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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 29, 2012

RECORDER'S TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO PLACE ONF CALENDAR TO RESCHEDULE EVIDENTIARY HEARING

APPEARANCES:

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

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Monday, October 29, 2012 at 8:37 a.m.

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

THE COURT: Good morning.

MR. ORAM: Good morning, Your Honor.

MR. OWENS: Good morning, Judge.

MR. ORAM: Christopher Oram on behalf of Mr. Johnson.

MR. OWENS: Steve Owens for the State.

THE COURT: Okay. So, it's on calendar to reschedule the evidentiary hearing. Ms. Jackson apparently is unavailable when we're set on November 15th. I assume you guys saw the email that she sent out giving her availability times. Have you looked at what you think will work for you?

MR. ORAM: Your Honor, I have not been privy to the email you're discussing. I talked to Ms. Jackson who told me that she was going to inform the Court of what her trial calendar would be. If I could -- I wondered if there was a time in December if -- no.

My difficulty, Your Honor, is after that I start a capital murder in front of Judge Smith on January 8th that I think will last for a month. And then I have the individuals accused of killing a police officer right after, February 11th. I think those will last probably a month at least each. And I anticipate since the State will not make --

THE COURT: And then she's booked in March, so then we're looking April, May looked good for her. I mean, look I wish I could tell you let's do it in December, but I just -- I can't not with everything else that I already have scheduled in there.

So, okay you have those conflicts January, February. She does

indicate that she is basically not available in March due to her trial schedule. What's -- do -- what are you looking like in April?

MR. ORAM: April if we could go sort of mid April. I start another capital one April 22nd, so if we could go before that.

THE COURT: Yeah.

MR. OWENS: I should be open. I didn't bring my calendar all the way through April, but I don't think I have anything scheduled yet.

THE COURT: Right. Okay. So, April 5th -- no I'm looking at the wrong year. Let's look at the right year. Where's -- okay here it is. Sorry, so we're in -- we start criminal. So, give me -- what's the first Thursday in April?

THE CLERK: April 4th.

THE COURT: And I'm still -- it looks like I'm still in civil then, which should make it easier. Okay. Let's go ahead and do that then.

THE CLERK: At 8:30?

THE COURT: Yes.

THE CLERK: April 4th, 8:30, evidentiary hearing.

THE COURT: And now -- so we're going to vacate the November 7 status check and November 15th evidentiary hearing. I think we should probably put it on for a status check again before that evidentiary hearing, so maybe like a Wednesday a week before that.

THE CLERK: Yes, Your Honor. March 27th, 8:30, status check.

...

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...

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

MR. OWENS: Got it thanks.

THE COURT: Okay.

[Proceeding concluded at 8:41 a.m.]

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

MONDAY, OCTOBER 1, 2012

RECORDER'S TRANSCRIPT OF PROCEEDINGS
STATUS CHECK: EVIDENTIARY HEARING

APPEARANCES:

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

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

THE COURT: All right, so let's move it to November 15th.

THE CLERK: November 15th, 8:30, evidentiary hearing.

THE COURT: Okay. So that's --

MR. ORAM: Your Honor, --

THE COURT: -- we're taking -- obviously vacating the October 4th. Okay.

MR. ORAM: Your Honor, I think it was a really good idea that we set this status check. I think we should probably do the same thing, just because I had four attorneys on board to be here for this Thursday.

THE COURT: Ah.

MR. ORAM: I don't want that to be a problem.

THE COURT: Right.

MR. ORAM: I'll send out letters immediately to the attorneys saying you know, be available. But there's a possibility of obviously that --

THE COURT: Okay.

MR. ORAM: -- one could not.

THE COURT: So, we're on for -- sorry November 15th. I can't even read my own writing. All right, so let's -- do you think earlier that same week or maybe the week before would be better?

MR. ORAM: Earlier that same week, Your Honor.

THE COURT: Okay. So, let's put in on Monday the -- is the 12th a holiday?

THE CLERK: Yes, Your Honor.

THE COURT: So, we better go to the week before. Let's go to the Wednesday before.

THE CLERK: November 7th 8:30, status check.

MR. ORAM: Thank you, Your Honor.

THE COURT: Okay.

[Proceeding concluded at 8:58 a.m.]

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

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

WEDNESDAY, JULY 11, 2012

RECORDER'S TRANSCRIPT OF PROCEEDINGS
STATUS CHECK: EVIDENTIARY HEARING

APPEARANCES:

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

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Wednesday, July 11, 2012 at 8:47 a.m.

THE MARSHAL: Top of page 2, State of Nevada v. Johnson, Donte.

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

MR. OWENS: Steve Owens for the State.

THE COURT: Good morning. Okay. So, apparently we're not ready for next --

MR. ORAM: Your Honor, I --

THE COURT: Or not that we're not ready that there's a witness unavailable.

MR. ORAM: Yes, Ms. Jackson, Alzora Jackson who was the main attorney in the 3rd penalty phase has indicated by email that she was -- would not be available. And she has given me a list of times which I have shown to Mr. Owens when she will not be available in the future so that we can be ready at one time.

What I had concern about was although we have other witnesses I -- it was my preference not to bifurcate this simply because it is so massive. If we all prepare and read over this and then have a few witnesses and then have to come back and do it again, I think it may be a sort of a waste of judicial resources. I'm not sure Mr. Owens has an objection to perhaps putting this on a time where we can call all the witnesses at one time.

MR. OWENS: I'm not opposed to that. And I've seen the email. Alzora's got a very difficult schedule. She does a lot of trials and --

THE COURT: Right.

MR. OWENS: -- she's the one that we probably need to work around as well as the Court's calendar. And I'll make myself available.

THE COURT: And so -- and just to remind because my recollection was that the hearing could take some time, about how -- I mean, are we looking at a full day or is that what we're thinking?

MR. ORAM: I would doubt it, Your Honor.

THE COURT: Okay.

MR. ORAM: Again I think we'd probably move quite quickly.

THE COURT: Okay.

MR. ORAM: A lot of the arguments can be made just with argument, which we've already done. And so --

THE COURT: Yeah.

MR. ORAM: -- a lot of it I'll be quick and to the -- I'm going to be thorough, but to the point.

THE COURT: Okay. Sure.

MR. ORAM: And so I would think somewhere between 4 and 6 hours at maximum.

THE COURT: Okay. All right, so knowing that her schedule -- Ms. Jackson's schedule is difficult, I mean, in terms of my Thursdays I think I'm book until sometime in September or so. And Thursdays are usually the day that I use for that sort of thing when I don't have a regular morning calendar. Now, potentially I might have some time the week of August 6th, which is during my civil stack. It looks like I might --

MR. ORAM: Your Honor, --

THE COURT: Not be in trial. No, bad?

MR. ORAM: Ms. Jackson says that's bad.

THE COURT: All right. Okay. So, I don't need to think any further on that one. Then, Keith, what's my next Thursday? We're probably -- I know we're -- I'm pretty sure we're well into September.

MR. ORAM: Your Honor, I wondered if I could just -- again I'm looking at Ms. Jackson's trial calendar.

THE COURT: Okay. So, you tell me what you're looking at.

MR. ORAM: She is looking at if 2 weeks past so the end of September of early October if you have anything there.

THE COURT: And then what am I in October?

[Colloquy between the Court and the Clerk]

THE COURT: October 11th is bad?

MR. ORAM: I'm in a capital trial starting October 8th. I wonder if the Thursday before that?

THE COURT: The 4th I was looking at. I'm just a little concerned because that's the last week of my criminal stack. And it looks like -- you know, I mean, I'm likely to be in trial that week. But, I mean, I could put it on. I mean, we all know trials often go away. Why don't we give it a shot? Okay. We'll go for October 4th. Let's put it at 8:30 and then I'm going to set a status check closer.

THE CLERK: October 4th 8:30, continued evidentiary hearing.

THE COURT: Right. So that'll be instead of July 19th. Okay. And then and why don't we then.

[The Court reads to herself]

THE COURT: Are all the witnesses people who are in town?

MR. ORAM: Yes.

THE COURT: Okay. So, there's no one we're worried about bringing in. So,

for example that Monday October 1st can we do just do a status hearing?

MR. ORAM: Sure.

THE COURT: So, I can let you know for sure whether to get everyone here or not.

MR. ORAM: Yes, Your Honor.

THE COURT: Let's do that.

THE CLERK: October 1st, 8:30, status check.

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

THE COURT: Okay. I'll know about my trial schedule and see if there's an issue.

MR. ORAM: Thank you.

THE COURT: All right.

MR. OWENS: Thanks, Judge.

THE COURT: Thank you.

MR. ORAM: Have a good day.

[Proceeding concluded at 8:53 a.m.]

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

WEDNESDAY, MARCH 21, 2012

RECORDER'S TRANSCRIPT OF PROCEEDINGS

STATUS CHECK: EVIDENTIARY HEARING PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

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

For the Defendant: CHRISTOPHER R. ORAM, ESQ.
DAYVID J. FIGLER, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Wednesday, March 21, 2012 at 8:48 a.m.

THE MARSHALL: Top of page 2, State of Nevada v. Johnson, Donte.

MR. ORAM: Good morning, Your Honor.

THE COURT: Good morning.

MR. ORAM: Your Honor, I've talked with Mr. Owens. I wondered if we could set a hearing -- an evidentiary hearing in sometime in July that's convenient to the Court, if it is convenient to the Court. And then maybe a status check a month before to make sure that everybody is -- would be ready, all the witnesses.

MR. OWENS: Sure. That works for me.

THE COURT: What's happening with the PET scan?

MR. ORAM: I am still continuing to work on that. It's been very difficult for the logistics of it. I am working with a couple doctors who have to make recommendations and trying to get an exact price on it. Once I have more information I will come to the Court and let the Court know.

MR. OWENS: I think that's something you wanted done before the evidentiary hearing. That's why we kind of need that status check in June to make sure that we're ready to go in July.

THE COURT: Okay. Let me take a look here.

[Colloquy between the Court and the Clerk]

THE COURT: So, let's put it on July -- Thursday morning July 19th at --

THE CLERK: 8:30?

THE COURT: -- 8:30.

THE CLERK: July 19th at 8:30.

THE COURT: Okay. And now you wanted a status then just on a calendar in

June before --

MR. ORAM: Or maybe -- yes, late June.

THE COURT: Just to make sure that things are all set.

MR. ORAM: Yes please, Your Honor.

THE COURT: So, how about June 13th, a month in advance. Should be okay.

THE CLERK: June 13th at 8:30.

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

MR. OWENS: Thanks, Judge.

THE COURT: Okay. Thank you.

[Case concluded at 8:50 a.m.]

[Case recalled at 9:21 a.m.]

MR. FIGLER: Your Honor, the matter that Mr. Oram had on, on page 2. I had a notice to show up for that, that there was potentially an evidentiary hearing in Donte Johnson's case. Was that kicked or --

THE COURT: Oh, the evidentiary hearing is scheduled for July 19th. There's a status hearing on June 13th to make sure it's going to be ready to go on that date, but the evidentiary --

MR. FIGLER: I'm sure Mr. Oram will contact me. I was --

THE COURT: I'm sure he will.

MR. FIGLER: -- counsel on the first trial back when.

...

...

...

THE COURT: Correct. Okay.

MR. FIGLER: Thank you, Your Honor.

THE COURT: Thanks.

[Proceeding concluded at 9:21 a.m.]

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 18, 2012

TRANSCRIPT OF PROCEEDINGS
STATUS CHECK: EVIDENTIARY HEARING AND PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

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

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Wednesday, January 18, 2012 at 9:52 a.m.

THE MARSHAL: Page 19, State of Nevada v. Johnson, Donte.

THE COURT: Good morning.

MR. OWENS: Good morning, Steve Owens for the State.

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

THE COURT: Okay. So, we are back to talk about scheduling the evidentiary hearing. And also you were going to get some information about the cost of PET scan you were asking for.

MR. ORAM: Yes, Your Honor, I got an estimate of approximately $900.

THE COURT: 900?

MR. ORAM: Yes.

THE COURT: Okay. I know we spent a lot of time the last time, so I don't want to reargue everything. But, I guess my question for you regarding that issue and I know we already talked about it, but I guess, you know, with Dr. Kinsora saying he didn't have the condition and with mom saying she didn't drink, I guess are you saying that even with that it's ineffective for counsel not to have at least gotten this done?

MR. ORAM: Correct. That's exactly what I'm saying. Irregardless of any -- because that was I believe connected with fetal alcohol. And there was some point the State brought up that there was inconsistencies in the --

THE COURT: Uh-huh.

MR. ORAM: -- mother's testimony whether she was drinking or not.

THE COURT: Yeah.

MR. ORAM: But, my argument is that they should have done a PET scan no matter what in this particular case. That based on the facts and the severity of the case that a PET scan was necessary.

MR. OWENS: Well and when people ask why the death penalty is so expensive this is why. Because, they want to do a PET scan even though their own doctor said there's no evidence of any alcohol fetal syndrome.

THE COURT: Yep.

MR. OWENS: So, they want to do it, what, out of an abundance of caution just to rule things out. There's no reason to do it here anymore than any other defendant. I think there's got to be some basis. But you're right we argued this before and whatever the Court wants to do.

MR. ORAM: Here would be my concern in response to that. It would be absolutely -- I think it would be a waste of judicial economy if let's say this matter went to Federal Court. And the Federal Public Defenders do it and then they come back and say: You know what, look at this great PET scan. Look at this brain scan that we have and they -- look at what it shows and it should have been argued to the jury. And then at that point some court in Federal Court, Ninth Circuit Federal District Court is reversing, saying ineffective assistance of counsel. Versus if we get it done now we can look at it and see --

THE COURT: Okay. So, let's focus here. So, is your argument that it should be done in every death penalty case or is there some unique factor here that you think would lead one to want to do it even in spite of what Dr. Kinsora was saying?

