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Attorney for Defendant
DONTE JOHNSON

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154
DEPT. NO. VI

REPLY BRIEF ON MR. JOHNSON'S INITIAL TRI AL ISSUES.

COMES NOW, Defendant, DONTE JOHNSON, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., and hereby submits this Reply Brief in regards to Mr. Johnson's initial trial issues.

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This brief 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 22nd day of August, 2011.

Respectfully submitted by:

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STATEMENT OF THE CASE

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

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.

This argument stands as submitted.

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 complained that the jury pool did not consist of a cross-section of Clark County, Nevada. Specifically, trial counsel noted that the jury pool consisted of over eighty potential jurors with only three potential minorities. The State's entire argument regarding this issue seems to fall on the failure of Mr. Johnson to demonstrate purposeful discrimination of African Americans (State's Response to Defendant's Petition for Writ and defendant's Supplemental and Second Supplemental Brief in support of Defendant's Writ of Habeas Corpus; Hereinafter referred to as "State's Response").

The State contends that Mr. Johnson is unable to show systematic exclusion of African Americans. As noted in Mr. Johnson's second supplemental brief, the Nevada Supreme Court cited statistics that there are approximately 9.1 percent of African Americans in Clark County. Williams v. State, 121 Nev. 934, 941, 125 P.3d 627 (2005). In Williams, the Nevada Supreme Court noted that the jury venire included only one African American out of forty venire members.

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Id. Here, Mr. Johnson's jury venire consisted of three minority jurors out of eighty venire members. Accordingly, out of Mr. Johnson's entire jury venire, only 3.75 percent were minorities.

The State claims that there is no proof of a systematic exclusion. Mr. Johnson can establish a pattern of systematic exclusion in the state of Nevada. In Williams, approximately 2.5 percent (1African American out of 40) made up the jury venire. Here, Mr. Johnson's venire was made up of 3.75 percent of minorities. Mr. Johnson was facing a death sentence. In 2010, the undersigned was appellate counsel in Delbert Cobb v. State of Nevada, 50346. The Nevada Supreme Court considered Mr. Cobb's issues during oral argument. [1] In Williams, the African American venire was limited to 5 percent. In fact, Delbert Cobb's jury venire included only two African Americans out of 70 venire members. Hence, Mr. Cobb's percentage of African Americans was 2.8 percent (See Cobb's Reply Brief pp. 10). During oral argument, the Nevada Supreme Court questioned Mr. Cobb's counsel regarding whether there was proof of systematic exclusion.

> To show that a right to a cross-section has been violated, a defendant must demonstrate:
>
> 1) That the group alleged to be excluded is a distinctive group in the community; 2) that the representation of this group in venires from which jury's are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that the under representation is due to systematic exclusion of the group in the jury selection process. See, Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996), Taylor v. Louisiana, 419 U.S. 522, 95 Sup .Ct. 692, 42 l.Ed. 2d 690 (1975).

Here, Mr. Johnson can prove that African Americans are a distinctive group. Next, Mr. Johnson can point to three recent cases to establish that juries are selected in an unfair and unreasonable relationship to the number of such persons in the community.

Lastly, Mr. Johnson must show that the under representation is due to systematic exclusion. In Cobb, the Nevada Supreme Court noted that Mr. Cobb examined the Clark County jury commissioner about the jury selection process and that the commissioner testified that jurors are selected form a list provided by the Department of Motor Vehicles. The jury commissioner

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[1]Attached for this Court's review is Mr. Cobb's briefing in the Nevada Supreme Court and the Nevada Supreme Court's Order of Affirmance. Mr. Johnson is aware that unpublished decisions are not binding. However, Mr. Johnson uses this material to establish a systematic exclusion of African Americans in Clark County venire panels.

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also noted that a Senate Bill was pending that would expand the pool of potential jurors to include those who were customers of Nevada Power. Without much analysis, the Nevada Supreme Court then ruled that there was no proof of systematic exclusion. However, Mr. Johnson can now provide this court with at least three cases where African Americans have been grossly under represented in a jury venire. The courts should no longer ignore what appears to be obvious. Surely, the court cannot conclude that these statistics are simply a coincidence. Mr. Johnson would respectfully request an opportunity to establish systematic exclusion at an evidentiary hearing. Mr. Johnson would request permission to call the heads of the public defender, special public defender, and federal public defender to establish a systematic exclusion.

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. Mr. Johnson should have had a fair cross-section of the community and was denied that right in violation of the due process clause and equal protection clause of the United States Constitution.

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

When the State moved to dismiss juror number seven, defense counsel made a contemporaneous Batson challenge (JT Day 2 pp. 6; ROA 8 1833). Defense counsel complained that the State had excluded the juror in violation of Batson v. Kentucky, 476 U.S. 79, 106 Sup. Ct. 1712, 90 L.Ed 2d 69 (1986). Juror number seven, Ms. Fuller indicated that she could consider the death penalty. Ms. Fuller stated that she could check the block on the form if the death penalty was appropriate. The prosecutor asked Ms. Fuller, "can you promise me this: That the verdict you pick will be a just and fair verdict no matter how difficult the choice?" Ms. Fuller stated, "definitely fair, yes". The prosecutor then passed for cause.

The State's argument provides that juror Fuller sat with her hands crossed and the State had a sense that she had disdain for the questioning of her (State's Brief pp. 67). The State also noted that she had a stepson in jail (State's Brief pp. 67). Again, counsel for Mr. Johnson argued this identical issue in front of the Nevada Supreme Court in Delbert Cobb v. State of Nevada,

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50346. In Cobb, counsel argued that trial attorneys routinely use pretextual excuses for excluding minority jurors. As in the instant case, in Cobb the prosecutors claimed they excluded African American jurors for their body language. Any experienced trial attorney knows they can make a record excluding virtually any juror based on body language. For example, counsel could argue, your honor, I noted that the juror appeared to pay much more attention to the defense attorney and appeared to ignore me when I questioned her. Your honor, the juror scowled at me several times during this week long voir dire process. Anyone can make these arguments. Does this argument preclude courts from recognizing that these pretextual reasons are in fact violations of the United States Constitution. These type of excuses can be used on a habitual basis. In fact, prosecutors often use these type of excuses because judges accept them.

In fact, in the State's Answering Brief in Cobb, the State made the following pretextual argument.

> In addition, the State made the district court aware that Ms. Dawson was standing at eye level right across from the prosecutor during the questioning regarding the close friend or relative charged with a crime. In her responses, she made no eye contact with the prosecutor, and was specifically looking at almost a ninety degree angle away in answering the questions about whether or not she felt that the person was treated fairly. The prosecutor noted that fact to his co-counsel immediately upon sitting down (Cobb, State's Answering Brief pp. 12).

Mr. Cobb's counsel tried to inform the Nevada Supreme Court that experienced trial attorney's can make these type of arguments anytime. The undersigned could make these type of arguments on virtually any juror, at any time. For example:

> Look, your honor, I noticed juror number forty-eight spent approximately eighty percent of the time looking at the prosecutors and would almost never look at my co-counsel. Throughout the voir dire process, I alerted my co-counsel to this problem.

These arguments are obviously pretextual.

Next, the State claims that Ms. Fuller noted that she had a stepson in jail and that she could sentence a person convicted of quadruple homicide to life with parole (State's Answer pp. 67). Initially, it should be noted that a sitting juror is required to consider that they can consider all forms of punishment. Hence, the State's contention that Ms. Fuller indicated that she could consider life with the possibility of parole is misplaced.

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However, the State's argument that Ms. Fuller had a stepson in jail is also predictable and pretextual. In Cobb, the Nevada Supreme Court entertained this identical argument during oral argument. In the State's Answering Brief in Cobb, they established that the challenged African American juror was removed because she had close family members and friends who were charged with a crime. In the instant case, the State claims that Ms. Fuller was excused in part because her stepson was in jail. During oral argument, the Nevada Supreme Court appeared concerned with counsel's argument that virtually every potential African American juror can be excluded for this reason. However, during oral argument the Nevada Supreme Court noted that counsel had not provided statistics to establish the fact. Mr. Cobb's counsel argued that the statistics provide that almost every single African American will know someone who has been charged with a crime. This is now easily proven. In Mr. Johnson's supplement he has provided statistics to establish this fact.

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[2]. 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

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

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100,000 white males[3]. 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[4]. Additionally, midyear 2006, African American men 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[5].

Hence, fifty-one percent of non-white males could anticipate being arrested for a felony at some time during their lifetime. Using this statistic alone, the prosecutors can pretextually preempt any African American juror. First, common sense dictates that every human being has a father. Therefore, every African American child has approximately a fifty percent chance that their father has been or will be arrested in their lifetime. For example: Your honor, I noted that the potential juror admitted that her father had been arrested. The point should now be clear. Every African American born would have two grandfathers (maternal and paternal). Therefore, there is approximately a fifty percent chance that the prospective juror's paternal grandfather would have been arrested. There would also be a fifty percent chance that the maternal grandfather would have been arrested. Now, upon birth, the prospective juror has three males in his or her life that have a fifty percent chance of being arrested during their lifetime. Already, the State has an opportunity to establish that the prospective juror was concerned about the arrest or conviction of their paternal grandparent in 1977, who the prospective juror believed was unfairly treated. For

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

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

[5]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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another example: Additionally, did you note the way the prospective juror crossed her hands when I questioned her about the matter?

Upon birth, potential African American jurors may well have brothers. Again, one brother provides a fifty percent chance of arrest at some point in his life. Prospective jurors may have male offspring. Each male offspring provides a fifty percent chance of arrest. African American jurors most likely would have friends growing up in the community. Each male, has approximately a fifty percent chance of an arrest. The point should be obvious. In Cobb, the Nevada Supreme Court indicated that the undersigned had not provided statistics. Now, the undersigned has provided statistics. Therefore, any experienced trial attorney can simply question an African American juror as to whether any family member or friend has ever been arrested. The chance that the answer is no, is extremely slim. Once the prospective juror admits to the arrest of a friend or family member, the prosecutor has a pretextual reason to preempt. It appears very curious, that in Cobb and the instant case, the State uses the same excuses to exclude the prospective juror.

In the instant case, the State explains, "juror number seven also indicated that she had a stepson in jail and that she could sentence a person convicted of quadruple homicide to life with parole" (State's Brief pp. 67). In Cobb, the State explained that Ms. Dawson (African American female) was removed because "she had close family members and friends who were charged with crime" (State's Brief pp. 12). This is pretextual and used on a systematic basis by prosecutors in Clark County to remove prospective jurors. The State was forced to pass for cause on Ms. Fuller because her answers rendered her death eligible. The State's excuses are typically used and are capable of repetition.

Appellate counsel was ineffective for failing to raise this issue on direct appeal. Mr. Johnson's due process and equal protection clause rights were violated by the exclusion of the juror.

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

This argument stands submitted.

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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 manner in which Mr. Johnson's trial jury was selected, the district court abused its discretion in failing to grant the defense challenges for cause. The defense challenged three prospective jurors who were clearly not qualified to perform as jurors in the instant case. The defense was forced to use a peremptory challenge to remove juror Fink. Mr. Fink indicated that he would always vote for the death penalty in a case of premeditated and intentional murder. The court denied the defenses' challenge for cause.

The defense was forced to use a peremptory challenge to remove juror Baker. Mr. Baker affirmed that an individual convicted of intentional and premeditated murder should receive the death penalty. Mr. Baker affirmed that there should be no parole for somebody convicted of premeditated and deliberate murder.

Lastly, the defense was forced to expend a peremptory challenge to remove juror Shink. Mr. Shink believed that prisoners who are convicted of crimes from car theft to murder should be eligible for Logan's runs numbers. That random drawings should occur and if your number is called you should be executed. Unbelievably, the district court denied the challenge for cause.

