IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEE TAYLOR, *Appellant,* vs. THE STATE OF NEVADA, *Respondent.*	**Supreme Court Case No. 65388** Dist. Ct. Case No. C-11-270343-1

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Nevada Revised Statute § 177.015(3) provides, that a Defendant may appeal a final judgment or verdict in a criminal case. The Judgment of Conviction in this matter was entered on March 7, 2014 and a Notice of Appeal filed on April 4, 2014. Further, pursuant to NRAP 4(b)(5), this appeal is being filed within thirty (30) days of the Judgment of Conviction. Thus, jurisdiction is proper in this Court.

ISSUES PRESENTED FOR REVIEW

I. Whether the show-up of Mr. Taylor was unnecessarily suggestive, resulting in unreliable out-of-court and in-court identifications that violated his constitutional right to due process of law;

II. Whether Mr. Taylor's Sixth Amendment right to a fair trial and Fifth Amendment right against self-incrimination were violated when the State used an inflammatory Powerpoint slide declaring him guilty and made inappropriate comments in closing arguments that a reasonable juror would interpret only to mean that Mr. Taylor was guilty;

III. Whether the warrantless access and use of hundreds of data points showing Mr. Taylor's historical cell phone location over a week long period was a search that violated Mr. Taylor's Fourth Amendment rights;

IV. Whether there was sufficient, properly admitted evidence at trial to support the jury's finding of guilt; and

V. Whether the accumulated persistent and pervasive errors so tainted Mr. Taylor's trial to deprive him of his Sixth Amendment right to a fair trial.

STATEMENT OF THE CASE

On January 14, 2011, a Clark County grand jury indicted Mr. Taylor on several charges – Burglary While in Possession of a Firearm (NRS 205.060) ("Count 1"), Conspiracy to Commit Robbery (NRS 200.380) ("Count 2"), Robbery with Use of a Deadly Weapon (NRS 200.380) ("Count 3"), and Murder with Use of a Deadly Weapon (NRS 200.030) ("Count 4"). The State charged Mr. Taylor with all 4 counts on November 18, 2010. Mr. Taylor pled not guilty to all counts during his January 28, 2011 arraignment in the Clark County District Court. The case went to trial and on February 27, 2013, the jury convicted Mr. Taylor on all 4 counts. Mr. Taylor moved for a new trial due to various prosecutorial errors that violated his constitutional rights, which was denied on April 8, 2013. A Judgment of Conviction was issued on March 7, 2014. (AA VOL 7 01501-01503) Mr. Taylor filed a timely Notice of Appeal to this Court on April 4, 2014.

STATEMENT OF FACTS

A. The Robbery-Murder

At Mr. Taylor's trial, the State's primary eyewitness was one Angela Chenault ("Chenault"). (AA VOL 5 01230, AA VOL 6 01270). Chenault was the mother of the victim Michael Pearson's ("Pearson") girlfriend, Tyniah Haddon ("Haddon"). (AA VOL 3 00648-00649). Chenault testified to the circumstances surrounding the crimes with which Mr. Taylor was charged. On November 18, 2010, Pearson brought Haddon's son, Chenault's grandson, to Chenault's apartment, as she typically watched him while Pearson went to his job on night shift and Haddon finished her day job. (AA VOL 3 00649). Pearson arrived at the apartment earlier than normal. AA VOL 3 00650). Pearson informed her that he had two acquaintances meeting him there before retrieving a large black bag of marijuana from outside the apartment that he then placed on top of Chenault's refrigerator. (AA VOL 3 00651-00653).

Chenault testified that she had recently returned from a trip to Michigan to bury her grandmother and that her great aunt had recently died. (AA VOL 3 00651). When Pearson arrived at her apartment, Chenault was busy frying chicken for herself and her children. (AA VOL 3 00651, 00657, 00660, 00664) In the meantime, Pearson began talking on his phone and he soon went outside. (AA VOL 3 00655-00656) When he returned and knocked to reenter the apartment, Chenault turned the doorknob to open the door and then immediately returned to her frying chicken. (AA VOL 3 00656, 00664). Pearson re-entered the apartment with two other men. (AA VOL 3 00656). Chenault had never met either of these men before and neither introduced himself to her. (AA VOL 3 00657, 00663).

The three men entered the apartment and one of them began looking around to determine who was there. (AA VOL 3 00657). Chenault claimed that when this man tried to go into her bedroom, where her grandson was watching television, she stood between him and the doorway to prevent his entry. (AA VOL 3 00658). Chenault stated that she stood face-to-face with this perpetrator only momentarily. (AA VOL 3 00658). This was Chenault's only face-to-face encounter with either perpetrator, as the rest of the time she had her back to the drug deal occurring behind her. (AA VOL 3 00651, 00660, 00664). Chenault stated that, as a general matter, she got "no good look" at the perpetrators. (AA VOL 3 00703).

