IN THE SUPREME COURT OF THE STATE OF NEVADA

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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 REPLY BRIEF

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ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This argument stands as submitted in the Opening Brief.

II. JOHNSON'S CLAIMS REGARDING INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL DURING THE 2000 JURY TRIAL AND DIRECT APPEAL ARE NOT PROCEDURALLY BARRED.

The district court carefully considered the State's time bar argument below. After significant briefing and oral argument, the district court denied the State's contention that Mr. Johnson's trial issues were time barred. The State repeats the same arguments in this Court as they previously made in the district court. A careful consideration of Mr. Johnson's arguments mandate the merits of his writ be heard.

A. MR. JOHNSON'S ISSUES REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL FROM TRIAL AND ON APPEAL FROM THE JUDGMENTS OF CONVICTIONS SHOULD BE HEARD ON THE MERITS.

In the instant case, Mr. Johnson can demonstrate good cause that an impediment external to the defense prevented him from complying with the State procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); citing, Pellegrini v. State, 117 Nev. 860, 886-887, 34 P.3d 519, 537 (2001);

Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). To find good cause there must be a "substantial reason: 1) that affords a legal excuse" Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

Mr. Johnson can demonstrate good cause for the failure to file the writ pursuant to NRS 34.726(1). First, the State cites no authority for the proposition that Mr. Johnson should not have concluded his third penalty phase and appeal before filing a post-conviction writ. The filing of the post-conviction writ after the remittitur was issued from direct appeal would have resulted in the withdrawal of his attorney's based upon the conflict of interest. Lastly, the State provides no case law for the proposition that Mr. Johnson is required to file his writ of habeas corpus prior to the third penalty phase.

The State claims that the defendant cannot contend that a sentencing rehearing prevented him from filing a timely petition. In support, the State cites to Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).The State argues that Mr. Johnson's post-conviction petition for a writ of habeas corpus should be limited to issues concerning the penalty phase of his trial because issues concerning the guilt phase should have been brought within one year of the date that this Court affirmed his convictions and reversed his sentence of death. There is no support for the

State's argument. Nevada does not provide for a bifurcated post-conviction proceeding. Mr. Johnson's judgment of conviction was not final until his final sentence was rendered by the district court. His post-conviction petition for a writ of habeas corpus was not due until one year after this Court's decision on direct appeal from his final penalty phase. Accordingly, Mr. Johnson's post-conviction petition was timely filed in this case and all issues, those concerning the guilt phase as well as those concerning the penalty phase, were properly before the district Court.

1. NRS CHAPTER 34 CONTEMPLATES THE FILING OF A SINGLE PETITION

The main premises underlying the provisions of NRS 34.720 et. seq., setting forth the procedures to be followed in post-conviction proceedings, is to insure that all of petitioner's claims are consolidated so as to avoid the inefficiency which would result from filing separate post-conviction petitions for each claim the petitioner may have (NRS 34.820(4)). An interpretation of NRS 34.726(1) which would permit bifurcated post-conviction proceedings such as that suggested by the State would place a greater burden on the system, the defendant, and the State.

A post-conviction petition filed before the final judgment of conviction is entered is a nullity as prematurely filed. NRS 34.724 permits a post-conviction

petition for a writ of habeas corpus to be filed by "[a]ny person convicted of a crime and under sentence of death or imprisonment[.]" Here, there was no valid judgment of conviction until the third penalty hearing was complete. The two prior judgments of conviction were invalid for the purpose of filing post-conviction proceedings because they lacked the essential requirement of a sentence once the sentence was vacated on appeal. See NRS 176.105 ("If a defendant is found guilty and is sentenced as provided by law, the judgment of conviction must set forth: (a) The plea; (b) The verdict or finding; (c) The adjudication and sentence, including the date of the sentence, any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment, a reference to the statute under which the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute; and (d) The exact amount of credit grated for time spent in confinement before conviction, if any." See also Ex Parte Dela, 25 Nev. 346, 250, 60 P. 217, 218 (1900) (there are two essentials to a judgment of conviction – "the statement defining the punishment, and the statement of the offense for which the punishment is inflicted"); Ex Parte Roberts, 9 Nev. 44 (1873) (judgment was void because it did not state a valid sentence); Ex Parte Salge, 1 Nev. 449, 453 (1865) (a valid judgment of conviction must list the reciting court and cause, the sentence defining the punishment, and a statement of the offense for

which the punishment is inflicted). A judgment of conviction is not final until a written judgment setting forth the plea; the verdict or finding; and the adjudication and sentence, including the date of sentence and a reference to the statute under which the defendant is sentenced. Bradley v. State, 109 Nev. 1090, 1094, 864 P.2d 1272, 1275 (1993) (citing NRS 176.035(1)). See also Johnson v. State, 118 Nev. 787, 59 P.3d 450, 460 n. 31 (2002) (a conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for sch a petition has expired) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987); Doyle v. State, 116 Nev. 148, 157, 995 P.2d 465, 471 (2000) (same); Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed.2d 204, 204 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798, 109 S.Ct. 1494, 1498, 103 L.Ed.2d 879, 887 (1989) (same).

The judgment of conviction is filed not merely after completion of the guilt phase of a capital trial, but only after the penalty has been determined. The judgment of conviction in this case, as required by NRS 176.105, sets forth both the fact of the conviction and the imposition of the death sentence. Where the Supreme Court affirms the conviction but reverses the death sentence and remands

for a new penalty hearing, the original judgment of conviction is void. Following retrial of the penalty phase, a new judgment of conviction is filed.

There is no statute providing for the filing of a post-conviction petition prior to entry of the final judgment of conviction, thus the petition was a nullity. See. Kinsey v. Sheriff, Clark County, 94 Nev. 596, 596, 584 P.2d 158, 159 (1978) (vacating order denying a pretrial petition for a writ of habeas corpus because there was no statute permitting a pretrial challenge to an order denying a motion for discovery and no statute providing for interlocutory appellate review of such orders); Sheriff v. Toston, 93 Nev. 394, 395, 566 P.2d 411, 411 (1977) (remanding case with instructions to dismiss a petition that did not meet the requirements imposed by the legislature). See also Allgood v. State, 78 Nev. 326, 372 P.2d 466 (1962) (finding it impermissible to file a notice of appeal prior to entry of judgment).

Further, NRS 34.724(1) provides in pertinent part that "[a]ny person convicted of a crime and under sentence of death or imprisonment . . . may, without paying a filing fee, file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence . . . ." Emphasis added. This statute requires that the petitioner be convicted of a crime and be under a sentence of death or imprisonment. Here, the petitioner's sentence was reversed, and the petitioner is

under neither sentence of death nor sentence of imprisonment and, under this statute, is not permitted to file for post-conviction relief.

Chapter 34 clearly contemplates that a single post-conviction petition will be filed which challenges both the underlying conviction and sentence. NRS 34.820(4) states in pertinent part that "all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and . . . any matter not included in the petition will not be considered in a subsequent proceeding." If this Court were to interpret Chapter 34 in the manner suggested by the State, Mr. Johnson would be unable to properly complete the petition. NRS 34.735 sets forth the form of the Petition for Post-Conviction Relief. In pertinent part, the instructions state that "(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence." Emphasis added. The instructions further state that "(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted." The statute also sets forth the form of the Petition, in pertinent part question 5: (a) Length of sentence; and (b) If sentence is death, state any date upon which execution is scheduled. This question can clearly not be answered by a petitioner

whose sentence has been reversed and who has yet to be resentenced.

Finally, NRS 34.750 provides that, in the case of an indigent defendant filing a petition for post-conviction relief, "the court may appoint counsel to represent the petitioner." However, NRS 34.820 provides, where "a petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's conviction or sentence, the court shall (a) Appoint counsel to represent the petitioner . . ." If NRS 34.726(1) were to be interpreted to require a petitioner to file a petition for post-conviction relief on his conviction only, while resentencing was pending, the following results are possible: 1) the petitioner could be denied appointed counsel for this petition, as he is not currently facing the death sentence, and 2) if he is unsuccessful in his petition and he is again sentenced to death, he may be denied appointed counsel in a petition for post-conviction relief challenging his subsequent death sentence. Further, he would be required to file his direct appeal of his subsequent death sentence within thirty days of entry of judgment of conviction, at a time when he may have a petition for post-conviction relief pending. Similarly, he could receive an unfavorable decision ion his petition for post-conviction relief, but be unable to appeal within the required thirty days because he may not yet have had his subsequent sentencing hearing.

"A fundamental rule of statutory interpretation is that the unreasonableness

of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result." Sheriff, Washoe County v. Smith, 91 Nev. 729, 733, 542 P.2d 440 (1975). An interpretation of Chapter 34 such as that suggested by the State would produce a clearly unreasonable result.