MR. ORAM: Some unique factor here.

THE COURT: Yeah.

MR. ORAM: I wouldn't argue it should be done in every death penalty case.

THE COURT: Okay.

MR. ORAM: However, I think the severity of the case mandated that in this particular case -- this was a fight for the man's life.

THE COURT: Right.

MR. ORAM: Mr. Johnson was in a fight for his life.

THE COURT: Well, --

MR. ORAM: Just from, I mean, you look at the pictures, some of the DNA results.

THE COURT: Right.

MR. ORAM: And so I would have thought that the best approach would be error on the side of caution, pull out every stop you can, have it done.

THE COURT: Okay. All right, I'm inclined to allow him to do it. Attempt to establish ineffective assistance, at least the opportunity to attempt to establish that. Obviously I've not made a finding on that. That's going to be the purpose of the evidentiary hearing. So, having said that how long will it take is it your understanding to get that done before we go forward?

MR. ORAM: Your Honor, do you -- I had talked to Mr. Owens about setting this out until April, maybe out of the abundance of caution if I could be given until May for the evidentiary hearing.

THE COURT: Well, why don't we -- why don't we do this. Why don't we set another status in 60 days and see what's happened and then we can schedule the evidentiary hearing.

MR. ORAM: That's fine, that's fine.

MR. OWENS: Which with the PET scan there's also the logistics of getting a death row inmate into whatever the facility it is. And I don't know what all would be involved, but I assume there's going to have to be an order that directs the prison how to orchestrate all that.

THE COURT: Good point.

MR. ORAM: I will talk to the Special Public Defender who has done this in the past and see what kind of coordination they've done. I'll talk to Mr. Owens, see if it's -- see if he approves of the procedure. And perhaps if we can agree on an order, then I can I just send it over.

THE COURT: Right, otherwise -- I mean, if you need to put it on calendar sooner than the 60 days --

MR. ORAM: Yeah, that's fine.

THE COURT: -- certainly do it if there's --

MR. ORAM: I will.

THE COURT: -- going to be a problem.

MR. ORAM: I will do that.

THE COURT: Right. I mean, obviously you have to acknowledge the security concerns.

MR. ORAM: Correct.

THE COURT: So, I don't know what's involved, but I'm glad you raised that.

MR. OWENS: Any further thoughts on the scope of the evidentiary hearing?

THE COURT: Yeah, I mean, really other than that which I was, you know, contemplating on the PET scan issue I'm -- I mean, I've had several of these hearing with Mr. Oram. I think he's pretty good at narrowing down what he presents. I'm inclined to let him show what he thinks he needs to show to try to establish ineffective assistance. So, I'm not inclined -- I guess that's a long way of saying I'm not incline to narrow it. I'm going to let him present the evidence he thinks he needs to present to establish it --

MR. OWENS: Okay.

THE COURT: -- to try.

MR. OWENS: And for the record I think we're looking at Dayvid Figler and/or Joe Sciscento for -- they were the trial counsel.

THE COURT: Uh-huh.

MR. OWENS: I think it was Lee McMahan on the first direct appeal.

THE COURT: Well, she won't be here.

MR. ORAM: She's -- she won't be here.

MR. OWENS: She's deceased, so --

THE COURT: Yes.

MR. OWENS: I don't know if she had anyone help her with that appeal or if she did it solo. We may have to check into that. And then I understand the penalty hearing in '05 was Alzora Jacksons and Brett Whipple.

THE COURT: Right.

MR. OWENS: I think they're both available.

THE COURT: Right.

MR. OWENS: So, we probably have four attorneys to hear from --

THE COURT: Right.

MR. OWENS: -- plus whatever experts they want to call I guess.

THE COURT: Right.

MR. ORAM: Yes.

MR. OWENS: Okay.

THE COURT: Right. So, I mean, it could take some time. But let's go ahead and put the status out 60 days so we can look at setting an evidentiary hearing depending on what's happening with the PET scan issue.

MR. ORAM: Yes, Your Honor.

THE CLERK: March 21st, 8:30.

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

THE COURT: Okay. Again, you know, let me know if there -- if you need my help on or a ruling regarding a transport issue.

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

MR. OWENS: Thanks, Judge.

[Proceeding concluded at 9:59 a.m.]

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

Jessica Kirkpatrick

Jessica Kirkpatrick
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 10, 2012

TRANSCRIPT OF PROCEEDINGS
STATUS CHECK: EVIDENTIARY HEARING AND PETITION FOR WRIT OF HABEAS CORPUS.

APPEARANCES:

For the State: AMY L. FERREIRA, ESQ.
Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Wednesday, January 11, 2012 at 8:48 a.m.

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

MS. FERREIRA: Your Honor, Mr. Owens should be arriving with this matter.

THE COURT: Sure, let's pass it.

[Case was trailed at 8:49 a.m.]

[Case recalled at 9:44 a.m.]

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

MS. FERREIRA: Your Honor, I'll apologize to the Court and to defense counsel. I've tried to contact somebody over in appeals to see if Mr. Owens was going to be present. I haven't heard back from anybody yet. So, I don't have any representations to make to the Court. I apologize.

MR. ORAM: Do you want to just --

THE COURT: Okay.

MR. ORAM: Do you want to pass it.

THE COURT: Pass it a week?

MR. ORAM: That's fine.

THE CLERK: January 18th, 8:30.

MR. ORAM: Thank you, Your Honor.

THE COURT: Okay. If you could let Mr. Owens know.

MS. FERREIRA: I will, Your Honor. Thank you.

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...

THE COURT: Thanks.

MS. FERREIRA: I apologize.

THE COURT: Uh-huh.

[Proceeding concluded at 9:45 a.m.]

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

Jessica Kirkpatrick
Court Recorder/Transcriber

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

THURSDAY, DECEMBER 1, 2011

TRANSCRIPT OF PROCEEDINGS
ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS
(ALL ISSUES RAISED IN THE PETITION AND SUPPLEMENT)

APPEARANCES:

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

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Thursday, December 1, 2011 at 8:51 a.m.

THE COURT: All right. Good morning.

MR. ORAM: Good morning, Your Honor.

THE COURT: So, we're on for argument on the petition for writ of habeas corpus. We didn't transport Mr. Johnson for this. I -- it's just argument today. It's not an evidentiary hearing. There's no --

MR. ORAM: Right.

THE COURT: -- issue with that I presume?

MR. ORAM: Correct.

THE COURT: Okay, good. Okay, so we now have issues, the substantive issues raised in the petition regarding ineffective assistance at both the trial phase which was back in, when was it 2000, and then the penalty phase in 2005, pursuant to my prior ruling. So, I know there is a lot of paper and don't feel compelled to re-argue everything that's in your papers. But, if you can focus on what you think the most important issues are. Mr. Oram.

MR. ORAM: Your Honor, and that is sort of a concern of mine, because the issues are so voluminous.

THE COURT: Yeah.

MR. ORAM: And I thought -- you know, I think a lot of the issues are important. But, basically I think I'll start from the end and say to the Court we want an evidentiary hearing. I think I have put forth enough here so that there are questions for all the attorneys involved as to the decision making process. And so I guess in brief if I only had seconds to argue it I'd say grant me an evidentiary hearing, --

THE COURT: Okay.

MR. ORAM: -- grant Mr. Johnson an evidentiary hearing so that --

THE COURT: Okay. I put you on a special hearing, so you have more than seconds.

MR. ORAM: Okay.

THE COURT: But, I do understand that that's the end game.

MR. ORAM: And unfortunately I think what I would be doing -- when I talked to Mr. Owens in preparation for this we were talking about how much argument there would be.

THE COURT: Right.

MR. ORAM: And it's not as though I have a lot to say other than for example what's in the reply briefs and what's contained within these supplements. It really is thought out. And then I responded to what the State had to say.

THE COURT: Yeah.

MR. ORAM: So, I guess I can sort of summarize my arguments. And I'll do it reasonably efficiently hopefully.

THE COURT: Okay.

MR. ORAM: With regard -- I will start with the issues contained in the second penalty phase first.

THE COURT: Okay. The -- which one are you calling the -- the second one which was the three judge panel?

MR. ORAM: No, I'm sorry.

THE COURT: Okay.

MR. ORAM: The second penalty phase where he's sentenced to death.

THE COURT: Okay.

MR. ORAM: With Alzora --

THE COURT: In 2005.

MR. ORAM: Right, Alzora Jackson and Mr. Whipple.

THE COURT: Which was a two phase penalty phase.

MR. ORAM: Correct.

THE COURT: Okay.

MR. ORAM: And what -- the first thing that I note about that was in the first trial the jury noted approximately 23 mitigators. They wrote them out. And in the second or the third penalty phase where Mr. Johnson is sentenced to death for a second time the jury finds only 7 mitigators. And that is all for the most part that was offered.

Now, what caused me concern was if you see that a jury has found 23 mitigators the first time. You would think that you would go to the second jury at a minimum and just list those and say: These are our mitigators. If one jury found them you would think the next jury found them.

Now as I read the State's response they completely speculate. What they say is: Oh, well that's one juror who wrote that out. Well, how do they know that? There's no way they were back in the jury room and know whether that was unanimous or that was one juror. Sure it can be one juror. As we all know --

THE COURT: Right.

MR. ORAM: -- in mitigators only one juror needs to find it. And there's not really a standard to that. But that's what the State then goes to. They say: This is the minimum. This is exactly what happened. It was one juror

that was -- just believed in this stuff, okay. But, they don't know that. And that's the problem is because they don't know that they don't know if a lot of jurors, maybe 5, maybe 4, maybe all of them found that these were all these mitigators.

So, why is a defense attorney -- if I came into this court and the Court asked me: Would you take this penalty phase, it's been reversed? And I went through the first penalty phase and I read it. And I saw the verdict form and I saw that there's 14 mitigators found. Those would be the 14 mitigators I'd put up on the board at a minimum, and told the next jury: Look at this.

Additionally, although there's no caselaw, I think the inverse is sort of interesting. I have had penalty phases that that is all I've tried. In other words, there was a reversal, for example, *Paul Lewis Browning* where there was a reversal of the penalty phase only some 20 years later.

THE COURT: Right.

MR. ORAM: And I wanted to argue residual doubt. And I was precluded as the law says --

THE COURT: Uh-huh, right.

MR. ORAM: -- precluded from arguing that. Because I wanted to say: Look at all this new information that's been found. Maybe he's not as guilty as the State wants you to believe.

THE COURT: Right.

MR. ORAM: I have been completely precluded from doing so.

THE COURT: Right.

MR. ORAM: Because the first jury found that.

THE COURT: Right.

MR. ORAM: Okay. So, why Is the law not the same for the Defendant? If the first jury has found 23 mitigators why is that not the law of the case that now --

THE COURT: Well, because the penalty phase is what was reversed, not the conviction.

MR. ORAM: Yes, the penalty phase is reversed.

THE COURT: So, you're doing a new penalty phase.

MR. ORAM: Yes, that's true.

THE COURT: Okay.

MR. ORAM: Yes, that's true.

THE COURT: All right.

MR. ORAM: But, I still think you could make the argument. And even since the Court has a very quick response to that, I still don't think the Court has a quick response for --

THE COURT: Right, why they wouldn't raise them is a different issue.

MR. ORAM: -- why wouldn't they raise them?

THE COURT: Right.

MR. ORAM: Yeah, why wouldn't they go and argue that?

THE COURT: Right.

MR. ORAM: And to me that was when I was investigating this I went to the prior attorneys, the attorneys from the first trial and said: What can you think of? And one thing that they mentioned is that there was this big long list of mitigators and were those found. It took me a while to find that list. And I have attached it. And when I found it I thought: Wow, that's interesting that

they didn't argue it. So, I think that is potentially ineffective assistance of counsel, combined with the fact that the first jury didn't execute.

So, if the first jury doesn't execute because as you recall it went to --

THE COURT: Right, they hung.

MR. ORAM: They hung.

THE COURT: Right.

MR. ORAM: So, if the jury looked at those 23 mitigators it perhaps gave some of the jurors the argument that this is so significant, his level of mitigation, which in this case there really was.

THE COURT: Sorry, just to interrupt for a second. In the very first penalty phase where they hung, was that a two phase penalty phase? So, in other words was it the first part of the penalty phase where they found those mitigators and then in the second phase they couldn't decide, or was it all together?

MR. ORAM: It was all together.

THE COURT: So, there was this list of mitigators from the jury that ultimately didn't reach a verdict --

MR. ORAM: Right.

THE COURT: -- in that case.

MR. ORAM: Right.

THE COURT: But what -- but there was a separate -- and I know it's attached in here. And I'm sorry I'm not -- don't have it in mind at the moment. But, what -- it was -- was it a separate verdict form on mitigation like I've seen

where you have kind of the blanks and, you know, some listed and some blanks?

MR. ORAM: Yes, and I can --

THE COURT: Or was it like the verdict form that ends up where no one signs it because they don't reach a verdict?

MR. ORAM: No, it was -- it says -- and I'm showing it to the prosecution. It says special verdict. And what is listed off is there are -- they were offered --

THE COURT: Okay.

MR. ORAM: -- the murder was committed while the Defendant was under the influence of extreme --

THE COURT: Right.

MR. ORAM: -- mental or emotional disturbance.

THE COURT: So, sorry it was a special verdict specifically for the purpose of identifying mitigators?

MR. ORAM: Yes.

THE COURT: Okay. All right.

MR. ORAM: And --

THE COURT: Go ahead.

