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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

SECOND 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 Second 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 14th day of July, 2010.

Respectfully submitted by:

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STATEMENT OF THE CASE

On September 2, 1998 an indictment was returned charging Donte Johnson with one count of burglary while in possession of a firearm, four counts of murder with use of a deadly weapon, four counts of robbery with use of a deadly weapon, four counts of kidnapping with use of a deadly weapon [1].

On September 15, 1998, notice of intent to seek the death penalty was filed (ROA 2 pp. 271). On February 26, 1999, a supplemental notice of intent to seek death penalty was filed. The notice indicated the murder was committed by (1), a person who knowingly created great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person; (2), the murder was committed while the person was engaged alone or with others, in the commission of or an intent to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home, or kidnapping in the first degree and that the person charged (A), killed or attempted to kill the person murdered or (B), knew or had reason to know that life would be taken or lethal force used; (3), the murder was committed to avoid or prevent a lawful arrest or to affect an escape from custody; and (4), the defendant has, in the immediate proceedings, been convicted of more than one offense of murder in the first or second degree (ROA 2 pp. 388)

On September 16, 1998, a superceding indictment was filed adding an additional charge of conspiracy to commit robbery and/or kidnapping and/or murder (ROA 2 pp. 278). On February 10, 1999, Mr. Johnson filed a pro per motion to withdraw the special public defender's office based upon a conflict of interest (ROA 2 pp. 380) The State filed an opposition to the pro per motion to withdraw counsel on February 19, 1999 (ROA 2 pp. 385). Mr. Johnson filed a second motion to dismiss counsel on April 17, 1999 (ROA2 pp.403). On April 15, 1999 the District Court considered the defendants motion to dismiss counsel (ROA 2 pp. 410). At the conclusion of the hearing, the Court denied the defendant's pro per motion to dismiss counsel (ROA 2 pp. 417).

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[1]The State admitted that Todd Armstrong was a fourth suspect in the case (ROA 8 1835, DAY 2, pp. 12). On direct examination, Todd Armstrong was asked whether he was promised anything regarding whether he would be prosecuted for this crime. He states that he was not promised anything by the District Attorney's office (JT Day 2 pp. 212; ROA 8 pp. 2035).

On May 17, 1999, the defendant filed a motion to proceed pro per with co-counsel and an investigator (429). The defendant requested permission to represent himself pursuant to Faretta v. California, 422 U.S. 806 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). On June 28, 1999, the defendant filed a pro per motion entitled memorandum to the court, complaining of ineffective assistance of counsel (ROA 2 499-504).

On December 6, 1999, the Court considered the defendant's motion to compel disclosure of existence of substance of expectations or actual receipt of benefits or preferential treatment for cooperation with the prosecution. The Court granted the motion to the extent that the State had a continuing duty to give information to the defense (ROA 6 pp. 1348).

On December 22, 1999, the defendant, again, filed a memorandum with the Court insisting that defense counsel file a motion to preclude the testimony of Sharla Severs (ROA 6 pp. 1457). On December 29, 1999, the defendant filed a memorandum with the Court requesting that his attorneys file numerous motions which had not been filed (ROA 6 pp. 1492).

STATEMENT OF THE FACTS

Mr. Johnson hereby adopts the statement of the facts as enunciated in the first supplemental brief.

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 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

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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).

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

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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.

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

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

A. MR. JOHNSON RECEIVED AN UNCONSTITUTIONAL JURY VENIRE

At the conclusion of voir dire, trial counsel argued that the jury pool did not reflect a cross-section of Clark County, Nevada (ROA 8 pp. 1833, JT Day 2 pp. 10). Specifically, trial counsel stated that the jury pool consisted of over eighty (80) potential jurors and only three (3) were potential minority jurors (ROA 8 pp. 1833).

In Williams v. State, 121 Nev. 934; 125 P. 3d 627 (2005), the Nevada Supreme Court

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considered a defendant's Sixth Amendment right to a fair cross section of the community in a venire panel. The Nevada Supreme Court expressed,

> Williams is entitled to a venire selected from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution. The Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community. Instead, the Sixth Amendment only requires that "'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Thus, as long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible. Williams 121 Nev. 934, 939, 940 (see also Evans v. State, 112 Nev. 1172, 1186, 926 P. 2d 265, 274 (1996), Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)).

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

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

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

Mr. Johnson should have been provided a new jury venire. In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986), the United States Supreme Court recognized that the remedy for Batson violations would vary from jury system to jury system and allow the courts to fashion their own remedy. 476 U.S. at 99. The United States Supreme Court reasoned that one of the remedies would be to discharge the venire and empanel an entirely new one. Id.

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

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cross section of the community.

On direct appeal, appellate counsel failed to raise this issue. If appellate counsel had raised this issue based upon the United States Constitution, the result of the appeal would have been different and Mr. Johnson would have been granted a new trial.

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

In the instant case, Mr. Johnson did not receive between six and nine (6-9) African Americans in his venire of approximately eighty (80). Additionally, this was compounded as the State dismissed a African American juror. There was a contemporaneous Batson Challenge on Juror number seven (7) (JT Day 2 pp. 6, ROA 8 pp. 1833).

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

> In State of Arizona v. Holder, 155 Ariz. 83 , 745 P.2d 141(1987), the court stated: A criminal defendant can use the facts and circumstances of his individual case to make a prima facie showing that the state is violating his equal protection rights by using peremptory challenges systematically to exclude members of the defendant's race from the jury.

The Holder court also held,

> In Batson, the United States Supreme Court indicated that to establish a prima facie case the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of race._155 Ariz. 83 , 745 P.2d 141(1987).

Mr. Johnson would contend he is a member of a cognizable racial group and the prosecutor did use a peremptory challenge to remove a member of Mr. Johnson's race.

Juror number seven (7) was only one of three potential minority jurors in the jury pool. The State preempted this juror[2] (ROA 8, 1829, JT 2 pp. 6). Hence, only one potential minority

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

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juror was available for selection[3]. Trial counsel objected to the fact that there were only three potential minority jurors in a pool of over eighty (80) (JT Day 2 pp. 10, ROA 8 1829).

In response to the Batson Challenge, the State claimed that the juror had a stepson who had been in jail (ROA 8 pp. 1830). The prosecutor also explained that she had crossed her arms when questioned (ROA 8 BS 1830) Ms. Fuller informed the prosecutor that she could be fair (ROA 12 BS 2821). Ms. Fuller indicated that sitting in judgment of Donte Johnson did not cause her concern. (12 BS 2821). Ms. Fuller indicated to the prosecutor that there was nothing in her social or religious background that would cause her a problem with sitting in judgment (12 BS 2821, JT Day 1 pp. 219). Ms. Fuller stated that she could pass judgment fairly (12 BS 2821). Ms. Fuller also explained without hesitation, she could consider all four forms of punishment. (VOL a. pp. 221 BS 2823). Ms. Fuller again affirmed that she could follow the law and consider all four forms of punishment (2823).