A "judgment" or "decision" is final for the purposes of appeal only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. Parr v. United States, 351 U.S. 513, 518, 76 S.Ct. 912, 915, 100 L.Ed. 1377, 1383 (1956). "'Final judgment in a criminal case means sentence. The sentence is the judgment.'" Id. (quoting Berman v. United States, 302 U.S. 211, 212-13, 58 S.Ct. 164, 84 L.Ed.2d 204 (1937)). "Adherence to the rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" Abney v. United States, 431 U.S. 651, 657, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651, 658 (1977) (quoting DiBella v. United States, 369 U.S. 121, 126 (1962)). See also Bateman v. Arizona, 429 U.S. 1302, 97 S.Ct. 1, 50 L.Ed.2d 32 (1976) (opinion of Rehnquist, J.) ("This Court is precluded from taking cases unless the petition is

from a ‘final judgment' within the meaning of 28 U.S.C. § 1257. In a criminal case, the ‘final judgment' is, of course, the imposition of a sentence." (Citing Parr v. United States, 351 U.S. 513, 518, 76 S.Ct. 912, 915, 100 L.Ed. 1377, 1383 (1956); Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 84 L.Ed.2d 204 (1937)).

2. CASE AUTHORITY SUPPORTS MR. JOHNSON'S POSITION

This issue was considered at length by the United States Court of Appeals for the Ninth Circuit in Edelbacher v. Calderon, 160 F.3d 582 (9th Cir. 1998). In that case, a defendant sought habeas corpus review of his conviction at a time when his conviction had been affirmed but his sentence of death had been vacated and he was awaiting a new penalty hearing. The court held that "[w]hen there is a pending state penalty retrial and no unusual circumstances, we decline to depart from the general rule that a petitioner must wait the outcome of the state proceedings before commencing his federal habeas corpus action." Id. at 583. The Court explained that it was generally not feasible to conduct habeas review of the guilt phase of a case prior to a determination of the sentence in part because it was necessary to know whether the case was capital or not. Id. at 585-86. It emphasized that the Supreme Court "has repeatedly held that the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." Id. at 585 & n.4

(citing Ford v. Wainwright, 477 U.S. 399, 411, 106 S. Ct. 2595, 2602, 91 L. Ed.2d 336 (1986); Zant v. Stephens, 462 U.S. 862, 885, 103 S. Ct. 2733, 2747, 77 L. Ed.2d 235 (1983); Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). It also noted that "prisoners in state custody subject to a capital sentence are afforded numerous other procedural guarantees such as the appointment of counsel and greater compensation for counsel, investigators, and experts." Id. (citing 28 U.S.C. 2261). The Court further noted that the procedural ambiguity of such a situation created duplicative proceedings, confusion and judicial inefficiency. Id. See also Burris v. Parke, 95 F.3d 465, 467 (7th Cir. 1996) (noting that "guilt and sentencing are successive phases of the same case, rather than different cases"; holding that a judgment refers to the sentence rather than the conviction; and holding that the Antiterrorism and Effective Death Penalty Act of 1996 would not permit bifurcated habeas proceedings.

The Florida Court of Appeals reached the same conclusion in Snipes v. State, 843 So. 2d 1043 (Fl. App. 2003). Snipes was tried and convicted of first degree capital murder, and subsequently sentenced to death. On direct appeal, the Supreme Court of Florida affirmed the conviction, but reversed the death sentence and remanded to the trial court with instructions to impose a sentence of life imprisonment. After the trial court imposed sentence in accordance with the

instructions of the Supreme Court, Snipes appealed this sentence to the court of appeals, which affirmed the sentence. Id. at 1043-44. Florida post-conviction statutes provide that post-conviction relief proceedings must be filed within two years of the date the judgment and sentence become final. Fla. R. Crim. P. 3.850, 3.851 The supreme court's mandate on direct appeal was issued on May 24, 1999. The court of appeals issued its mandate affirming Snipes' life sentence on January 16, 2001. Snipes filed a motion for post-conviction relief on January 4, 2002. The trial court dismissed his petition as untimely, alleging that the two-year time period began to run when the supreme court issued its mandate on May 24, 1999 . Snipes argued that the time period did not begin to run until January 16, 2001, when the appeals court issued its mandate affirming his life sentence. Id. at 1044. The court agreed with Snipes. Further the court illustrated the unreasonable results which might have occurred if the time period had begun to run at the date of the issuance of the supreme court's mandate. Snipes could not have filed his motion for post-conviction relief while the appeal of his sentence was still pending in the appeals court, because the court would have been without jurisdiction to entertain it. Under the trial court's analysis, Snipes' two-year period of time would have been reduced from two years to two months. Further, the court stated that, given the trial court's determination that the time period began to run on May 24, 1999, if

the court of appeals had delayed its decision on Snipes' appeal of his life sentence for four additional months, Snipes would have forfeited his post-conviction rights altogether. Id.

3. THE STATE'S PROPOSED PROCEDURE HAS NOT BEEN FOLLOWED IN OTHER NEVADA CASES

Similarly situated defendants have not been required to utilize the procedure the State argues is required by Nevada law. The following cases are illustrative:

John Mazzan was convicted of one count of first degree murder and sentenced to death. On direct appeal from his judgment of conviction, this Court affirmed the finding of guilt on the charge of murder but vacated his sentence and remanded the matter for a new penalty hearing. Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984). In the second penalty hearing he was again sentenced to death. Mazzan v. State, 103 Nev. 69, 733 P.2d 850 (1987). Following the decision on direct appeal from the second sentence of death, Mazzan filed in the district court a petition for post-conviction relief and a motion for a stay of execution. The district court granted the stay and held a hearing on appellant's petition. On December 2, 1987, the district court entered an order denying the petition for post-conviction relief. Mazzan v. State, 105 Nev. 745, 747, 783 P.2d 430 (1989). This Court subsequently noted that Mazzan's 1987 petitioner alleged. "ineffective assistance of

counsel at trial, on appeal, and during the second penalty phase." Mazzan v. Warden, Nevada State Prison, 112 Nev. 838, 840, 921 P.2d 920 (1996). At no point did this Court conclude that any of the claims raised in the 1987 petition were untimely because they were not filed withing one year of the decision on the first direct appeal in 1984.

After a May 1987 mistrial resulting from a hung jury, Victor Jimenez's second trial in January 1988 produced convictions of first-degree murder and robbery with use of a deadly weapon, and a sentence of death. This Court affirmed his convictions on appeal, but reversed his capital sentence. Jimenez v. State, 105 Nev. 337, 775 P.2d 694 (1989). Following a second penalty hearing, Jimenez again received a death sentence, which this Court affirmed. Jimenez v. State, 106 Nev. 769, 801 P.2d 1366 (1990). In 1991, Jimenez filed a post-conviction petition in the district court. Counsel was appointed and counsel filed a supplemental petition in 1992. The post-conviction petition included claims relevant to the guilt phase and the penalty phase, and included claims that the State withheld exculpatory evidence relevant to the guilt phase. This Court found merit to the claims and ordered a new trial on both guilt and penalty. Jimenez v. State, 112 Nev. 610, 612, 918 P.2d 687 (1996). At no point in its opinion did the Court find that claims concerning the guilt phase were not timely raised because a

post-conviction petition was not filed within one year of the first appeal.

Henry Dawson was convicted of first degree murder and sentenced to death. This Court affirmed the conviction and remanded for a new penalty determination. Dawson v. State, 103 Nev. 76, 734 P.2d 221 (1987). After his second penalty hearing, Dawson was sentenced to death, and this Court affirmed the sentence. Dawson v. State, Docket, No. 18558, Order Dismissing Appeal, October 21, 1988. Dawson filed a proper person petition for post-conviction relief, alleging that he had received ineffective assistance of counsel in the guilt phase and penalty phase. The district court denied the request for counsel and dismissed the petition. This Court directed the district court to hold an evidentiary hearing to resolve the factual issues raised in Dawson's petition and to appoint counsel to represent him during those proceedings. Dawson v. State, Docket No. 20440, Order of Remand, November 17, 1989. After an evidentiary hearing, the district court denied Dawson's petition for post-conviction relief. This Court addressed the merits of the issues and affirmed. Dawson v. State, 108 Nev. 112, 825 P.2d 593, 594-595 (1992). At no point in its opinion did this Court conclud that the claims concerning the guilt phase of the case were procedurally barred as untimely based on the fact that the claims were not presented until completion of the second penalty hearing and the appeal therefrom.