MR. ORAM: And what they actually did -- what the jury did is they list -- they checked some of them, and then they began listing other mitigators on the second page. And then they listed in their -- somebody's handwriting, one of the juror's I presume handwriting --

THE COURT: Right.

MR. ORAM: -- the other mitigators. So, what you had is if you look back as a defense attorney and you look back you see all those found you would

think that you would go to the next jury and say: Look these are the mitigators. And it didn't result in a death sentence. So, my argument would be those are the type of things that you have to argue the second time around.

Now, the -- Ms. Jackson and Mr. Whipple did put on a case of mitigation. And Mr. Johnson irregardless of how significant the crime is really had significant mitigation. It really was quite extensive, his childhood. And I think that's --

THE COURT: Right.

MR. ORAM: -- born out in --

THE COURT: There's child abuse and all kinds of things.

MR. ORAM: Yes. And it's born out in both verdict forms. The second jury found 7. So you have to offer those. And so I would argue that it was, one, under first prong of *Strickland* below a standard of reasonableness not to argue the exact same mitigators.

THE COURT: Well, was evidence put on regarding those? I mean, whether they were listed out on the form in advance for the jurors or not, I mean, were those same issues presented to the jury the second time?

MR. ORAM: Yes. Yes, I would argue that the issues of mitigation were presented the second time. It was -- I read the penalty phase of the third -- I read the third penalty phase first in this case.

THE COURT: Yes.

MR. ORAM: And there was quite extensive mitigation put forth.

THE COURT: Okay.

MR. ORAM: I cannot argue to the Court that it wasn't. I read it and it was. But it was not argued correctly.

THE COURT: Okay.

MR. ORAM: It was not submitted correctly. And so, I would think that there were issues regarding ineffective assistance --

THE COURT: Right

MR. ORAM: -- and whether the result of the case would have been different.

THE COURT: Right and then you also -- and, you know, kind of moving ahead a bit, you also argued that they didn't present fetal alcohol syndrome?

MR. ORAM: Correct.

THE COURT: Okay.

MR. ORAM: And they didn't present fetal alcohol syndrome and they didn't do a PET scan of Mr. Johnson. Mr. Johnson does fit into the factors of fetal alcohol. And apparently fetal alcohol is very easy to misdiagnose. And I cited authority for that proposition. His mother admitted that she was drinking while she was pregnant.

I don't know if you've ever seen Mr. Johnson. He's extremely small. He makes me look very large.

THE COURT: Okay.

MR. ORAM: He really is a small man. And is -- and then the other aspect or factor is poor reasoning skills. Well, I would think reviewing this file that he meets that. So, they should have done more to establish fetal alcohol disorder.

They also should have had his brain analyzed. It wouldn't have been difficult in this case to have his brain analyzed. And at the end of this hearing that's another thing I'm going to ask for is funding to do the --

THE COURT: Right to do that.

MR. ORAM: -- PET scan to see if there's something wrong with his brain.

THE COURT: Do you have or have you received the file that, I guess that was the special PD's Office, have you received their file?

MR. ORAM: Yes.

THE COURT: And so are -- you're telling me that in review of that file it looks like that was not investigated?

MR. ORAM: The PET scan?

THE COURT: The fetal alcohol issue.

MR. ORAM: I came to that conclusion with a meeting with one of the attorneys.

THE COURT: Okay.

MR. ORAM: That --

THE COURT: Go on.

MR. ORAM: -- when I asked --

THE COURT: Okay.

MR. ORAM: -- what did -- what was wrong. And so I would argue that those two matters should have been done. And a PET scan I think would be interesting just to see if there's something wrong with this individual's brain. It -- let's say there is something wrong with his brain, then obviously that's going to be a big huge mitigator --

THE COURT: Sure.

MR. ORAM: -- where you're telling the jury look this guy, something is mentally wrong with this human being.

THE COURT: Right.

MR. ORAM: That should have been done as well. Another factor that I noticed in the case was that during closing argument in the third penalty phase defense counsel stated or tried to state that the co-Defendants Smith and Young received less sentences -- lesser sentences than Mr. Johnson ultimately received. And they received life sentences. The State objected during closing argument. There was no evidence presented of their sentences.

THE COURT: Okay.

MR. ORAM: And it was sustained. Now the State is arguing: Well they were very clever in their argument. No, let's follow the law. If the argument is sustained then that means the argument is sustained and there is no evidence before the jury, none, that these other two individuals received lesser sentences. Furthermore, arguments of counsel are not evidence.

Now the State argues: Well, there's no right to present the co-Defendant's sentences. That's absolutely wrong. And I'm citing now to *Flanagan and Moore versus State of Nevada*, which can be found at 112 Nevada at 1422, 930, Pacific 2d at 699. And I am now stating that the Defendant has raised this issue several times in the past. The Court has already made the determination that it was not error for the District Court to admit evidence of co-Defendant sentences into evidence.

In *Flanagan and Moore* it was actually the State who wanted to state that other people had received lesser sentences than Moore and Flanagan and Mr. Moore should be sentenced to death.

THE COURT: So, they said what? It was not error to allow the evidence.

MR. ORAM: Yes, it was not error.

THE COURT: Okay.

MR. ORAM: And so, I actually pulled that because I saw that the State has argued inconsistently. In other words, when it's good for them to introduce it they have gotten the Supreme Court to agree with them. When it's bad, they've gotten -- they're trying to convince courts that they shouldn't. And I understand they're advocating. But clearly that was admissible.

And I would think that was a really good argument that should have been presented in proportionality. And obviously it's an issue because the State has argued it in the past. And that is you put someone on the witness stand, the attorneys perhaps, prosecutor perhaps, someone. It's not hard to establish these were the sentences of the other two individuals who went over there and then executed these four boys, four young men. And so I don't understand why defense counsel did not do that. They wanted to say it. But you don't wait until closing argument and then get an objection sustained. Just prove it. And just do what I did, pull *Flanagan* and tell the Court: I'm going to do it. They get to do it. We get to do it.

And I think that's interesting, because if you look back at the mitigation list found by the first jury some of the mitigators were quite interesting in terms of they suggest in the mitigators that there is no eye witness to the identity of the shooter. And that's one of the handwritten mitigators. And that's exactly what it says in quotes: No eye witnesses to identity of shooter.

And so you could combine that in a second penalty or in the third penalty phase and say, and what should have happened is: These other two Defendants received life sentences. Mr. Johnson is much smaller in stature than these other two Defendants. He was not the ring leader. I know the

State's suggests that he is, but he is not the ring leader. And in fact there's no identity as to who is the shooter here. And if perhaps Young or Smith is the shooter then why should Donte Johnson die for this crime? And that was not completed. And that should have been done.

They didn't call the Defendant's father. The Defendant's father should have been called to the witness stand. The State's argument on that does not make any sense and here's why. They say that the Defendant's would have been hostile.

Your Honor, that is one of the most exciting things that I deal with in a penalty phase. I have done several where that is the best tactic I have. And I know the State, Mr. Owens would say how so? But in the penalty phases I've done I've had Judges say: Yeah, that's right I see what you're doing.

Because here's what you do; you set up the father or whoever the bad parent is. You bring inlet's say it's the mother who beat her child or neglects her child or there's a prostitute in bringing people in. And I've had this recently in two capital trials in the last two years. And that is you then bring in witnesses to say: Yeah, the mother -- I watched the mother burn the child over the stove when the Defendant was young. I've watched the mother have the child hide in a closet when she's having sex with -- in acts of prostitution.

Then knowing that the mother is going to be hostile and wants to present this wonderful vision of herself, after you've completely hammered her in a penalty phase, you put her on the stand and ask her: Were you a good mother? Oh, I did everything. I bought him shoes. I took him to football. I -- this and that. And the jury now doesn't believe the mother and then you can

go with the mother. You can absolutely hammer on the mother. Didn't you do X, Y, and Z. You failed to take your kid to football. You failed -- you sat there and burned your kid. And the more she denies it the worse she looks.

So, that's really what the State is arguing, that if we put -- or if the attorneys had put the father on the witness stand then it would not have helped because he would have been adverse to Mr. Johnson's position. On the contrary, he would have proved why Mr. Johnson grew up to be the way he is.

After you're done doing that, Your Honor, in a closing argument what do you say to a jury? Do you know who would you have ever guessed was most likely to come and sit at this table, who? Having seen that father, that drug addict, gang member, piece of human garbage, wouldn't you have bet of all the people in the world that it would be Mr. Johnson sitting here? Was he given the opportunity to go up in Summerlin with good parents who took him to little league, encouraged him. If he had problems in school got him a tutor. Is that what you expect? No, because those kids often times grow up. And if one of those kids ends up here, in counsel table, then that's pretty horrific. Not so in a case like Mr. Johnson where he's raised in a gangbanging environment by an abusive father, somebody who's neglected him. And you see the argument is very easy to make.

I would think that it was incumbent upon counsel to bring in Mr. Johnson's father in mitigation if nothing else to pound on him for his neglect and his abuse. I would argue that all of those factors and the other ones that I have listed would amount to ineffective assistance of counsel.

Another thing that I noticed from this case and is a reoccurring theme in capital cases. This is very interesting what the State is doing. This

about using the defense mitigation investigation against the Defendant. In the case I cite to Tina Francis who was a mitigation specialist. She got information. Dr. Schmidt relied upon the information and then they -- the Court ordered that Tina Francis' report be used or be given to the State, then the State cross-examines.

Now, I've been making this argument and I have it coming up to the Nevada Supreme Court in another one of my cases. Here is the problem. When we used to do these cases, capital cases, I could go out or send my investigator out to say: You talked to X, Y, and Z; find out about this Defendant.

Your Honor, what you're going find if you have let's say 10 capital defendants and any lawyer is assigned -- a reasonable lawyer is assigned to represent 10 capital defendants. And you go out and investigate. You know, you're not going to find all these wonderful things. He was in the church choir. He was just a wonderful boy and why did this happen? We do not know.

THE COURT: Right.

MR. ORAM: Usually what you find is that some people say he is the worst kid you could imagine. He peeled the family cat. He, you know, killed the dog and shoved it in a dumpster. And so when you hear these things and -- or you'll hear somebody say: He raped me all my life. I hated him. I hated being in the house with him. And so what you do is you recognize that's not going to be very helpful. Tell the investigator: Thank you very much; lose their phone number. Okay. And if the State finds them, okay fine. But we are not going to give that information up.

THE COURT: Right.

MR. ORAM: Now, what the Supreme Court in their infinite wisdom have done is they've ordered that we have the assistance of mitigation specialists, psychologists, fine. That's fine. But the mitigation experts then go out and do is they find all these different people and then they write up reports. And then we -- what was happening is mitigation specialist writes up these reports. We give them to the psychologist so the psychologist can know. Now the psychologist has read this --

THE COURT: Well, that's where the problem is.

MR. ORAM: That's where the problem is.

THE COURT: Because when you hand it to testifying expert to rely on.

MR. ORAM: And that's what they did here.

THE COURT: Yeah.

MR. ORAM: Okay. So, what the State has done now consistently under *Floyd* is they have said if they're going to call a mitigation specialist -- let's say the mitigation specialist hears 10 witnesses, maybe some of them have since died that have good things to say. Then the Courts are saying and the State is asking that if you're going to put that mitigation specialist on the stand we want all their notes, all their reports.

Well, you see the problem is that now if they're subject to cross-examination they're going to hurt the Defendant. They can't help but hurt the Defendant. It's almost like putting me on the stand and say: So what have you found out about your client? It would not be comfortable at all. Because if I had -- was forced to tell the truth I'm probably going to say: Yes, I heard some very bad things about this particular Defendant. It just seems impossible that you wouldn't.

So, I don't understand how we're forced, and in this case the State has forced the defense camp to get the mitigation expert, to get these witnesses, and then turn around and say we want the information. And then they're using it against Mr. Schmidt and Mr. Johnson.

And here's how they did it with the fetal alcohol syndrome. There was conflict. The mother testified that she drank during the pregnancy. Apparently Tina Francis wrote down that the mother didn't drink. So, you can't tell if the mother wanted to be a saint on the day she was interviewed or if she wanted to be bad on the day she testified. You can't tell. But obviously it was helpful at the time of the penalty phase, her testimony: I drank during pregnancy.

So, then the State has this information. That's not what she said to Tina Francis and Dr. Schmidt has relied upon Tina Francis. Therefore, Dr. Schmidt, look at how wrong you are. Or I think it was actually Dr. Kinsora. I'm sorry. It was Dr. Kinsora.

THE COURT: Okay.

MR. ORAM: And so they've used that. And so I think the problem is that the defense should have refused to turn it over. Now we have to follow court orders. But I've been telling Judges that I'm not going to use it and then there's other aspects of it saying that you're going to render me ineffective. If you make me turn over those reports I'm not going to -- I'm not going to use them. And then if the Court wants to render me ineffective go ahead and do so. But I have had significant arguments about this. Because what the State is doing is they're putting essentially an investigator in the defense camp by doing that.

Shouldn't it simply be that we get to go out and investigate, we get to find out about the Defendant, and then we get to present what's favorable to the Defendant? Not that we go out and find out about the Defendant and everything that's bad is eventually going to get turned over.

So, now what I have done in my office on my capital cases. I have 6 of them pending. I have my mitigation expert call my office and she gives us information right after the interview.

THE COURT: Uh-huh.

MR. ORAM: We write them down.

THE COURT: Right.

MR. ORAM: Okay. And we tell the mitigation expert: You're not to talk to anybody else about this information --

THE COURT: Right.

MR. ORAM: -- unless I'm present. And then I get to hear. That's ridiculous. It's a ridiculous procedure. And so I think here what the problem was is the first attorneys were ineffective for letting that occur.