Ms. Fuller was asked whether she could consider the death penalty and she indicated she could (2823). In fact, Ms. Fuller went further, stating that she could check the block on the form if she believed the death penalty was the appropriate punishment (BS 2824). The last question by the prosecutor was, "Can you promise me this: That the verdict you pick will be a just and fair verdict, no matter how difficult the choice? Juror Fuller stated, "definitely fair, yes". The Court then stated, "Pass for cause" and the prosecutor stated yes. (JT Day 1 pp. 223).

A review of Ms. Fuller's questioning by the prosecutor establishes that she could be fair to the State of Nevada and would have considered the death penalty. There was nothing in the transcript to reflect that she would be unfair to the State of Nevada. In fact, defense counsel accused the State of using pretextual reasons for excusing Ms. Fuller[4]. (JT Day 2 pp. 8).

A review of Ms. Fuller's testimony demonstrates the State had no race neutral reason to

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

[4]After the prosecutor provided the race neutral reasons, defense counsel stated, "Now which of those reasons are you determining to be race neutral and which do you determine to be pretextual so I can respond to them" (ROA 8 pp. 1831, JT Day 2 pp. 8).

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preempt this particular juror. Ms. Fuller's testimony demonstrates that she should not have been systematically excluded. (See Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986)).

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

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

Additionally, the United States Department of Justice concluded that in 1997, nine percent (9%)of the African American population in the United States was under some form of correctional supervision compared to two percent (2%) of the Caucasian population[5]. Statistics from the United States Department of Justice show that at midyear 2008, there were 4,777 black male inmates per 100,000 black males held in state and federal prisons and local jails, compared to 1,760 Hispanic male inmates per 100,000 Hispanic males and 727 white male inmates per 100,000 white males[6]. Under the state's argument, virtually, every African-American as a prospective juror would be ineligible under the state's theory of racial neutrality because the statistics show they will know someone who has been arrested.

According to the Bureau of Justice Statistics presented by the Department of Justice African American's were almost three (3) times more likely than Hispanics, and five times more likely than Caucasians to be in jail[7]. Additionally, midyear 2006, African American men

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

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

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

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comprised forty-one (41%) percent of the more than two million men in custody. Overall, in 2006 African American men were incarcerated at a rate of six and a half percent (6.5%) times the rate of Caucasian Men[8].

In the instant case, the State used a reason to excuse juror Fuller that can be used against almost any single African American in Clark County. The statistics cited above illustrate that almost every African American will have had a family member or someone closely associated with him or her who has been arrested in their lifetime. Now, prosecutors are free to argue, that the potential jurors being excused because they know someone who has been arrested and their body languages (twitching of facial muscles, crossing of the arms, crossing of the legs) all establish a race neutral reason to excuse the juror.

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

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

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

The defense complained that they were life affirming jurors who were not essentially opposed to considering the death penalty. The court denied the objection (ROA 8 pp. 1825; Day 2 pp. 2). The State used one of their peremptory challenge on Mr. Calbert (ROA 12, 2860; JT Day 1 pp. 258). The State used their second peremptory challenge to excuse Mr. Morine. (ROA 12, 2819).

Mr. Calbert indicated that he was opposed to the death penalty (JT Day 1 pp. 236; ROA 12 2838). Although Mr. Calbert indicated he was opposed to the death penalty he stated he would

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

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consider it (ROA 12 2839; JT Day 1 pp. 237). Mr. Calbert stated, "I mean, it would really be a situation where I just felt that the person was just so cold hearted, and that would be definitely the only answer to the problem, you know, I could consider it" (JT Day 1 pp. 237; ROA 12 pp. 2839). Mr. Calbert was challenged for cause by the State however, Mr. Calbert was again asked whether he could consider the death penalty and he answered, "Yes, I could" (ROA 12 2842; JT Day 1 pp. 240). Mr. Calbert again affirmed that he could follow the law and consider all four forms of punishment at sentencing (JT Day 1 pp. 244; ROA 12 pp. 2846).

During voir dire, the prosecution questioned prospective juror Mr. Morine (JT Day 1 pp. 68; 11 ROA 2670). Mr. Morine agreed that all four forms of punishment could be appropriate in a murder case (JT Day 1 pp. 65; 11 ROA 2668). Mr. Morine agreed that the worst possible crimes deserve the worst possible punishment (JT Day 1 pp. 66; ROA 11 pp. 2668). Mr. Morine indicated that he could impose a death sentence although he stated... "I think it would take an awful lot of compelling argument for and an awful lot of soul searching before I could ever come to that conclusion" (JT Day 1 pp. 68; 11 ROA 2670).

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

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

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

The 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).

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

1. **POTENTIAL JUROR FINK**

Mr. Fink indicated that his favorable beliefs regarding the death penalty were "deeply held" (ROA 11 2738; JT Day 1 pp. 136). Mr. Fink was asked the following question, "So you would agree that you would always vote for the death penalty when you have premeditated intentional murders," and Juror Fink stated he would (ROA 11 2739;J T Day 1 pp. 137). The defense attempted to ask the juror if he found an individual guilty of premeditated intentional multiple murders would he automatically vote for the death penalty and an objection was sustained (ROA 11 2739; JT Day 1 pp. 137). The defense then attempted to ask the juror whether every person convicted of intentional premeditated deliberate murder should receive the same sentence, Mr. Fink indicated, yes. Mr. Fink was then asked, "Do you think the only appropriate penalty should be the death penalty to which the State successfully objected and the Court sustained the objection[9] (ROA 11 2740; JT Day 1 pp. 138).

Mr. Fink indicated that he would not take the defendant's youth into account in terms of mitigation. (ROA 11 2741; JT Day 1 pp. 139). Mr. Fink explained that if the defendant had a bad childhood, he would think that was just something used in today's society, as an excuse[10]. (ROA 11 2742; JT Day 1 pp. 140). Mr. Fink further stated that was the type of mitigation he would not consider in a penalty phase. (ROA 11 2742; JT Day 1 pp. 140).

Mr. Fink obviously believed that the only appropriate punishment for an individual convicted of premeditated deliberate first degree murder was the death penalty. A review of the transcript reflects his obvious opinions. Mr. Fink would not even consider appropriate mitigation. More importantly, the District Court erroneously precluded the defense from verifying those facts.