At this point, Pearson had removed the marijuana from atop the refrigerator and placed it on the kitchen table. (AA VOL 3 00660-00661). Pearson asked for money from the two men in exchange for the drugs, garnering the response that the men were "taking" the drugs. (AA VOL 3 00665). Chenault testified that Mr. Taylor then began "shaking down" Pearson. (AA VOL 3 00667). Pearson reached to his right side where he had stowed a gun. (AA VOL 3 00659) Shots were then fired. (AA VOL 3 00670). When Chenault turned around, she found Pearson had

been shot and the two men had absconded with the drugs. (AA VOL 3 00670-00671).

B. The Las Vegas Police Department ("LVPD") Investigation and Arrest of Mr. Taylor

Detective Martin Wildemann ("Wildemann") of the LVPD was the detective assigned to interview the witnesses. (AA VOL 5 01049). He interviewed Chenault at her apartment. 3 RT 200. Wildemann also interviewed Haddon. (AA VOL 5 01067). Haddon gave further details on the drug deal, telling Wildemann that an acquaintance she knew by the name of 'D' had arranged to buy a large amount of marijuana from Pearson. (AA VOL 5 01067). Wildemann obtained Pearson's cell phone number from Haddon and subsequently accessed Pearson's cell phone records with help from the Federal Bureau of Investigation. (AA VOL 5 01067). These records included the cell phone numbers that Pearson had contacted just before his death. (AA VOL 5 01067). From these records Wildemann was able to identify Mr. Taylor's cell phone number, leading him to the name and address of Jennifer Archer ("Archer"), Mr. Taylor's girlfriend. (AA VOL 5 01069). He was also able to identify Archer's vehicle. (AA VOL 5 01069).

Wildemann had surveillance placed on Archer's residence. (AA VOL 5 01069). Archer then "made" the surveillance and left her home. (AA VOL 5 01072). Wildemann began looking for her in the immediate vicinity and finally located her pulling into a bar. (AA VOL 5 01072). Archer entered the bar and surfaced a few minutes later with Mr. Taylor. (AA VOL 5 01073). The two left and Wildemann followed, requesting a patrol car to stop them in a shopping plaza parking lot. (AA VOL 5 01074-01075). The two exited the car and Mr. Taylor was placed into custody. (AA VOL 5 01075). Wildemann then asked him if he had a phone, to which Mr. Taylor responded in the affirmative. (AA VOL 5 01076). Detective Wildemann retrieved the phone from Mr. Taylor and Mr.

Taylor provided the phone number. (AA VOL 5 01076). Wildemann called the number to confirm it was the phone he retrieved from Mr. Taylor. (AA VOL 5 01077)

C. The Show-Up and Subsequent Identifications of Mr. Taylor

Wildemann, with Mr. Taylor still in custody in the parking lot, phoned Chenault around 11:45 P.M, more than eight hours after the crime had occurred. (AA VOL 3 00673-00674; AA VOL 4 00759-00760). Chenault met Wildemann nearby and he had her get into his car. (AA VOL 4 00760). He then drove her to where Mr. Taylor was being detained, in the middle of a shopping plaza, telling her "they had him over here." (VOL 3 00707); AA VOL 5 01078). It was "pitch black" outside and spotlights were placed on Mr. Taylor. (AA VOL 5 01078). When they arrived, Chenault was quiet. (AA VOL 5 01079). Chenault observed Mr. Taylor from the backseat of Wildemann's car, several yards from where Mr. Taylor was being detained. (AA VOL 5 01078-01079). She then asked to pull closer and Wildemann complied. (AA VOL 5 01079-01080). Chenault's first response to seeing Mr. Taylor was that she did not believe him to be one of the men in her apartment. (AA VOL 5 01080).

Once he returned Chenault to her family, Wildemann went to the police station and obtained a picture of Mr. Taylor. (AA VOL 5 01081). He texted that picture to Haddon and asked if that was the person she knew as 'D.' (AA VOL 5 01081). Haddon confirmed that Mr. Taylor was 'D.' (AA VOL 5 01080). Haddon texted Wildemann a few hours later, telling him that she had shown the photo to Chenault and Chenault had positively identified Mr. Taylor as one of the perpetrators. (AA VOL 5 01083-01084). This was the only point at which Chenault in any way definitively identified Mr. Taylor as one of the perpetrators. (AA VOL 3 00677; AA VOL 5 01083-01084). Chenault also made an in-court identification of Mr. Taylor during his trial. (AA VOL 3 00659-00600).