During the third penalty phase, and this is very brief, during the third penalty phase defense counsel split on whether there were drugs in the prison. Ms. Jackson says there wasn't, Mr. Whipple says there was. That's ineffective. It's inconsistent and it shouldn't be done in front of the jury.

The defense filed a motion in limine so that the victims in the case would not be referred to as kids, the kid, this kid, that kid. And the State did not follow that as well as they should have in the first trial. The Nevada Supreme Court noted it, said it was improper, don't do it again. Then in the third penalty phase defense counsel refers to them as kids. It doesn't make

any sense that I'm asking that X, Y, and Z not be mentioned and then I'm the one mentioning X, Y, and Z. I think that's ineffective.

The last one is the impeachment by a misdemeanor. The State impeached one of the witnesses. And again I won't go into much detail. It's in the moving papers. They impeach a witness with a misdemeanor. The State has some reason why that's permitted in their argument. It's quite a clever argument. But the fact of the matter is you can't impeach somebody with a misdemeanor. You can impeach them with a felony conviction.

All these matters were not raised. And therefore they amount to ineffective assistance of counsel. I would argue that there should be an evidentiary hearing on all of those matters to determine why those things were not done in that third penalty phase which could well have resulted in a sentence of less than death for Mr. Johnson.

If you want me to I can address now the trial issues or I can let Mr. Owens respond to those.

THE COURT: Why don't you --

MR. ORAM: Keep going?

THE COURT: Yeah, keep going.

MR. ORAM: Okay.

THE COURT: Just remind me just briefly, so the last penalty phase, which is the currently penalty that's imposed was Alzora Jackson and Brett Whipple.

MR. ORAM: Correct.

THE COURT: And then who was the trial counsel from the conviction?

MR. ORAM: It was Judge Sciscento and Mr. Dayvid Figler.

THE COURT: Okay. Go ahead.

MR. ORAM: With regard to the issues from -- bear with me, Your Honor.

THE COURT: Uh-huh.

MR. ORAM: The first issue that I saw in the trial was the voir dire. The voir dire of that first trial was somewhat alarming. Now first of all, I cite the statistics about the jury panel that is brought in. The jury panel that's brought in was 80 jurors with only 3 minorities.

Now I cite to *Williams versus State*. And I want to address something with the Court about this matter. I have had a similar argument where I said the jury venire did not meet the cross section of the community standard enunciated by the United States Constitution. And I argued this issue in front of the Nevada Supreme Court a couple of years ago in *Cobb versus State of Nevada*. And I had neglected to demonstrate to the Court what some of the statistics that I have put in Donte Johnson. One that I'll be referring to constantly is that approximately 50 percent of all African Americans will be -- African American males will be arrested at some point in their life.

THE COURT: Uh-huh.

MR. ORAM: So that -- I want that as a starting point. Now when you look at *Williams*, apparently *Williams* was found that we have 9.1 percent of African Americans in Clark County. In *Williams* there was approximately -- court's indulgence.

THE COURT: Sure.

MR. ORAM: The -- in *Williams* the Court found that on average 3 Africans Americans are present in any 40 person venire. Here what we had is

3 minority members out of 80, and so clearly it was unrepresented. Now, in *Williams* they said that there is no systematic exclusion.

However, what I'd really like to do is I'm going to eventually if this case goes to the Nevada Supreme Court I want to show the Nevada Supreme Court that this is happening in a regular basis in Clark County. I could show it in *Cobb*. I can show it here. And I can show it in a couple of other cases. And so the very fact that there was not enough African Americans or minorities is a discriminatory pattern in our system. Something is going wrong. I don't know why it's going wrong, but it is going wrong.

And what happens then is not only was the panel not a cross section of the community, but then the State starts a pattern. And they do this quite often and I have seen it. And this is what I argued in *Cobb*. What they did is they have an African American juror. And the African American jury says I had a stepson who is in jail. And apparently she crossed her arms during questioning. Based on that the State excluded her, perempted her. There was an objection and that was the State's reasoning. In *Cobb* --

THE COURT: It was a *Batson* challenge.

MR. ORAM: It was a *Batson* challenge.

THE COURT: Uh-huh.

MR. ORAM: In *Cobb* when I argue for the Nevada Supreme Court it was identical. It -- when I say that it was somebody had been incarcerated. And something about the way the juror acted was unacceptable.

Now if you read what the juror said, Juror 4, she answered the questions perfectly appropriately. That's why the State was led to this: She crossed her arms and she's had a stepson that was arrested.

Now I want to come back to that 50 percent. Why I find that comical is you bring me 12 African American jurors and if I'm a prosecutor it doesn't take me anything to get rid of every single one of them. Who here knows somebody who's been arrested? Okay. So, let's say we've got juror Number 1 over there, Jane Doe. She's a 22-year-old juror. There's a 50 percent chance her father been arrested, right, because statistics show a 50 percent chance if her father is African American that he's been arrested.

Maybe her father hasn't been. He's one of the 50 percent that hasn't been. How about your grandfather has he been arrested? No. Well, how about your -- that was your paternal grandfather. How about your maternal grandfather, has he been arrested? No. How about any of your uncles? Any of them been arrested? You see now we're starting to run out of people that -- how could they be passing this 50 percent? You got any sons, any children, you got a husband, any boyfriends? Any of them if they were African American been arrested?

I would suggest to the Court that it's going to be rare that if I bring in 12 African Americans, that most of them are not going to say: Yeah, you know what I had a stepson, I had a brother, I had a sister, I had a mother, I had a dad that one of them was arrested. Oh really. Okay. Thank you.

Judge, the reason I excluded Jane Doe is because did you notice that her uncle had been arrested when she was 5. And did you notice that when I was questioning her about it she seemed somewhat uncomfortable. And another thing I noticed is that when Mr. Owens asked her questions, I've been watching for these 3 days, that when Mr. Owens would ask questions she would pay a lot of attention to the defense attorney. But when I asked her

questions she crossed her arms, she crossed her legs. I noticed that. Did you notice that? And she would laugh at Mr. Owens' jokes, but she never laughed at mine. She wouldn't quite make eye contact with me. There's my race neutral reason. And I can do it every single time.

And they did it in *Cobb*. And I didn't have that statistic at the time. I told the Court I thought it was about 50 percent. And they looked at me like I was from outer space. I read it in law school, so I was aware of it. But that Supreme Court looked at me like I might as well just be making that up. So, now I'm going to bring it up to them, show them it's absolute truth, and show them that in ever single case -- not every single one, I'm sure that there are African American's in Clark County that know no one who's every been arrested. But I suggest as you as a trial judge know that a lot of African Americans will know someone who's arrested just looking --

THE COURT: Well, that's true, but let's assume for a moment you're right you have the backup for that statistic and so we have an African American come in as a potential juror their likely to have it and State may want to exclude them for that reason. As long as -- so there may -- you know, there likely will also be some Caucasian person on the jury panel who knows someone who's been arrested as well. As long as they would exclude both of them and treat them similarly based on that issue isn't -- is that still discrimination?

MR. ORAM: No, no, not at all. No, I would think if lets say there were 5 people that knew somebody who was arrested and they excluded all of them. That sounds like a pattern. You don't want people who know somebody who's been arrested.

THE COURT: Right.

MR. ORAM: But, my point is --

THE COURT: As long as you're not using it as a pretext to get rid of African Americans.

MR. ORAM: Right. There are 3 African -- or there were 3 minorities on this panel.

THE COURT: Yeah.

MR. ORAM: One didn't get to questioning, leaving 2.

THE COURT: Okay.

MR. ORAM: Okay.

THE COURT: Uh-huh.

MR. ORAM: So, the one gets kicked off because yes --

THE COURT: The stepson --

MR. ORAM: -- stepson --

THE COURT: Uh-huh.

MR. ORAM: -- and the crossing of the arms.

THE COURT: Uh-huh.

MR. ORAM: See, and so my point is if I'm an experienced prosecutor and we have a young prosecutor -- and I understand why they do it. I do; I understand why they do it.

In fact in the last capital trial I did right before we excluded or started the peremptory challenges I told Judge Herndon I just thought -- you know, I always wait until the end and then get upset about it. I said: We have 2 African Americans sitting over there. I know what they're going to do they're going to come in here they're going to talk about the one had an arrest.

They're going to talk about -- or knew somebody that got an arrest. And I just started saying: I'm telling you right now they're going to do it. They're going to do it. It's discriminatory. And for whatever reason they decided not to do it to both of them.

And so, I just see that this is a pattern that they are doing. And they're not doing it to everybody else. They're doing it to get off the one of the only two minorities that are potentially on that jury. And they didn't have -- they don't have good cause. It's not like the person said my stepson was arrested. He was mistreated the police are horrible. And you at the DA's Office you mistreated him, and I'm gonna, you know, do -- and I'm not happy about. And everybody can see it. When that happens and we do see that. We see people who are completely hostile to the State. But that wasn't here. What was here was absolute excuse to get rid of that juror. I think my point has been made, so I'll move on through this.

THE COURT: Okay. Go on. Uh-huh.

MR. ORAM: Okay. The other thing that I thought was interesting was the way the trial Judge permitted the State to get rid of life-affirming jurors. There were several jurors who said --

THE COURT: Sorry. Did Judge Gates try both of these?

MR. ORAM: Judge Sobel, who has since passed.

THE COURT: Judge Sobel was the first time?

MR. ORAM: Yes.

THE COURT: Okay.

MR. ORAM: And he's the District Court Judge that was making the decisions I'm speaking of now.

THE COURT: Right. Okay, and who was the judge on the last penalty phase?

MR. ORAM: Judge Gates.

THE COURT: That was. Okay, sorry, go on.

MR. ORAM: And so -- and everything I'm speaking about is the jury from the first --

THE COURT: Right.

MR. ORAM: There were life-affirming jurors, people who said: Yes, I prefer life. But each one of them, as I've cited in my papers, stated that, yes, they could consider a death sentence. And that's all that you need.

THE COURT: Right.

MR. ORAM: That is all the standard that you need, is to say --

THE COURT: Right, can consider all the options.

MR. ORAM: -- yeah, I could consider it.

THE COURT: Right.

MR. ORAM: Right, I'd consider it. I'd follow the law.

THE COURT: Uh-huh.

MR. ORAM: Your Honor, I don't really want to do this. It would be very hard. But that's what they say. When the State challenged the Judge would grant it. And so that seemed peculiar to me. What's even more peculiar is that the State or the defense tried to challenge approximately 3 jurors. And I have laid those jurors out, Juror Fink, F-I-N-K, Juror Baker, and Juror Shink S-H-I-N-K. I want to address -- all the jurors that I'm now going to address were -- could only really consider the death penalty. They said that. They basically said we're automatic death votes.

THE COURT: Uh-huh.

MR. ORAM: And what was even more alarming was --

THE COURT: They were left on?

MR. ORAM: They were perempted by the defense.

THE COURT: Okay.

MR. ORAM: They were forced to perempt.

THE COURT: Okay. So, cause challenges were denied, so they were --

MR. ORAM: Cause challenges were denied, they were perempted. But, here's one I thought was the most interesting and the best example for the Court. Juror Shink, if he's the individual that pulled the trigger does he deserve the death penalty? Yes. Then Mr. Shink affirmed his "Logan Run" theory. I -- does the Court know Logan Run?

THE COURT: Yes.

MR. ORAM: Okay. And he affirmed his Logan Run theory saying that even car thieves they should put their numbers in a barrel and you should pull the number out, and if you have then you die. And he specifically had his own theory that if you get less than one year in prison then you should be exempt from that. So he was generous enough to say look if the guy didn't get a year in jail, which we know to be less than a felony, then we don't kill them. But everybody else goes into a barrel, we draw their number and we kill them, simple as that. That man affirmed that that was his absolute belief, that he'd had that belief for a long time.

And it was difficult when that man was challenged for cause when you're reading the transcript and then you see the denial. I would think that is the best example of somebody who's -- he is the ridiculous. He's the ridiculous

argument where I would think some court would cite that in an opinion saying that is just ridiculous that you -- that a court could not see that he is substantially impaired from doing his duties as a juror. He's automatically going to vote for death.

And so what is the defense now forced to do? The defense is forced to take almost approximately 40 percent of their perempts and get rid of jurors that are automatic death voting jurors. And what I thought was particularly interesting is the cases that I found they talk about -- well, I'll just cite to a US Supreme Court case where I'm not citing the majority, I'm citing the dissent. It was a 5 to 4 case, so it is quite a close case.

But the dissenters in *Ross versus Oklahoma,* which is found on page 19 in my second supplement stated: The defense's attempt to correct the Court's error and preserve its Sixth Amendment Claim deprived it of a peremptory challenge. That deprivation could possibly have affected the composition of the jury panel under the *Gray* standard. Because the defense might have used the peremptory to remove another juror and because of the loss of the peremptory might have affected the defense's strategic use of its remaining peremptories, they say that they are seriously concerned. 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 a prosecution in order to preserve the Sixth Amendment Right to an impartial jury.

Clearly what they were talking about was they're talking about a single peremptory. Here we had 3. And I have laid that out very, very

specifically, where 40 percent of the peremptories were used to try to get a fair jury. The stack was against them, and it shouldn't have happened.

When -- I would imagine if you heard Logan's Run and a defense attorney said we challenge, that you -- I wouldn't even have thought that it would go very far simply. Because once you hear that I think a Court could say: Is that your true belief? Yes. Okay, thank you let's get out of here. Let's move on. Instead of saying: No, he -- you know, no that seems -- yeah, it seems reasonably fair to me. You know, car thieves should die as well. Obviously it's not. So, under this circumstance the defense was in a very bad position.