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

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

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The defense challenged Mr. Fink for cause (BS 2802 of ROA 12, JT Day 1 pp. 200). Trial counsel indicated that Mr. Fink would automatically vote for the death penalty if he convicted Mr. Johnson. The Court denied the challenge for cause (BS 2804). Therefore, the defense was forced to use of one their eight peremptory challenges to remove Mr. Fink (BS 2913). Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the trial attorney's objections to the district court's improper and unconstitutional denials of the defenses challenge for cause in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

2. POTENTIAL JUROR BAKER

Mr. Baker (just like Mr. Fink) indicated that he was a strong supporter of the death penalty (JT Day 1 pp. 152; ROA 11 2754). Mr. Baker affirmed that an individual who is found guilty of intentional and premeditated murder should receive the death penalty (JT Day 1 pp.152-153; ROA 11 2754). The defense then asked, "so you're saying that there is - - if I'm hearing you right, there is no circumstances where someone who you already convicted of a premeditated deliberate and intentional murder should get life with the possibility of parole". Juror Baker replied, "A possibility, but not parole" (JT Day 1 pp. 153; ROA 11 2754). Prospective juror Baker indicated that it would be highly unlikely that he could vote for a period or a term of years (JT Day 1 pp. 153; ROA 11 2754). Mr. Baker was further asked the following, "Let me ask you, do you feel that's appropriate for every case in which a person has been found guilty and the aggravators are there as well, do you think that person should get the death penalty every time?" Juror Baker replied, "I believe so, yes (JT Day 1 pp. 153; ROA 11 2754).

Mr. Baker did not believe he should consider the youth of the defendant in the penalty phase (JT Day 1 pp. 154; ROA 11 2755). Mr. Baker did not think that the defendant's childhood would be important to consider during the penalty phase (JT Day 1 pp. 154-155; ROA 11 2756-2757). Mr. Baker was also asked, "But once your positive that the person did the offense, it would be hard for you to come up with a scenario where you wouldn't vote for the death penalty, is that fair to say". Mr. Baker stated, "Yes, that's fair" (JT Day 1 pp. 156; ROA 11 2758).

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Trial counsel challenged Mr. Baker for cause (ROA 12 2802). Trial counsel challenged on the basis that Mr. Baker would automatically vote for the death penalty and he could not consider all four forms of punishment (ROA 12 2802). The District Court denied the challenge for cause (ROA 12 2804). Therefore, the defense was forced to use another peremptory challenge to excuse prospective juror, Mr. Baker (ROA 12 pp. 2878; JT Day 1, pp. 276).

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

3. POTENTIAL JUROR SHINK

Mr. Shink indicated that he would impose a death sentence if there was overwhelming evidence of guilt (BS 2792). Mr. Shink was asked the following question, "So if he's the individual that pulled the trigger, that's when you would say the person deserves the death penalty?" Mr. Shink stated, "Yes" (JT Day 1 pp. 191; 12 ROA pp. 2793).

Mr. Shink was so bizarre in his answers that he actually indicated that prisoners should be given numbers, and a number should be picked out of the barrel for their execution. Mr. Shink affirmed that they should use a "Logan's Run" theory on punishment[11] (JT Day 1 pp. 191-192; ROA 12 pp. 2793). Mr. Shink was asked the following question, "You mentioned earlier, probably the best thing to do is just get a random drawing and go into the prisons and run around and pull out the numbers?" Juror Shink replied, "Yeah". Mr. Shink was then asked, "So you're saying that people who are in prison from anywhere from car theft to murder, they're eligible for Logan's Runs numbers?" Mr. Shink stated, "Yes, unless they got less than a year, they would be exempt (JT Day 1 pp. 192; 12 ROA 2793). Defense counsel then asked Mr. Shink, "How long have you had this view of kill em' all let God sort em out?" Mr. Shink replied, "I don't know a long time" (JT Day 1 pp. 192; 12 ROA 2793). Mr. Shink was further questioned as to his "Logan's Run" theory. Defense counsel stated, "How ingrained is it in your beliefs that it's easier to kill or it's best to put them in a drum, pull out the numbers and get rid of them?" Mr. Shink

[11] Logan's run refers to a Hollywood Film where people are randomly considered for death. (JT Day 1 pp. 191-192; 12 ROA 2793)

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stated, "because they had a choice. There was nobody twisting their arms to do what they did. They made a decision. Nobody else did" (ROA 12 2794-2795; JT Day 1 pp. 193-194).

Trial counsel challenged Mr. Shink for cause based on his "Logan Run Theory" of pulling out numbers for execution, on car thieves to murderers (12 ROA 2802-2803 JT Day 1 pp. 201). Unbelievably, the District Court denied the challenge for cause (JT Day 1 pp. 204; 12 ROA 2805). Hence, the defense was forced to use another peremptory challenge to excuse a prospective juror. Mr. Henry Shink who believed in a "Logan's Run" theory of execution was acceptable to the judge (12 ROA 2847).

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

For instance, prospective juror Davis, initially indicated that he did not believe in the death penalty (JT Day 1 pp. 295, ROA 12 pp. 2897). However, under further questioning, Mr. Davis was asked, "Now if the judge was to instruct you on the law and say that you have to consider everything in a particular case, can you follow the law to consider things?" Juror Davis stated, "I can consider stuff ya" (12 ROA 2900; JT Day 1 pp. 295). However, the transcript reflects that Mr. Davis was significantly opposed to the death penalty. Therefore, the State's challenge for cause was granted. Therefore, the district court determined that a prospective juror who opposed the death penalty was not appropriate to sit on the jury. However, someone who believed that a car thief should have a number thrown into a barrel until it was his time for execution was properly seated.

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

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

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continue to question Mr. Davis (12 ROA 2903, JT Day 1 pp. 301).

Similarly, prospective juror Grecco was challenged for cause by the State and the judge granted the State's challenge (12 ROA 2945-2947; JT Day 1 pp. 343). Mr. Greko had demonstrated reservation on the death penalty (Even though Mr. Grecco had answered in his questionnaire (question number 45) that he would not always vote for a life sentence). Mr. Grecco answered "no" in his questionnaire when asked if he would always vote for life and never consider the death penalty (JT Day 1 pp. 345; ROA 12 pp. 2947). The challenge for cause was sustained (JT Day 1 pp. 345; ROA 12 pp. 2947). Mr. Grecco was asked whether he would legally consider all four forms of punishment. Mr. Grecco said, "legally I would consider all four, yes". (ROA 12 pp. 2931; JT Day 1 pp. 329). For a second time, juror Grecco stated "legally I would have to consider it" regarding the death penalty (ROA 12 pp. 2944; JT Day 1 pp. 333).

Hence, any prospective juror with reservations regarding the death penalty was successfully challenged by the State. Whereas, people who would only consider the death penalty and could not consider a life sentence, including a prospective juror with a "Logan's Run" theory, could not be successfully challenged for cause by the defense in violation of the Fourteenth, Fifth, Sixth, and Eighth amendments to the United States Constitution.

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

In Marshall v. Loneerger, 459 U.S. 422, 103 Sup. Ct. 843, 74 L.Ed. 2d. 646 (1983) "the question is not whether a reviewing court might disagree with the trial court's findings, but

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whether those findings are fairly supported by the record" 459 U.S. at 432. In United States v. Martinez-Salazar, 528 U.S. 304, 120 Sup. Ct. 774, 145 L.Ed. 2d. 1792 (2000), the United States Supreme Court held, "although the peremptory challenge plays an important role in reenforcing a defendant's constitutional right to trial by an impartial jury, this court has long recognized that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not a federal constitutional dimension, See Ross v. Oklahoma, 487 U.S. 81, 88, 108 Sup. Ct. 2273, 101 L. Ed.2d 80 and Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L. Ed.2d 759 (1965).