The State claims this matter should be dismissed as moot. The State claims that since Mr. Johnson was not sentenced to death, the exclusion of the potential jurors have nothing to do with their inability to be impartial in determining guilt (State's Answering Brief pp. 69). In support of this argument, the State cites to NCAA v. University of Nevada, Reno, 97 Nev. 56, 57, 624 P.2d 10 (1981) (State's Answer pp. 69). A review of the single case cited by the State provides absolutely no analysis to the instant situation. Mr. Johnson received a jury that was selected in highly discriminatory and unconstitutional manner. Mr. Johnson was then convicted of four counts of first degree murder. In a separate penalty hearing, the State relied upon this juries verdicts to inform the third penalty phase jury that the convictions had already been established and residual doubt could not be considered. Mr. Johnson was subsequently sentenced to death. The State's citation to NCAA v. University of Nevada, Reno, 97 Nev. 56, 57, 624 P.2d 10 (1981),

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has absolutely nothing to do with this issue. The State cites no legal authority for the proposition that Mr. Johnson could be convicted of first degree murder when the district court repeatedly denied proper challenges for cause. Additionally, it has long been noted that there is overwhelming evidence that death qualified juries are substantially more likely to convict or convict on more serious charges than juries on which unaltered opponents on capital punishment are permitted to serve. See, Buchanan v. Kentucky, 483 U.S. 402, 427, 107 Sup. Ct. 2906, 97 L. Ed 2d 336 (1987). As the State can cite no authority for their contention, this court must consider Mr. Johnson's complaints that he should not have been convicted with his counsel having to use approximately forty percent of their peremptory challenges to remove jurors that should have been removed for cause.

Next, the State argues that appellate counsel was not ineffective for failure to raise this issue on appeal because the district court did not err in denying defendant's challenges for cause (State's Answer pp. 70). The State claims that Mr. Johnson has taken excerpts from the prospective jurors statements out of context. Mr. Johnson would respectfully request that the State re-read juror Shinks entire questioning during voir dire. There is nothing taken out of context that would explain Mr. Shink's bizarre and extreme opinions regarding his "Logan's Run" theory. It would be almost impossible to categorize Mr. Shink's position in any other fashion. More importantly, if the State believed that Mr. Shink's statements were taken out of context, surely, they could have informed this court how the statements were taken out of context. In fact, the State claims,

> Defendant's assertion that prospective juror Shink wanted to pull numbers out of a barrel, similar to Logan's Run is a mischaracterization of Shink's attempt to explain his random suggestions about prison overcrowding, future deterrence of crime, and the money spent on prisoners could be better spent on society's youth (State's Answer pp. 70).

It is true that Mr. Shink believed that executing prisoners randomly from car theft to murder would permit society more money to spend on society's youth. It is true that Mr. Shink believed that this may help with prison overcrowding and future deterrence. Mr. Johnson agrees. This is exactly why Mr. Shink was the most obviously unqualified juror to sit in a quadruple murder. Mr. Shink was not qualified to sit on a car theft case. In Leonard v. State, 117 Nev. 53, 17

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P. 3d 397, the Nevada Supreme Court held,

> We agree that "equal consideration of all three possible forms of punishment, including death, is not required. Rather the proper question is whether a prospective jurors views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" Wainwright v. Witt, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 105 Sup. Ct. 844 (19985) (quoting Adams v. Texas, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 100 Sup. Ct. 2521 (1980).

The State provides no citation to the record establishing that Mr. Johnson has improperly or inaccurately cited Mr. Shink's statements. How can the State argue that these opinions did not substantially impair him for qualification in a first degree murder trial. The district court abused its discretion when it failed to grant the defense challenge for cause. Although the district court has broad discretion in rulings on challenges for cause, this amounted to abuse of discretion.

If appellate counsel had raised this issue on appeal, the result of the appeal would have resulted in reversal.

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 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

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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.

Juror Baker affirmed that a person convicted of murder should not be considered for parole. In the State's response they refuse to address Mr. Johnson's citation establishing that juror Baker was not qualified pursuant to Leonard and Wainwright. Additionally, Mr. Fink affirmed that **every** person convicted of intentional premeditated deliberate murder should receive the death penalty. The State cannot dispute this contention. In the State's answer, the State simply provides an opinion given by Mr. Fink, that life without parole maybe the worst possible punishment. However, the State provides no citation that Mr. Fink could consider all forms of punishment. In fact, none of the three jurors could consider all three forms of punishment. All three jurors answers established that they were substantially impaired in carrying out their duties. It was abuse of discretion for the district court to force Mr. Johnson to use almost half his peremptory challenges to remove jurors who were unqualified.

E. CUMULATIVE ERROR

Mr. Johnson is entitled to a new trial based upon a highly discriminatory and unconstitutional nature in which voir dire was conducted. First, there was an obvious pretextual removal of a qualified African American female. Second, the jury venire did not represent a cross section of the community. Additionally, the defense was forced to use peremptory challenges to remove three prospective jurors because the district court abused its discretion in denying the challenges for cause. This resulted in cumulative error. Therefore, Mr. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution. Mr. Johnson's trial jury was selected in violation of the due process and equal

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protection clause of the United States Constitution.

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.

Mr. Johnson received ineffective assistance of counsel for failure to object to the kidnapping charges. In the instant case, four young men were shot inside a home. There is no indication from the facts that the convictions for kidnapping were not incidental to the robbery. The facts suggest that the victims were the victims of robbery and murder, not kidnapping.

In Pascua v. Nevada, 122 Nev. 1001, 145 P.3d 1031 (2006), the Nevada Supreme Court clarified whether dual convictions can be obtained for kidnapping and murder when the convictions arise from a single course of conduct. Id. In Pascua, the Nevada Supreme Court held that a conviction for kidnapping and murder arising from the same course of conduct was proper under the test presented in Mendoza, Supra. The Nevada Supreme Court carefully considered the facts in Pascua's case and determined that the movement of the victim substantially exceeded that required to complete the associated crime 122 Nev. 1001, 1005.

The facts in Pascua's case are clearly different that the facts in the instant case. In Pascua, defendants entered the victim apartment to rob him of his casino sports book ticket valued at $44,000 dollars. The assailant hit the victim with the hammer and defendants made repeated demands for money. After handing over his wallet, the victim was forced to surrender the combination to his safe but denied possession of the sports book ticket. The victim was then dragged from the kitchen to his bed. During this eight hour period, the victim was repeatedly hit in the head with a hammer. The defendant's strangled and choked the victim and actually filled his nostrils and mouth with caulking. Id.

After refusing to divulge information surrounding the sports book ticket, the victim was moved and eventually murdered. The victim was moved away from the broken window in the kitchen in attempting to make it more difficult for his discovery. Additionally, the State contended that the victim had been tied down and the defendant's had climbed on top of the victim choking him and striking him with the hammer. Id. at 106.

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Pursuant to the unique facts enunciated in Pascua, the Nevada Supreme Court determined "[t]hus, the movement of Upson (the victim) could have been found by the jury to have had the independent purpose of torturing Upson into revealing the location of the sports book ticket" Id. The Nevada Supreme Court further reasoned, "[h]ence, the jury could have found that Upson's movement to the bed substantially exceeded that required to complete the associated crime, since it lessened his chances of being found or being able to escape while providing Pascua with greater opportunity to cause further harm to Upson" Id.

In the instant case, Pascua's facts do not resemble the facts enunciated in Johnson's trial. In fact, there is no evidence that the movement of the victim's substantially increased the risk of harm over and above that necessary to commit the crimes charged.

In the State's response, the State reiterates the graphic and brutal nature of the instant crimes. Mr. Johnson acknowledges the crime was brutal. However, nothing in the facts establishes that the victims were kidnapped and that their limited movement increased their risk of harm. Mr. Johnson received ineffective assistance of trial counsel for failure to file a motion to dismiss the kidnapping. Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the issue on appeal. In the instant case, the factual scenario demonstrates that any evidence of kidnapping was clearly incidental to the robbery and therefore, the kidnapping charge should have been dismissed.

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

This argument stands submitted.

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.

This argument stands submitted.

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 as to future dangerousness and whether a prisoner could kill a prison guard or a maintenance worker. (JT Day 1 pp. 70; ROA 11 pp. 2672).

In the State's response, they claim that the issue was meritless (State's Response pp. 76). The State claims that the prosecutor's questions were not objectionable. Additionally, the State claims that the words "intestinal fortitude" may have been used in an improper closing argument in Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), but they were just "two words" and were completely unrelated (State's Response pp. 76). In fact, the State's comments during voir dire mirrored the improper argument made in the capital case of Castillo v. State, Supra. In Castillo, 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.

In the instant case, the prosecutor appears to use the exact same tactics that were used in Castillo. The only difference is, the comments were directed to the jury during voir dire and not in closing argument. It is highly coincidental that the prosecutor would ask a potential juror about their "intestinal fortitude" to impose the death penalty and whether Mr. Johnson could have future dangerousness in prison when this was the exact same problematic comments considered in Castillo. If the comments were improper in Castillo, then they are improper in the instant case. The Nevada Supreme Court did not rule that "intestinal fortitude" were two simple words used in a lengthy closing argument. The Nevada Supreme Court expressed concern that the prosecutor had used this language. More importantly, the Nevada Supreme Court's ruling in Castillo occurred the same year as Mr. Johnson was indicted, but well before his jury trial.

Therefore, it was ineffective assistance of appellate counsel to fail to raise this issue on appeal in violation of Mr. Johnson's constitutional rights.

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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).

First, the State claims that the hearsay objection was unpreserved because it was not objected to at trial (State's Response pp. 77). Mr. Johnson recognizes that the hearsay was not objected to at trial. Mr. Johnson received ineffective assistance of trial and appellate counsel for failure to object and raise this issue on direct appeal. Mr. Johnson has informed this court in his supplemental brief that he complains that both his trial and appellate counsel were ineffective for numerous failures to object and raise issues.

The State claims "defendant fails to explain how the above statement was an admission of hearsay. The State fails to see what statement is being offered for the truth of the matter asserted" (State's Response pp. 78). The State further argues that Armstrong's statement was not used for the truth of the matter asserted and that Bryan's discussion with the police was relevant for the effect on leading Armstrong's voluntary statement as to who committed the crime (State's Response pp. 79). The State's claim is meritless. Often, when the State has violated the rules of hearsay, the State claims that the matter was not used for the truth of the matter asserted. Mr. Armstrong testified at trial. There was no need for Mr. Armstrong (the fourth suspect) to mention that Mr. Bryan Johnson made any comment to the police regarding who committed the crime.

In Crawford v. Washington, 541 U.S. 36, 124 Sup. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court determined that, 1) testimonial hearsay must be excluded unless the declarant is available for cross-examination at trial, or 2) if declarant is unavailable the statement was previously subjected to cross examination. Here, Mr. Armstrong's statements imply that Bryan Johnson is also Donte Johnson's accuser. A review of the transcript would openly suggest that Bryan Johnson would implicate Donte Johnson as the killer. Obviously, Mr. Armstong was

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concerned about his own credibility and used Bryan Johnson's statements to corroborate his testimony that Donte Johnson had committed the crime. Mr. Armstong was specifically referring to a conversation between Bryan Johnson and the police. Therefore, the statement would clearly be testimonial. Bryan Johnson was unavailable for cross-examination and there was never an opportunity to confront Bryan Johnson regarding these statements.

Bryan Johnson's comments were clearly used for the truth of the matter asserted. That is, Bryan Johnson knew that Donte Johnson was the killer. This directly corroborated Mr. Armstrong. It was ineffective assistance of trial and appellate counsel for failure to object and raise this issue on direct appeal in violation of the standards enunciated by the United States Supreme Court in Strickland v. Washington, Supra.

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). 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).

The State claims that neither of these individuals were receiving any benefit and therefore Mr. Johnson's argument is without merit. Mr. Johnson would specifically request an evidentiary hearing to provide evidence that the State did provide these individuals with benefits that were not

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forthcoming to Mr. Johnson.

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.

This argument stands submitted.

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

This argument stands submitted.

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

During opening argument, the prosecutor informed the jury that Sharla Severs had been informed that she must tell the truth and had been warned. The State argues that the prosecutor has a right to occasionally argue that a witness is lying. The State cites state authority for this proposition. However, the State fails to acknowledge that the Ninth Circuit has specifically warned prosecutors against this type of argument. In United States v. Combs, 379 F. 3d 564, 575 (9th Cir. 2004), the Ninth Circuit warned that a prosecutor was improperly vouching when the prosecutor implied that the agent would be fired for committing perjury. Here, the prosecutor specifically made the identical argument to the jury claiming that Ms. Severs had been told the

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definition of perjury and instructed that she must tell the truth. The State fails to consider the Ninth Circuit's warnings against these type of arguments

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

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).

The State acknowledges that the district court granted defense counsel's objection (State's Response pp. 84). However, Mr. Johnson specifically referenced the prosecutor's comments directly after the judge sustained "the golden rule" objection. The prosecutor explained that there should be "no doubt in anyone's mind" regarding the fear of the victims. In essence, the prosecutor completely ignored the district court's ruling sustaining defense counsel's objection. The prosecutor simply rephrased the same objectionable comment. The State utterly fails to address Mr. Johnson's citation to the record.

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).