There appear to be no case in which the State's proposed procedure of bifurcating guilt and penalty phase habeas corpus proceedings has been followed. Certainly it would be inequitable to mandate such a procedure without prior notice to the defendant.

4. COMMON SENSE SUPPORTS MR. JOHNSON'S POSITION

There are practical considerations which also support Mr. Johnson's position that the time for filing a post-conviction petition for a writ of habeas corpus does not commence until the judgment is final. The bifurcated procedure suggested by the State would lead to absurd results and outrageous costs. For example, the following issues would be presented:

a. Jurisdiction:

Under the State's proposed procedure, it is possible that this Court would entertain an appeal from the denial or grant of a post-conviction petition for a writ of habeas corpus at the same time the new penalty hearing was proceeding in the district court. In such a situation, both the district court and the Supreme Court would be claiming jurisdiction over the same case. This Court, however, has repeatedly held that jurisdiction over a case may not co-exist simultaneously in this Court and the district court. See Buffington v. State, 110 Nev. 124, 868 P.2d 643 (1994); Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

b. Conflicts with Counsel:

Under the State's proposed procedure it is possible that a defendant would be represented by an attorney for the second penalty hearing at the same time that the defendant was challenging the effectiveness of that same attorney. In most cases, trial counsel represents the defendant upon remand for a new penalty hearing. If the State's procedure were followed, the defendant would be arguing that same attorney's performance was ineffective and prejudicial through post-conviction proceedings at the same time as the second penalty hearing. Such a procedure would be highly debilitating to the attorney-client relationship and would create additional conflicts that would be the source of future claims.

c. Appointment of Counsel:

A defendant who is sentenced to death is entitled to the appointment of post-conviction counsel. NRS 34.820(1) (providing for mandatory appointment of counsel for the first post-conviction petition challenging the validity of conviction or sentence where the petitioner has been sentenced to death). Cf. NRS 34.750(1) (providing for discretionary appointment of counsel in other cases). See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). Under the State's proposed procedure, the district court would not be able to determine whether or not counsel was mandated because the district court would not know the defendant's sentence.

Likewise, the district court would not be able to determine whether Supreme Court Rule 250, which governs procedures in capital cases, was applicable to the case. Further, the district court would not know whether to pay appointed counsel $100, the rate for non-capital cases, or $125, the rate for capital cases. Still further complications would ensue as the district court considered appointment of experts and investigators and considered the degree of scrutiny to give the claims presented in the petition.

d. Possession of the File:

Under the State's proposed procedure, duplicate copies of the entire file would be necessary as both trial counsel and post-conviction counsel would need a complete copy in order to adequately represent the defendant. As the files in capital cases are often enormous, considerable expense would be incurred. Still further expenses could be incurred unnecessarily if different Deputy District Attorneys were assigned for the penalty phase and habeas proceedings or if different District Court Judges were assigned to the two phases of the case. Duplicate copies would also be required if the original file was sent to this Court for an appeal from the penalty verdict if post-conviction proceedings were still pending in the district court.

e. Attorney-Client Privileged Matters:

A defendant has a right to have confidential and privileged conversations with his attorney. This privilege may be waived during post-conviction proceedings if certain issues are raised. A defendant may be hesitant to raise certain issues in a post-conviction petition if the privilege would be waived as a result and the penalty phase were still pending.

f. Federal Review

The federal courts are strict in their requirements both that a single habeas petition be filed and that it be filed within one year of the final decision of the state appellate court's decision on direct appeal. See Carey v. Saffold, 536 U.S. 214 (2002); 28 U.S.C.S. § 2244(d)(1)(A) (federal Antiterrorism and Effective Death Penalty Act of 1996). Under the State's proposed procedure, chaos and confusion would result as to when a defendant was obligated to file his federal court petition.

Conclusion

For each of the above stated reasons, the State's argument should be rejected. There is no support for the State's assertion that a capital defendant must file two post-conviction petitions - one challenging the guilt phase of his case and one challenging the penalty phase of his case. To the contrary, Nevada statutory and case authority clearly provides for a single post-conviction proceeding following a decision on direct appeal from a final judgment of conviction, which includes both

the finding of guilt and entry of a valid sentence. Accordingly, Mr. Johnson's claims concerning both the guilt phase and the penalty phase of this case are properly before this Court.

B. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS HIS ATTORNEYS HAD AN ACTUAL CONFLICT OF INTEREST IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the State's response, the State contends Mr. Johnson's issues relating to his actual convictions are time barred (State's Answering Brief p. 27).

On December 18, 2002, this Court affirmed Mr. Johnson's convictions. However, this Court reversed Mr. Johnson's sentences of death. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002). At trial, Mr. Johnson was represented by Mr. Joe Sciscento and Mr. Dayvid Figler. On direct appeal, Mr. Johnson was represented by Lee McMahon of the Special Public Defenders office (See, Johnson v. State,118 Nev. 787, 59 P.3d 450 (2002)). This Court issued a remittitur on January 14, 2003. The State claims Mr. Johnson's one year time limit to file a post-conviction writ began January 14, 2003. See NRS 34.726(1). Hence, the State argues that Mr. Johnson was required to file his post-conviction writ no later than January 13, 2004 (State's Answering Brief pp. 31).

During this time period, the special public defender continued to represent

Mr. Johnson. The Special Public Defender conducted investigation and began preparation for Mr. Johnson's third penalty phase. In fact, the special public defender represented Mr. Johnson during the third penalty phase. The Special Public Defender continued to represent Mr. Johnson on appeal from the sentences of death he received during his third penalty phase.

Accordingly, *assuming arguendo* this Court agrees with the State's position, Mr. Johnson received ineffective assistance of counsel based upon an actual conflict of interest. The court appointed the Special Public Defender to represent Mr. Johnson. Yet, counsel for Mr. Johnson should have filed a post-conviction proceedings. Mr. Johnson has been condemned to death and was represented by counsel. In the instant case, the undersigned has found numerous instances of ineffective assistance of trial and appellate counsel. All of the issues allege that the Special Public Defenders committed ineffective assistance of counsel. Rather than file these issues in a timely fashion, the Special Public Defender failed to ever file a post-conviction petition for Mr. Johnson. The Special Public Defender would have been required to argue that they had provided ineffective assistance of counsel both at trial and on appeal. Obviously, the Special Public Defender has an actual conflict in claiming that they had provided ineffective assistance of counsel to Mr. Johnson.

The Sixth Amendment provides that "in all criminal prosecutions, the

accused shall enjoy the right...to have the assistance of counsel for his defense". This right to counsel includes a "correlative right to representation that is free from conflicts of interest" Wood v. Georgia, 450 U.S. 261, 271, 67 L.Ed. 2d 220, 101 Sup. Ct. 1097 (1981); See also, Cuyler v. Sullivan, 446 U.S. 335, 345, 64 L.Ed. 2d 333, 100 Sup. Ct. 1708 (1980). Whether a defendant's representation "violates the sixth amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed de novo" Triana v. United States, 205 F.3d 36, 40 (2nd Cir. 2000)(quoting United States v. Brau, 159 F.3d 68, 74 (2nd Cir. 1998), cert denied 531 U.S. 956 (2000).

Conflicts of interest can be placed into three categories. The first category describes those conflicts that are so severe that they are deemed per say violations of the sixth amendment. Such violations are unwaivable and do not require of showing that the defendant was prejudiced by his representation. See, United States v. Fulton, 5 F.3d 605, 611 (2nd Cir. 1993); United States v. John Doe # 1, 272 F.3d. 116, 125 (2nd Cir. 2000); Finlay v. United States, 537 U.S. 851, 154 L.Ed. 2d 82, 123 Sup. Ct. 204 (2002); Armienti v. United States, 234 F.3d 820, 823 (2nd Cir. 2000). By contrast when an actual conflict of interest occurs when the interest of the defendant and his attorney "diverge with respect to a material factual or legal issue or to a course of action" United States v. Schwarz, 283 F.3d 76, 91 (2nd Cir.

2002). To violate the sixth amendment, such conflicts must adversely affect the attorney's performance. See, United States v. Levy, 25 F.3d 146, 152 (2nd Cir. 1994). Lastly, a clients representation suffers from a potential conflict of interest if "the interest of the defendant may place the attorney under inconsistent duties at some time in the future" United States v. Kliti, 156 F.3d 150, 153 (2nd Cir. 1998). To violate the sixth amendment such conflicts must result in prejudice to the defendant. Levy, 25 F.3d at 152.