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

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

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

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peremptory challenges in order to remedy the trial court's errors.

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

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

The dissent explained, "The Court today ignores the clear dictates of these and other similar cases by condoning a scheme in which a defendant must surrender procedural parity with the prosecution in order to preserve his Sixth Amendment right to an impartial jury". 487 U.S. 81, 96.

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

In Morgan, the United States Supreme Court noted that Illinois conducts capital cases in two phases (Nevada conducts the trial and penalty phase as well). In Morgan, the United States Supreme Court noted that the trial court questioned every member of the venire whether they possessed moral or religious difficulties that would prevent them from imposing the death penalty regardless of the facts. However, the trial court refused a defense request to ask perspective jurors whether they would automatically vote to impose the death penalty if they found the defendant guilty Id. The trial court found that it had properly questioned the jury because all of the jurors were asked whether they could follow the law and whether they could be fair and impartial. In the

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panel, all the jurors swore to render a verdict in accordance with the law. Id. The supreme court of Illinois held that 1) there is no rule requiring a trial court to life qualify a jury to exclude all jurors who believe that the death penalty should be imposed in every case. Id.

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

The United States Supreme Court determined that any juror who would automatically vote for death is entitled to have a defendant challenge for cause that perspective juror. 505 U.S. 719, 729. "...Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. Dennis v. United States, 339 U.S. 152, 171-172 , 70 Sup. Ct. 519, 94 L.Ed. 734 (1950). "Voir dire plays a critical function in assuring a criminal defendant that his constitutional right to an impartial jury will be honored. Without an adequate voir dire the trial judges responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled" Rosales-Lopez v. United States, 451 U.S. 182, 101 Sup. Ct. 1629, 188, 68 L.Ed. 2d. 22 (1981). The United States Supreme Court ultimately reversed the lower court's decision, "because the inadequacy of voir dire leads us to doubt that the petitioner was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment, his sentence cannot stand" 504 U.S. 719, 739.

In the instant case, Mr. Johnson's voir dire was unconstitutional for a number of reasons. First, the judge systematically precluded the granting of defense counsel's challenges for cause in a blatant violation of Morgan v. Illinois. Defense counsel actually cited the district court to Morgan v. Illinois at the time of their objections (8 ROA 1826; JT Day 2 pp. 371). The district court ignored the defenses challenges. In addition, over the defense objection, jurors were excused because of their concerns regarding the death penalty (juror Davis and juror Grecco). Juror Lewis, indicated in voir dire that she could not consider the death penalty (8 ROA 1826; JT Day 1 pp. 370). However, the court noted that this answer was different than what she had answered in her

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questionnaire (8 ROA 1827; JT Day 1 pp. 371). E.

E. CUMULATIVE ERROR

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

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

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

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

Recently, the Nevada Supreme Court provided in Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006),

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

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

> (1) if movement of victim is incidental to robbery and does not substantially increase risk of harm over and above that necessarily present in crime of robbery itself, it would be unreasonable to believe that Legislature intended a double punishment . . .and
>
> (2) convictions of kidnaping were subject to being set aside where, with respect to movement and detention of victim, movement appeared to have been incidental to robbery and without an increase in danger to victims and detention was only for short period of time necessary to consummate robbery.

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

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

Likewise, in Hampton v. Sheriff, 95 Nev. 213,591 P.2d 1146 (1979), the Nevada Supreme Court reversed the decision of the district court wherein the appellant's Petition for Writ of Habeas Corpus had been denied. Again, the Nevada Supreme Court held that a separate charge of kidnaping would not lie against the appellants, as the movement of the victim had occurred incidentally to the commission of a robbery.

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

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

Trial counsel for Mr. Johnson filed a motion for change of venue prior to voir dire. The State filed their opposition (ROA 6 pp.1421). In the motion, the State argues that the defense filed a motion for change of venue pursuant to NRS 174.455 which provides, "an application for removal of a criminal action shall not be granted by the Court until after the voir dire examination has been conducted...". Defense counsel renewed his request for a change of venue after jury selection (JT Day 4 pp. 166; ROA 13 at 3147).

In the instant case, several members of the jury had heard about this case through the media. Juror Juarez had heard about the case. (ROA 11 2682; JT Day 1 pp. 80). Juror Baker had some knowledge of the case (ROA 11 pp. 2687; JT Day 1 pp. 85). Juror Garceau had heard about the case on Channel 8 news (ROA 11 pp. 2769; JT Day 1 pp. 167). Juror Garceau stated that it inflamed his emotions, the description of the crime it made him angry (ROA 11 2770; JT Day 1 pp. 170). Juror Garceau stated this in front of the entire jury panel. Prospective juror Sandoval stated that when she read the summary on the questionnaire it "rang a bell" regarding the facts (ROA 12 2927; JT DAY 1 pp. 325).

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

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

The Nevada Supreme Court further stated, [t]his, of course, implicates the jury selection

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process and explains why a motion for a change of venue must be presented to the court after voir dire of the venire". (See, NRS 174.45) Mr. Johnson's conviction was in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise this issue on direct appeal.

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

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

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

The district court then precluded Mr. Johnson's defense attorneys from questioning Mr. Armstrong based on the highly relevant fact that Mr. Armstrong was a witness in two murder cases, yet claimed to receive no benefit. This information went to his prejudice and bias. The State requested the Court strike the cross-examination (ROA 8 pp. 2067; JT Day 2 pp. 136)

Mr. Armstrong admitted that he had identified the defendant in the other murder case, but the question was stricken based upon an objection by the State (ROA 8 pp. 2071; JT Day 2 pp. 140). Mr. Armstrong denied receiving any benefit from the State (ROA 8 pp. 2070; JT Day 2 pp. 139). The defense was denied the opportunity to go into the facts of the other case[12].

[12] The State admitted that Todd Armstrong was a fourth suspect in the case (DAY 2, pp. 12). On direct examination, Todd Armstrong was asked whether he was promised anything regarding whether he would be prosecuted for this crime. He states that he was not promised anything by the District Attorney's office (JT Day 2 pp. 212).

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District Court's have wide discretion to control cross-examination that attacks a witnesses general credibility. However, a trial court's discretion is narrowed when bias or motive is a subject to be shown and the cross-examiner must be permitted to elicit the facts which impeach a witnesses testimony, Busnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979);See Also Ransey v. State, 100 Nev. 277, 279, 680 P.2d 596, 597 (1984). The Nevada Supreme Court has held, "[a]nd extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50. 085(3)" Lobato v. Nevada, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004).