In the State's response, they cite no legal authority for the proposition that blatant speculation is proper (State's Response pp. 85). Mr. Johnson cited legal authority holding that facts not introduced into evidence is improper. See, Agard v. Portuondo, 117 F. 3d 696, 711 (2nd Cir. 1977).

In the instant case, Mr. Johnson received ineffective assistance of counsel for failure to

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raise these issues on direct appeal. If these issues had been raised on direct appeal, the result of the direct appeal would have been different.

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

This argument stands submitted.

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.

This argument stands submitted.

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.

This argument stands submitted.

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.

This argument stands submitted.

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.

This argument stands submitted.

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

This argument stands submitted.

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

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This argument stands submitted.

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

This argument stands submitted.

XX. MR. JOHNSON IS ENTITLED TO AN EVIDENTIARY HEARING

This argument stands submitted.

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 2nd day of August, 2011.

Respectfully submitted by:

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EXHIBIT A

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DELBERT CHARLES COBB,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 50346

FILED

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APPEAL FROM JUDGMENT OF CONVICTION
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JENNIFER TOGLIATTI, PRESIDING

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

On October 17, 2002 Mr. Cobb was charged by way of Information with conspiracy to commit a crime, murder with use of a deadly weapon, and attempt murder with use of a deadly weapon (A.A. Vol 3 P.P. 363). An Initial Arraignment was held on October 23, 2002 (A.A. Vol 14 P.P. 2827). Mr. Cobb entered a plea of not guilty to these charges.

(A.A. Vol 14 P.P. 2828). On April 16, 2007 Mr. Cobb's jury trial began in front of the Honorable Jennifer Togliatti (A.A. Vol 14 P.P. 2855). The trial concluded on May 1, 2007 (A.A. Vol 14 P.P. 2862). The jury returned with verdicts of Count 1- Guilty of conspiracy to commit a crime, Count 2 - Guilty of First Degree Murder with use of a deadly weapon, Count 3 - Guilty of Attempt murder with use of a deadly weapon, Count 4 - Not Guilty (A.A. Vol 14 P.P. 2862). On May 2, 2007 the penalty phase commenced (A.A. Vol 14 P.P. 2863). The Penalty phase concluded on May 3, 2007 (A.A. Vol 14 P.P. 2864). The Jury returned a sentence of Life without the possibility of parole (A.A. Vol 14 P. P. 2864).

Mr. Cobb's sentencing was held on September 19, 2007 (A.A. Vol 14 P.P. 2868). Mr. Cobb was sentenced as follows: A $25.00 Administrative Assessment fee, submission to testing to determine genetic markers and pay a $150.00 DNA Analysis fee, as to count 1 to Clark County Detention Center (CCDC) for twelve (12) Months; as to count 2 sentenced to life in the Nevada Department of Corrections (NDC) without the possibility of parole, plus and equal and consecutive life in NDC without the possibility of parole for use of a deadly weapon, Concurrent with Count 1 and sentenced as to count 3 to a minimum of ninety six (96) months and a maximum of two hundred forty (240) months in NDC plus and equal and consecutive minimum of ninety six (96) months and a maximum of two hundred forty (240) months in NDC for use of a deadly weapon, concurrent with Count 2; with zero (0) days credit for time served (A.A. Vol 14 P.P. 2868).

The Judgement of Conviction was filed on September 27, 2007 (A.A. Vol 14 P.P. 2817). On October 8, 2007 Mr. Cobb filed a notice of appeal (A.A. Vol 14 P.P.2819-2820). (A.A. Vol. VIII, pp. 1868-1869).

STATEMENT OF FACTS

David Hollis was a juvenile probation officer supervising Mr. Cobb (A.A. Vol 9 pp. 1875). Mr. Hollis testified he was a previous member of a gang in 1976, in Los Angeles (A.A. Vol 9 pp. 1876). Mr. Hollis was in a "blood" gang from 1976-1982 (A.A. Vol 9 pp. 1976-1877). Mr. Hollis came on a football scholarship to UNLV, where he played football for three and a half years (A.A. Vol 9 pp. 1877). After a professional football career, Mr. Hollis became a youth parole officer (A.A. Vol 9 pp. 1878). He has been in that position for 10 years at the time of his testimony (A.A. Vol 9 pp. 1878). Mr. Hollis claimed to be knowledgeable about gang language and culture in Las Vegas (A.A. Vol 9 pp. 1878-1879).

In November/December of 1999, Mr. Hollis had a relationship with Mr. Cobb (A.A. Vol 9 pp.1879). Mr. Hollis had been in contact with Mr. Cobb and was attempting to steer him towards athletics (A.A. Vol 9 pp. 1880).

Mr. Hollis was familiar with the 28th Street gang (A.A. Vol 9 pp. 1885). Mr. Hollis confirmed that Mr. Cobb admitted to being a part of the 28th Street gang in 1999 (A.A. Vol 9 P.P. 1885). Mr. Hollis claimed Mr. Cobb admitted his moniker was "Shady" (A.A. Vol 9 pp. 1885). Mr. Hollis testified that gang members often patrol their neighborhood and question anyone who comes into their neighborhood about what gang they are connected with (A.A. Vol 9 pp. 1887-1889).

November 13, 1999, incident

On November 13, 1999, at approximately 11:30p.m., Officer Collin Jotz responded to a shooting (A.A. Vol 7 pp. 1433-1435). The shooting had occurred at the corner of Fremont and

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21st Street near a convenience store (A.A. Vol 7 pp. 1435). A Hispanic male was laying on his back in front of the convenience store door (A.A. Vol 7 pp. 1435). The Hispanic male was wearing a white jersey with the number 13 on it (A.A. Vol 7 pp. 1436). Officer Jotz realized the victim had traveled a short distance before collapsing where he was located (A.A. Vol 7 pp. 1438-1439). The victim had actually gone into the convenience store to ask someone to call for help (A.A. Vol 7 pp. 1439). The victim appeared to be in pain because he was gaging on his own blood from being shot in the throat (A.A. Vol 7 pp. 1442).

On November 13, 1999, Shanta Patel was working at the Quick Stop on Fremont Street at approximately 11:00 and 11:30 p.m, when a man entered the store bleeding and she called 911 (A.A. Vol 8 pp. 1479). The man appeared to be of Mexican decent and approximately 35-40 years of age.

Ms. Patel explained that the man a was wondering in the store as though he was going to purchase something rather than desperately running into the store for help claiming he'd been shot (A.A. Vol. 8 pp. 1485). In fact, a purchase was actually made (A.A. Col 8 pp. 1456).

On November 13, 1999, Juan Lopez, and his father Juan Lopez Martinez, were walking home after purchasing cigarettes at a store located at the intersection of Fremont and at 21st Street (A.A. Vol 1 pp. 39). Approximately one block from the store, Juan Lopez was stopped by persons in a white Astro van (A.A. Vol 1 pp. 41). The time was approximately 11:30 P.M. (Las Vegas Metropolitan Police Department (LVMPD) Officer's Report, Event # 991113-2636, 11-16-99). It was dark, and the lighting conditions in the area were poor (A.A. Vol 1 pp. 51).

Juan Lopez(the son) testified that he was able to identify two persons sitting in the front of the van, but was not able to determine their size, race or how they were dressed. (A.A. Vol 1 pp. 42). Someone in the van, asked Juan Lopez where he was from, which Juan Lopez understood to mean that he was being asked about his gang affiliation (A.A. Vol 1 pp. 43). In

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response, Juan Lopez identified himself as a member of the gang "Little Rascals." (A.A. Vol 1 pp. 44).

Shortly after responding, someone from inside the van began shooting at Juan Lopez.(A.A. Vol 1 pp. 44). Juan Lopez and Juan Lopez's father were shot several times (A.A. Vol 1 pp. 45-46).

At the hospital, Juan Lopez, Jr., was unable to give a recorded statement because he was under the influence of pain killers, which were prescribed for his injuries (A.A. Vol 10 pp. 2051). On February 8, 2000, Detective Messinar took Mr. Lopez's (Jr.) recorded statement while he was housed at a correctional facility in North Los Angeles (A.A. Vol 10 pp. 2053).

During trial, Mr. Lopez Jr., was arrested on a material witness warrant and forced to testify (A.A. Vol 8 pp. 1493). During direct examination of Mr. Lopez, he claimed to have difficulty remembering any of the events surrounds his father's death and his previous testimony. Mr. Lopez could not even recall giving a statement to the police (A.A. Vol 8 pp. 1495).

Mr. Juan Lopez admitted that he was incarcerated in a California prison at the time of his testimony (A.A. Vol 8 pp. 1491). Mr. Lopez was incarcerated for assault with a firearm; a parole violation (A.A. Vol 8 pp. 1491). Mr. Lopez could not recall whether he was in Las Vegas on November 13, 1999, but remembered he was in Las Vegas when his father died (A.A. Vol 8 pp. 1492).

Mr. Lopez remembered being shot in the face, neck, chest and leg (A.A. Vol 8 pp. 1496). Mr. Lopez claimed he did not remember much after being shot (A.A. vol 8 pp. 1497). Mr. Lopez could not recall providing an identification of the driver or passenger in the vehicle that was involved in the shooting (A.A. Vol 8 pp. 1498).

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Juan Lopez, Jr. survived his gunshot wounds, but Juan Lopez's father died two weeks after being shot. (A.A. Vol 1 pp. 18).

On November 28, 1999, an autopsy was performed upon the body of Juan Lopez, Sr. A bullet was removed from the body (A.A. Vol 7 pp. 1302). Juan Lopez, Sr., was 39 years of age. Mr. Lopez died as a result of homicide from a gunshot wound to the head (A.A. Vol 7 pp. 1317-1318). After being shot, medical procedures were used to provide Mr. Lopez the ability to breathe. However, he developed pneumonia (A.A. Vol 7 pp. 1320). Dr. Sheldon Greene determined the cause of death was ". . . pneumonia due to respiratory paralysis due to injury to the brain stem due to a gunshot which went back there and caused that injury." (A.A. Vol 7 pp. 1321).

Mr. James Krylo examined 12 cartridge cases recovered from the crime scene; ten were fired by the same firearm (A.A. Vol 10 pp. 2107). The other two cartridges were consistent with being fired by the same firearm but it was not conclusive (A.A. Vol 10 pp. 2108).

Mr. Cobb detailed the events leading up to the shooting of Mr. Lopez, Sr. and Jr. (A.A. Vol 11 pp. 2259). Mr. Cobb stated he was picked up in a white astro van by a friend with the moniker "Sniper" (A.A. Vol 11 pp. 2263). Also in the van was "Scrappy" (not Angela Orozco) (A.A. Vol pp.2263). And "Elmo"(A.A. Vol pp. 2263). The van pulled up to Mr. Lopez and "Sniper" asked him where he was from (A.A. Vol pp. 2264). Mr. Cobb was 16 years old at the time (A.A. Vol 11 pp 2267).

Mr. Cobb had not seen a rifle that night but then noticed that the rifle was out. Mr. Cobb had gotten out of the vehicle and was smoking marijuana when he observed Juan Lopez with a number 13 shirt running and shots were being fired (A.A. Vol 11 pp. 2268). Mr. Cobb denied shooting the gun (A.A. Vol pp. 2269).

Mr. Cobb's fingerprints were not located on any of the cartridges or bullets located at

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the crime scene (A.A. Vol 7 pp. 1423). Mr. Cobb admitted he was the only (mixed race) black individual in the van on November 13, 1999, when Mr. Lopez was killed. Mr. Cobb was in the passenger seat (A.A. Vol 11 pp. 2590). Mr. Snipes was Hispanic (A.A. Vol 11 pp. 2290). During Mr. Cobb's recorded statement, he explained, that the person named "Joe" was the actual shooter (A.A. Vol 10 pp. 2054). As a result of the interview with Mr. Cobb, detectives attempted to locate an interview "Joe" DeVora (A.A. Vol 10 pp. 2057).

December 16, 1999, incident

On December 16, 1999, Officer Angelique DePalma responded to a shooting at approximately 9:00 p.m. (A.A. Vol 8 pp. 1664). The shooting scene was located at approximately 21st Street from Washington (A.A. Vol 8 pp. 1665). Allegedly, the victim told Officer DePalma that the man who shot him was a black guy but he spoke Spanish (A.A. Vol 8 pp. 1668-1669). He further allegedly described the gun as a long gun, like a rifle (A.A. Vol 8 pp.1669). Thereafter, the victim lost consciousness (A.A. Vol 8 pp. 1669). The victim also was asked by Officer DePalma whether the shooter yelled any gang information and he said he did not he just walked up and shot him (A.A. Vol 8 pp. 1672).