Now, I know that the State is going argue, and it is reasonable for them to argue the following: That jury didn't sentence him to die, so therefore all the stuff you're talking about what's the real prejudice? The real prejudice is this. That we know that death qualified juries are more apt to convict then a non death jury.

We also know that when you stack a case so that, one, what you have is you get rid of minorities. There's almost no minorities when the whole panel was brought in. And it was objected to. And then not only have you gotten rid of minorities or that there weren't enough minorities in -- to begin with, but then when clearly obviously non-qualified jurors are there. The Court will not even grant the defense challenge for cause, forcing the defense and forcing Mr. Johnson into a miserable jury process. That's what occurred in this.

And I would argue to the Court that my issue that I have raised on that -- on the jury from pages 6 through 23 of my second supplement, should

be considered very carefully by the Court. And I would ask to question -- the difficulty is I believe its Lee McMahon, in fact I'm sure it was who did it. And she's passed. But I would like to at least question both the first trial attorneys as to did they talk to Lee McMahon. Why was this not raised? This issue wasn't raised to the Court.

And I was sort of surprised when I saw the appeal that why would you not raise it? They were objecting. These were all objected to. And they were getting pretty hostile, the defense attorneys. In fact one of the cases I'm citing in there they're telling the Court this is not fair. And they're saying it over and over and over. Why wasn't it raised on appeal? And I would argue it was ineffective assistance of counsel.

I'll move on from that argument and I -- before I do, I also argue cumulative error with that. In other words, if each one of those little issues with how that jury was picked is insufficient, all of them put together was unfair.

The kidnappings were incidental to the robbery. The issue under *Mendoza* is that it increases the harm.

THE COURT: Right.

MR. ORAM: I will tell the Court that when the perpetrators arrived one of the poor young men was taken into the house. They were bound. They were shot. It was incidental to the robbery. The robbery was for a PlayStation and other things. And but under *Mendoza,* Your Honor, I would argue that it should have been raised on appeal. There should have been a pretrial motion. That it was incidental. He shouldn't have been convicted of kidnapping.

Change of venue, Your Honor. They filed a motion for change of venue. This was a high profile case. They didn't raise it on appeal. There was a motion filed. It should have been raised on appeal. And again I'm doing it to be as brief as possible. But obviously each one of these I'm arguing under the *Strickland* standard, and that we've --

THE COURT: Sure.

MR. ORAM: -- we've met both of those standards.

There's some issues about Todd Armstrong. Todd Armstrong was the -- the State admitted was the fourth suspect. He testified. And he had testified in another murder case, a completely separate one. So he became pretty good at pointing the finger at people and getting himself off the hook. During the cross-examination the defense wanted to ask about that other murder. They were precluded from doing so.

I cite to *Lobato* and several other cases where it goes to bias. And this man was a significant witness for this State obviously because he was the fourth suspect. Fourth suspect is on there. He hasn't be charged with this -- with any of these four murder nor the one in Henderson. Yet they can't go into detail about it. All they were able to do was have Mr. Armstrong say: Yes, I didn't receive any benefit. Well obviously he received a benefit at least in my opinion. You're not getting charged with these four murders and getting sentence to death. So I would argue that it was ineffective assistance of counsel not to raise that issue on appeal.

The next issue is during voir dire the prosecutor asked one of the prospective jurors: Do you have intestinal fortitude to carry out a death sentence? In a case of *Billy Castillo* it was found to be improper when perhaps

their finest prosecutor Mel Harmon argued: Do you have the resolve, do you have the intestinal fortitude? I will tell the Court he was doing that during closing argument. This was in voir dire. It's still improper and it should result in the writ being granted.

There was hearsay that was not permitted and not raised in this particular case. Under *Crawford* I cite to it. And that was that Todd Armstrong, again the fourth suspect, was questioned regarding a conversation he overheard between the police and a witness named Brian Johnson. Mr. Armstrong, over defense objection, was permitted to say that he heard Brian Johnson tell the police we knew who did it. That implies that Brian Johnson knew what Mr. Armstrong was saying, that Donte Johnson is guilty. And it gave credence. It gave credibility.

What's even more interesting under *Crawford* is that really is testimonial hearsay. Because Brian Johnson was talking to the police, so then in their investigation they're investigating it Brian Johnson is saying: We knew who did it. Mr. Armstrong, over defense objection, is saying: I heard Brian Johnson say we knew who did it. And it gives him the credibility that another witness also knows that I'm in agreement. That was not raised on appeal. That's ineffective assistance of counsel.

The defense was not permitted to go into the benefits, get into the benefits of Todd Armstrong and Lashaw -- L-A-S-H-A-W-N-Y-A, last name Wright. She said she was receiving no benefit. And I would argue that they were receiving benefits. It was improper, should have been raised on appeal.

They filed the motion of guilt phase that there shouldn't be any mention of it being guilt phase. Judge, that's sort of a boiler plate motion we file.

THE COURT: Yep.

MR. ORAM: And apparently the prosecution I noticed mentioned it numerous times. I've cited when they did. I'll submit that to the Court.

THE COURT: Uh-huh.

MR. ORAM: There were bad acts raised in the first trial that were not objected to on appeal, specifically that Mr. Johnson sold narcotics. And that should have been raised on appeal.

There was improper witness vouching. And I'm just again going through the arguments. The prosecution vouched for a witness by saying that Ms. Wright had been told specifically about perjury. And she was told that how serious that was. And although she's lied in the past essentially she's not going to be doing that again. I've cited caselaw saying that the prosecution cannot vouch for a witness.

The prosecutor asked for the jurors to place themselves in the shoes of the victims. The prosecutor in closing argument states: Imagine the fear in the minds of these three boys as they face down, duct tapped at their ankles and wrists completely defenseless as they hear the first shot that kills their friend Peter Talamantez. Imagine the fear in their minds and imagine the fear as they all lay waiting for their turn.

It was improper for the prosecutor to talk about facts not in evidence. On the cigarette butt found at the scene the DNA shows a major component of being Donte Johnson, a minor component of an unknown

person. The prosecutor in closing argument said: I wonder if what Donte Johnson did was he was smoking that cigarette and then before he shot one of the victims he let him have a drag of the cigarette. That was highly improper, because it's complete speculation. And it also is -- well it's speculation. It should have been raised on appeal.

Autopsy photos should have been raised on appeal. They were objected to.

Unrecorded bench conferences should have been raised on appeal.

And, Your Honor, I -- Your Honor, I also object to several matters that I know have been rejected over and over and over. I object to the premeditation and deliberations instruction, the reasonable doubt instruction. I object to an instruction under *Sharma*. Those issues, Your Honor, I have raised and I raise in every murder case they have always been rejected by the Court.

THE COURT: Right.

MR. ORAM: I ask you revisit them --

THE COURT: Uh-huh.

MR. ORAM: And I think if I have missed any issues, I'd ask to rely upon my briefs. And I ask that you grant an evidentiary hearing so that I may explore these matters with defense counsel.

THE COURT: What's -- just curiosity what's the current status in the Federal Court on the deliberation, premeditation issue?

MR. ORAM: The Nevada Supreme Court just will not --

THE COURT: No, I know --

MR. ORAM: -- grant that.

THE COURT: Wasn't there a federal --

MR. ORAM: Yes, a district court recently said you're going to give this person a new trial. But every time I have this issue I lose the issue. And you're talking about the one prior to *Byford*. The -- I believe.

THE COURT: No, the current premeditation -- I thought there was --

MR. ORAM: There is, but I -- yes there --

THE COURT: You know what, no, maybe it was --

MR. ORAM: Yes, you are right, Your Honor. You are right. It's under *Polk*. I think that's what you're referring to. That the federal courts had said previously the -- before *Byford*, before we had the distinct definition of premeditation, deliberation, and willfulness. Now in the *Byford* instruction we always instruct on what each one of those mean.

THE COURT: Right.

MR. ORAM: They didn't use to.

THE COURT: Right, no I know that.

MR. ORAM: Okay. And so the federal courts have reversed several. The Nevada Supreme Court had been unwilling to do that. So I would submit it to the Court's review for this matter -- these matters.

THE COURT: Okay. Thank you.

MR. OWENS: Now on that *Polk, Nika, Byford* issue I don't know that the Nevada Supreme Courts and federal courts are really that far apart. The federal courts have never held that *Byford* is retroactive. The reversals from the federal court have always been cases that were still pending on direct appeal, that were instructed under *Kazalyn,* and so they were entitled to a -- the new law under *Byford*. And then the question becomes was it harmless error to instruct the way that they did. But, the Supreme -- federal courts have not

disagreed with the Nevada Supreme Court's holding that *Byford* is a new law that is not retroactive in any case that was final prior to 2000. They have not been entitled anywhere to the new instructions.

THE COURT: Okay.

MR. OWENS: With that we reached a lot of issues. I'm kind of -- I'm going to try to go quickly. If Your Honor has interest in any particular issues certainly feel free to slow me down or ask more details about those particular issues.

I want to refresh the Court about what the standard is here for ineffective assistance of counsel. Because I think we've gotten far afield from that. The question is not whether a better defense could have been presented in hindsight, looking at the file now some 11 years later, is there a different way we could have defended this guy, nor is the question whether or not Mr. Oram would have tried the case differently.

The Supreme Court -- US Supreme Court, Nevada Supreme Court case authority acknowledge that there are many ways in which competent representation can be given and multiple ways and strategies that are all acceptable in defending a capital litigant. In fact there's as many strategic ways as there are defense counsel out there doing capital cases.

THE COURT: Sure.

MR. OWENS: And just because Mr. Oram would have done it differently really doesn't matter. The question is whether the defense that was mounted, whether the defense attorneys that did represent Defendant did so effectively in the decisions that they made, not whether they could have made better decisions.

So, starting with that the third penalty hearing, which is the last penalty hearing was in 2005, the one that imposed the death sentence that's currently in effect.

Failure to present evidence of fetal alcohol syndrome. Dr. Kinsora, the defense expert who is a neuropsychologist testified at trial that the Defendant was really bright. He got good grades and that he found no evidence of fetal alcohol syndrome in the Defendant. The defense's mitigation report drafted by Tina Francis also said that she saw no evidence of alcohol drinking by the mother during pregnancy. The mother, Eunice Cain testified in that trial that she drank during her pregnancies, but with one exception. She drank during all of her children, the one exception being that she did not drink during her pregnancy with the Defendant.

With those facts there is no ineffective assistance there. They did explore fetal alcohol syndrome, and they were told by their experts and the -- by the Defendant's own mother that fetal alcohol syndrome was not going to be an issue. It's sheer speculation some 11 years later that we want to go have him tested for it under -- because it's been 11 years and maybe a new expert will say something different. That's not the question.

THE COURT: Was there an IQ test or anything like that presented at all?

MR. OWENS: Dr. Kinsora did a -- I thought did a neuropsychological workup. He testified.

THE COURT: Right. Okay.

MR. OWENS: I don't know what the IQ score was, but he commented and testified repeatedly the Defendant was really, really bright --

THE COURT: Okay.

MR. OWENS: -- and got good grades. This was not your typical capital litigant that may be a slow learner. He was really bright.

Fetal alcohol syndrome is a wishy-washy thing. It's not in the DSM IV, whatever they call it. It's not an official diagnostic tool. So, there are -- the criteria by which you are able to diagnose this is really subjective.

The question is not whether they could get a new expert to come in and say: Well, I think there is some evidence of fetal alcohol. The question is whether counsel was effective at the time, 11 years ago in exploring this. And they were. They asked a neuropsychologist about it. They asked the Defendant's mother. It didn't pan out for them, nothing ineffective there.

They said they failed to obtain a PET scan and Mr. Oram would like to do one now. On what basis? It's a pure fishing expedition in the hopes that it will turn up something to give them something new to argue. The question is: Are there grounds for it? Was there clues out there for defense counsel at the time or indeed today that would suggest that he's suffering some -- from sort of brain defect that's going to show up on a PET scan?

I don't think we've reached the point where every death row litigant before trial has to undergo a 3D imaging PET scan of his brain. We only do it in those cases where there's an expert that says: I think there's something going on here and we need to look further. Here the experts said -- Dr. Kinsora testified he did not believe there was any brain damage. There's no reason to do the PET scan. And so counsel was not ineffective. And there is no grounds to go and get one now. Kinsora's testimony was there is nothing to suggest anything wrong organically. There is no organic brain disorder. So

they'd be going against their own expert now to go out and get some expensive 3D imaging that is just not warranted.

Failure to present evidence of the co-Defendant sentences of life. I've looked at *Flanagan and Moore* and, you know, we're bound by it. That is the law in Nevada. I can tell the Court that that is bad law. It was bad when it was created. That was Dan Seatnam [phonetic] of our office in the *Flanagan/Moore* case that wanted to get it in to his advantage. And we persuaded the Court that that was proper. The weight of authority out there is that that is not proper. The co-Defendants' sentences and the sentence that other jurors gave to other defendants really is not relevant to determining whether this particular defendant, it's an individualized decision, whether he should receive the death penalty.

That being said I recognize it's the law. I think someday it's going to be overturned. But that is the law that you can get it in. In *Flanagan and Moore* they didn't say that you must allow it. They said it was not error for the court to have allowed it in that case. That doesn't mean that the Judge is precluded from -- or that the Judge can't prevent that evidence from coming in. You don't -- you can't read it that way.

Proportionality cuts both ways. The co-Defendant's sentences may very, very well have hurt the Defendant for the jury to hear actual evidence. The -- in the third penalty hearing his counsel did blurt it out, so the jury was aware of it. And you're right the law says we presume jurors follow the instructions and that they didn't consider it. The question is whether counsel was ineffective in not putting on actual evidence. We don't know that the

Court would have allowed it. Not withstanding *Flanagan and Moore* the Court may have said: No, I think that's too far afield; I'm not going to allow that.