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

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

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

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

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

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

During the voir dire, the prosecutor asked the jury during voir dire, "do you believe that you have the intestinal fortitude, for lack of a better word, to impose the death penalty if you truly

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believe that it fits this crime? (JT Day 1 pp. 38; ROA 11 pp. 2640). During voir dire, the prosecutor also speculated that Donte Johnson has future dangerousness and could kill a prison guard or a maintenance worker. (JT Day 1 pp. 70; ROA 11 pp. 2672).

During voir dire, the prosecutor questioned a juror stating, "you would agree that it's possible someone in that situation might harm somebody in prison?" The prospective juror replied stating that it is entirely possible. The prosecutor then stated, "you would agree that there aren't just prisoners in prison, there are prison guards, correct". The prosecutor further states, "medical staff in prison"? The prospective juror replied, yes. The prosecutor further asked, "maintenance workers at a prison correct:? The juror replied yes. The prosecutor then states, "certainly you would concede that it's possible for somebody who was convicted of a crime to harm those individuals within the confines of the prison". During this point in voir dire, the defense objects to the prosecution speculating that Mr. Johnson will kill a prison guard or other staff member (ROA 11 2672; JT Day 1 pp. 70).

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

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

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

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

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

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

In the instant case, the district court permitted inadmissable hearsay during the direct examination of Todd Armstong. During his testimony, Todd Armstrong was questioned regarding a conversation he overheard between Bryan Johnson and the police (ROA 8 pp. 2022; JT DAY 2 pp. 184). Hence, Mr. Armstrong was permitted to state that Bryan Johnson tells the police that "we knew who did it" (ROA 8 2022; JT Day 2 pp. 184).

The United States Supreme Court held that an out of court statement may not be admitted against a criminal defendant unless the Declarant is unavailable and the defendant had prior opportunity to cross-examine the Declarant. The United States Supreme Court reasoned that the only indicia of reliablity sufficient to satisfy the U.S. Constitution's Confrontation Clause was "actual confrontation." Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004).

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

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

Mr. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal.

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

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

A. TODD ARMSTRONG

Mr. Armstrong testified for the State (ROA 8 2062-2065; JT Day 2 pp. 239). The State should have introduced that evidence on direct examination and introduced the fact that he had testified for the State instead of having Mr. Armstrong testify that he had received no benefit in the instant case without even mentioning the prior murder.

B. LASHAWNYA WRIGHT

Lashawnya Wright testified as a witness for the State. Ms. Wright says she is receiving no special treatment on her other cases (ROA 8 2141; JT Day 2 pp. 210). Ms. Wright does admit that the prosecutor helped her get released on a misdemeanor (ROA 8 pp. 2120; JT Day 2 pp. 231).

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Ms. Wright testified that she was receiving no benefit, even though she has a probation hold (ROA 8 2081-2114; JT Day 2 pp. 258-291).

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

> In sum, we hold that the prosecution's failure to disclose the deal between McLaurin and the police violated Brady. The rule in this situation is clear and specific: the prosecution must disclose material evidence favorable to the defense. Brady, 373 U.S. at 87. By implicitly finding that the suppression of McLaurin's leniency deal was immaterial, the state court unreasonably applied Supreme Court-established federal law set down in Napue, Brady, Giglio, and Kyles. The recurrent theme of these cases is that HN13where the prosecution fails to disclose evidence such as the existence of a leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial. Napue, 360 U.S. at 270; Giglio, 405 U.S. at 154; Kyles, 514 U.S. at 444. Here, the prosecution failed to disclose a promise of immunity given to McLaurin, its "star witness," in exchange for his testimony, testimony that provided the only evidence of a motive and the opportunity to kill the victim and that included a confession by Horton himself. The state court was not only wrong in its application of these cases, it was objectively unreasonable. See 28 U.S.C. § 2254(d)(1); Lockyer v. Andrade, 538 U.S. 63, 75-76, 155 L. Ed. 2d 144, 123 S. Ct.

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1166 (2003); see also Gantt, 389 F.3d at 916 (holding that the state court's conclusion that the suppression of evidence did not violate Brady was an unreasonable application of clearly established federal law).

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

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

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

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

During voir dire the prosecutor refers to the trial as the "guilt phase" (ROA 12 pp. 2811; JT Day 1 pp. 209). Again, in voir dire, the prosecutor refers to the trial phase as the "guilt phase" (JT Day 1 pp. 338; ROA 12 2940). The State continues to refer to the trial phase as the "guilt phase". Trial counsel for Mr. Johnson does not object (ROA 11 pp. 2656, 2671; JT Day 1 pp. 54, 69). The prosecutor tells the jury that the first part of the trial is called the Guilt Phase of the trial (ROA 12 pp. 2851; JT Day 1 pp. 249).

Article I, Section 8, of the Nevada Constitution, as well as the Fifth, Sixth and

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Fourteenth Amendments to the United States Constitution, guarantee every criminal defendant the right to a fair trial. This right requires the court to conduct trial in a manner which does not appear to indicate that a particular outcome of the trial is expected or likely.

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

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

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

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

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

Once the court's ruled that evidence is probative of one of the permissible issues under NRS

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48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991). "The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

A. MR. JOHNSON SOLD NARCOTICS

During the direct examination of Ms. Sharla Severs, the prosecutor elicited that Mr. Johnson would sell crack cocaine to several individuals (ROA 9 pp. 2147; JT Day 3 pp. 16). The prosecutor asked Ms. Severs whether she had actually personally witnessed Mr. Johnson selling drugs, to which she replied, "yes" (JT. DAY 3 pp. 17). Again, the prosecutor elicits from witness Bryan Johnson that Donte Johnson had sold him crack cocaine in the past (ROA 9 pp. 2302). The prosecutor asked if Mr. Johnson would put the cocaine in a black and mild cigar box and Bryan

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Johnson stated, he never remembered Donte Johnson selling narcotics to him in that fashion (JT. DAY 3 pp. 171, ROA 9 pp. 2302).

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

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

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

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

A. IMPROPER WITNESS VOUCHING

During closing argument the following exchange took place,

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

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

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

The prosecutor: "And if Donte Johnson is not guilty and Lashawnya Wright must be lying too. So Sharla is lying, Todd is lying, Bryan is lying, and Lashawnya

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Wright is lying." (JT Day 4 pp. 215; 13 ROA 3196).

In the instant case, the prosecutor was essentially vouching for the credibility of the witness indicating that there was no evidence that these individuals were lying and therefore they were telling the truth. In United States v. Williams, 112 Fed. Appx 581, 204 U.S. Ap. Lexis 22077 (2004), the Ninth Circuit Court of appeals held that a defendant was entitled to a new trial when the prosecutor improperly vouched for the veracity of a government key witness. Id. In Williams, the prosecutor explained that the government agent came to court and told the truth. That the government agent had told the truth about what had occurred. It was improper for the prosecutor to place the prestige of the government behind a witness through assurances of the witnesses veracity. See United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993).