While a defendant is generally required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel. See, Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 Sup. Ct. 2052 (1984), this is not so when counsel is burdened by an actual conflict of interest. Id. 466 U.S. at 692. Prejudice is presumed under such circumstances. See also, United States v. Malpiedi, 62 F.3d 465, 469 (2nd Cir. 1995); United States v. Iorizzo, 786 F.2d 52, 58 (2nd Cir. 1986). Therefore, a defendant claiming he was denied a right to conflict free counsel based on an actual conflict need not establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish 1) an actual conflict of interest that 2) adversely affected his counsel's performance. See, Cuyler v. Sullivan, 446 U.S. 335, 348, 64 L. Ed 2d 333, 100 Sup. Ct. 1708 (1908);

See also, Levy, 25 F.3d at 152.

"An attorney has an actual, as opposed to potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interest diverge with respect to the material factual or legal issue or to a course of action." Winkler v. Keane, 7 F.3d 304, 307 (2nd Cir. 1993).

The State claims that Mr. Johnson missed his statutory time period for alleging ineffective assistance of counsel for his convictions. Mr. Johnson was represented by the Special Public Defender who did not file the petition (*assuming arguendo* this court rules that the State was correct). Based on this actual conflict of interest, the case law establishes Mr. Johnson received ineffective assistance of counsel. Mr. Johnson is entitled to a new penalty phase based on the failure of his counsel to recognize that an actual conflict of interest existed during the third penalty phase.

Mr. Johnson is entitled to a new penalty phase based upon ineffective assistance of counsel based upon a conflict of interest in violation of the sixth and fourteenth amendments to the United States Constitution.

C. MR. JOHNSON'S ISSUES REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL FROM TRIAL AND ON APPEAL FROM THE JUDGMENTS OF CONVICTIONS ARE NOT TIME BARRED PURSUANT TO HOLLAND V. FLORIDA, 130 S.Ct. 2549 (JUNE 14, 2010).

In the instant case, Mr. Johnson's counsel failed to timely file a post-conviction Petition for Writ of Habeas Corpus. Additionally, Mr. Johnson's counsel failed to advise him of his need to file a timely petition.

In Holland v. Florida,130 S. Ct. 2549 (June 14, 2010), the United States Supreme Court determined that limitation periods are customarily subject to equitable tolling. The United States Supreme Court reasoned that basic habeas corpus principles have always considered equitable principles.

The United States Supreme Court granted Holland's petition for Certiorari. The Eleventh Circuit Court of Appeals application of equitable tolling doctrine to instances of professional misconduct, conflicted with the approach taken by other circuits Id. at 2560. The United States Supreme Court had not decided whether the statutory limits for the one year filing of the petition would be tolled for equitable reasons. Id. at 2560. See also, Pace v. DiGuglielmo, 544 U.S. 408, 418, n. 8 (2005). The United States Supreme Court determined that the AEDPA "statute of limitations defense... is not jurisdictional" Id. at 2560. See also Day v. McKonough, 547 U.S. 198, 205 (2006). "It does not set forth an inflexible rule requiring dismissal whenever it's clock has run Id. at 208.

"It is hornbook law that limitation periods are customarily subject to equitable tolling" Id. at 2560. See Irwin v. Department of Veterans Affairs, 498

U.S. 89, 95)(internal quotations omitted). "...the presumption strength is reinforced by the fact that equitable principles have traditionally governed the substance of law of habeas corpus, Munaf v. Geren, 553 U.S. 674, 693 (2008), for we will not construe the statute to displace court's traditional equitable authority absent the clearest command, Miller v. French, 530 U.S. 327, 340 (2000). Id. at 2560.

The United State Supreme Court in Holland, reasoned that the application of equitable tolling would not affect the substance of a petitioner's claim. Id. at 2560. The United States Supreme Court reasoned that basic habeas corpus principles have always considered equitable principles, Holland (pp. 16). See also, Slack v. McDaniel, 529 U.S. 473, 483 (2000).

The United States Supreme Court provided,

> The importance of the Great Writ, the only writ explicitly protected by the constitution, Art. I. Sec. 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open Id. at 2562.

The United States Supreme Court has held that a petitioner is entitled to equitable tolling if she can show that 1) she was pursing her right diligently, and 2) that some extraordinary circumstance stood in her way and prevented timely filing. Id. at 2562. See also, Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

The United States Supreme Court reminds courts for the need of "flexibility", for avoiding "mechanical rules " Holland, 130 Sup. Ct. 2562. See also Holmberg v. Armbrecht,327 U.S. 392, 396 (1946). The United States Supreme Court reasons,

> ...We have found a tradition in which court of equity have sought to relieve hardships which, from time to time, arise from hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity (Holland v. Florida, pp. 17)(Internal quotations omitted), See also Hazel-Atlas Glass Co. v. Hartford Empire Co, 322 U.S. 238, 248 (1944).

Moreover, the United States Supreme Court explained,

> Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case Holland, 130 Sup. Ct. 2563.

The United States Supreme Court enunciated that the Eleventh Circuit rule is difficult to reconcile with more general equitable principles and that it failed to recognize, at least sometimes, professional misconduct amounts to egregious behavior, which would create an extraordinary circumstance and demands equitable tolling. Holland, 130 Sup. Ct. 2563.

In this case, the failure of Mr. Johnson's counsel to file a timely petition or advise Mr. Johnson of the need to file a timely petition demands the extraordinary

circumstance which warrants equitable tolling.

In Holland v. Florida, the United States Supreme Court provided the following ratio decidendi,

> Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove egregious and can be extraordinary even though the conduct in question any not satisfy the Eleventh Circuit's rule. See, e.g. Nara v. Frank, 264 F.3d 310, 320 (CA3 2001)(ordering hearing as to whether client who was effectively abandoned by lawyer merited tolling); Calderon, 128 F.3d, at 1289 (allowing tolling where client was prejudiced by a last minute change in representation that was beyond his control); Baldayaque, 338 F.3d at 152-153 (finding that where an attorney failed to perform an essential service, to communicate with the client, and to do basic legal research, toling could, under the circumstances, be warranted); Spitsyn, 345 F.3d, at 800-802 (finding that extraordinary circumstances may warrant tolling where lawyer denied client access to files, failed to prepare a petition, and did not respond to this client's communications); United States v. Martin, 408 F.3d 1089, 1096 (CA8 2005) (client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct). We have previously held that a garden variety claim of excusable neglect, Irwin, 498 U.S., at 96, such as a simple miscalculation that leads a lawyer to miss a filing deadline, Lawrence, supra, at 336, does not warrant equitable tolling. But the case before us does not involve, and we are not considering, a garden variety claim of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct. And, as we have said, although the circumstances of a case must be extraordinary before equitable tolling can be applied, we hold that such circumstances are not limited to those that satisfy the test that the Court of Appeals used in this case. Holland, 130 Sup. Ct. 2564. (Internal quotations omitted).

Pursuant to Holland v. Florida,130 S.Ct. 2549 (June 14, 2010), the United

States Supreme Court determined that limitation periods are customarily subject to equitable tolling. Therefore, Mr. Johnson's issues regarding ineffective assistance of counsel from trial and on appeal from the judgments of convictions were correctly heard on the merits for the failure of Mr. Johnson's counsel to file a timely writ.

TRIAL PHASE ARGUMENTS

II. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ON DIRECT APPEAL THE UNCONSTITUTIONALITY OF JOHNSON'S JURY SELECTION PROCESS.[1]

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

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[1] Recently, in Buchanan v. State, 130 Nev. Adv. Rep. 82, 335 P.2d 207, 209 (2014), this Court held that "[w]hen a defendant asserts a Batson violation, it is a structural error to dismiss the challenged juror prior to conducting the Batson hearing because it shows that the district court predetermined the challenge before actually hearing it". This is because the "dismissal of a prospective juror before holding a Batson hearing may present the appearance of improper judicial bias." Id.

A. MR. JOHNSON RECEIVED AN UNCONSTITUTIONAL JURY VENIRE

At the conclusion of voir dire, trial counsel complained that the jury pool did not consist of a cross-section of Clark County, Nevada. Specifically, trial counsel noted that the jury pool consisted of over eighty potential jurors with only three potential minorities. The State's entire argument regarding this issue seems to fall on the failure of Mr. Johnson to demonstrate purposeful discrimination of African Americans (State's Answering Brief pp. 37-40).

The State contends that Mr. Johnson is unable to show systematic exclusion of African Americans. As noted in Mr. Johnson's second supplemental brief, this Court cited statistics that there are approximately 9.1 percent of African Americans in Clark County. Williams v. State, 121 Nev. 934, 941, 125 P.3d 627 (2005). In Williams, this Court noted that the jury venire included only one African American out of forty venire members. Id. Here, Mr. Johnson's jury venire consisted of three minority jurors out of eighty venire members. Accordingly, out of Mr. Johnson's entire jury venire, only 3.75 percent were minorities.