But, let's say the Court would have allowed it I would note that during the first trial in 2000, there the trial attorneys specifically sought to exclude it and that was granted. Because they felt it was not in their client's best interest to have the jurors hear that all the non-shooters got life sentences. So, what are you going to do with the shooter? Is it fair to give him the same sentence when he's the shooter? The evidence I think is overwhelming.

I know that there was some argument and because that's really all that they had to play in this case is to say: Well, we don't know for sure that he's the shooter. He's got blood on his pant leg. There was testimony that he laughed as he shot these victims execution style in the head and the blood gurgled up out of the head. And this Defendant laughed. That was the testimony that the jury heard. This Defendant took one of the victims and moved him into another room and was all alone with him in that room when he executed him.

So what do you do with someone who is the actual shooter if the accomplices and the aiders and abettors who participated in this robbery, kidnapping, if they all get life sentences what do you do with the shooter? How do you punish him? So this can cut both ways. And defense counsel in the first trial certainly thought that way. This is clearly a strategic decision whether or not to allow this in.

Maybe Mr. Oram would have wanted it in. That's not to say it's ineffective for any defense counsel that might disagree with Mr. Oram and say: You know what, I don't want the jury to hearing that. I think that may hurt my

client. I don't want the jury to hear what the co-Defendants' sentences were. These strategic decisions we have to trust to counsel, give them the wide latitude and discretion to defend the case as they see fit.

We don't have to have an evidentiary hearing on that. We don't have to call in those attorneys and ask them. It is presumed that counsel's decisions are strategic. We can look at the record and see that: Hey, in the first trial some attorneys didn't do it. In this trial we can see how it might have hurt the defense. We can afford them the latitude that this was a reasonable strategic decision.

Failed to offer mitigators by the first jury. Look, anything can be a mitigator. And just because the first jurors came up with 23 mitigators doesn't mean that counsel is ineffective unless you put all 23 of those back in front of the next jury. Again this is a personalized strategic decision. Not all counsel are going to try it the same way. We have case authority that say -- says that counsel is not ineffective even if he doesn't list any mitigators for the jury.

Some attorneys feel it is better to just give that one catchall. Give the standard mitigators out of the statute, the last one of which is a catchall that says anything can be a mitigator and then argue that to the jury. And let them -- puts them in the position of having to think about: Well, what could mitigate here. And then they're more likely come up more.

I know that in the first trial those attorneys only offered 5 statutory mitigators in the instruction. And the jury came up with 23. Here counsel gave them 7 listed mitigators. Not all of them were found by the jury. Two of them were written in. And so some of these mitigators in a bifurcated hearing would have really come back to undermine the defense's strategy in

bifurcating, because once they put on evidence of mitigation we're allowed then to rebut it. And if they put on and list as certain aggravators here that opens them up to rebuttal in a bifurcated hearing.

We put on evidence in aggravation. Here the aggravators were really the basis of the crime. There was really nothing new that we put on in our case in aggravation. We didn't get to put in all the other horrible --

THE COURT: What were the aggravating circumstances?

MR. OWENS: What's that?

THE COURT: What were the aggravating circumstances?

MR. OWENS: I'm not sure I have those handy.

THE COURT: More than one victim or something like that.

MR. OWENS: There's one aggravator, and I assume it's that there's more than one victim. So, the jurors already heard that in the guilt phase. There was nothing really new.

THE COURT: Right, so there's really nothing.

MR. OWENS: Now there's a ton of non-statutory aggravating facts that we want them to hear.

THE COURT: Correct.

MR. OWENS: But --

THE COURT: Other evidence.

MR. OWENS: -- which include another murder.

THE COURT: Uh-huh, right.

MR. OWENS: But, that's the strategy. By getting it to bifurcate the jury doesn't hear about that before they go weighing.

THE COURT: Right, right.

MR. OWENS: And so they're able to put in these mitigators, but we get to rebut any mitigators and so you've got to be very careful. If you put in some mitigators about -- and I had them here; I don't have them right now. I got so many issues going on. There was two of the mitigators in our brief that we referred to that if they had put those on would have opened the door to the jury hearing about the other murder. That he had relatively no prior record, okay, because they hadn't heard about his prior record yet. And yet I think one of those 23 mitigators --

THE COURT: Oh that was one of the --

MR. OWENS: -- is he doesn't have any record.

THE COURT: Okay.

MR. OWENS: Because they didn't hear about any. Well, of course they didn't. We weren't allowed to put it in prior to them weighing. And so they got that advantage of that mitigator and so there's strategy reasons here. Just because there was 23 mitigators doesn't mean the next counsel has to put in all 23.

THE COURT: Well, wait a minute. Sorry.

MR. OWENS: Uh-huh.

THE COURT: I thought and maybe I misunderstood. I thought in the first jury that ended up hanging on penalty that I thought that was not a bifurcated penalty.

MR. OWENS: It was not.

MR. ORAM: No, it was. And the reason you're saying that is because you asked me and I incorrectly told you that's why I tabbed that.

THE COURT: Oh.

MR. ORAM: Your Honor, it -- and --

THE COURT: Because then at the time they were listing mitigators had they heard the State's other evidence or not?

MR. ORAM: Well, Your Honor, it was bifurcated but the instruction --

MR. OWENS: Here's the two aggravators in my brief. This is what I was referring to. Here's -- I'm reading from our brief: For example, had Defendant's counsel offered the following two mitigating circumstances to the jury during the eligibility phase the State would have been able to rebut these mitigators with the devastating evidence described above, which is the prior murder and things in jail.

THE COURT: Okay. So there was a separate eligibility?

MR. OWENS: In the last penalty hearing, yes.

THE COURT: Right.

MR. OWENS: One of those mitigators that the first jury found --

THE COURT: Oh, I see what you're saying. I see what you're saying. Okay.

MR. OWENS: One of the first of those mitigators was the killings happened in a relatively short period of time and it was a more isolated incident than a pattern. There was a pattern and we could have rebutted that had they offered that to the jury in mitigation. Now that was a finding that the first jury made, does that mean the next counsel has to put that out there when he knows darn well that there is a pattern that we can show?

The other mitigator that the first jury found, one of these 23, was that there was no indication of any violence while in jail. Donte Johnson picked somebody up and threw them off a railing in the jail. So, we clearly could have

rebutted that. I don't know to what extent that evidence was elicited in the first trial. But just because those were mitigators that the first jury found doesn't mean some counsel just like a robot says: I'm putting all 23 of these in. There's has to be some exercise of strategy and good reasoning and thinking by defense counsel.

In my brief I also point out that they argued many mitigators that they did not list. I don't know if you want me to go into them. But there's 5 different areas here of mitigation, many of which cover some of those 23 that the first jury found. So although they weren't articulated in an instruction and the jury would have had to have written them in, they were argued to the jury that way.

Let's see, failed to present evidence from Defendant's father. I don't know if Mr. Oram has spoken to the Defendant's father and whether we have any proffer of proof of what the father would or would not say. And so it's mere speculation whether he would have been a good witness or not. Mr. Oram, that's worked for him in the past to put on the abuser and that garners sympathy for the victim. And that may very well be a very good tactic. That doesn't mean that other attorneys can't disagree and that we're going to say you're ineffective if you don't put the abuser on the stand.

It can be effective to not hear from the father. I don't know that the father's available. There's been no showing that he was even available for trial counsel to have found him. So, there's multiple ways of doing this. No showing that it necessarily would have benefitted him. It's a strategic decision. Some counsel think -- may think it would be good. Others, you know, you get the -- he can maybe the jurors would agree with him. And maybe he's going to

say: It's the mother that did the abusing; they're out to get me. It can open up a can of worms that is within trial counsel's strategic decisions to make.

Let's see, the mitigation report from Tina Francis. This was not compelled from the defense pursuant to some sort of reciprocal discovery rule just because they had it that they had to give it us. Only when they sought to introduce it through an expert and they gave it to the expert and he based his opinion on it then it comes in under 50.305. There's a statute that says that we get to inquire into the basis for his opinion.

And it's been 11 years and there's still no case authority in their favor on this issue. That they get to keep those things secret when they're having their expert rely on it, but they still don't have to give it to us and they want their expert to testify. The choice is theirs. If they want to keep it secret and not do our work for us, I get that, and they get to keep some of that secret from the jury. But, their choice is then not to put their expert on the stand or don't have their expert rely on it. The choice is in their court. The ball's in their court. We don't have a choice in the matter. They put someone on the stand we're entitled to it.

A writ was just denied the other day on this issue. So, 11 years later the defense still does not like the area -- this area of law. They don't like having to give us anything. But the law requires them to. And so, you know, they're arguing for changes in the law. You can't base a post-conviction petition on changes in the law -- this is what the law should be, therefore counsel was ineffective.

Let's see, trial counsel's arguments contradicted each other. Yeah, technically they probably did. But again argument is what attorneys do. This

is the -- a very personalized, individualized, specialized art form of arguing. And, you know, you have to look at how it was perceived by the jury. And now if they're coming out in contention and undermining theories of defense that they have proffered to another I can see how you might have a claim that that's ineffective and counsel really working against each other. Here they're working in favor. They're working with each other. They're trying to save the man's life.

So you got one attorney saying that: Yeah, he can't get alcohol -- or drugs or was it alcohol -- can't get access to drugs in prison and so all his violent crime that's happened when he's been under the influence of drugs we're not going to have a problem with that so put him in prison.

The next one comes along is now having to respond to the State's closing argument. And we've been able to do some damage by pointing out that he's been violent in prison as told to us by some prison guards. And so the next attorney has to come in and impugn the credibility of those prison guards somehow. And that's how she comes up with this argument that says: You know what, yeah, drugs, usually not in prison but there are some exceptions. This doesn't undermine first counsel. There shouldn't be any access to alcohol, but there potentially could be if the prison guards break the law, violate the law and bring in alcohol.

And so she's used that to impugn the credibility of the guards to show that they should not be believed necessarily when they claim that the Defendant was violent in prison. So, yeah they argued it a little bit differently. It worked to the Defendant's advantage. I don't think anything that they say in arguments like that can be deemed to be ineffective. It's just different counsel

perceiving different strategic arguments to make that will be persuasive with the jury. I think it is persuasive. And whether it is persuasive is a subjective decision that we shouldn't be sitting in judgment of here today.

Reference to victims as kids. You know, on direct appeal the Court said that the State's reference to kids was appropriate and non-prejudicial. There was no harm in referring to these victims as kids, appropriate and non-prejudicial. So, now on post-conviction they want to take issue with their own counsel referring to the victims as kids. You have to look at in context. When counsel was doing this she was explaining how the State supposedly was using the term kids to undermine their defense and make the victims more sympathetic. Counsel did this to explain the State's tactics and arguments. In that context it was appropriate.

Let's see, raising improper impeachment of defense witness. Oh, impeaching Dr. Zamora with misdemeanor convictions. If you read the record on this they objected because we had asked whether he had prior felony convictions. And he said no. And then we went to misdemeanors. And so there's an objection: You can't impeach him. And we said: This isn't impeachment. And we were cut off. I don't know exactly what the -- we said that several times to the Judge. The Judge said: Move on, you don't -- you can't impeach with that. This isn't impeachment, Judge. There was going to be an explanation for it. We didn't get to hear it in the record because we moved on. But it was not being offered for impeachment. We know you can't impeach with a prior misdemeanor conviction. There was another purpose behind it.

We do know that this Dr. Zamora had already testified that he had assaulted woman and been in gangs committing crimes. So, this was not about his criminal record, impeaching him with it, because the jury had already heard he had already said that he assaulted a woman and was committing crimes in a gang. And so obviously our trial prosecutor wanted to explore that a little bit more. They had opened the door to it. Anyway, the objection was sustained so I don't know how this was ineffective. They objected, sustained.

Moving on, now we're going to the trial. They claim there's no fair cross section. Finally in their reply brief do they move beyond this venire and they bring up -- I think they got a total of 3 venires. That's still not a fair representation. What about all the venires out there where there is more minorities than is reflected in the population? You got to look at a larger segment here of the venires to be able to draw any conclusion. Just because he can point out three where the venire did not match the population in the public is not grounds to advance his claim here.

They have to show not just that there is a disparity and there is no entitlement or right to have a particular venire reflect the population at large. You have to show that the disparity results from purposeful discrimination. All he's shown and argued here today is that it results from socioeconomic environment. He comes up with this statistic that African males are arrested -- 50 percent of them are arrested. Well, that's sad. That's a race neutral reason though. There's socioeconomic factors at play that make them more involved within the criminal justice system. And that is sad and we as a society need to do something about that.

However, when we're talking about excluding them from a jury, no one's excluding them because of race. They have to show a disparate impact is the result of purposeful discrimination. Not just that there's a discriminate impact. Not just that we don't have enough African Americans on a jury panel. They have to rule out all these other reasons. And there are many out there.

I mean, look at death row. We've heard that all the time. Why is half the population on death row African American? Well, they commit a disproportionate number of murders. And it's because of socioeconomic factors and all sorts of factors that they have to rule out. You can't just show disparate -- a disparate result and therefore assume it must be the result of somebody discriminating against African Americans.

Kind of merged in with the *Batson* challenge there were so many race neutral reasons here. And there was one juror that was struck on a peremptory who was African American and the highest deferential standard of review is entitled to the trial attorney who found no purposeful discrimination. There's a whole slew of race neutral reasons here, not the least of which that her stepson was serving in jail. There's no chance that would have won on appeal had that issue been raised on appeal. It would have been affirmed.