Bryon Wilson was member of the 28th Street gang in December of 1999 (A.A. Vol 11 pp. 2234-2236). Byron Wilson is both black and Hispanic (A.A. Vol 11 pp. 2236). Mr. Wilson's moniker is "Mytay"(A.A. Vol 11 pp. 2236). Mr. Wilson indicated there were a number of 28th Street gang members that were of mixed race (A.A. Vol 11 pp. 2237).

Mr. John Grailer lived at 820 North 21st Street (A.A. Vol 8 pp. 1653). On December 16, 1999, Mr. Grailer heard a "pop, pop, pop" as his wife was getting ready to go to bed (A.A. Vol 8 pp.1655). Mr. Grailer went outside to investigate and noticed a young man laying in the road groaning (A.A. Vol 8 pp. 1655). The victim appeared to be of Hispanic descent (A.A. Vol 8 pp. 1659). The victim stated he wanted to get up and go see his girlfriend but he was unable to

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move (A.A. Vol 8 pp. 1659). When the victim's girlfriend showed up she was upset but Mr. Grailer did not notice whether she conversed with her boyfriend/victim (A.A. Vol 8 pp. 1661-1662).

On December 16, 1999, Jorge Contreras, was walking along 21st Street, just north of Kirk Avenue. approximately 9:19 P.M., Jorge Contreras was shot several times with a .22 rifle. (Id.) An officer at the scene testified that Jorge Contreras had said that the subject was a "... light-skinned black male that, he said the subject spoke Spanish to him and that the subject was on foot and approached him and shot him."

Enrique Contreras had a son, Jorge Contreras. Jorge had gone to work but was told to come home because he was ill with the flu (A.A. Vol 9 pp 1780-1782). Enrique said that his son had left work on the bus (A.A. Vol 9 pp. 1782). Jorge worked for Nathan's HotDog Stand on December 16, 1999 (A.A. Vol 9 pp. 1783).

On December 17, 1999, Enrique was advised that his son was in serious medical condition as result of gun shot wounds (A.A. Vol 9 pp. 1784-1785). Enrique denied that his son was involved in any gangs (A.A. Vol 9 pp. 1786).

Beatrice Hernandez was Jorge Contreras' girlfriend at the time of the shooting (A.A. Vol 9 pp. 1786). Beatrice received a phone call that Jorge had been shot and she rushed to the scene (A.A. Vol 9 pp.1795). When Beatrice arrived at the scene, Jorge was not there (A.A. Vol 9 pp.1796).

At trial, Beatrice testified that on one occasion, she saw Jorge speaking to a man and then questioned Jorge regarding the questions with the man. Beatrice testified that Jorge said that he was talking with "Shady" and that "Shady" wanted to know what gang he was from and he denied being involved with a gang (A.A. Vol 9 pp. 1792). Beatrice was permitted to testify that Shady was black (A.A. Vol 9 pp. 1793). Beatrice claimed that she had seen "Shady"

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graffiti on 28th Street (A.A. Vol 9 pp. 1813). She witnessed the graffiti approximately a year before the shooting (A.A. Vol 9 pp. 1813-1814). Beatrice noticed that "Shady" graffiti would be apparent and then it would be painted over and then it would be back up again all the way until Jorge died (A.A. Vol 9 pp. 1816). Over defense counsel's objection, Beatrice is permitted to state that she questioned Jorge about whether "Shady" had shot him. Beatrice claimed that Jorge's father was present in the hospital with her when this occurred (A.A. Vol 9 pp. 1801-1803).

A Winchester .22 rifle was found by Las Vegas Metropolitan Police Department detectives, on December 23, 1999, inside an apartment located at 4640 E. Charleston, No. 6.(apartment of Angela Orozco) (A.A. Vol 2 pp. 185-186). The Defendant was not a resident of the apartment (A.A. Vol 1 pp. 85).

On December 16, 1999, Crime Scene Analyst responded to the homicide scene (A.A. Vol 8 pp. 1692-1693). Thereafter, an autopsy is conducted on Jorge Contreras on January 18, 2000 (A.A. Vol 7 pp. 1323). The autopsy of Mr. Contreras revealed three gun shot wounds (A.A. Vol 7 pp. 1350). Mr. Contreras had received medical attention for his gun shot wounds for approximately a month before he passed (A.A. Vol 7 pp. 1350). The recovery of the bullet revealed a small caliber, either .22 or .25 bullet (A.A. Vol 7 pp. 1352).

Four cartridge cases were analyzed and were all consistent with being fired from the Winchester rifle. Three bullets from that crime scene were consistent with being fired from the rifle. There was no fingerprinting results associating Mr. Cobb to any of the weapons in this case.

Mr. Cobb denied being involved in this shooting that occurred on December 16, 1999 (A.A. Vol 11 pp. 2277) Mr. Cobb admitted that he went to middle school with Jorge Contreras but never had a dispute with him (A.A. Vol 11 pp. 2279).

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During trial, the jury was then read the sworn testimony of Angela Orozco (A.A. Vol 10 pp. 2008-2009). During the preliminary hearing, Ms. Orozco identified Mr. Cobb in court and stated that his nickname was "Shady" (A.A. Vol 10 pp. 2009). Ms. Orozco denied remembering a period of time when "Shady" and a man named "Drifter" came to her residence and brought a gun (A.A. Vol 10 pp. 2010). Ms. Orozco said that the bullets found by the police in the drawer were handed to her by her brother and that she put them there (A.A. Vol 10 pp. 2012). Ms. Orozco told the police that "Shady" had told her that he had left the gun at his house not at hers (A.A. Vol 10 pp. 2012). Ms. Orozco did remember a time when her older brother, Mr. Cobb and some other people were passing around some bullets (A.A. Vol 10 pp. 2015-2016). Ms. Orozco admitted that she really had not seen the men handling and passing the bullets around she had just heard that from her younger sister (A.A. Vol 10 pp. 2018-2019).

During trial, the sworn testimony of Ishmael Orozco's preliminary hearing transcript was read to the jury (A.A. Vol 10 pp. 1996) Ishmael was living at 4640 East Charleston, Apartment Number Six just before Christmas in 1999 (A.A. Vol 10 pp. 1997). Ishmael was the father of Angela and Juan Orozco (A.A. Vol 10 pp. 1996-1997). Ishmael denied he was asked permission to search his daughter's room for a rifle (A.A. Vol 10 pp. 1997). In fact, Ishmael stated that police suggested he would go to jail unless he agreed to sign a consent to search form (A.A. Vol 10 pp. 1997-1998). The guns located did not belong to anyone in his family (A.A. Vol 10 pp. 1999). Ishmael denied that signing the consent to search was voluntary. (A.A. Vol 10 pp. 2005). Ishmael believed that if he did not sign the consent to search form that either his children or himself would end up in jail (A.A. Vol 10 pp. 2006).

During the search of 4640 East Charleston, Apartment Number Six, the Orozco Apartment, the police located two rifles underneath a bed (A.A. Vol 10 pp. 1974). A consent to search the home had been provided by Ishmael Orozco (A.A. Vol 10 pp. 1975). The original

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information provided to authorities leading to the Charleston residence was from Juan Orozco (A.A. Vol 10 pp. 1976). Juan Orozco had the moniker "Happy" and Angela Orozco had the moniker "Scrappy" (A.A. Vol 10 pp. 1980). Delbert Cobb did not reside at the Orozco residence (A.A. Vol 10 pp. 1984). Police retained gang files on nine individuals named "Shady" one of which was identified as a Twenty Eighth Street (AA. Vol 8 pp. 1586). The Twenty Eighth Street "Shady" was identified as Delbert Cobb (A.A. Vol 8 pp. 1587).

Alfred Jones was incarcerated in prison for robbery at the time of his testimony (A.A. Vol 12 pp. 2441-2442). In 1999, he was part of the 28th Street gang (A.A. Vol 12 pp. 2442). Mr. Jones remembered that another person besides Mr. Cobb used the nickname "Shady" (A.A. Vol 12 pp. 2442). This person was African American and named "Chris"(A.A. Vol 12 pp. 2442-2443). Mr. Jones described the other "Shady" as a bigger man than Mr. Cobb (A.A. Vol 12 pp. 2443).

Mr. Bryon Wilson was recalled by the defense (A.A. Vol 12 pp. 2448). Mr. Wilson had known Mr. Cobb since fifth or sixth grade (A.A. Vol 12 pp. 2448). Mr. Wilson was aware of two other individuals beside Mr. Cobb who used the nickname "Shady" (A.A. Vol 12 pp. 2449). One of the other individuals was a dark skinned 28th Street gang member (A.A. Vol 12 pp. 2449). The other individual was also a 28th Street gang member (A.A. Vol 12 pp. 2449). Mr. Wilson said that the other two "Shady's" were about the same height and weight as Mr. Cobb but one was darker and one was lighter than Mr. Cobb (A.A. Vol 12 pp. 2451). One of the people using the moniker "Shady" was named "Chris" (A.A. Vol 12 pp. 2451).

Mr. Wilson also knew Mr. Cobb as "Foxy" (A.A. Vol 12 pp. 2452).

Delbert Cobb's father, Delbert Cobb, II, testified for the defense (A.A. Vol 12 pp. 2455-2456). Mr. Cobb, II, had worked for Ace cab company for almost 19 years (A.A. Vol 12 pp. 2456). Mr. Cobb said his son used the nickname "Shady" (A.A. Vol 12 pp. 2457). However, in

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grade school Mr. Cobb also used the moniker "Foxy" (A.A. Vol 12 pp. 2457).

Mr. Cobb began socializing with the 28th Street gang at approximately age 9 (A.A. Vol 11 pp. 2297). Mr. Cobb admitted he had told police he patrolled the neighborhood and confronted rival gang members (A.A. Vol 11 pp. 2300). Mr. Cobb denied ever owning a .22 caliber rifle but admitted possessing a .22 caliber rifle (A.A. Vol 11 pp. 2302). Mr. Cobb was unaware of any other 28th Street gang member who was black and named "Shady" (A.A. Vol 11 pp. 2309).

Detective Antonio Morales testified regarding his extensive knowledge working gang cases (A.A. Vol 8 pp. 1505-1507). Detective Morales explained that "Surenos and Nortenos" make up Hispanic gangs in the community (A.A. Vol 8 pp. 1510). The Twenty Eighth Street gang is a "Surenos" gang (A.A. Vol 8 pp. 1510-1511). Detective Morales described how members become gang members by being "jumped in" or "grand fathered in" (A.A. Vol 8 pp. 1518). Patrolling a neighborhood occurs when rival gang members patrol their own neighborhood looking for rival gang members (A.A. Vol 8 pp. 1524). Over defense counsel's continuing objection, the court permitted testimony that gang members have a responsibility in investigating rival members who come into their territory (A.A. Vol 8 pp. 1524-1525).

On December 18, 1999, detectives contacted Mr. Hollis in order to arrange a meeting with Mr. Cobb (A.A. Vol 9 pp. 1884). On December 22, 1999, Mr. Hollis was present with detective at Mr. Cobb's house when Mr. Cobb gave his recorded interviewed (A.A. Vol 9 pp. 1890). On December 22, 1999, officers obtained a butt stock plate recovered by Probation Officer Hollis (A.A. Vol 10 pp. 2081). After providing Mr. Cobb his Miranda rights, an interview was conducted with Mr. Cobb by Detective Batson (A.A. Vol 10 pp. 2082). On December 23, 1999, Detective Batson conducted a second interview with Mr. Cobb (A.A. Vol 10 pp. 2084).

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Dr. Martin Jankowski, a professor of Sociology at the University of California at Berkley, testified regarding his knowledge of gangs (A.A. Vol 11 pp. 2187-2196). Dr. Janaowski had researched gangs extensively (A.A. Vol 11 pp. 2196-2202). In fact, Dr. Jankowski wrote a book on gangs (A.A. Vol 11 pp. 2202). His book received a number of awards (A.A. Vol 11 pp. 2203).

Dr. Jankowski explained how the gangs share clothing and many other personal objects (A.A. Vol 11 pp. 2203-2204). They share guns, knives, and many other things (A.A. Vol 11 pp. 2204). Dr. Jankowski explained how gangs often purchase weapons with the gangs money and therefore it belongs to the gang rather than to an individual (A.A. Vol 11 pp. 2204).