The State claims that there is no proof of a systematic exclusion. Mr. Johnson can establish a pattern of systematic exclusion in the state of Nevada. In Williams, approximately 2.5 percent (1 African American out of 40) made up the

jury venire. Here, Mr. Johnson's venire was made up of 3.75 percent of minorities. Mr. Johnson was facing a death sentence. In 2010, the undersigned was appellate counsel in Delbert Cobb v. State of Nevada, 50346. This Court considered Mr. Cobb's issues during oral argument. [2] In Williams, the African American venire was limited to 5 percent. In fact, Delbert Cobb's jury venire included only two African Americans out of 70 venire members. Hence, Mr. Cobb's percentage of African Americans was 2.8 percent (A.A. Vol. 36 p. 7732). During oral argument, this Court questioned Mr. Cobb's counsel regarding whether there was proof of systematic exclusion.

To show that a right to a cross-section has been violated, a defendant must demonstrate:

> 1) That the group alleged to be excluded is a distinctive group in the community; 2) that the representation of this group in venires from which jury's are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that the under representation is due to systematic exclusion of the group in the jury selection process. See, Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996), Taylor v. Louisiana, 419 U.S. 522, 95 Sup .Ct. 692,

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[2]In the district court below, Mr. Johnson attached Mr. Cobb's briefing in this Court (A.A. Vol. 36 p. 7732). Mr. Johnson is aware that unpublished decisions are not binding. However, Mr. Johnson uses this material to establish a systematic exclusion of African Americans in Clark County venire panels.

42 l.Ed. 2d 690 (1975).

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

Lastly, Mr. Johnson must show that the under representation is due to systematic exclusion. In Cobb, this Court noted that Mr. Cobb examined the Clark County jury commissioner about the jury selection process and that the commissioner testified that jurors are selected form a list provided by the Department of Motor Vehicles. The jury commissioner also noted that a Senate Bill was pending that would expand the pool of potential jurors to include those who were customers of Nevada Power. Without much analysis, this Court then ruled that there was no proof of systematic exclusion. However, Mr. Johnson can now provide this court with at least three cases where African Americans have been grossly under represented in a jury venire. The courts should no longer ignore what appears to be obvious. Surely, the court cannot conclude that these statistics are simply a coincidence. Mr. Johnson would respectfully request an opportunity to establish systematic exclusion at an evidentiary hearing. Mr. Johnson would request permission to call the heads of the public defender, special public defender,

and federal public defender to establish a systematic exclusion.

On direct appeal, appellate counsel failed to raise this issue. If appellate counsel had raised this issue based upon the United States Constitution, the result of the appeal would have been different and Mr. Johnson would have been granted a new trial. Mr. Johnson should have had a fair cross-section of the community and was denied that right in violation of the due process clause and equal protection clause of the United States Constitution.

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

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

The State's argument provides that juror Fuller sat with her hands crossed

and the State had a sense that she had disdain for the questioning of her (State's Answering Brief pp. 39). The State also noted that she had a stepson in jail (State's Answering Brief pp. 40). Again, counsel for Mr. Johnson argued this identical issue in front of this Court in Delbert Cobb v. State of Nevada, 50346. In Cobb, counsel argued that trial attorneys routinely use pretextual excuses for excluding minority jurors. As in the instant case, in Cobb the prosecutors claimed they excluded African American jurors for their body language. Any experienced trial attorney knows they can make a record excluding virtually any juror based on body language. For example, counsel could argue, your honor, I noted that the juror appeared to pay much more attention to the defense attorney and appeared to ignore me when I questioned her. Your honor, the juror scowled at me several times during this week long voir dire process. Anyone can make these arguments. Does this argument preclude courts from recognizing that these pretextual reasons are in fact violations of the United States Constitution. These type of excuses can be used on a habitual basis. In fact, prosecutors often use these type of excuses because judges accept them.

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

In addition, the State made the district court aware that Ms. Dawson

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

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

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

These arguments are obviously pretextual.

Next, the State claims that Ms. Fuller noted that she had a stepson in jail and that she could sentence a person convicted of quadruple homicide to life with parole (State's Answer pp. 40). Initially, it should be noted that a sitting juror is required to consider that they can consider all forms of punishment. Hence, the State's contention that Ms. Fuller indicated that she could consider life with the possibility of parole is misplaced.

However, the State's argument that Ms. Fuller had a stepson in jail is also predictable and pretextual. In Cobb, this Court entertained this identical argument

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

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

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

Additionally, the United States Department of Justice concluded that in 1997, nine percent (9%)of the African American population in the United States was under some form of correctional supervision compared to two percent (2%) of the Caucasian population[3]. Statistics from the United States Department of Justice show that at midyear 2008, there were 4,777 black male inmates per 100,000 black males held in state and federal prisons and local jails, compared to 1,760 Hispanic male inmates per 100,000 Hispanic males and 727 white male inmates per 100,000 white males[4]. Under the state's argument, virtually, every African-American as a prospective juror would be ineligible under the state's theory of racial neutrality because the statistics show they will know someone who has been arrested.

According to the Bureau of Justice Statistics presented by the Department of Justice African American's were almost three (3) times more likely than Hispanics, and five times more likely than Caucasians to be in jail[5]. Additionally, midyear 2006, African American men comprised forty-one (41%) percent of the more than

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

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

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

two million men in custody. Overall, in 2006 African American men were incarcerated at a rate of six and a half percent (6.5%) times the rate of Caucasian Men[6].

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

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

the arrest or conviction of their paternal grandparent in 1977, who the prospective juror believed was unfairly treated. For another example: Additionally, did you note the way the prospective juror crossed her hands when I questioned her about the matter?

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

In the instant case, the State explains, "juror number seven also indicated that she had a stepson in jail and that she could sentence a person convicted of

quadruple homicide to life with parole" (State's Answering Brief p. 40). In Cobb, the State explained that Ms. Dawson (African American female) was removed because "she had close family members and friends who were charged with crime". This is pretextual and used on a systematic basis by prosecutors in Clark County to remove prospective jurors. The State was forced to pass for cause on Ms. Fuller because her answers rendered her death eligible. The State's excuses are typically used and are capable of repetition.

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

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

This argument stands submitted as enunciated in the Opening Brief.

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

Compounded with the discriminatory and unconstitutional manner in which Mr. Johnson's trial jury was selected, the district court abused its discretion in failing to grant the defense challenges for cause. The defense challenged three

prospective jurors who were clearly not qualified to perform as jurors in the instant case. The defense was forced to use a peremptory challenge to remove juror Fink. Mr. Fink indicated that he would always vote for the death penalty in a case of premeditated and intentional murder. The court denied the defenses' challenge for cause.

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

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

The State claims this matter should be dismissed as moot. The State claims that since Mr. Johnson was not sentenced to death, the exclusion of the potential jurors have nothing to do with their inability to be impartial in determining guilt (State's Answering Brief p. 42). In support of this argument, the State cites to

NCAA v. University of Nevada, Reno, 97 Nev. 56, 57, 624 P.2d 10 (1981) (State's Answering Brief pp. 44). A review of the single case cited by the State provides absolutely no analysis to the instant situation. Mr. Johnson received a jury that was selected in highly discriminatory and unconstitutional manner. Mr. Johnson was then convicted of four counts of first degree murder. In a separate penalty hearing, the State relied upon this juries verdicts to inform the third penalty phase jury that the convictions had already been established and residual doubt could not be considered. Mr. Johnson was subsequently sentenced to death. The State's citation to NCAA v. University of Nevada, Reno, 97 Nev. 56, 57, 624 P.2d 10 (1981), has absolutely nothing to do with this issue. The State cites no legal authority for the proposition that Mr. Johnson could be convicted of first degree murder when the district court repeatedly denied proper challenges for cause. Additionally, it has long been noted that there is overwhelming evidence that death qualified juries are substantially more likely to convict or convict on more serious charges than juries on which unaltered opponents on capital punishment are permitted to serve. See, Buchanan v. Kentucky, 483 U.S. 402, 427, 107 Sup. Ct. 2906, 97 L. Ed 2d 336 (1987). As the State can cite no authority for their contention, this court must consider Mr. Johnson's complaints that he should not have been convicted with his counsel having to use approximately forty percent of their peremptory challenges

to remove jurors that should have been removed for cause.