State used peremptories in challenging life-affirming jurors. Again this is pertaining to the jury that did not ultimately reach a sentence decision. So, I don't know that it's cognizable. Plus there is no citation to any legal authority that says the State can't use peremptories to challenge life-affirming jurors, and that that creates any kind of a prejudice or harm to the Defendant just because they're in theory more likely to convict. I know that arguments be made. I haven't seen Mr. Oram or anyone else cite any case authority that has

agreed with that argument. So, just because he can concoct an argument here today does not mean counsel was ineffective in failing to make an argument for which there is currently no case authority.

Court denied Defendant's cause challenges to 3 jurors. Again this was in the initial jury that did not actually reach a decision on the sentence. And these cause challenges all go to issues concerning their ability to fairly determine a sentence. They hung. And so I don't know that you can even raise it. To the extent that you can, he's citing to dissent in *Ross v. Oklahoma*. The majority says you cannot show any prejudice from the denial of a cause challenge unless you can show that there was a biased jury who was actually seated. As long as you're able to remove them with a peremptory you're out of luck; you're done.

I understand there was a dissent. How old is *Ross v. Oklahoma*? The law hasn't changed. So again he's arguing for changes in the law. That's not what it is. He has to show that he ran out of peremptories and there was a biased jury actually seated. The goal of having peremptories is to impanel a fair and impartial juror. There's no showing that the jury, however it was arrived at, was impartial or that it was partial and unfair. So, he cannot prevail on the claim.

The incidental kidnapping. Here we have asportation, moving him to another room. We have them bound, duct tapped, hands behind the back so they can't run away, making them easy targets. I just don't think that was -- it was really going to fly. Could it have been raised? Sure. Would it have --was it ineffective not to? No, every time there's a kidnapping charge you don't have to raise issues that you don't think are going to be meritorious. I don't

think with the asportation we have here and the restraint of the victims that that would have been successful and so no ineffectiveness there.

Venue, I still see no basis for the motion. That is so, so rarely granted. There's only been a few cases in the history of all of Nevada where there's been a proper request for venue.

Let's see, precluded -- oh, in cross-examining Armstrong he only precluded the substance of the murder, the facts, the details of the other murder that Armstrong witnessed. They did -- the Judge did not preclude the defense from questioning Armstrong about his being coincidentally yet another witness for the State in yet another murder. They were allowed to elicit that and they did. They got out their point that: Hey, that's awfully coincidental you really think you're not getting any benefit here by not being charged when you're a witness not just to one murder but two murders? They were able to dirty him up. That was fair game. That was appropriate cross-examination. They weren't limited in that regard. They were limited from getting into the facts of the other crime and trying to prove up that other murder and what exactly had gone on there. Trying to show that Armstrong committed the murder.

Let's see, intestinal fortitude argument in voir dire. I believe that was on a jury -- on the first jury that did not sentence the Defendant to death. If I'm mistaken about that then please correct me. But, my understanding is that again that's voir dire of the first jury that did not determine death.

And I think it is entirely different whether you're arguing to a jury that do you have the intestinal fortitude to vote for death, kind of goading them in, challenging them saying you're not strong enough, you got to be a man here

and vote for death. That is something entirely I think in voir dire where the environment and pressure is not nearly as intense to say: In the appropriate case would you have the intestinal fortitude to vote for death?. That's an appropriate question. I haven't always heard it phrased that way. It's usually when it comes right down to it can you -- do you have that capacity within you --

THE COURT: To be able to sign or vote for it.

MR. OWENS: -- in the appropriate case to vote for death? And so, I think in context I don't think it was even objectionable. Even if it was, I don't see any prejudice here that's going to result in us reversing the trial or the -- because of this one reference that wasn't objected to in voir dire.

Let's see, in violation of hearsay and confrontation when Todd Armstrong talked to the police and said supposedly what this other witness Brian Johnson said. Todd Johnson -- or Todd Armstrong said: We knew who did it. As that -- he was repeating a statement that Brian Johnson had said to the police. Yeah, but he didn't say who Brian Johnson told the police did it. He didn't say to the jurors in the courtroom that Brian Johnson said Donte Johnson did the murder. He simply said Brian Johnson told the police that we, Todd and Brian, knew who did it. And then each gave their separate statement to the police.

To the extent that there may be some minor hearsay violation there, Brian Johnson testified. You can have no confrontation violation when Brian Johnson testified. I think our briefs disagree on this and one of us may be inaccurate. My brief, my research shows that Brian Johnson actually testified so he's subject to cross-examination regarding that. You can have no

constitutional confrontation claim, maybe a minor hearsay issue. But, you know, we waive hearsay objections all the time when evidence is coming in anyway and to speed things along, we know Brian Johnson's going to testify. No harm, no foul, certainly no grounds to reverse.

Ineffective assistance on appeal, failed to raise a *Brady* violation as to Todd Armstrong. It's sheer speculation some 11 years later that Todd Armstrong received some sort of benefit. Yeah, they think he did. And they think it's just inconceivable that he didn't get some sort of benefit out of this deal. But you got to have something to back it up before you challenge prior counsel for not raising it on appeal. There are no grounds for it even today.

Lashawnya Wright, they say the record shows she got help with release on a misdemeanor. They know that because it was elicited at trial. The jury heard that. So how can that be a *Brady* violation? The jury was able to consider that about Lashawnya Wright. So, there was no grounds for a viol -- *Brady* violation even today.

Ineffective assistance of counsel, failing to object to references to the guilt phase. I showed no case authority on this issue. Maybe some Judges would have precluded that. Maybe some Judges would have allowed that to come in. I don't find that that is so prejudicial that counsel should have objected. I think Mr. Oram said that counsel did file a motion. I thought in reading this issue that he's raising it for the first time and saying that they should have filed a motion. I don't think they did. If they did it -- and you know, I just don't see any way in which on appeal it hadn't been raised for some violation that Supreme Court would have reversed because we referred to

it as a guilt phase. And you have to look at it in context, we never said guilt phase and implied that he was therefore guilty.

Ineffective assistance, oh this thing about Defendant selling narcotics as bad act evidence. This was proffered by the defense. This was their theory to explain away his fingerprints on this -- on the cigar box. This first came out through the defense counsel in opening statement. This wasn't a prior bad act the Defendant was selling drugs. This was their defensive theory to explain why his fingerprint was on a cigar box in at the scene of the crime. And it's because drugs were being sold. He painted the victims as drug sellers and Donte Johnson, yeah, was a drug buyer. That worked to their advantage. It wasn't a prior bad act that the State needed to hold a *Petrocelli* hearing on to introduce. It was introduced by the defense.

Improper witness vouching because we argued that a not guilty would mean that 5 witnesses would be lying. That's not objectionable. Maybe some Judges would have sustained an objection. I think there is great leeway there to argue that when you have multiple accounts -- we've cited the authority our brief -- multiple accounts all of which cannot be true and depend on somebody is lying. Yeah, there's case authority that say you can't call the Defendant a liar. But you certainly can come out and say look somebody's lying here. And that's what a juror's job is, ferret out the truth. We're fooling ourselves if we think everyone's going to be honest in the courtroom. Some people inevitably will be lying. And we are given leeway to be able to argue that.

Ask the jurors to place themselves in victim's shoes. It certainly looked like that's what the prosecutor was doing from my reading of the

transcript. The objection was sustained. So, I don't know how that can be an issue. Counsel was effective. He saw it. He objected. It was sustained.

Reference to facts not in evidence. Oh, explaining the DNA mixture on the cigarette. What other inference do you want to draw? I mean they're free to draw if there are other inferences. The evidence showed there was a mixture of DNA on this cigarette from the Defendant and from the victims. You know, that's fair game. We can argue inferences. Certainly even if they had objected, even if it had been sustained -- I don't think it was objectionable, even if it had been sustained, and it was error not to have objected. I don't see this as being some sort of prejudicial thing. The jury knew what the evidence showed, that there was DNA on the cigarette from the Defendant and the victims.

Let's see, improper witness -- no I went there. Autopsy photos that seldom is ever goes any where. I've never seen that succeed. Judges are really careful in narrowing these down. He hasn't shown that their -- the photos here were so pervasive or unnecessary that it was overly gruesome.

Failing to object, make record of unrecorded bench conferences. He still has no basis to say what was said during those bench conferences that was prejudicial. There's no basis to appeal that. Every time they have, unless they can come up with what the substance was at the bench conference by talking to witnesses and show their prejudice by it not being raised, they just cannot prevail on that claim.

The instructions, you know, I'm not even going to go there. He admits that they've already been rejected by the Court, his arguments. And so

presumably they're in there to preserve the issue for future courts down the road.

THE COURT: Right.

MR. OWENS: So, unless Your Honor has something else I think I've touched on everything and would submit it.

THE COURT: Okay. So, Mr. Oram, on the fetal alcohol and PET scan issue, Dr. Kinsora opined that it was not applicable?

MR. ORAM: Yes, and that's why --

THE COURT: So, how is it ineffective?

MR. ORAM: Well, that's why I cite to the standard which says how easily it can be misdiagnosed. And that is also one matter that I'd like to address with the Court. Mr. Owens said that the mother admitted that she did not drink. I'm citing from volume 6, April 26th, 2005 at page 152. I cited this in my supplemental brief, the very first one. Eunice, that's the Defendant's mother, stated that she drank alcohol when she was pregnant Donte. I know this is a very voluminous case. And when you'd asked me was there a bifurcated penalty phase at first I told you no. I was wrong. But unless the State has something different, I know she --

MR. OWENS: Whose testimony was that that you just read?

MR. ORAM: From Eunice -- Eunice described Donte Johnson as her oldest child. Eunice stated that she drank alcohol when she was pregnant with Donte. I'm reading from page 17, Mr. Owens, of my first supplemental brief.

MR. OWENS: Yeah, okay, I --volume 6 on page 164 I've got the actual quotes not a paraphrasing.

The State asked: You used alcohol and drugs while you were pregnant with each one of those children?

Eunice Cain: No, one I didn't.

The State: Which one did you not?

Eunice Cain: My son.

The State: The Defendant?

Eunice Cain: Yes.

That's where I'm getting mine from.

MR. ORAM: Your Honor, I'm citing -- I wish I had volume 6. I'm sure that that's probably an accurate cite. As I told you earlier, she had given at least Tina Francis some indication that she had not and then that was used against her. I -- again it's so voluminous, but I even have it down to the page that that's what she said.

I realize that there is a conflict in what she had said. And that's why I told the Court that. The standard that was used with -- to determine fetal alcohol is it's easy to misdiagnose. The reason I cite that in there is because I recognize that that's what Dr. Kinsora thought. So, to me I still think that there should be a hearing because she did say that on that page. And I cited that. Obviously if the State thought I was wrong they'd look at that page say I had mis-cited.

Additionally, he was small in stature and his reasoning was poor. Those are the standards for fetal alcohol. So, I would argue that there should have been a hearing to determine why it was not done. Remember Dr. Kinsora is from the first trial, the first penalty phase. And I'm talking about it in the third penalty phase. Why they didn't explore that further.

THE COURT: Dr. Kinsora didn't testify in that last penalty phase?

MR. ORAM: Court's indulgence.

THE COURT: I mean, I -- he may not have. I'm not saying he -- I think he did or didn't.

MR. OWENS: I don't recall, Judge.

THE COURT: I mean, I'm sure they had some neuropsychological testimony --

MR. ORAM: Judge -- Your Honor, bear with me, let me see if I can find that.

THE COURT: -- in 2005 in a death penalty phase. Well, I mean, ultimately the issue is, you know, how can we say counsel in that last penalty phase --

MR. ORAM: He did.

THE COURT: He did. How can we say that counsel in that penalty phase were ineffective for not having fetal alcohol syndrome testimony if their expert is saying don't see a fetal alcohol syndrome problem. There's evidence that he or at least this Dr. Kinsora thought he was smart. And mom is saying didn't drink when I was pregnant with him.

MR. ORAM: I would argue he meets the factors. I would argue that she did say at least one time that she did drink. And therefore, I would argue ineffective assistance. With that I would leave it with the Court's discretion.

THE COURT: Okay.

MR. ORAM: With the PET scan, the PET scan I think it's the inverse argument. Mr. Owens argues well what proof do I have? Well, I don't; I mean, I can't say, you know, I've been looking at his head. And I can't. But, that's

why you do it. The crime and the case itself screams out get it done. And here's why, this seems like a case that if you were assigned I don't think -- I mean, I know that there are differences of how you can handle a case. But I also think that there are some cases that maybe there is a chance the man's going to be found not guilty. But, I would think that when you look at the pictures of this case, look at the pictures, you think this looks like a fight for a human beings life.

THE COURT: Sure.

MR. ORAM: That's what it looks like.

THE COURT: Absolutely that's where your focus is going to be.

MR. ORAM: And so, you better pull out all the stops here, as many as you can think of. And one would be this may be the case that we have his brain analyzed to see if there's something with -- wrong with him so that we can argue scientifically that there is something wrong with him.

Do I have any proof as I stand here that yes I have some reasonable suspicion that this will show that? No, I could not tell you. In other words, I would not want to be sitting there waiting for the results to come through that back door and have my credibility on the line. I don't know.

THE COURT: Right.

MR. ORAM: But I would have thought they should have done it just because this is the case, especially in the third penalty phase, where you know you're just fighting for his life. You better do what's necessary.

Now I can tell you as an officer of the court that I sat down with Ms. Jackson in her office at the Special Public Defenders. She's a very gracious lady, a very fine defense attorney. And this was a conversation that

occurred. I asked: Was it done? We had a discussion about it. It wasn't. I would think that she would think that it was a good idea to have a PET scan done. I do not think she would think it was a bad idea. In retrospect I think it -- she will agree that it should have been done. And therefore I'd ask for the funding of it for it to see if it's going to be done.