Lourdes Nicholson was living with her son, Jose DeVora in November/December, 1999. (A.A. Vol 10 pp. 2045). Jose is also known as "Joe" (A.A. Vol 10 pp. 2046). Ms. Nicholson was upset that her 16 year old son, Jose had quit school and was getting into trouble. Ms. Nicholson threatened to send Jose to live with his grandmother in El Paso (A.A. Vol 10 pp. 2046-2047). Ms. Nicholson obtained a bus ticket for her son to go to El Paso (A.A. Vol 10 pp. 2048). As they arrived in El Paso on December 12, 1999, police contacted Ms. Nicholson and indicated they wanted to talk to Jose (A.A. Vol 10 pp. 2048).

Jose DeVora testified that in November/December, 1999, he was a member of the 28th Street gang (A.A. Vol 11 pp. 2218). Mr. DeVora admitted that guns were passed from person to person amongst members of the 28th Street gang (A.A. Vol 11 pp. 2220-2221). Mr. DeVora had never observed Mr. Cobb with any weapons in that time period. However, in his statement to the police, Mr. DeVora stated he had seen Mr. Cobb with a gun but testified that he was pressured by the police and that was lie (A.A. Vol 11 pp.2224-2227). Mr. DeVora denied being the shooter in the two homicides (A.A. Vol 11 pp. 2231).

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Delbert Cobb testified on his own behalf. In November/December 1999, Mr. Cobb was attending Desert Pines High School (A.A. Vol 11 pp. 2251). Mr. Cobb admitted he falsely accused Joe DeVora of being involved in the two killings because he knew he was out of town and could not get in trouble for it (A.A. Vol 11 pp. 2292).

On December 22, 1999, Mr. Hollis was present when Mr. Cobb was handcuffed. It appeared to Mr. Hollis that Delbert was very sick (A.A. Vol 9 pp. 1892). Mr. Hollis said Mr. Cobb hung his head and stated, "he just looked at me, just kind of put his head down. He said I was trying to do the best I could on parole, but if they didn't- - do anything if I didn't do what I had to do for the hood they were going to get me." (A.A. Vol 9 pp. 1892).

The following Bad Acts were introduced during Mr. Cobb's trial.

C. Bad Act of November 4, 1999

In November/December 1999, Mr. Cobb was attending Desert Pines High School (A.A. Vol 11 pp. 2251). In November of 1999, (prior to the shooting of Angel Melendez), there was an incident at Mr. Cobb's school (A.A. Vol 11 pp. 2251-2252). Mr. Cobb pulled into the parking lot of school with his friend Miguel (A.A. Vol 11 pp. 2252). There was a truck parked with a bunch of other guys hanging out (A.A. Vol 11 pp. 2252). One of the people in the truck told Mr. Cobb to move his vehicle believing if was their parking spot (A.A. Vol 11 pp. 2253). Mr. Cobb refused to move the vehicle (A.A. Vol 11 pp. 2253). An argument ensued but Mr. Cobb didn't think anything of it (A.A. Vol 11 pp. 2253). Later that day at school, in the bathroom, someone lunged at Mr. Cobb (A.A. Vol 11 pp. 2254). As a result, Mr. Cobb was injured and beaten up (A.A. Vol 11 pp. 2255). There were two or three attackers (A.A. Vol 11 pp. 2255-2256). Several days later, Mr. Cobb and a classmate were going home (A.A. Vol 11 pp. 2257) Mr. Cobb recognized the truck from the parking lot and it made him angry (A.A. Vol 11 pp. 2257). Mr. Cobb drove to Angela Orozco's house and Mr. Cobb obtained a rifle and got

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in the back of the car and drove back to where he had seen the truck (A.A. Vol 11 pp. 2258). Mr. Cobb admitted to going back and shooting at the truck approximately 13 times (A.A. Vol 11 pp. 2258). It was with the Remington rifle (A.A. Vol 11 pp. 2258-2259).

On November 4, 1999, Mr. Melendez was present at 21st and Ogden (A.A. Vol 7 pp. 1366). Mr. Melendez denied being a gang member at that time (A.A. Vol 7 pp. 1367). Mr. Melendez noticed a black individual approach and Mr. Melendez was told to get down (A.A. Vol 7 pp. 1369). Mr. Melendez heard the word "gang" (A.A. Vol 7 pp. 1369). Mr. Melendez heard a black man say the word "gang" and then heard firecracker sounds (A.A. Vol 7 pp. 1370). Mr. Melendez described the black man as dark skinned, 5'5 to 5'6, 150 lbs to 155 lbs (A.A. Vol 7 pp. 1371). Mr. Melendez heard five to eight firecracker sounds (A.A. Vol 7 pp. 1371).

Mr. Melendez had written a statement indicating that the black male had reached towards his pants pocket and then started shooting (A.A. Vol 7 pp. 1372). Mr. Melendez agreed he had picked an individual out of a six-pack line up, but that he "did it randomly" (A.A. Vol 7 pp. 1372-1373). Mr. Melendez indicated he was out on the street with his friends but none of them were gang members(A.A. Vol 7 pp. 1375-1376). Mr. Melendez also admitted he had talked with friends and based upon those discussions he had provided that information to the police (A.A. Vol 7 pp. 1376). Mr. Melendez did not observe the shooter but picked someone out of a line up because he felt pressured by the police (A.A. Vol 7 pp. 1377-1378). Mr. Melendez had told police approximately two times he did not remember who shot but he picked someone out of a line up just to relieve the pressure from the police (A.A. Vol 7 pp. 1377-1379).

Angel Melendez testified that he was currently incarcerated for armed robberies (A.A. Vol 7 pp. 1362-1364). Mr. Melendez had received a sentence of two(2) to seven (7) years plus

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an equal and consecutive two (2) to seven (7) years sentence (A.A. Vol 7 pp. 1364).

Detective William Mellis provided a six-pack line up to Angel Melendez (A.A. Vol 9 pp. 1941). Over the objection of defense counsel, Officer Mellis described a conversation with Mr. Melendez where he described that he and his four other friends came around or were at 147 North 21st Street and a black male came around the corner with a gun said something and began shooting (A.A. Vol 9 pp. 1935). Mr. Melendez described the shooter as a black male about 5'5 and about 115 pounds (A.A. Vol 9 pp. 1937). Mr. Melendez wrote on the six-pack that the person in the number 3 position was the person who shot at us (A.A. Vol 9 pp. 1946). Mr. Cobb was in position number 3 (A.A. Vol 9 pp. 1946).

Mr. James Krylo examined 13 cartridge cases from the November 4, 1999, incident (A.A. Vol 10 pp. 2082). One firearm fired all 13 cartridge cases (A.A. Vol 10 pp. 2105).

D. Bad Act of December 11, 1999

On December 11, 1999, Mr. Cobb was involved in an incident to which he plead guilty to (A.A., Vol. 11, pp. 2269-2270). Mr. Cobb was at a female friend's house with about five or six other people when he first observed Mr. Venegas (A.A. Vol 11 pp. 2270). There was a knock at the door and Mr. Venegas was there and Mr. Cobb confronted him (A.A. Vol 11 pp. 2273). One of the females had complained to Mr. Cobb that Mr. Venegas was an ex-boyfriend of one of the girls and he did not leave them alone. Mr. Cobb confronted Mr. Venegas because of this fact (A.A. Vol 11 pp. 2274). Mr. Venegas appeared drunk (A.A. Vol 11 pp. 2275). A quick fist fight developed and blows were exchanged (A.A. Vol 11 pp. 2275). Later on that evening, Mr. Venegas and a bunch of his friend were hanging out on the side of the apartments (A.A. Vol 11 pp. 2276). Mr. Venegas observed Mr. Cobb walk up to the van. Mr. Cobb grabbed the rifle and shot a couple of times (A.A. Vol 11 pp. 2276).

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I. MR. COBB IS ENTITLED TO A NEW TRIAL BASED UPON THE STATE PREEMPTING JURORS IN AN UNCONSTITUTIONAL MANNER IN VIOLATION OF BATSON V. KENTUCKY.

Defense counsel complained that the State had preempted Juror Number 639, Mrs. Dawson (A.A., Vol. 6, pp. 1263). The State also preempted Juror Number 884, Mrs. Gardener (an African American) (A.A., Vol. 6, pp. 1263). The defense complained the State had excluded the jurors 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. Cobb would contend he is a member of a cognizable racial group and the prosecutor did use peremptory challenges to remove members of Mr. Cobb's race. Defense counsel complained that only three minorities were left on the jury pool which included Juror Number 373, 744 and 821 (A.A., Vol. 6, pp. 1264). One juror was Asian, Cajun and Hispanic (A.A., Vol. 6, pp. 1264). Defense counsel further complained that Mr. Cobb was African American and Hispanic and now the African Americans had been excluded (A.A., Vol. 6, pp. 1264).

In response, the State claimed they excused Mrs. Dawson as she had a family member

charged in California and indicated that family member was treated unfairly (A.A., Vol. 6, pp. 1265). According to the State, that answer was inconsistent with her questionnaire(A.A., Vol. 6, pp. 1265).

Ms. Dawson testified:

Mr. Stanton:	Okay. Fair enough. And, Ms. Dawson. You indicated in your questionnaire a couple of questions that I asked as follows. And I apologize about the intrusiveness of these questions. You indicated to questions 28 and 29 about family members or close friends that had been arrested or charged with crimes. Do you remember that?
Prospective Juror Dawson:	Yes.
Mr. Stanton:	Were they close friends or family members to you?
Prospective Juror Dawson:	Yes.
Mt. Stanton:	Were those charges brought in the State of Nevada?
Prospective Juror Dawson:	No.
Mt. Stanton:	What state were they brought in, and how long ago was it?
Prospective Juror Dawson:	California, and I don't know how it's been that they were charged, but probably last year or the year before, or something like that.
Mr. Stanton:	Okay You indicated in the follow up question about that that you felt they were treated fairly.
Prospective Juror Dawson:	I was not directly involved in any kind of way. So from my understanding of the cases, yes.
Mr. Stanton:	Okay:
Prospective Juror Dawson:	From what I heard.
Mt. Stanton:	So somewhat from a distant perspective, from California, you hear facts and kind of gossip within family or friends about what happened? Is that fair?
Prospective Juror Dawson:	Yes.
Mt. Stanton:	And from that you feel that they were treated fairly?
Prospective Juror Dawson:	Yes.
Mr. Stanton:	Is the -
Prospective Juror Dawson:	For the crime that was
Mr. Stanton:	Okay. Is the person still being prosecuted?
Prospective Juror Dawson:	No, (indiscernible).
Mr. Stanton:	Pardon me?
Prospective Juror Dawson:	The time has been served.

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Mr. Stanton:	Okay. So that's resolved?
Prospective Juror Dawson:	Yes.
Mr. Stanton:	Is there anything out of that experience that sticks in your mind that makes you someone that would o be carrying over what you know, and your feelings. about that case, into this case if you were sat as a juror?
Prospective Juror Dawson:	No, because I don't know anything about it.(A.A. Vol, 5,pp. 900-902).

. . . .

The defense complained the State had not enunciated race neutral reasons and the court overruled the defense objection (A.A., Vol. 6, pp. 1267).

In the instant case, the State did not have a race neutral reason and it precluded Mr. Cobb from receiving a fair trial. The State also claimed one reason they preempted Mrs. Dawson as she made no eye contact (A.A., Vol. 6, pp. 1265). A review of Mrs. Dawson's testimony indicates she was consistent with her questionnaire. Mrs. Dawson indicated she believed her family member was treated fairly and she did not have any preconceived biases. Mrs. Dawson was one of the two African Americans in Mr. Cobb's jury pool.

The State also preempted Juror Number 884, Mrs. Gardener (an African American) (A.A., Vol. 6, pp. 1263).

Ms. Gardner testified :

Prospective Juror Gardner:	Yes.
Mr. DiGiacomo:	All right. Now approximately how old is your son?
Prospective Juror Gardner:	He's 26.
Mr. DiGiacomo:	26?
Prospective Juror Gardner:	And he's currently incarcerated here in Nevada, correct?
Prospective Juror Gardner:	Yes.
Mr. DiGiacomo:	And he was prosecuted by our office.- Is that fair?
Prospective Juror Gardner:	Yes.
Mr. digiacomo:	Okay.
Prospective Juror Gardner:	I believe so.

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Mr. DiGiacomo: How many times was he prosecuted by our office?

Prospective Juror Gardner: I think this will be the second time.

Mr. DiGiacomo: This will be the second time?

Prospective Juror Gardner: Um-hum.

THE COURT: Ms Carter, could you do me a favor? The microphone is up on the wall in front of the people in front of you, and my court recorder is nodding to me that she's having a hard time -- could you speak up a little?

