

6. There is not rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Johnson deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as aggravated as the one for which Mr. Johnson was sentenced to death have also resulted in lesser sentences. See Ewish v. State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

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

8. These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a moratorium on imposition of the death penalty.

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9. The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

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

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

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

In support of this claim, Mr. Johnson alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

1. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to life. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948) [hereinafter "UDHR"]; International Covenant on Civil and Political Rights, adopted December 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR"}. The ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art. 6. Other applicable articles include, but are not limited to ICCPR, Art. 9 ("[n]o one shall be subjected to arbitrary arrest"), ICCPR, Art. 14 (right to review of conviction and sentence by a higher tribunal "according to the law"), ICCPR, Art. 18 ("right to freedom of thought"), UDHR, Art. 18 (right "freedom of thought"), UDHR, Art. 19 (right to "freedom of opinion and expression"), UDHR, Art. 5 and ICCPR, Art. & (prohibition against cruel, inhuman or degrading treatment or punishment); *See also* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). In support of such claims, Mr. Johnson reasserts each and every claim and supporting fact contained in this petition as if fully set forth herein.

2. The United States Government and the State of Nevada are required to abide by norms of international law. The Paquet Habana, 20 S.Ct. 290 (1900)("international law is part of

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our law and must be ascertained and administered by the courts of justice of appropriate jurisdictions"). The Supremacy Clause of the United States Constitution specifically requires the State of Nevada to honor the United States' treaty obligations. U.S. Constitution, Art. VI.

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

4. A recent United Nations report on human rights in the United States lists some specific ways in which the American legal system operates to take life arbitrarily. Report of the Special Rapportuer on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/681 (Add. 3)(1998) [hereinafter "Report of Special Rapportuer"]. United Nations Special Rapportuer Bacre Waly Ndiaye found "[m]any factors other than the crime itself, appear to influence the imposition of the death sentence [in the United States]." Class, race and economic status, both of the victim and the defendant are key elements. Id., at 62. Other elements Mr. Ndiaye found to unjustly affect decisions regarding whether the convicted person should live or die include:

a. the qualifications of the capital defendant's lawyer;

b. the exclusion of people who are opposed to the death penalty from juries;

c. varying degrees of information and guidance given to the jury, including the importance of mitigating factors;

d. prosecutors given the discretion whether or not to seek the death penalty;

e. the fact that some judges must run for re-election.

5. The reasons why Mr. Johnson's conviction and sentence are arbitrary and, therefore, violate International Law are described throughout this petition; Mr. Johnson

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incorporates each and every and supporting facts as if fully set forth herein. However, to assist the court, Mr. Johnson provides the following examples of how his conviction and sentence are arbitrary in nature (they specifically correspond to the arbitrary factors listed above from the Report of Special Rapportuer):

a. People who were opposed to the death penalty were excluded from Mr. Johnson's jury;

b. A single aggravating action (burglary) was allowed to be used against Mr. Johnson in multiple ways in order to justify the imposition of the death penalty, while mitigating factors were not fully considered;

c. The prosecutor had discretion in whether or not to seek the death penalty;

d. The judge presiding over Mr. Johnson's trial was elected;

e. The Nevada Supreme Court which reviewed the case is elected;

f. Finally, an additional factor not listed in the Report of the Special Rapporteur but clearly an indication of the arbitrary nature of the imposition of the death sentence in Nevada, members of the judiciary admit that they do not read briefs regarding the death penalty cases before them.

6. These violations of international law were prejudicial *per se*. In the alternative, the State cannot show beyond a reasonable doubt that these violations did not affect Mr. Johnson's conviction and sentence and thus relief is required.

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

Johnson's state and federal constitutional right to due process, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment due to cumulative error. U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8;

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Art. IV, Sec. 21.

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

Each of the claims specified in this supplement requires vacation of the sentence and reversal of the judgement. Johnson incorporates each and every factual allegation contained in this supplement as if fully set forth herein. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice.

In Dechant v. State, 116 Nev. 918, 10 P.3d 108,(2000), the Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, the Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue

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of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

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

XIV. MR. JOHNSON IS ENTITLED TO AN EVIDENTIARY HEARING

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

In the instant case, an evidentiary hearing is necessary to question trial counsel and appellate counsel. Mr. Johnson's counsel fell below a standard of reasonableness. More importantly, based on the failures of trial and appellate counsel, Mr. Johnson was severely prejudiced, pursuant to Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984).

Under the facts presented here, an evidentiary hearing is mandated to determine whether the performance of trial counsel and appellate counsel were effective, to determine the prejudicial impact of the errors and omissions noted in the petition, and to ascertain the truth in this case.

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CONCLUSION

Based on the foregoing, Mr. Johnson's writ in the instant matter must be granted based upon violations of the United States Constitution Amendments Five, Six, Eight, and Fourteen.

DATED this 12 day of October, 2009.

Respectfully submitted by:

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DONTE JOHNSON

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

RECEIPT OF COPY

RECEIPT OF A COPY of the attached **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS** is hereby acknowledged this 12 day of October, 2009.

DAVID ROGER, DISTRICT ATTORNEY
By KH
DEPUTY DISTRICT ATTORNEY
200 Lewis Avenue

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520 South Fourth Street, Second Floor
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AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

CHRISTOPHER R. ORAM, being first duly sworn, deposes and says:

I am an attorney duly licensed to practice law in the State of Nevada. I am counsel for the Defendant in the above-entitled matter. I have personal knowledge of all matters contained herein and am competent to testify thereto. As post-conviction counsel in the instant case the undersigned made contact with Mr. David Figler. Mr. Figler was trial counsel at the first trial and at the second penalty hearing before the three judge panel for Mr. Donte Johnson. Mr. Figler informed the undersigned that the first jury filled out a mitigation form finding more than thirty (30) mitigators including one indicating the defendant's role in the instant case.

After discussing the matter with Mr. Figler, the undersigned has made attempts to obtain the penalty phase verdict forms form the first jury trial. Unfortunately, the requested verdict forms provided by the court clerk were the guilt verdict forms from the first trial. Further efforts to obtain the mitigation form have yet to result in the location of the verdict form. However, once an investigator is appointed, the investigator can go through the entire court file in order to locate the mitigation form which the court clerks have not been able to locate.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on: October 12, 2009

Christopher R. Oram, Esq.
Attorney for Defendant,
Donte Johnson

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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 XXXII

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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

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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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