Additionally I think if it's not and assuming arguendo that this gets to federal court, they'll claim it should have been done. That this should have been done, why didn't you do it? So, I'm asking for the funding today. I would like to see that it gets done. And if there is something wrong with the brain then I can make a more intelligent argument in terms of, yes, it would have had a profound effect.

Mr. Owens is right and he is wrong. He is right in that I have no proof. He is wrong in that if there was evidence of brain injury -- which I also agree that one of the doctors I believe Dr. Kinsora said he saw no evidence of brain injury. But he didn't do a PET scan, he can't ascertain that information. And so, I think under those circumstances it should have been done.

There are a few other matters that I'd like to address very briefly from what Mr. Owens said. He asked did Brian Johnson testify. He couldn't think of it again. It is a massive file. As he was saying that I looked, he did.

THE COURT: Sorry. Hold on a second. Sorry.

[Colloquy between counsel]

[Colloquy between the Court and the Marshal]

THE COURT: Sorry about that.

MR. ORAM: Okay. Thank you. He asked did Brian Johnson testify. I argued it was hearsay. I looked Brian Johnson did in fact testify --

THE COURT: Okay.

MR. ORAM: -- for whatever that's worth. You know, when he talks about -- when Mr. Owens talks about *Ross*, the *Ross* case -- and he's right the Supreme Court of the United States has said a peremptory challenge and they addressed one juror.

Now what I thought was interesting about that is when you look at United States versus *Martinez-Salazar,* which I've cited in my briefs, US Supreme court said: In conclusion we note that what this case does not involve a trial court deliberately misapplied the law in order to force the defendants to use peremptory challenges to correct the court's error. So, what the Supreme Court is saying is yes, you can't argue what I'm essentially arguing unless -- because in that case they were saying the District Court did not do that.

I would argue here under these circumstances, especially Juror Fink or Juror Shink that that is clear -- well there's Fink and Shink -- that is clear to me that looks to me like, with all due respect, an abuse of discretion. The Logan's Run juror that is -- how that is not a challenge for cause, how that was not granted, I don't understand that. And that forces the defense to then use those. So, I would say that we did meet the standard under the standard that was not as the US Supreme Court said that we note does not involve. Here it does involve it. And it's not just one peremptory, it's three. And so, I would say that the Trial Court deliberately misapplied the law.

I don't want to say Trial Court. I was fond of Judge Sobel, however that was very poor reasoning. So, I would say that the Court

seriously was remiss in its duty when it did not grant the peremptory challenges and it forced the Defendant to use peremptory challenges --

THE COURT: It didn't grant cause challenge.

MR. ORAM: I'm sorry. Did not grant the cause challenge and forced the Defendant to use peremptory challenges to correct the Court's error. And I think that I'm not asking for a change in the law. I'm saying you can look at that quote and say it applies here. So under that, although *Ross* was only dealing with one peremptory, the US Supreme Court has said what it does not exist in *Martinez-Salazar*. Here it does.

With regard to not bringing out the co-Defendants' sentences the State argues that attorneys can look at things differently. Okay, I agree. What was Donte Johnson's attorneys trying to do in the third penalty phase? What did they do, not Mr. -- this person standard. Let's just look at what they did. They tried to tell the jury that Young and Smith were not given death sentences. That's what they tried to do. That was their tactic, not mine, theirs. They tried to tell it to the jury, an objection happened, it was sustained. So, what was their intention? What was their motivation? It's obvious they wanted the jury to know. Yet they had not taken the precautions to get it done. So, I saw --

THE COURT: Sorry.

THE MARSHAL: Thank you, counsel.

MR. ORAM: So, I saw that if that's their intention, that's their motivation to get it done. They didn't get it done. So, this isn't me trying to supplement my ideas of what should happen. All I'm doing is looking at the situation, looking at their motivation, looking at their intent and saying: Well, why didn't

you get it done? You should have got it completed. There's caselaw as the State admits. The State says: That is the law, it comes in. So, simply call somebody to the witness stand. Or have the Court take judicial notice of it, either one.

And I don't want to quibble because I think it could be proved if the Court says I'm not taking judicial notice. Okay, fine then I'll call the P&P officer. P&P Officer, what were their sentences? Their sentences were life without parole. There you go. Okay. We'll call their attorneys, what was their sentences? Life without parole. And so there you go, it's proved. Now the State can't stop it under *Moore and Flanagan* and you get to argue it without objection. That's not my argument. That's what they tried to do and they were unsuccessful. They were ineffective.

The next one, the State is -- has a clever argument on those mitigators. They say well 2 of them would have opened the door. The difference between 7 and 23, it's not 7 and 9 where the 2 then equal out. Okay. Let's take the State's representations as exactly accurate. I don't want to open the door so I don't use 2. Now I've got 21, 21 versus 7 gives more 14 additional mitigators. Why not list them?

I suspect, I don't get to see what everybody else does, but when you're giving that instruction now the Court has to give an instruction on mitigators that you think that you can show. So I can list them. The easiest thing to do in this case as the third penalty juror -- anybody if there was a fourth penalty phase should do is take those 23 minus the 2 that the State has now put on the record are going to hurt, forget those ones. List the 21 and say: Look at those Ladies and Gentlemen of the Jury. We have established

this, this, this, and this. And so, I would argue that those -- that was a serious error in this particular case.

With regard to picking that jury, I had -- I actually had put in my brief in the reply brief the issue of *Delbert Cobb*. And I think I attached, I did, his decision. And in that case what I think is just so interesting is that in *Cobb* the State argues that Ms. Dawson, the prospective juror, was standing at eye level across from the prosecutor. And her close friend or relative was charged with a crime. See, there you go, close relative or friend was charged with a crime. They can't say: Yeah, you saw how she said she couldn't be fair or how she was angry, just that there was a friend. She made no eye contact with the prosecutor and looked at almost a 90 degree angle away in answering the questions. Okay. And so you see there's nothing in the record to support that other than a prosecutor telling the Court: Hey, that's what I did.

But, you see that -- I didn't really quite understand Mr. Owens argument in that he saying that, yes, this is sort of a socioeconomic problem in the society. I understand that. But what I'm saying is it can be used each and every time. You bring me 80 jurors. I'm the prosecutor. I look back I see two black faces. I think to myself I'm going to get rid of both of these. I'm going to, just watch me. Young prosecutor: How are you going to do that? I'm like: Watch this.

And I just go through that process. Do you know anybody that's been arrested? Yes, my -- as a matter of fact my uncle did. Judge, did you notice the way he answered that question he was turning away from me. His eye flickered. He twitched. He did -- his legs were crossed that was very suspicious. And there you go, there's my reason. End of story.

And so then we have to accept this each and every time. And if they're doing it in *Cobb* and they're doing it here, then it seems like that is becoming a pattern. Because what they can't do is they're not showing other factors. In other words, what I've seen in the past, and I know the Court would have seen, is somebody who is really hostile to the State. There are people. They come in, you bring in 80, somebody's going to be really hostile to State. You know, you didn't treat my son right, you people. I -- you know, I'm -- it's just obvious. And here all they can do is say that a close friend, relative, stepson has been arrested and we don't like the body language and the Supreme Court is granting these things.

And so at some point I think I would be remiss in my duties if I didn't start pointing out this pattern. And at some point maybe the Supreme Court or a Court will say: You know that is unacceptable. That juror answered the questions correctly. If you go back and look at Juror Fuller she was perfect. She said she could follow the law. She said she could do absolutely everything. And then they get her for those reason. I would suggest that that combined with all the other difficulties in the jury selection should amount to either granting of the writ and a new trial or to an evidentiary hearing.

Your Honor, I think there were a whole bunch of issues that I have briefed. I don't want to say that I conceded all of the jury instructions. One of the jury instructions was based on *Sharma*. I don't -- the Nevada Supreme Court has said that was improper. It didn't say specifically the instruction that he had to have specific intent to kill, and so I am not conceding that. I am simply trying to inform the Court as an officer of the court that there have been certain decisions --

THE COURT: Sure.

MR. ORAM: -- that are against me. But I don't concede it. I don't want somebody to say later on that I have conceded those matters.

I think that I have put forth enough here to garner an evidentiary hearing. There are enough issues as to why for example: That you didn't use those other mitigators, why you didn't get a PET scan, why you didn't try to call the father. Different matters that I would argue should result in an evidentiary hearing. With that I'll submit it.

THE COURT: Obviously you've raised a lot of different issues to attempt to establish the ineffective assistance. And, you know, we're all certainly aware of the *Strickland* standard on showing that. And, you know, I guess it's particularly tough on this one in light of the *Strickland* standard and knowing that it's not just, you know, it's not just that someone did something different than another attorney would do. And it's not even if we would all say it was a mistake. But, it's got to be, you know, so, you know, below the standard that it's -- that it's like not having counsel representing you. And so, it's obviously a high standard to meet and tough to establish. And counsel who represented Mr. Johnson on the whole, you know, are capable counsel and I think, you know, put in significant effort in their representation on the case.

But having said that there are some issues raised that I think warrant an evidentiary hearing so we understand some of the reasoning, to what extent things were done in error or things were done as strategic decisions and to attempt for the -- Mr. Oram to attempt to establish prejudice, you know, which is difficult to do on the bare record and on the papers. And, you know, particularly when you've got -- I mean, obviously these cases are

important in every criminal case where ineffective assistance is raised. And although there is not a different standard when you have a death penalty case, you obviously want to be sure that everything is done correctly.

So, having said all that and I do appreciate the time you took today going through these issues to kind of focus it a little better for me. I do think we need to have an evidentiary hearing.

Now, having said that I guess we need to talk about the discovery that Mr. Oram wants to do for an evidentiary hearing, what kind of -- what you're looking for. Or I guess how much time we need at least before the hearing and how much time to plan out that the hearing would take up? So, Mr. Oram why don't you tell me what you see going forward with me having said we get an evidentiary hearing?

MR. ORAM: Your Honor, with regard to a PET scan when I'd asked Drew Christiansen about it my recollection is he said on something like this you're going to have to ask the District Court. He wasn't just going to carte blanche grant it. I'm asking you --

THE COURT: Right. How much?

MR. ORAM: I'm asking --

THE COURT: How much is it?

MR. ORAM: I don't know. I can find out and come back to court. I -- unfortunately I don't have that answer.

You know, Your Honor, I could also contact I would anticipate calling four -- at least four witnesses. And that would be --

THE COURT: Uh-huh.

MR. ORAM: -- the four defense attorneys.

THE COURT: Right.

MR. ORAM: Perhaps I should make contact with them, find out how much a PET scan is going to cost, and come back to court. I think maybe if I could talk to Mr. Owens we could probably come up with what we estimate to be a time. I would think this matter, because of the length of the issues, may take a little while in examination.

THE COURT: Right. I mean, I don't think this is just going to be, you know, come in for a half hour one morning.

MR. ORAM: Yeah, I don't know. So, does the Court want to do that so that we -- maybe we have a better time.

THE COURT: So, let's set a status where after you have an opportunity -- but just, I mean, so you know I'm probably going to be trying to put this on a Thursday or Friday. And, I mean, I don't know how much time you need to get a PET scan done if I approve to do that. But, we're obviously looking at, you know, probably at least February/March.

MR. ORAM: That's fine. I would think it was going to have to be out that long as well, Judge.

THE COURT: Yeah.

MR. ORAM: Do you want to come back in 30 days us to come --

THE COURT: Okay, so come back on a status in early January --

MR. ORAM: Yes.

THE COURT: -- to see about scheduling evidentiary hearing and maybe have some more information about timing issues.

MR. ORAM: Yes, Your Honor.

THE COURT: Okay. Can you do that Keith?

THE CLERK: Yes, Your Honor. Just a regular calendar?

THE COURT: Yeah, on a regular calendar for a status.

THE CLERK: January 11th, 8:30.

MR. OWENS: And, Judge, might I suggest in preparation for that status check that Your Honor give some thought to narrowing the scope of the evidentiary hearing. Because if we're talking about --

THE COURT: Everything.

MR. OWENS: -- on all the issue. Because I doubt that Mr. Oram or -- and I are going to agree. Because it's my position no facts are in dispute here that make any difference and we don't need an evidentiary hearing. He's going to want to have an evidentiary hearing I imagine on the broadest possible scope.

THE COURT: Yeah.

MR. OWENS: So, we're going to need some guidelines from you. Otherwise we'll be faced with, you know, potentially multiple day hearing going over every single issue. If there are particular facts, particular issues that concern Your Honor that you'd like to hear from trial counsel on. I think the parties could benefit from your guidance as to what exactly you want to hear. That would narrow it down, save a lot of resources and prep time.

THE COURT: I'll -- I think it makes sense to attempt to do that. And I will think about that in advance of that hearing. Okay. So, we'll see you back January 11th to talk further about the parameters --

MR. ORAM: January 11th.

THE COURT: -- and timing for that evidentiary hearing.

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

THE COURT: Thanks for you time.

MR. OWENS: Thanks, Judge.

MR. ORAM: Thank you, Your Honor.

THE COURT: I do appreciate it.

[Proceeding concluded at 10:40 a.m.]

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

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

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

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APPELLANT'S APPENDIX TO THE OPENING BRIEF
VOLUME XXXVIII

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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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35	TRANSCRIPT OF PROCEEDINGS DEFENDANT'S MOTION TO PLACE ON CALENDAR TO EXTEND THE TIME TO FILE REPLY BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS/HEARING AND ARGUMENT: DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (FILED 07/06/2011)	7537-7574
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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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