Prospective Juror Gardner: Yes.

THE COURT: Thank you, ma'am.

Mr. DiGiacomo: I take it from your questionnaire that you felt like the treatment of your son by the system wasn't exactly fair?

Prospective Juror Gardner: No.

Mr. DiGiacomo: No, I'm wrong, or no, the treatment wasn't fair?

Prospective Juror Gardner: Yes, you're wrong.

Mr. DiGiacomo: Okay. So the system did treat him fairly?

Prospective Juror Gardner: Yes.

Mr. DiGiacomo: Okay. In response to your -- to questions about your opinion of various people in the system there was a response to the prosecutor's question. And I took your no comment as a no comment, like you didn't want to say anything wrong. Did I read that wrong?

Prospective Juror Gardner: What question was it, sir?

Mr. DiGiacomo: It was a question of what is your opinion of prosecutors, and your response was, no comment.

Prospective Juror Gardner: It all varies to me.

Mr. DiGiacomo: Okay.

Prospective Juror Gardner: Because I've been in and out of court so much with my son.

Mr. DiGiacomo: Did you -- let me rephrase this then. Did you feel that any one of the prosecutors that were involved in the prosecution of your son did not act fairly?

Prospective Juror Gardner: No, I just felt like the -- the defense -- what are they called, when you get --

Mr. DiGiacomo: The defense attorney is the one that represented your son.

Prospective Juror Gardner: Yeah. That they could've did a little more, answered more of his phone calls and stuff.

Mr. DiGiacomo: Okay.

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Prospective Juror Gardner:	And procrastinate.
Mr. DiGiacomo:	So you felt like he didn't get the best representation from the defense attorneys?
Prospective Juror Gardner:	Yeah, and we didn't have the money to pay for an attorney.
Mr. DiGiacomo:	Okay. But you're telling myself and the Court that you don't hold any resentment whatsoever to the District Attorney's Office for the prosecution of your son?
Prospective Juror Gardner:	Not at all. (A.A., Vol. 6, pp. 1019-1025).

A review of Ms. Gardner's and Ms. Dawson's testimony demonstrates the State had no race neutral reason to preempt either Mrs. Gardner or Mrs. Dawson. Mr. Cobb has presented a prima facie showing that the State has violated his equal protection rights by using peremptory challenges systematically to exclude members of the defendant's race from the jury. Neither, Mrs. Gardner and Mrs. Dawson's testimony demonstrates they should have been systematically excluded. (See Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986)). Mr. Cobb would respectfully request this Court reverse his convictions and grant him a new trial based. check + change this

II. MR. COBB IS ENTITLED TO A NEW TRIAL BASED UPON THE FAILURE TO PROPERLY PRESENT A CONSTITUTIONAL JURY VENIRE IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Defense counsel complained to the court that the racial make up of the venire panel was inadequate (A.A., Vol. 6, pp. 1267).

As a result of defense counsel's objection to the venire as whole and based upon defense's contention that the State had excluded jurors in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986), the court permitted Ms. Judy Roland to testify (A.A., Vol. 12, pp. 2486). Ms. Roland is a jury commissioner for Clark County (A.A., Vol. 12, pp. 2486).

The jurors are summoned by the Department of Motor Vehicles (A.A., Vol. 12, pp.

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2487). Currently there is Senate Bill 43 pending before the legislature which would permit an increase in the list of jurors through Nevada Power (A.A., Vol. 12, pp. 2487).

Defense counsel complained that the State had preempted Juror Number 639, Mrs. Dawson (A.A., Vol. 6, pp. 1263). The State also preempted Juror Number 884, Mrs. Gardener (both African Americans) (A.A., Vol. 6, pp. 1263). The defense complained the State had excluded the jurors in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986). The defense complained the State had not enunciated race neutral reasons and the court overruled the defense objection (A.A., Vol. 6, pp. 1267). [1]

In the instant case, not only was the jury venire apparently under represented with regard to minorities but specifically, the jury venire was insufficient in terms of the African American population be represented. More importantly, defense counsel complained that the remaining African Americans were excluded by the State (this issue was raised in argument number I).

Defense counsel specifically requested that a new jury venire be produced based upon defense counsel's objection to the original venire (A.A., Vol. 7, pp. 1342). Defense counsel complained that African Americans are a distinctive group and were excluded in the instant case (A.A., Vol. 7, pp. 1342-1343). Defense counsel complained that the original venire had only two African Americans (A.A., Vol. 7, pp. 1342).

In Williams v. State, 121 Nev. 934; 125 P. 3d 627 (2005), this Court considered a defendant's Sixth Amendment right to a fair cross section of the community in a venire panel. This Court expressed,

Williams is entitled to a venire selected from a fair cross section of the

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[1] The Venire has been described as a group of persons sent to the district court from which a jury was chosen. A jury pool is the entire group of persons called for jury service that day. See Williams v. State, 121 Nev. 934; 125 P. 3d 627 (2005).

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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, this 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. Cobb did not receive between 9-12 African Americans in his venire of approximately one hundred and twenty. Additionally, unlike Mr. Williams, Mr. Cobb had less African Americans in his venire panel by percentage. Additionally, as was noted in the previous argument, the State dismissed both of the African American jurors with peremptory challenges.

Mr. Cobb 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 n. 24. The United States Supreme Court reasoned that one of the remedies would be to discharge the venire and empanel an entirely new

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one. Id.

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

In Williams, this Court held,

> To demonstrate a prima facie violation of the fair-cross-section requirements, the defendant must show:"(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Williams 121 Nev. 934, 939, 940.

In the instant case, it is clear that African Americans are a distinctive group within our community. Next, it is clear that in Mr. Cobb's venire panel that African Americans were underrepresented. It is further clear that the State ensured that Mr. Cobb would have no African Americans on his jury by way of preempting the only two that were present out of the one hundred and twenty.

Mr. Cobb is also required to show that the under representation is due to systematic exclusion. In Williams, this Court held that, "there is no evidence to indicate that the jury selection process in Clark County systematically excludes African Americans from the jury process." However, in the instant case, the questioning of the jury commissioner establish that attempts are being made to use Nevada Power to locate prospective jurors as opposed to the Department of Motor Vehicles. Clearly, this remedy is based upon the fact that Nevada Power probably will bring forth more potential jurors and a better cross-section of minorities in our community. This establishes that our system recognizes our difficulties. Mr. Cobb is able to point at Mr. Williams and claim that this is proof that the jury venire panels in Clark County are

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often underrepresented. Mr. Cobb had a jury panel of one hundred and twenty people and not one African American on his trial jury.

This issue combined with the exclusion by the prosecutors of the only two African Americans resulted in a violation of Mr. Cobb's Sixth and Fourteenth Amendment rights. Mr. Cobb should not have been forced to trial with a non-African American jury. Defense counsel objected to he venire panel as a whole and the prosecution ensured that there would be no African American jurors.

III. MR. COBB IS ENTITLED TO A NEW TRIAL BASED UPON NRS 173.115 AND THE LACK OF A COMMON SCHEME OR PLAN CONNECTING THE CRIMES, THE REMOTENESS OF THE CRIMES AND THE UNFAIR PREJUDICIAL EFFECT OF TRYING BOTH CASES TOGETHER IN FRONT OF A SINGLE JURY.

Nevada law permits joinder of counts for three reasons. First, NRS §173.115.1 permits two or more offenses to be charged in the same information if the offenses are based "on the same act or transaction." Second, NRS §173.115.2 permits two or more offenses to be charged in the same information if the offenses are based "on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Third, this Court has indicated that if "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002), citing, Mitchell v. State, 105 Nev. 735, 782 P.2d 1340, (1989). Because of the considerable length of time between November 13, 1999, and December 16, 1999, the counts related to acts committed on those days cannot be reasonably considered to be part of "the same act or transaction." Therefore joinder under NRS §173.115.1 is clearly not justified.

When considering joinder under NRS §173.115.2, it is useful to distinguish the facts of the case at hand with the facts of a case for which this Court found joinder permissible. In

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Floyd, the defendant argued that counts related to the sexual assault of a woman at gunpoint inside an apartment and the subsequent shooting of five employees at a nearby supermarket should be severed. However, this Court found that "joinder was proper because the acts charged were at the very least 'connected together'." Floyd v. State, 42 P.3d 249, 254 (2002).

The Court explained that a connection existed because (1) the counts relating to the subsequent act began only fifteen minutes after the counts relating to the first act had ended, (2) the same firearm was used at both acts, and (3) the actions and statements made at the prior act were "relevant to the question of premeditation and deliberation" at the subsequent act. Id. But no such connection exists in the case at hand. All of the connections established in Floyd are not only absent, but are diametrically different.

First, if a connection between separate acts can be argued to exist because of their relative proximity in time, then it is reasonable to expect that the existence of such a connection is diminished as the length of time between the acts increases. A total of thirty-three days separated the events that occurred on November 13, 1999, from the events that occurred on December 16, 1999. So while a connection may still remain between two acts after only fifteen minutes, extending that time more than a month fold would seem to extinguish such a connection.

Second, though a connection may be argued to exist when the same firearm is used in different acts, it seems that any possibility of such a connection is lost when different firearms are used. In the case at hand, forensics reports suggest that a Remington .22 rifle was used on November 13, 1999, and a Winchester .22 rifle was used on December 16, 1999. Since different weapons were used, a connection does not exist.

However, the prosecution may argue that the separate acts may still be connected by the use of different weapons if a link can be established between the Defendant and both weapons.

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Based on available evidence, that linkage would likely depend on the vague statement from one of the residents of the apartment who told detectives that her sister, had told her, that the Defendant had told her, that he "... had a couple of guns ..., gun on him or at his house and he came over with a bag of bullets to my house and supposedly he brought the guns over to my house but I didn't know about them until [the] Gang Unit came over one day and found them underneath my bed." (A.A., Vol. 3, 391-425).

If it could be established that the sister's statement was acceptable evidence and not just hearsay, and if it could be established that the sister's statement was acceptable evidence and not just, and if it could be established that the Defendant did not supposedly bring the guns, but in fact brought the guns to the apartment, then perhaps there could be a link between the Defendant and the weapons. But because none of that has been established, such a link does not exist. Therefore, even the remote possibility that separate acts may still be connected by the use of different weapons, fails.

Third, the prosecution has not demonstrated any link between any alleged actions or statements made by the Defendant at either of the shooting incidents that would be "relevant to the question of premeditation and deliberation" of the other shooting incident.

It is difficult to imagine what else could connect together the acts that occurred on November 13, 1999 and December 16, 1999. The acts related to November 13, 1999, involved a vehicle, whereas, the acts related to December 16, 1999, did not. (PHT, 10/1/02 p.176; Id. at 110). The acts related to November 13, 1999, involved two or more persons in the vehicle, whereas, the acts related to December 16, 1999, involved only one pedestrian. (PHT, 10/1/02 p.176; Id. at 110). A Hispanic victim was queried in English, on November 13, 1999, whereas, a Hispanic victim was queried in Spanish, on December 16, 1999. The Defendant has voluntarily indicated that he was present, though not as a participant, on November 13, 1999,

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whereas, the Defendant has indicated that he did not have any involvement on December 16, 1999.

There is also no evidence of a common scheme or plan linking the acts that occurred on the separate dates. Though the prosecution had the opportunity to charge the Defendant with gang-related counts, they decided not to pursue any counts related to gang activity. Absent sufficient evidence to pursue such action, it would be difficult to reasonably argue that the acts were linked by a common gang-related scheme or gang- related plan. There is no justification for joinder under NRS §173.115.2 because the acts were not "connected together" and were not part of a "common scheme or plan."

Finally, this Court has stated that if "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed." Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002), citing, Mitchell v. State, 105 Nev. 735, 782 P.2d 1340, (1989). It would seem that the only evidence that might come close to being cross-admissible would be evidence of a connection between the Defendant and the weapons. But as previously discussed, the admissibility of that evidence is highly suspect. There is no other evidence for the counts related to acts occurring on November 13, 1999, that would be cross-admissible in evidence at a separate trial for the counts related to acts occurring on December 16, 1999. Therefore, none of the reasons that would justify joinder of the counts against the Defendant, exist.

The same reasons that make joinder of the counts inappropriate, make the severance of the same counts appropriate. The controlling state statute which describes relief from prejudicial joinder is NRS §174.165, which states in part,

> "[i]f it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts,

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grant a severance of defendant's or provide whatever other relief justice requires."