Next, the State argues that appellate counsel was not ineffective for failure to raise this issue on appeal because the district court did not err in denying defendant's challenges for cause (State's Answering Brief p. 46). The State claims that Mr. Johnson has taken excerpts from the prospective jurors statements out of context. Mr. Johnson would respectfully request that the State re-read juror Shinks entire questioning during voir dire. There is nothing taken out of context that would explain Mr. Shink's bizarre and extreme opinions regarding his "Logan's Run" theory. It would be almost impossible to categorize Mr. Shink's position in any other fashion. More importantly, if the State believed that Mr. Shink's statements were taken out of context, surely, they could have informed this court how the statements were taken out of context. In fact, the State claims,

> Defendant's assertion that prospective juror Shink wanted to pull numbers out of a barrel, similar to Logan's Run is a mischaracterization of Shink's attempt to explain his random suggestions about prison overcrowding, future deterrence of crime, and the money spent on prisoners could be better spent on society's youth (State's Answering Brief p. 45).

It is true that Mr. Shink believed that executing prisoners randomly from car theft to murder would permit society more money to spend on society's youth. It is true that Mr. Shink believed that this may help with prison overcrowding and

future deterrence. Mr. Johnson agrees. This is exactly why Mr. Shink was the most obviously unqualified juror to sit in a quadruple murder. Mr. Shink was not qualified to sit on a car theft case. In Leonard v. State, 117 Nev. 53, 17 P. 3d 397, this Court held,

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

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

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

In the instant case, the defendant was forced to use three peremptory challenges after the trial judge erroneously failed to grant three challenges for cause even after the jury was announced. In the instant case, the defense clearly

complained about the juries makeup and their failure to represent a cross-section of the community. In Ross, the United States Supreme Court held that a loss of a single peremptory challenge does not constitute a violation of the constitutional right to an impartial jury Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273,101 L. Ed. 2d 80 1988). So long as the jury which sits is impartial Id. The Majority in the United States Supreme Court decision in Ross determined that the single loss of the state law right to a single peremptory challenge did not violate his right to a fair trial under the federal constitution 47 U.S. at 90-91.

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

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

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

The dissent explained, "The Court today ignores the clear dictates of these

and other similar cases by condoning a scheme in which a defendant must surrender procedural parity with the prosecution in order to preserve his Sixth Amendment right to an impartial jury". 487 U.S. 81, 96.

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

E. CUMULATIVE ERROR

Mr. Johnson is entitled to a new trial based upon a highly discriminatory and unconstitutional nature in which voir dire was conducted. First, there was an

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

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

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

In Pascua v. Nevada, 122 Nev. 1001, 145 P.3d 1031 (2006), this Court

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

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

After refusing to divulge information surrounding the sports book ticket, the victim was moved and eventually murdered. The victim was moved away from the broken window in the kitchen in attempting to make it more difficult for his

discovery. Additionally, the State contended that the victim had been tied down and the defendant's had climbed on top of the victim choking him and striking him with the hammer. Id. at 106.

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

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

In the State's Answering Brief, the State reiterates the graphic and brutal nature of the instant crimes. Mr. Johnson acknowledges the crime was brutal. However, nothing in the facts establishes that the victims were kidnapped and that their limited movement increased their risk of harm. Mr. Johnson received

ineffective assistance of trial counsel for failure to file a motion to dismiss the kidnapping. Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the issue on appeal. In the instant case, the factual scenario demonstrates that any evidence of kidnapping was clearly incidental to the robbery and therefore, the kidnapping charge should have been dismissed.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

During the voir dire, the prosecutor asked the jury during voir dire, "do you believe that you have the intestinal fortitude, for lack of a better word, to impose the death penalty if you truly believe that it fits this crime? (ROA 11 pp. 2640). During voir dire, the prosecutor also speculated as to future dangerousness and whether a prisoner could kill a prison guard or a maintenance worker. (ROA 11 pp.

2672).

In the State's response, they claim that the issue was meritless (State's Answering Brief p. 55). The State claims that the prosecutor's questions were not objectionable. Additionally, the State claims that the words "intestinal fortitude" may have been used in an improper closing argument in Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), but they were just "two words" and were completely unrelated (State's Response pp. 55). In fact, the State's comments during voir dire mirrored the improper argument made in the capital case of Castillo v. State, Supra. In Castillo, this improper prosecutorial argument to which Castillo objected at trial, was as follows:

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

In the instant case, the prosecutor appears to use the exact same tactics that were used in Castillo. The only difference is, the comments were directed to the jury during voir dire and not in closing argument. It is highly coincidental that the

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

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

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

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

First, the State claims that the hearsay objection was unpreserved because it

was not objected to at trial (State's Answering Brief p. 57). Mr. Johnson recognizes that the hearsay was not objected to at trial. Mr. Johnson received ineffective assistance of trial and appellate counsel for failure to object and raise this issue on direct appeal. Mr. Johnson has informed this court in his supplemental brief that he complains that both his trial and appellate counsel were ineffective for numerous failures to object and raise issues.

The State claims "defendant fails to explain how the above statement was an admission of hearsay. The State fails to see what statement is being offered for the truth of the matter asserted" (State's Answering Brief pp. 57). The State further argues that Armstrong's statement was not used for the truth of the matter asserted and that Bryan's discussion with the police was relevant for the effect on leading Armstrong's voluntary statement as to who committed the crime (State's Answering Brief pp. 57). The State's claim is meritless. Often, when the State has violated the rules of hearsay, the State claims that the matter was not used for the truth of the matter asserted. Mr. Armstrong testified at trial. There was no need for Mr. Armstrong (the fourth suspect) to mention that Mr. Bryan Johnson made any comment to the police regarding who committed the crime.

In Crawford v. Washington, 541 U.S. 36, 124 Sup. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court determined that, 1) testimonial

hearsay must be excluded unless the declarant is available for cross-examination at trial, or 2) if declarant is unavailable the statement was previously subjected to cross examination. Here, Mr. Armstrong's statements imply that Bryan Johnson is also Donte Johnson's accuser. A review of the transcript would openly suggest that Bryan Johnson would implicate Donte Johnson as the killer. Obviously, Mr. Armstong was concerned about his own credibility and used Bryan Johnson's statements to corroborate his testimony that Donte Johnson had committed the crime. Mr. Armstong was specifically referring to a conversation between Bryan Johnson and the police. Therefore, the statement would clearly be testimonial. Bryan Johnson was unavailable for cross-examination and there was never an opportunity to confront Bryan Johnson regarding these statements.

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

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

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

A. IMPROPER WITNESS VOUCHING

During closing argument the following exchange took place,

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

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

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

The prosecutor: "And if Donte Johnson is not guilty and Lashawnya Wright must be lying too. So Sharla is lying, Todd is lying, Bryan is lying, and Lashawnya Wright is lying." (13 ROA 3196).

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

arguments

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

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

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

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

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

The State acknowledges that the district court granted defense counsel's objection (State's Answering Brief p. 68). However, Mr. Johnson specifically referenced the prosecutor's comments directly after the judge sustained "the golden rule" objection. The prosecutor explained that there should be "no doubt in anyone's mind" regarding the fear of the victims. In essence, the prosecutor completely ignored the district court's ruling sustaining defense counsel's

objection. The prosecutor simply rephrased the same objectionable comment. The State utterly fails to address Mr. Johnson's citation to the record.

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

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

In the State's response, they cite no legal authority for the proposition that blatant speculation is proper (State's Answering Brief p. 69-70). Mr. Johnson cited legal authority holding that facts not introduced into evidence is improper. See, Agard v. Portuondo, 117 F. 3d 696, 711 (2nd Cir. 1977).

In the instant case, Mr. Johnson received ineffective assistance of counsel for failure to raise these issues on direct appeal. If these issues had been raised on direct appeal, the result of the direct appeal would have been different.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

PENALTY PHASE ARGUMENTS

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

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

Counsel's complete failure to properly investigate renders his performance ineffective.

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

effective representation . . . is the independent duty to investigate and prepare.").

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

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), the Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

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

have been different. *Id. at* 694, 104 S. Ct. at 2068.

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

A. FAILURE TO PRESENT ANY MITIGATION ON FETAL ALCOHOL DISORDERS

A review of the file reveals that counsel failed to obtain or conduct testing on Mr. Johnson to determine whether he suffered from Fetal Alcohol Disorder. The State claims that Dr. Thomas Kinsora concluded there was no evidence that Mr. Johnson suffered from Fetal Alcohol Syndrome. Dr. Kinsora also labeled Mr. Johnson as "a really bright individual" (State's Answering Brief p. 89). The State concludes that the defendant's mitigation expert saw no reason to conduct any further inquiry, and therefore, there is no proof that Mr. Johnson suffered from Fetal Alcohol Syndrome. However, the State cites to the Fetal Alcohol Syndrom: Guidelines for referral and diagnosis (July 2004) wherein the guidelines state "it is easy for a clinician to misdiagnose Fetal Alcohol Syndrom" (State's Answering Brief p. 89). The State recognizes that Mr. Johnson fits several of the factors of Fetal Alcohol Syndrome. The State admits that the defendant's mother, Eunice

Cain testified that she drank alcohol while pregnant with the defendant (State's Answering Brief p. 87).