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

In the instant case, during opening argument, the prosecutor informed the Court that Sharla Severs had given numerous inconsistent statements throughout the investigation of the case. The prosecutor then stated, 'You will learn that she had been told again and again what perjury is and that she must tell the truth when she comes to this courtroom" (JT Day 2 pp. 50; 8 ROA 1873). At which time, the district court overruled the defenses objection.

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

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

A prosecutor may not make remarks putting jurors in the victims shoes. A prosecutor

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should also not make remarks requesting that jurors consider the victims plight. Normally, such comments violate the rule against referring to facts not in evidence since the evidence of the victims reaction before death is not before the jury. In Rhodes v. State, 547 So.2d 1201, 1205-06 (Florida 1989), the court remanded for a new sentencing hearing where a prosecutor improperly asked the jurors to place themselves at the crime scene, Cert. Denied 513 U.S. 1046 (1994). Bertolotti v. State, 476 So.2d 130, 133 (Florida, 1985) (condemning prosecutors suggestion that jurors put themselves in the victims position and imagine the final pain, terror, and defenselessness of the victims. Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991) (Holding it is improper for a prosecutor to place the jury in victims shoes). Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1991)(the Court has held that arguments asking the jury to place themselves in the shoes of a party of the victim(the golden rule argument) are improper. Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702-03 (1987) (Explaining that the prosecutor improperly placed the jury in the position of the victim by stating the following, "can you imagine what she must have felt when she saw that it was the defendant and he had a gun?"

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

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

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

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

These improper remarks by the prosecutor were objected to by defense counsel (JT Day 4

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pp. 200-201; 13 ROA 3181-3182). Therefore, Mr. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal.

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

During the testimony of the State's DNA expert, Mr. Tom Wahl, Mr. Wahl explained the DNA on a cigarette butt from the crime scene contained a major DNA component allegedly consistent with Donte Johnson and human DNA that was a mixture (JT Day 4 pp. 105-212).

During closing argument the prosecutor stated, "Did Donte Johnson allow the victim to take one last drag of the cigarette before he put a bullet in the back of his head? Is that why there is two sources of DNA on the cigarette? We know Donte Johnson smoked the cigarette, we know Donte Johnson was at the crime scene" (JT Day 4 pp. 212). The prosecutor further stated, "Did Donte Johnson allow the victim to take on last drag before he put a bullet in the back of his - -" (JT Day 4 pp. 212). Defense counsel objected to these statements, as speculation (JT Day 4 pp. 212).

Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997) (Holding that alluding to facts that are not in evidence is prejudicial and not at all probative) cert. granted on other grounds, 119 Sup. Ct. 1248 (1999). In the instant case, the prosecutor asked the jury to completely speculate as to the minor component of the DNA. Defense counsel objected to these statements by the prosecutor as to speculation and appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution. These comments taken as a whole mandate a new trial for Mr. Johnson.

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

The defense filed a motion to exclude autopsy photos (ROA 5 pp. 1098-1101). During the

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testimony of the medical examiner, Dr. Bucklin, the defense continued to object to the photographs. The Court noted that there was a continuing objection (JT Day 3 pp. 274; ROA 10 pp. 2406). The autopsy photos and exhibit numbers that were objected to by defense counsel were exhibits 74, 76, 135-148 151 113 114 116 120, 125, 127, 130 134 (JT Day 4 pp. 166, ROA 13 3147). In Byford v. State of Nevada, 116 Nev. 215 pp4 P.2d 700 (2000), the Nevada Supreme Court held:

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

Although, the Nevada Supreme Court noted the admission of evidence is within the trial court's sound discretion, Mr. Johnson would argue this evidence should not have been permitted. It was admitted to inflame the jury. Appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on direct appeal.

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

In the instant case, numerous bench conferences were held during trial. None of the bench conferences were recorded. In Daniels v. State of Nevada, 119 Nev. 498, 78 P.3d 890 (2003), the Nevada Supreme Court expressed that rarely should a proceeding in a capital case not be recorded and failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations.

On direct appeal, Johnson argued that there were 59 bench conferences off the record. Johnson

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claimed this violated Nevada Supreme Court rule 205 (5) (a) and his right to meaningful appellate review. The Nevada Supreme Court explained, "Johnson's trial attorney did not object to these off the records conferences or try to make them part of the records. Thus Johnson did not preserve the issue for appeal, and he fails to show that any plain error occurred" (Nevada Supreme Court decision pp. 28-29).

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

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

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

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

In the instant case, it is uncertain as to what was discussed during the numerous bench conferences held during Mr. Johnson's trial, as they were unrecorded. Mr. Johnson was denied meaningful appellate review because the trial court conducted numerous conferences without having them reported, or recorded, and transcribed in violation of Nevada Supreme Court Rule 250 (5)(a). Trial counsel was ineffective for failing to object to the bench conferences being unrecorded and failing to place on record what was stated during said unrecorded bench conferences in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

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

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

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

1. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
2. The youth of the Defendant at the time of the crime.
3. Witness to father's emotional abuse of mother.
4. Witness to drug abuse by parents and close relatives.
5. Abandonment by parents.
6. Poor living conditions while at great grandmothers.
7. Turned into police by great grandmother.
8. Crowded living conditions while at grandmothers house.
9. Very violent neighborhood.
10. Witness to various acts of violence in neighborhood.

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11. Had to live a guarded life
12. Grandmothers second house was even more crowded.
13. No way to avoid gangs at second house
14. Gang intimidation
15. Could not comply with parole conditions - other gang territories
16. Indicators he may have wanted to return to parole school
17. Lack of positive male role model
18. Lifestyle of victims
19. No eyewitness to identify of shooter
20. Killings happened in a relatively shore period of time, more isolated incidence than a pattern
21. No indication of any violence while in jail
22. Appears to excel in structured environment of jail
23. Joined gang to protect family (Special Verdict Form, attached as Exhibit A).

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

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

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

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finding that Mr. Johnson had already been determined to be the physical killer and defense counsel failed to enlighten the court that the first jury did not agree with that conclusion.

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 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.

Counsel for Mr. Johnson fell below a standard of reasonableness by not obtaining the special verdict form and listing each and everyone of these mitigators to the jury. But for the failure of counsel to argue these mitigators pretrial and/or to the jury, the result of the trial would have been different (ie. the first jury did not sentence Mr. Johnson to death). Mr. Johnson received ineffective assistance of counsel in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

///

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

These issues are presented here because the Nevada Supreme Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

A. THE "PREMEDITATION AND DELIBERATION" INSTRUCTION

INSTRUCTION NO. 36 AND 37

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

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

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

The vague "premeditation and deliberation" instruction given during Johnson's trial, which does not require and sort of premeditation at all, violated the constitutional guarantee of

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due process of law because it was so bereft of meaning as to the definition of two elements of the statutory offence of first degree murder as to allow virtually unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess culpability and made defense against the charges virtually impossible, due to the inability to discern what the State needs to prove to establish the elements of the charged offense.