When counts are not related, "the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. If the court finds a likelihood that this may occur, severance should be granted." Floyd v. State, 118 Nev. 17, 42 P.3d 249 (2002), citing, People v. Bean, 46 Cal. 3d 919, 760 P.2d 996 (Cal. 1988).

The counts of each event are prejudicial in their nature and will be highly inflammatory to any jury. By joining the counts of each event, the State will be able to provide a circular argument, wherein the likelihood that the Defendant committed the offenses at one of the events is made more probable by the possibility that the Defendant committed the offenses at the other event.

There is nothing about the counts that so intricately connects them that makes severance improper. The disparity in the evidence between the counts relating to the events of November 13, 1999, and December 16, 1999, together with the inadmissibility of this evidence at separate trials, caused extreme prejudice to the Defendant and is "... so manifestly prejudicial that it outweighs the dominant concern with judicial economy." (See, United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980)). A jury could not reasonably be expected to compartmentalize the evidence and moreover, there are no curative instructions which would address the prejudice raised by the admission of the evidence against the Defendant. Therefore, severance of the counts is warranted.

There was little if any justification for joinder of the counts associated with the events of November 13, 1999, with those associated with the events of December 16, 1999. For the same

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reasons that joinder of the counts was inappropriate, severance of the same counts was crucially appropriate.

Although the State may contend the jury did not find Mr. Cobb guilty of this crime and therefore it is harmless. Mr. Cobb would disagree. This information was extremely prejudicial and should not have been admitted into Mr. Cobb's trial. Mr. Cobb had an opportunity to confront the witnesses against him. In presenting this inadmissible hearsay evidence prohibited Mr. Cobb his constitutional rights of Confrontation and cross-examination. Based on the foregoing, Mr. Cobb would respectfully request he be granted a new trial.

IV. THE DISTRICT COURT ERRED IN PERMITTING EVIDENCE OF INADMISSABLE BAD ACTS.

On April 20, 2004, the State filed a Notice of Motion and Motion to Admit Evidence of Other Crimes (A.A., Vol. 4, 441-460). On April 26, 2004, Mr. Cobb filed his Response (A.A., Vol. 4, 461-464).

The State was permitted to introduce two prejudicial bad acts against Mr. Cobb. Although Mr. Cobb plead guilty to both bad acts, they should have been excluded as their probative value did not outweigh the prejudicial effect.

A. The Attempted Murder of Angel Melendez

The State was permitted to introduce the following bad act information regarding this incident. Mr. Cobb plead guilty to Two Counts of Attempted Murder with Use of a Deadly Weapon (A.A., Vol. 3, 449-458).

On November 4, 1999, Mr. Melendez was present at 21st and Ogden (A.A. Vol 7 pp. 1366). Mr. Melendez denied being a gang member at that time A.A. Vol 7 pp. 1367). Mr. Melendez noticed a black individual approach and Mr. Melendez was told to get down (A.A. Vol 7 pp. 1369). Mr. Melendez heard a black man say the word "gang" and then heard

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firecracker sounds (A.A. Vol 7 pp. 1370). Mr. Melendez described the black man as dark skinned, 5'5 to 5'6, 150 lbs to 155 lbs (A.A. Vol 7 pp. 1371). Mr. Melendez heard five to eight firecracker sounds (A.A. Vol 7 pp. 1371). Mr. Melendez had written a statement indicating that the black male had reached towards his pants pocket and then started shooting (A.A. Vol 7 pp. 1372). Mr. Melendez agreed he had picked an individual out of a six-pack line up, but that he "did it randomly" (A.A. Vol 7 pp. 1372-1373). Mr. Melendez indicated he was out on the street with his friends but none of them were gang members (A.A. Vol 7 pp. 1375-1376). Mr. Melendez also admitted he had talked with friends and based upon those discussions he had provided that information to the police (A.A. Vol 7 pp. 1376). Mr. Melendez did not observe the shooter but picked someone out of a line up because he felt pressured by the police (105-106). Mr. Melendez had told police approximately two times he did not remember who shot but he picked someone out of a line up just to relieve the pressure from the police (A.A. Vol 7 pp. 1377-1378).

In November/December 1999, Mr. Cobb was attending Desert Pines High School (A.A. Vol 11 pp.2257). In November of 1999, prior to the shooting of Angel Melendez, there was an incident at Mr. Cobb's school (A.A. Vol 11 pp. 2251-2252). Mr. Cobb pulled into the parking lot of school with his friend Miguel (A.A. Vol pp. 2252. There was a truck parked with a bunch of other guys hanging out (A.A. Vol 11 pp. 2252).. One of the people in the truck told Mr. Cobb to move his vehicle believing that was their parking spot (A.A. Vol 11 pp. 2253). Mr. Cobb refused to move the vehicle (A.A. Vol 11 pp. 2253). An argument ensued but Mr. Cobb didn't think anything of it (A.A. Vol 11 pp. 2253). Later that day at school, at the bathroom, someone lunged at Mr. Cobb (A.A. Vol 11 pp. 2254). As a result, Mr. Cobb was injured and beaten up (A.A. Vol 11 pp. 2255). There were two or three attackers (A.A. Vol 11 pp. 2255-2256). Several days later, Mr. Cobb and a classmate were going home (A.A. Vol 11

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pp. 2257) Mr. Cobb recognized the truck from the parking lot and it made him angry (A.A. Vol 11 pp. 2257). Mr. Cobb drove to Angela Orozco's house and Mr. Cobb obtained a rifle and got in the back of the car and drove back to where he had seen the truck (A.A. Vol 11 pp. 2258). Mr. Cobb admitted to going back and shooting up the truck shooting approximately 13 times (A.A. Vol 11 pp. 2258). It was with the Remington rifle (A.A. Vol 11 pp. 2258-2259). That incident occurred November 4, 1999.

B. The Attempted Murder of Carlos Venegas

On December 11, 1999, detectives responded to the 500 block of 28th Street with regard to a gang related shooting (A.A. Vol 8 pp. 1609). An individual had been shot in the mouth by perpetrators in a white van (A.A. Vol 8 pp. 1609).

On December 11, 1999, Mr. Cobb was involved in an incident to which he plead guilty to (142-143). Mr. Cobb was at a female friend's house with about five or six other people when he first observed Mr. Venegas (1430. There was a knock at the door and Mr. Venegas was there and Mr. Cobb confronted him (146). One of the females had complained to Mr. Cobb that Mr. Venegas was an ex-boyfriend of one of the girls and he did not leave them alone. Mr. Cobb confronted Mr. Venegas because of this fact (147). Mr. Venegas appeared drunk (147). A quick fist fight developed and blows were exchanged (148). Later on that evening, Mr. Venegas and a bunch of his friend were hanging out on the side of the apartments (148). Mr. Venegas observed Mr. Cobb walk up to the van. Mr. Cobb grabbed the rifle and shot a couple of times (149).

In the instant case, the State presented the above outlined bad acts against Mr. Cobb. The State held the necessary hearings and the district court found the bad acts would be admissible against Mr. Cobb.

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to

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prove the character of a person in order to show that the acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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

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

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

In presenting these acts the State portrayed Mr. Cobb as someone of bad character. These acts were clearly prejudicial and should have been excluded as they only showed that Mr. Cobb is someone of bad character.

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V. THE DISTRICT COURT ERRED IN PERMITTED THE STATE TO PRESENT THE PRELIMINARY HEARING OF ANGELA OROZCO.

At the preliminary hearing, Angela Orozco. Juan Orozco refused to testify and was held in contempt.

On November 27, 2006, the State filed a Motion to Admit the Preliminary Hearing Testimony of Angela (A.A., Vol. 4, pp. 663-667). At the time of trial, Angela Orozco was not able to be located.

Mr. Cobb would contend Ms. Orozco's preliminary hearing transcripts should not have been read to the jury as Mr. Cobb was not given an opportunity to fully cross-examine the witnesses against him.

Clark County District Attorney Investigator, William Faulkner testified, he had attempted to find an individual named Angela Orozco (189). Mr. Faulkner came into contact once with Ms. Orozco and asked her to come to a pre-trial conference. She was not uncooperative but did seem hesitant (190). Mr. Faulkner testified he made several attempts to contact Ms. Orozco and attempted to serve her a subpoena (192-193). Mr. Faulkner was unable to locate Ms. Orozco even after attempting to show pictures around her last known residence (192-193).

Mr. Cobb would contend the State's effort to locate Ms. Orozco was not sufficient. Mr. Faulkner relayed she was not uncooperative but did seem hesitant. Mr. Cobb would contend it was incumbent on the State to locate Ms. Orozco. In failing to locate Ms. Orozco and permitting her preliminary hearing transcripts to be read to the jury denied Mr. Cobb his constitutional right to confrontation.

The United States Constitution guarantees a fair trial through th Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth

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Amendment, including the confrontation clause:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the assistance of counsel for the defense. See, United States Constitution, Amendment Six.

In, Cruz v. New York, 107 S.Ct. 1714 (1987), at 1717; the United States Supreme Court held that, "[T]he confrontation clause of the Sixth Amendment guarantees the right of a criminal defendant to be confronted with the witnesses against him." The United States Supreme Court further stated, "[w]e have held that guarantee, extended against the states by the Fourteenth Amendment, includes the right to cross-examine witnesses." See, Pointer v. Texas, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). In the instant case, it is Mr. Cobbs's contention in admitting Ms. Orozco's preliminary hearing transcript, denied him his constitutional right to confront and cross-examine the witnesses against him.

VI. MR. COBB IS ENTITLED TO A NEW TRIAL BASED UPON INADMISSABLE HEARSAY IN VIOLATION OF THE UNITED STATES CONSTITUTION.

The district court erred by permitting several inadmissible hearsay statements throughout Mr. Cobb's trial. The following issues of hearsay were extensively litigated in the pretrial phases of Mr. Cobb's case.

A. Brief Statement of Case regarding the Pre-Trial Motions regarding Hearsay Statements.

On March 25, 2004, Mr. Cobb filed a Motion in Limine to Exclude Hearsay Statements. On April 9, 2004 the State filed their Opposition. On June 14, 2004, Mr. Cobb filed his Supplement to the Motion in Limine to Exclude Hearsay Statements. Thereafter, the Court ordered an evidentiary hearing be held regarding the Motions.

On May 16, 2005 the evidentiary hearing was held. During the evidentiary hearing,

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Doctor Nathan Ozobia testified as a witness for the defense. Ms. Beatrice Hernandez (victim Jorge Contreas girlfriend) testified for the State. At the conclusion of the evidentiary hearing, the Court requested a written brief on the hearsay matters.

Pursuant to the court's order, on June 28, 2005, Mr. Cobb filed his Supplemental Brief discussing the issues of hearsay testimony. On August 1, 2005 the State responded. On August 18, 2005, Mr. Cobb filed his reply brief regarding the hearsay statements. On August 22, 2005, arguments were heard by the court. Thereafter, the court took the matter under advisement. On November 14, 2005, an Order was filed.

On October 18, 2006, the State filed a Notice of Motion and Motion for Leave to Reconsider and Motion to Reconsider Admissibility of Hearsay Statement. On October 30, 2006, Mr. Cobb filed his Opposition to Motion to Reconsider Admissibility of Hearsay Statement. On December 4, 2006, the Court granted the State's Motion to Reconsider Admissibility of hearsay statements. The following instances of hearsay were presented during Mr. Cobb's trial. Mr. Cobb will address each instance below:

A) JORGE CONTRERAS'S STATEMENT TO MS. HERNANDEZ THAT HE ALLEGEDLY WAS CONTACTED BY A PERSON IDENTIFIED AS "SHADY".

On May 16, 2005, Jorge's girlfriend Beatrice gave the following testimony.

> Yes, I was walking to pick up my sister and I saw George talking to some guy down the street, about three blocks down from me, and he walked in his car and left before I met George. So I asked him, "What was that all about?" And he said "Don't worry about it. That was "- - he referred to him as Shady. (Evidentiary hearing 5/16/05 p. 44, l. 8-14).

During trial the district court permitted Ms. Hernandez to testify:

Q. And you turned the corner. How far would you say you were from George when you turned the corner?
A. About two, three blocks down.
Q. Two, three blocks down? And did you immediately recognize that it was George --

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A. Yes.
Q. -- having this conversation? Did you recognize the other individual that he was talking to?
A. No.
Q. Did you see anything associated with this other individual that he was talking to?
A. I -- as soon as I approached George, the other individual got in the car and left.
Q. Do you remember anything about the description from your mind as to what this person looked like?
A. No.
Q. Okay. Once this person got in the car and left, did you have a conversation with George?
A. Yes.
Q. Okay. And can you explain to the ladies and gentlemen of this jury how that conversation began?
A. Yes. I asked George what that was all about. He said that was Shady, and he wanted to know what gang I was from. I said nowhere. And that was -- that was it.
Q. Okay. Let me stop for just a second. He said to you that that was Shady?
A. Yes. (A.A. Vol. 9, pp. 47-49).