The State admits that Mr. Johnson is of extremely small stature (State's Answering Brief pp. 87). Additionally, the State admits that Mr. Johnson suffers from "poor reasoning and judgment skills".

Based on the factors, Mr. Johnson's counsel should have investigated the possibility that Mr. Johnson suffered from Fetal Alcohol Syndrome. Mr. Johnson received ineffective assistance of counsel based on the failure of counsel to properly investigate. If an expert had testified to Mr. Johnson's Fetal Alcohol Syndrome the result of the penalty phase would have been different. Hence, Mr. Johnson can meet both prongs of the Strickland standard.

B. FAILURE OF COUNSEL TO OBTAIN A PET SCAN

The State claims "even assuming that this Court somehow finds defendant's counsel deficient for failing to conduct a PET scan defendant's claim must still fail because he cannot meet the second prong of Strickland. Defendant has not even attempted to demonstrate that a PET scan could have possibly led to a more favorable outcome during his penalty phase" (State's Answering Brief p. 92-93). In fact, a PET scan may establish that Mr. Johnson suffered from brain injury. If a jury was aware that the defendant suffered from a brain injury, they most certainly

would have found this a mitigating circumstance. Had the jury been aware of additional mitigating circumstances, the result of the sentence would have been different. Mr. Johnson was entitled to funding by the state to determine whether there was brain injury.

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

The State acknowledges the defense failed to present any evidence establishing that the co-defendant's received life sentences (State's Answering Brief p. 93). The State claims that counsels mentioning of the life sentences during closing argument was sufficient. Yet, the State acknowledges that closing argument is just argument. The defense failed to present any evidence of the life sentences.

Moreover, the State objected to defense counsels argument and the objection was sustained. The State provides no case law for the proposition that proportionality cannot be considered. Defense counsel was ineffective for failing to present actual evidence, either by way of testimony or exhibit establishing that both defendants received life sentences. Appellate counsel was also ineffective for failing to raise this issue on appeal.

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

In the instant case, during the third penalty phase, trial counsel failed to offer mitigating circumstances which the first jury had determined existed. According to the State, counsel during the third penalty phase had reason to avoid some of the twenty-three mitigating circumstances found by the jury in 2000 (State's Answering Brief p. 99-103). A comparison between the seven mitigating circumstance found by the third penalty phase jury compared to the twenty-three found by the initial jury demonstrates ineffective assistance of counsel. For instance, the jury in 2000 found mitigator three "witness to father's emotional abuse of mother". Whereas, the third penalty jury was not asked to specify the mitigator of the father's emotional abuse of the mother. The initial jury found that Mr. Johnson witnessed drug abuse by parents and close relatives. Whereas, the third penalty jury did not make such a finding. The 2000 penalty jury found that Mr. Johnson had poor living conditions while living with his great grandmother. The third penalty jury did not make such a finding. The 2000 penalty jury found the mitigator that the great grandmother turned Mr. Johnson into the police. The third penalty jury did not. The 2000 penalty jury found crowded living conditions while at the grandmothers house. The third penalty jury did not find this mitigator. The 2000 penalty jury found that Mr. Johnson lived a guarded life, whereas the third penalty jury made no such finding.

In fact, several of the twenty-three mitigators listed by the 2000 jury was not found by the third penalty jury. More importantly, trial counsel in the third penalty phase failed to offer these mitigators. Interestingly enough, Mr. Johnson's first trial jury was unable to reach a verdict as to his sentence. Having found twenty-three mitigators, the jury did not impose a sentence of death. Whereas, during the third penalty phase only seven mitigators were found and Mr. Johnson received sentences of death. According to the state,

> Defendant's 2000 special verdict form only had five mitigating circumstances specifically enumerated, three of which were found by the jury. The remaining twenty mitigating circumstances were added to the special verdict form by a member of the jury (State's Response pp. 99-103).

The State's claim that twenty mitigators were added by a member of the jury is speculative. The State has no way of determining whether all the jurors found these mitigators or if just one found each mitigator. However, trial counsel during the third penalty phase failed to recognize that jurors found twenty-three mitigators and failed to offer these mitigators to the third penalty phase jury.

Additionally, during the third penalty phase, the State claimed that Mr. Johnson unequivocally fired the fatal shots according to the evidence. Yet, the 2000 penalty jury found that there was "no eyewitness to identify the shooter". The State argues that the first jury did not provide an expression of doubt as to who was

the actual shooter. The State speculates that "...it is simply a statement that one of the jurors may have felt more comfortable with returning a death verdict had he heard eyewitnesses testimony from a third party" (State's Answering Brief p. 99-302). This is pure speculation. Maybe all of the jurors believed there was a doubt as to who actually pulled the trigger. For the State to conclude that a single juror may have felt comfortable returning a death verdict had there been an eyewitness is pure supposition.

The State provides no case law or reasonable rational for the failure of counsel to offer the twenty-three mitigators listed by the 2000 jury in the third penalty phase. There would be no rational or tactical reason for failing to offer mitigators that had already been found by a previous jury.

The failure to properly review and investigate the case rendered Mr. Johnson's sentence of death unreliable. When twenty-three mitigators were found, the jury did not sentence Mr. Johnson to death. Whereas, when seven mitigators were found, he received multiple sentences of death.

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

In the instant case, the defense presented evidence that Mr. Johnson had been abused by his father and that his father was abusive to his mother. The defense

failed to call Mr. Johnson's father in the penalty phase. The State claims that defense counsel could not be deemed ineffective for failing to call a witness that would likely have been hostile (State's Answering Brief p. 104). On the contrary, one of the most effective tactical decision a capital litigator can make is to present the following scenario: evidence that a parent has been neglectful and/or abusive. Thereafter, call the parent who claims to be a model parent. This type of evidence has been repeatedly effective in establishing the neglect and abuse of a parent.

In the instant case, Mr. Johnson presented overwhelming evidence of his father's abusive behavior. Having reviewed the transcripts, no rational trier would believe the father's denial of abuse. A jury would have rejected the father's denials of abuse and recognized the lack of parenting by Mr. Johnson's father. It was a significant tactical error in failing to call the abusive parent.

Mr. Johnson is entitled to an evidentiary hearing to establish the allegations of ineffective assistance of trial and appellate counsel for failure to investigate and present mitigation evidence in violation of the United States Constitutions amendments five, six, eight, and fourteen.

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

This argument stands as submitted in the Opening Brief.

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

Mr. Johnson's conviction is invalid under the Federal Constitution based on his counsel providing a copy of Tina Fracis' mitigation report to the State in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. At the direction of the district court, defense counsel provided the State with a copy of Tina Francis' mitigation report. The State was permitted to impeach Dr. Kinsora with information contained within Tina Francis' report. Specifically, the State used the report to question Dr. Kinsora regarding the following: 1) Donte's mother had not used drugs or alcohol her pregnancy, 2) Donte Johnson allegedly took a small caliber gun and gave it to a co-defendant in another case because the c-defendant was angry with the cheerleader, 3) Donte's grandmother stated he should have been treated as an adult by California authorities, and 4) Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas then in LA.

Prior to Dr. Kinsora's testimony, he admitted that he relied upon numerous documents for his opinions. One of the documents Dr. Kinsora admitted to reviewing was a report by the mitigation specialist, Tina Francis.

The State has no right to request the district court to order the production of reports generated by mitigation specialists. This issue is reoccurring in capital trials in this jurisdiction. First, capital litigators are required to obtain mitigation specialists. Prior to this requirement, capital litigators conducted their own mitigation investigation with the aid of private investigators. The information obtained by the capital litigators was not discoverable as it is work product. Now, in the infinite wisdom of higher courts, mitigation specialists are required. Admittedly, some capital litigators have proven so lazy that the mitigation investigation had not been conducted at the time of penalty phase. Thus, causing several courts concern regarding this issue. However, the result is proving to be equally devastating.

Mitigation specialists are required to interview many individuals associated with the defendant. Thereafter, the conversation with potential mitigation witnesses are recorded or placed in reports, then provided to the defense. Almost systematically, prosecutors now request that the mitigation information contained in these reports be produced to the State. It is difficult to imagine the information contained in these reports will not have evidence of the defendant's poor character. For instance, many defendants who are charged with capital murder have significant criminal histories. It is rare, that a capital defendant has an exemplary

past. Hence, an extensive investigation into the defendant's background will possibly lead to multiple witnesses who have very damaging information against the defendant. This information is then placed into reports.