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

B. THE REASONABLE DOUBT INSTRUCTION

INSTRUCTION NO. 5

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

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

The instruction given to the jury minimized the State's burden of proof by including terms

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"It is not mere possible doubt, but is such a doubt *as would govern or control a person in the more weighty affairs of life*" and "Doubt, to be reasonable, must be *actual*, not mere possibility or speculation." This instruction inflates the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. See Victor v. Nebraska, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); Cage v. Louisiana, 498 U.S.39, 41 (1990); Estelle v. McGuire, 502 U.S. 62, 72 (1991). Johnson recognizes that the Nevada Supreme Court has found this instruction to be permissible. See e.g. Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998); Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). This issue is presented here because the Nevada Supreme Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

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

INSTRUCTION NO. 12:

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

Over the objection of defense counsel, the district court gave the jury instruction number twelve (JT Day 4 pp. 167; 13 ROA 3148).

Jury Instruction 12 fails to inform the jury that Mr. Johnson would have been required to have the intent that the crime charged was to be committed. In fact, the instruction fails to provide the fundamental elements of intent. The instruction given to the jury fails to dictate that a

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defendant cannot be convicted under conspiracy to specific intent crimes unless the defendant had the specific intent to commit those crimes. Yet, Mr. Johnson is convicted of the kidnappings which were all specific intent crimes. Additionally, the prosecutor highlighted the faulty instruction during closing argument (JT Day 4 pp. 198; (13 ROA 3177).

In Sharma v. Nevada, 118 Nev. 648; 56 P. 3d 868; (2002)[13], the Nevada Supreme Court held:

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

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

Trial counsel objected to this instruction (JT Day 4 pp. 167; 13 ROA 3148). Therefore, appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on appeal in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution.

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

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

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define malice.

Express malice is that deliberate intention unlawfully to take away the life of a human, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

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

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

Johnson's state and federal constitutional right to due process, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment due to cumulative error. U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

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

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

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

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

XIX. THE UNDERSIGNED ENDORSES ALL ARGUMENTS RAISED ON BOTH DIRECT APPEALS TO THE NEVADA SUPREME COURT(TRIAL AND FINAL PENALTY PHASE).

The undersigned acknowledges that the district court cannot over rule the Nevada Supreme Court's determination on the issues already previously argued in both direct appeals from the trial and the penalty phase. However, the undersigned endorses those issues and would note that with regard to the search warrant issue, (of Mr. Johnson's objection to the belongings located in the bedroom), appellate counsel should have cited to Minnesota v. Olson, 494 U.S. 91, 110 Sup. Ct. 1684, 109 L.Ed. 2d. 85 (1990).

///

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XX. 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). At the evidentiary hearing, Mr. Johnson wishes to call the jury commissioner to establish the aforementioned statistics regarding the jury venire.

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 14th day of July, 2010.

Respectfully submitted by:

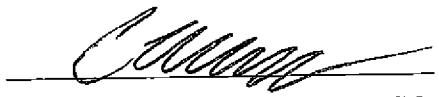

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EXHIBIT A

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

Case No. C153154
Dept. No. V
Docket H

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the Defendant, DONTE JOHNSON, Guilty of COUNT XIII- MURDER OF THE FIRST DEGREE, designate that one or more jurors have found that the mitigating circumstance or circumstances checked and/or written below have been established.

✓ The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

___ The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

___ The Defendant acted under duress or under the dominion of another person.

✓ The youth of the Defendant at the time of the crime.

✓ Any other mitigating circumstances witness to fathers physical & emotional abuse of mother witness to drug abuse of parents and close relatives abandonment by parents

DATED at Las Vegas, Nevada, this 15 day of June, 2000.

John C. Young
FOREPERSON

EXHIBIT "A"
Page 4591

- poor living conditions while at great grandmothers
- turned in to police by great grandmother
- crowded living conditions while at grandmothers house

- very violent neighborhood
  - witness to various acts of violence in neighborhood
  - had to live a guarded life
  - grandmothers second house even more crowded
  - no way to avoid gangs at second house
  - gang intimidation
  - could not comply with parole conditions - other gang territories
  - indications he may have wanted to return to parole school
  - lack of positive male role model
  - lifestyle of victims
  - no eyewitness to identity of Shooter
  - Killings happened in a relatively short period of time. more isolated incident than pattern
  - no indication of any violence while in jail
  - appears to excell in structured environment of jail
  - joined gang to protect family

ROC
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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 **SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS** is hereby acknowledged this 14 day of July, 2010.

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

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an investigator. It's Mike Karstedt, who was a longtime investigator for the DA's office, which in and of itself is not a problem.

THE COURT: Right.

MR. OWENS: But, it's my understanding that he was the part of the actual prosecution team on the co-Defendant, Terrell Young.

THE COURT: Right.

MR. OWENS: And if he had virtually any involvement at all with Terrell Young I I would think they would be conflicted off of Donte Johnson. So, I've asked Mr. Oram to look into that and select another investigator if that is the case.

THE COURT: Sure, that makes sense.

MR. ORAM: I will do that. I understand the State's concern with money. Perhaps I should just motion the Court for it. But it -- as Mr. Owens points out it is a capital case, and he has a right to effective assistance of counsel on post conviction. I have to make sure the job is done correctly.

THE COURT: Right.

MR. ORAM: In the first supplement, Your Honor, I did mention so the State would be on notice, that I felt that perhaps they should have done some type of brain scan upon Mr. Johnson. So, what I will ask is I'll file a motion with the Court. If the Court could first give it -- me an opportunity to brief and supplement after the investigation. And I will make sure that that whatever happens, whatever date that is I will get any additional supplements done at that time.

In other words, if the Court was to grant DNA I would push the DNA person to get it done in a timely manner so that we could get it all done in

this time period.

THE COURT: Okay. I mean, I would also like to see a motion on those issues to be sure I understand why --

MR. ORAM: Yes.

THE COURT: -- we have a need for it. So, and now if you're -- I mean, we just appointed this investigator last week, so obviously it hasn't gone anywhere yet. So, whether it's this investigator or another investigator, you're going to need some time to use those services.

MR. ORAM: Correct.

THE COURT: And then file whatever supplement you need to thereafter.

MR. ORAM: Right. And the Court had previously said in that supplement I can use anything from the first trial, which I have not yet briefed. But, I will do it all at this time period, Your Honor.

THE COURT: So, how long do you think you need before you are looking at filing a brief --

MR. ORAM: Could we --

THE COURT: -- or should we just status check it?

MR. ORAM: Could we have 60 days for investigation to be done, which gives us two months. And then 30 days after that, and I'll file the supplement.

THE COURT: So, 90 days --

MR. ORAM: Please.

THE COURT: -- for a supplement to be due.

MR. ORAM: Please.

THE CLERK: April 21st.

THE COURT: Okay. And so, obviously you should act quickly to confirm

which investigator you're going to be using and get a motion on if you think these other experts.