The district court erred as Ms. Hernandez should not have been able to testify regarding "Shady".

NRS §51.085 (Nevada's present sense impression statute) states, "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule. The Court addressed the "present sense impression" exception in Browne v. Nevada, 113 Nev. 305, 312 (1997).

In Browne the Court held, "The policy for admitting statements under this exception is that the statement is more trustworthy if made contemporaneously with the event described. Narciso v. State, 446 F. Supp. 252, 285 (E.D. Mich. 1977). (emphasis added). Further this Court in Bemis v. Edwards, 45 F.3d 1369, 1372, (1995), addressed the applicability of the "present sense impression" exception noting "to qualify under either exception, an out-of-court

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statement must be nearly contemporaneous with the incident described and made with little chance for reflection."

Here, Jorge's alleged comments to Beatrice does not qualify as a "present sense impression" under NRS §51.085. Beatrice, by her own admission states that she saw Jorge from three blocks away. (emphasis added). Therefore, Beatrice must have walked up to three blocks prior to any discussions with Jorge. Walking three blocks takes time. Any statements made to Beatrice could not have been contemporaneous or immediately thereafter. Because it took time for Beatrice to walk to Jorge, and because Jorge's statements to Beatrice were "not" contemporaneous to the event described, any alleged statements made by Jorge must be considered inadmissable hearsay.

B) JORGE CONTRERAS'S ALLEGED COMMUNICATIONS BY POINTING TO HIS FATHER AND MS. HERNANDEZ TO TESTIFY THAT THE PERPETRATOR WAS SHADY.

In the pretrial motions, the State presented four arguments to the district court in order to admit the non-verbal statements by Jorge to Beatrice and his father while in the hospital. 1) Jorge's statement was non-testimonial; 2) the statement was part of an excited utterance; 3)the statement was part of a dying declaration, and 4), the statement is still admissible under the residual hearsay exception as the trustworthiness of a dying declaration is still present.

Ms. Hernandez was permitted to testify:

Q. Okay. Did there come a point in time -- well, let me ask you this. This conversation you had with him about who shot him --
A. Yes.
Q. -- what prompted the conversation?
A. His friends were watching him from the glass.
Q. His friends were watching him from the glass?
A. Yes. And they wanted to come in. His father wouldn't -- didn't want anybody else in the room, and George waved them in, and his father said I don't want anybody else in this room –

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Mr. Whipple:	Judge, I'm going to object to hearsay to what the father said.
Mr. DiGiacomo:	Not offering it for the truth of the matter asserted.
The Court:	Okay. I'm going to allow the witness' answer up until this point to stand and then continue.
Mr. DiGiacomo:	Thank you.

Mr. DiGiacomo:

Q.	Did he say the reason why he didn't want anyone else in this room?
A.	I -- I didn't –
Q.	Okay. Then what did you say?
A.	I said Shady? Did Shady do this to you?
Q.	And what was George's reaction to you saying that?
A.	He pointed at me.
Q.	He stared pointing at you?
A.	Yes (A.A., Vol. 9, pp.1803).

The district court committed error. Ms. Hernandez should not have been permitted to present to testify as to what Jorge told his father. This inadmissible hearsay evidence. In admitting this evidence it deprived Mr. Cobb of his right to cross-examination, in violation of his right to "actual" confrontation of the witnesses against him under the Nevada and Federal Constitution. Mr. Cobb will outline all the State's contentions to demonstrate this inadmissible hearsay evidence should not have been presented at trial.

1) Jorge's statement was testimonial;

First, the State argued in their pretrial motions that this statement is not testimonial and therefore, the Crawford v. Washington, 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004), holding would not apply.

Mr. Cobb would contend the statement of hte deceased in this case was made after an investigation was initiated and Jorge Contreras could "reasonably expect [the statement] to be used as prosecutorial." Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004). Therefore, the statement is testimonial in nature, unreliable and therefore, inadmissible pursuant

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to Crawford. The district court erred in permitting this inadmissible hearsay.

The 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 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. The statement Jorge made to Beatrice and her father were testimonial.

In the State's pre-trial motions they cite Harkness v. State, 122 Nev. Adv. Rep. 84; 143 P.3d 706; (2006), and Mr. Cobb would contend the State's argument is misplaced and Jorge's statement was non-testimonial. The opinion states in part:

> We now take the opportunity to further refine this rule by presenting a nonexhaustive list of factors for courts to consider in determining whether a statement is testimonial: (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question (e.g., whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events made in a more formal setting sometime after the exigency had ended. No one factor is necessarily dispositive, and no one factor carries more weight than another. These factors will assist courts in ascertaining the relevant facts surrounding the circumstances of a hearsay statement in order to determine its testimonial nature. Harkness v. State, 122 Nev. Adv. Rep. 84; 143 P.3d 706; (2006).

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In Harkins the victim had been shot, went to a neighbor to have them call police, offering statement of who shot him without inquiry, and was in an emergency because 911 was called and he was bleeding to death. Harkins v. State, 122 Nev. Adv. Rep. 84; 143 P.3d 706; (2006). The situation in Harkins is quite different from what is now before the Court. Here, the facts continue to favor the Defendant's position that the statement was testimonial. The first factor, to whom the statement was made, is neutral. Though Beatrice is an acquaintance of Jorge, she acted as an agent of the government when she immediately called the homicide detectives to inform them that "Shady" shot Jorge. As this Court is well aware, the police regularly ask witnesses, and friends to contact them if they learn anything, in short to act as their agents. The second factor, the statement being spontaneous or in response to a question, sides completely with the defendant. Beatrice's father asked Jorge, "So who did this to you?" followed by Beatrice asking, "Shady? Was it Shady that did this?" Jorge clearly made this statement in response to these questions.

The third factor, the purpose of the statement, was not for the purpose of providing assistance in an emergency, it was in response to a question intending to gather evidence. The shooting happened more than two weeks prior, and Jorge was safely in the hospital. Additionally, Beatrice's actions confirm her intent of the question to gather evidence because she immediately called the police to tell them "Shady" shot Jorge. This factor also sides with the Defendant.

The fourth factor, whether the statement was during an emergency, or in a more formal setting, sides with the Defendant. The emergency was long since over. The setting in the hospital was as formal as could be expected for a hospitalized patient. The police even had a formal meeting with Jorge earlier that morning in the hospital. None of these factors are dispositive, and no one factor carries more weight than the other. Harkins v. State, 122 Nev.

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Adv. Rep. 84; 143 P.3d 706; (2006). Therefore, because one of the factors is neutral, and the other three weigh in favor of the Defendant, the statements must be considered testimonial, and therefore inadmissible in order to protect Defendant Cobb's constitutional rights of Confrontation and cross-examination.

2) The Statement was part of an excited utterance;

Addressing the question as to whether Jorge's statement was an excited utterance, the State claimed that Jorge had no time to reflect and fabricate his response.

Hearing the name "Shady" is not excitable in the least. Additionally, because homicide detectives had been there previously, Jorge had plenty of time to reflect and fabricate a response. The identification came nearly two weeks after the shooting, not a matter of minutes or hours.

3) The Statement was a dying declaration;

A communication made almost a month after being injured can not be a dying declaration. The State cited to Bishop v. State, 92 Nev. 510, 554 P.2d 266; (1976), to support their proposition of a dying declaration exception. In Bishop, the dying declaration was made two (2) days after injury. Here, it is almost a month! The State was unable to cite any case law to support their position that a person can believe that death is imminent a "month" after an injury. The dying declaration exception is found at NRS §51.335, where it states "statements made by a declarant while believing that his death was imminent . ." (emphasis added).

Jorge must have felt that his death was imminent for a full month after his injury. In Bishop,92 Nev. 510, 554 P.2d 266; (1976), this Court clarified NRS §51.335 stating, "the declarant subjectively senses impending death without any hope of recovery, then there is present the vibrant requisite which the law demands. ." Id at 518. Here, the State's explanation of the dying declaration exception can not be accepted. Here, testimony of Beatrice Hernandez

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showed that the victim seemed to be aware only of the shot to his leg and was "not" aware of the fact that he had been shot in the head. Lastly, any of the alleged statements of impending death by the declarant are simply not supported by the record and they should not have been admitted.

The State assumes (in pre-trial motions) that because noone had told Jorge that he was going to live that Jorge believed his death was imminent. However, on January 3, 2000, Jorge awoke from a comma. No one had told him they thought he was not going to make it. Further, a few days later Jorge was moved to rehabilitation, dead and dying people don't need rehabilitation. Both Jorge and Beatrice thought Jorge was going to make it (A.A, Vol. 9, pp. 1804-1805). Most importantly, while Jorge was speaking to Beatrice and his father, nothing gave Jorge the impression his death was imminent, Jorge wanted to spend time with his friends. The State carries the burden of proving Jorge was in fear of his imminent death for the statement to be admissible, and the State has failed to do so. It appears Jorge was getting better, not dying. Coming out of a coma is considered to be a good sign, not a forebearer of imminent death. This was not a dying declaration and should not have been admitted.

4) The Statement is admissible under the residual hearsay exception as the trustworthiness of a dying declaration.

The State may contend the statements may be admitted under NRS §51.315 must also fail. As NRS 51.315 is clearly outlined by this Court in Maresca v. Nevada, 103 Nev. 669, 748 P.2d 3, (1987), held:

> We have previously held that a statement could be admitted under NRS 51.315 where the person making the statement had no involvement with the police, the defendant, or the victims; where neither the declarants nor the police had any apparent motive to lie; where the declarants were unavailable for trial; and where the statement, in its nature, was of a relatively simple kind which could be recorded with little prospect of later misinterpretation.

Here, the facts violate the parameters of NRS §51 .315. First, the declarant had an

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involvement with the defendant. The State has already acknowledged the fact that Jorge and Shady met at least five to six months prior to December 1999. This involvement violates the first prong of NRS 51.315. Second, the alleged communication between the declarant and the witnesses was "not" of a relatively simple kind. Here, Jorge was "not" in his normal state of mind. Dr. Ozobia testified that Jorge was heavily medicated and under stress and trauma (A.A., Vol. 3, pp. 510). Additionally, no matter how close Jorge was to his girlfriend and his father, they could not read his mind. Jorge did not communicate by talking to Beatrice or his father. Rather, there was alleged pointing and subjective interpretations by a third party. This third party interpretation is not the "simple kind of recorded" communication that is identified by the Court. Maresca v. Nevada, 103 Nev. 669, 748 P.2d 3, (1987).

Mr. Cobb's position is that any alleged statements made to Beatrice from Jorge do not qualify because Jorge knew Shady and also due to the medical condition of Jorge and the inherent bias of Beatrice. Beatrice testified for the first time, on May 16, 2005, that during the time Jorge was in rehabilitation, Jorge had told her who had - shot him. Beatrice admitted that although she knew who had shot Jorge, that she never told her parents. (5/16/05 Evidentiary Hearing, p. 60, l. 22-25). In fact, Beatrice summarized that she never told anybody that Jorge had told her who the shooter was. (5/16/05 Evidentiary Hearing, p. 60, l. 14). Finally, when Beatrice testified at Preliminary Hearing apparently she did not find it important to tell any other person who shot her boyfriend Jorge. (5/16/05 Evidentiary Hearing, p. 70). Clearly, to now allow this questionable evidence to "now" come before the finder of fact would be improper. This speculative, questionable evidence does not fit within the parameters of NRS § 51.315 and should be denied as questionable hearsay testimony.

The district court erred in permitting the above outlined instances of hearsay. Permitting these hearsay statements denied Mr. Cobb his right to confrontation with the

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witnesses against him.

CONCLUSION

Therefore, based upon the arguments herein, Mr. Cobb would respectfully request that this Court grant him a new trial, based upon the fact that defendant did not receive a fair trial as afforded by the United States Constitution's Amendments.

DATED this 16 day of February, 2009.

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CERTIFICATE OF COMPLIANCE

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

DATED this 10 day of February, 2008.

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 10 day of February, 2008, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S OPENING BRIEF**, addressed to:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

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

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

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APPELLANT'S APPENDIX TO THE OPENING BRIEF
VOLUME XXXVII

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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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