Additionally, capital defense teams often work hand in hand. Therefore, it is common for the psychologist and/or psychiatrist and mitigation specialist to provide information to one another. It is also has been common for capital litigators to provide all mitigation information to each of the potential penalty phase experts. Often, a mitigation expert will list in his or her report everything they have reviewed. Therefore, the expert is now in a position to have rendered conclusions based upon the entire review of what is listed on the report. The State then claims that all of that information is now discoverable. However, the reports almost invariably contain extremely damaging information against the defendant. **This is exactly what occurred here. This is exactly is occurring throughout the state of Nevada.** This Court has not had an opportunity to have this issue extensively litigated and to consider the ramifications of their previous holdings.

In Floyd v. Nevada, 118 Nev. 156, 42 P.3d 249 (2002), this Court held that the State's use of evidence obtained from Mr. Floyd's own expert did not violate Floyd's constitutional rights. In Floyd, the defense filed notice of their intention to potentially call Neuropsychologist David Schmidt. The district court ordered the

defense to provide the State with Dr. Schmidt's report which included standardized psychological testing. Dr. Schmidt did not testify. During the penalty phase Mr. Floyd called Dr. Edward Dougherty. In rebuttal, the State called Dr. Lewis Mortillaro, Dr. Mortillaro relied in part on the results from the standardized testing administered by Dr. Schmidt. Id.

Floyd argued that Dr. Motillaro's testimony violated his constitutional rights and attorney client privilege. This Court determined that Dr. Schmidt's report and test results were not internal documents representing the mental processes of defense counsel. 118 Nev. 156, 168. NRS 174.234(2) and NRS 174.245(1)(b) require discovery from the defendant only when he intends to call an expert witness or to introduce certain evidence during his case in chief. The State often relies upon Floyd for the argument that the mitigation specialist's report should be produced for the State. The State continuously claims that the psychologist and psychologist have relied upon documents, including information from the mitigation specialist and therefore the report is discoverable.

In the instant case, the defense did not call Tina Francis as a witness. Yet, Tina Francis' report was used to impeach Dr. Kinsora and to establish extremely poor character evidence against Mr. Johnson. The concern is as follows. The defense is required to obtain a mitigation specialist who then proceeds to interview

numerous witnesses. In order to establish a thorough job, the mitigation specialist places in a report the information he or she has received. Everyone on the defense team obtains those reports. Therefore, the potential defense witnesses have reviewed the report and potentially relied upon information within the report. Now, the report is discoverable. In essence, the State has forced the defense to have an informant within the defense camp. This is logical given the State's continuous requests for the information from the mitigation specialist. The discovery statute that previously required defense counsel to turn over reports of non-testifying experts was declared unconstitutional by this Court. See, Binegar v. Eighth Judicial District Court, 112 Nev. 544, 551-52, 915 P.2d 889, 894 (1996).

In the instant case, the defense should not have placed their expert in such a position that he would be impeached with the mitigation specialists report. Additionally, appellate counsel should have raised this issue on appeal. Mr. Johnson was devastated by the mitigation specialists report that was mandated by the courts. The State's argument that this policy and procedure is constitutional is meritless. Mr. Johnson is entitled to a new penalty phase based upon ineffective assistance of appellate counsel. Mr. Johnson is also entitled to a new penalty phase based upon the unconstitutional ruling of the district court mandating the production of the mitigation specialist's report in violation of the fifth, sixth,

eighth, and fourteenth amendments to the United States Constitution.

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

In the instant case, during closing argument, defense counsel contradicted each other. One attorney indicated that there are no drugs in prison. However, co-counsel argued that drugs are present in the prison. In the State's response, the State takes great pains in attempting to surmise the tactical decision of both Mr. Johnson's attorneys for providing inconsistent arguments. There is no valid reason for inconsistent arguments to the jury. Defense counsel should have met and conferred regarding their potential arguments. For one attorney to argue there are no drugs in prison only to have the fact disputed by the other attorney amounts to a divided defense team. The State claims there were two motivations for the inconsistent arguments. Yet, there maybe two different motivations but the end result is inconsistency. Inconsistency in front of a jury does not equate to effective assistance of counsel. One defense counsel arguing to the jury that the other defense attorney is wrong because there are drugs in prison disparages counsel.

This issue is evidence of cumulative error and ineffective assistance of counsel. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though those errors are harmless individually" Butler v.

State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir.1993), (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal").

Mr. Johnson is entitled to a new penalty phase based upon ineffective assistance of trial counsel when counsel inconsistent arguments to the jury.

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

During closing argument, the defense attorney explained that it didn't matter whether Mr. Johnson laughed about the murders or not after one of the "kids" are killed. Defense counsel further stated, "does it make any worse? The poor kid is dead". Defense counsel was ineffective for referring the victims as "kids" because this Court had already considered whether it amounted to prosecutorial misconduct for the district attorney to refer to the victims as "kids". This Court noted,

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

> collective description. But we conclude that the State's handful of references to them as "boys" or "kids" did not prejudice Johnson. Johnson v. State, 122 Nev. 1344, 1356, (2006).

In the State's response, they admit that this Court found that the State violated the pre-trial order by referring to the victim as "kids" (State's Answering Brief pp. 131).

Next, the State spends great effort in attempting to surmise the tactical decision why defense counsel would move to preclude the State from referring to the victims as "kids" and thereafter, refer to the victims as "kids". There is no valid reason defense counsel forgot the court's own prior rulings. Mr. Johnson will not entertain reasons why defense counsel would move to preclude the use of the words "kids" to describe the victims and thereafter have his own attorney describe the victims as "kids".

This amounts to ineffective assistance of counsel. "The Supreme Court has clearly established that the combined effect of multiple trial errors violated due process when it renders the resulting criminal trial fundamentally unfair" Tarle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007)(citing, Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996). The cumulative effect of multiple errors can violate due process even when no single error arises to the level of a constitutional violation or would independently warrant reversal. Id.

Citing, Chambers 410 U.S. at 290.

Mr. Johnson is entitled to a new penalty phase based upon numerous errors which have established a violation of both prongs of Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984). First, the errors fell below a standard of reasonableness. Second, the errors prejudiced the defendant, which resulted in a sentence of death.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

During the penalty phase, the prosecutor improperly impeached one of Mr. Johnson's mitigation witnesses with evidence of a misdemeanor conviction.

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

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

NRS 50.095 states as follows:

"Impeachment by evidence of conviction of a crime.

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

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

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

In the State's answering brief, the State admits this was improper impeachment evidence (State's Response pp. 140-141). However, the State argues that Mr. Johnson suffered no prejudice as a result of the improper question (State's Response pp. 140). The State claims they had another motivation for questioning Dr. Zamora as opposed to impeachment. The State's argument makes no sense and violates the statute. It does not matter whether you have a separate motivation for desiring to question a witness regarding misdemeanor convictions. The law dictates you cannot impeach a witness with this type of cross-examination. Any skilled litigator could inform a trial court that they are not impeaching the witness with a misdemeanor conviction but simply want to establish that the witness has lied, deceived, is violent, or makes things up and that is why they want to question the witness about a misdemeanor conviction. Clearly, the State used improper

impeachment on Mr. Johnson's mitigation witness. The errors during the third penalty phase were numerous and cumulative and should result in a new penalty phase. Mr. Johnson's penalty phase was unconstitutional in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

XXVI. THE DEATH PENALTY IS UNCONSTITUTIONAL

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

This argument stands as submitted in the Opening Brief.

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

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

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

Each of the claims specified in this supplement requires vacation of the

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

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

The errors in the instant case should result in a new penalty phase. The cumulative errors were numerous. The errors included counsel's failure to properly investigate and present information regarding Fetal Alcohol Syndrome, failing to obtain a PET scan, failure to offer mitigators which had been found by a previous jury, failure to present evidence from the defendant's father, failure to preclude the State from introducing inadmissible bad acts, failure for handing over mitigation

reports, and failure for the attorney's disputing facts with one another, failure to refer to the victims as "kids", and failure for not raising on appeal the prosecution improperly impeaching a defense witness. Therefore, Mr. Johnson is entitled to a new penalty phase.

CONCLUSION

Based on the foregoing, Mr. Johnson respectfully requests this Court order reversal of his convictions.

DATED this 13th day of November, 2015.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b), this appellate brief complies because although it is comprised of 19, 206 words, the undersigned has filed the appropriate motion to exceed the page limitation.

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

DATED this 13th day of November, 2015.

Respectfully submitted by,

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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 13th day of November, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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