MR. ORAM: Right. And the investigator -- even if Mr. Karstedt does have a conflict, I would just use Mr. Dennis Reiffer [phonetic]. And he does not have a conflict that I know of. And so, that shouldn't delay things at all.

THE COURT: And, right, I mean, I didn't grant it based upon it being Mr. Karstedt particularly. So, if you have a different qualified investigator it would be the same deal at least at this point of up to $2,500 and --

MR. ORAM: Okay.

THE COURT: -- unless you present something to indicate something different on that.

MR. ORAM: And the other motions I'll put on very, very shortly so there shouldn't be any delay.

THE COURT: Okay. So, if your brief is due April 21st then we're going to need then time after that for State to respond to that supplementation. How much time do you need?

MR. OWENS: it is -- it's hard to know without actually seeing it, --

THE COURT: Yep.

MR. OWENS: -- but I'd like to think I can get one in within 30 days.

THE COURT: All right. So, let's go 30 days later.

THE CLERK: May 26th.

THE COURT: May 26th for the State to respond. Let's go ahead and put the hearing two weeks after that.

THE CLERK: Yes, Your Honor.

MR. ORAM: And that would just be for argument correct, Your Honor?

THE COURT: Yes.

THE CLERK: June 9th, 8:30.

MR. ORAM: Thank you very much, Your Honor.

THE COURT: And you can file a reply brief in the interim there.

MR. ORAM: Yes, Your Honor. Thank you very much.

THE COURT: Right. So that will be for argument. And at that time we can evaluate the claims and whether -- if there is an evidentiary hearing necessary we can schedule it.

MR. ORAM: Yes, Your Honor. Thank you very much, Your Honor.

THE COURT RECORDER: Is this a 250 case?

MR. ORAM: It is a 250 case, yes.

THE COURT: Oh, there is -- yes, vacate the January 25th hearing that was set on argument for this. Thank you.

[Proceeding concluded at 9:22 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Ramirez

Jessica Ramirez
Court Recorder/Transcriber

TRAN

FILED
JAN 22 2010
CLERK OF COURT

COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 20, 2010

TRANSCRIPT OF PROCEEDINGS
STATUS CHECK: BRIEFING/FURTHER PROCEEDINGS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA RAMIREZ, COURT RECORDER

Wednesday, January 20, 2010 at 8:41 a.m.

THE MARSHALL: Bottom of page 1, State of Nevada v. Johnson.

MR. ORAM: Good morning, Your Honor, Christopher Oram on behalf of Mr. Johnson. Court's indulgence.

[Colloquy between counsel]

MR. ORAM: I believe we have to wait for Mr. Owens. That's what the State says.

THE COURT: Okay. Pass it.

[Case was trailed at 8:41 a.m.]

[Case was recalled at 9:16 a.m.]

THE MARSHAL: Bottom of page 1, State of Nevada v. Johnson.

THE COURT: Good morning, Your Honor, Christopher Oram on behalf of Mr. Johnson. He is not present.

MR. OWENS: Steve Owens for the State.

THE COURT: All right. So, Mr. Oram where are we?

MR. OWENS: Your Honor, you signed the order for the investigator. We got that the other day. I do realize -- I've talked to Mr. Owens. He indicated that the person I wanted to use in the investigation may have a conflict. I'll check that out. Obviously it won't change the amount, but I'll just use a different investigator if there is a conflict with him.

Your Honor, additionally, there are two other matters that I think I have to address with the Court. And they are I need two other experts. One, Mr. Johnson wants me to get and that is a DNA expert. I did not find that independently. He's just specifically sent me a letter. And in the letter he says

that he actually sent a copy of the request to the Court too. And he says that he wants a DNA expert. Therefore, I'm going to ask for a DNA expert. I'm also -- will need a full psychological exam of this particular individual.

Now, what I'm wondering is does the Court prefer that I put this on in the form of a motion for those two matters and let the State respond to it, giving them adequate time? I haven't put Mr. Owens on any notice of this. So, I can perhaps do that without it causing any additional delay. I can do it in the time period I'm going to be given to have the investigation done and then supplement.

MR. OWENS: Judge, my concern is of course the cost and the delay associated with a request like that, and assuring that there is a real need for that type of information. And just because it's a death penalty case doesn't mean we just start throwing money at it.

THE COURT: Right.

MR. OWENS: I'd like to know what in the case was done on -- in terms of DNA and what in terms was done on a psychological evaluation previously and why there would be a need. Was it deficient before? Why do we need --

THE COURT: Right.

MR. OWENS: -- yet another expert --

THE COURT: I agree.

MR. OWENS: -- other than just for the sake of the hopes of getting a different or a better opinion the second time around.

THE COURT: Right.

MR. OWENS: On the investigator I just happened to look at Blackstone and saw that the Court -- there'd been an ex parte motion for appointment of

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COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 19, 2009

TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO PLACE ON CALENDAR TO EXTEND THE TIME FOR THE FILING OF A SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS AND TO PERMIT AN INVESTIGATOR AND EXPERT

APPEARANCES:

For the State: JEFFREY S. ROGAN, ESQ.
Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA RAMIREZ, COURT RECORDER

Monday, October 19, 2009 at 8:38 a.m.

THE MARSHALL: Page 11, State of Nevada v. Johnson, Donte.

MR. ORAM: Good morning, Your Honor, Christopher Oram on behalf of Mr. Johnson.

Your Honor, this is on for my motion. I filed a 65-page supplement. However, --

THE COURT: I saw that.

MR. ORAM: However, what I noticed, Your Honor, is in this particular case there's actually three penalty phases. There was actually three. There were in fact twenty-two and a half banker's boxes.

So, what I request is I went through the third penalty phase in its entirety. I went through a lot of boxes and wrote up the 65-page supplement that you see. However, now what I need is need experts. I need an investigator, and I would ask for an opportunity to supplement one more time on this particular case.

MR. ROGAN: Your Honor, I'm sorry. I'm not handling this case, if we could just trail it.

THE COURT: So, hearing no objection -- Mr. Oram, how long do you think you need?

MR. ORAM: 90 days is that possible?

THE COURT: Okay. So you need 90 days to file a further supplement?

MR. ORAM: That's correct.

THE COURT: So, let's get a date for that.

THE CLERK: Yes, Your Honor.

MR. ORAM: And on that date could we just have a status check, so that I could file it and then the State could just respond to it?

THE COURT: You want a status when your brief is due?

MR. ORAM: Yes.

THE COURT: Okay. So, let's get the date

THE CLERK: That would be January 20th, 8:30.

MR. ORAM: Thank you very much, Your Honor.

THE COURT: Thank you. So, you should have filed your supplement by then. And we'll check the status on that, and then set the rest of the briefing and hearing date.

MR. ORAM: Yes, thank you very much, Your Honor.

THE COURT: Okay.

[Proceeding concluded at 8:39 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Ramirez

Jessica Ramirez
Court Recorder/Transcriber

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 XXXIII

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IN THE SUPREME COURT OF NEVADA

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

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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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