D. The State's Subpoena of Mr. Taylor's Historical Cell Phone Location Data

The State also accessed Mr. Taylor's phone records by obtaining a subpoena under the Stored Communications Act.[1] (AA VOL 5 01086) ["Hearing on All Remaining Motions to Suppress"] These records - at least eighteen Excel spreadsheet pages - included the numbers to which Mr. Taylor placed calls or from which he received calls for a weeklong period leading up to Pearson's murder. (AA VOL 7 01514-01567) [State's Exhibit 114B-D] They also disclosed the locations of each and every cell phone tower to which Mr. Taylor's phone had connected across the Las Vegas area. (AA VOL 7 01514-01567) [State's Exhibit 114B-D] The State was able to determine Mr. Taylor's location throughout the Las Vegas area on the day of the murder, including several private residences. (AA VOL 7 01504-01513) [State's Exhibits 1-5] Mr. Taylor's cell phone records were admitted as substantive evidence at trial over Mr. Taylor's objection. (AA VOL 3 00743-00744)

E. The State's Closing Arguments

During closing arguments, the prosecution utilized a Powerpoint presentation. (AA VOL 7 01565-01573) [Court's Exhibit 51] One of the slides in that presentation contained a booking photograph of Mr. Taylor. *Ibid.* Across this picture, the State placed the phrases "It's all bad," a statement Mr. Taylor purportedly texted to his girlfriend after the crime, and "GUILTY." *Ibid.* Additionally, both prosecutors commented on Mr. Taylor's guilt in closing. With regard to the cell phone evidence, Ms. Christensen stated that "[t]he defense

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[1] 18 U.S.C. § 2703(d) allows disclosure of private communications data via subpoena "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

suggests that it's not his phone...I would submit to you because the person using that phone is guilty of the crimes charged in this case. So he's got to distance himself from that phone. But the evidence is overwhelming. He can't." (AA VOL 5 01217). Mr. DiGiacomo stated in rebuttal that "[t]here has to be a rational explanation for the evidence. And I challenge you to find it. . . . I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor," that the jury had "a duty to find the truth," and that "there's at least one person in this room who knows beyond a shadow of a doubt who killed Michael [Pearson]." (AA VOL 6 01272). He ended by admonishing the jury that if "you're doing your job...you'll come back here and tell that person [Mr. Taylor] you know [who killed Pearson], too." (AA VOL 6 01272). These statements were made just before the jury entered their deliberations.

Notably, there was little properly admitted substantive evidence of Mr. Taylor's guilt. The one set of fingerprints found at the scene was not matched to Mr. Taylor, as such was potentially exculpatory. (AA VOL 5 01018-01019). No gunshot residue was found on Mr. Taylor, as he was never tested for it. (AA VOL 5 01187). The marijuana Mr. Taylor allegedly stole was never found. (AA VOL 5 01189, 01191). The murder weapon was likewise never recovered. (AA VOL 5 01192). Nevertheless, the jury still convicted Mr. Taylor on all four charged counts.

SUMMARY OF THE ARGUMENT

Identification procedures utilized in the course of criminal investigations can deprive criminal defendants of their right to due process of law where they are unnecessarily suggestive. Certain procedures are, as a general matter, unnecessarily suggestive, such as a one-on-one show-up. Mr. Taylor's due process rights were violated when the LVPD conducted an unnecessarily suggestive show-up that was not justified by any exigent circumstances. Moreover, this

identification cannot be saved from funning afoul of the Constitution because it was unreliable, even independent of the suggestive procedure. Chenault had little time to view the perpetrators in her home, was inattentive and distracted at the time of the crime, and could not definitively identify Mr. Taylor as one of the perpetrators until **after** her daughter showed her a picture of Mr. Taylor. Furthermore, these same factors indicate Chenault's in-court identification of Mr. Taylor was likewise unreliable. Therefore, all identification evidence should have been excluded at trial and the failure to do so violated Mr. Taylor's fundamental right to due process of law.

Mr. Taylor's Sixth Amendment right to a fair trial was also violated when the prosecution utilized a Powerpoint slide containing his booking photo with the words "GUILTY" across the picture during closing arguments. This slide communicated the prosecution's personal belief in Mr. Taylor's guilt, a statement that would be impermissible to make orally and is therefore impermissible to make via trial aids. Additionally, both prosecutors made indirect comments that a reasonable juror would only interpret as being a personal belief that Mr. Taylor was guilty. These comments further violated Mr. Taylor's Sixth Amendment right to a fair trial. Lastly, Mr. DiGiacomo, one of the prosecutors, impermissibly commented on Mr. Taylor's failure to take the stand, violating his Fifth Amendment rights. Therefore, Mr. Taylor's convictions should be reversed.

The State also introduced Mr. Taylor's historical cell phone location data as substantive evidence to show Mr. Taylor was at the scene of the crime, which was admitted over objection. These records contained hundreds of location points over a weeklong period. They also allowed the police to determine Mr. Taylor was at several private residences across the Las Vegas area. The quantity and private nature of this data shows that the State's access and use of that data was a search within the meaning of the Fourth Amendment. Because the State did not have a

warrant for this data, it violated Mr. Taylor's Fourth Amendment rights and the cell phone location data should have been excluded at trial.

From the foregoing, it is clear that many pieces of evidence were improperly admitted against Mr. Taylor at trial. This evidence included eyewitness testimony as to the identification of Mr. Taylor as one of the perpetrators and evidence tending to establish that Mr. Taylor was at the scene of the crime. Considering the evidence that was *properly* before the jury, then, no reasonable juror could have found the elements of each crime proven beyond a reasonable doubt. There was essentially no properly admitted evidence establishing Mr. Taylor's identity as one of the perpetrators, in the absence of the identification and cell phone data. Moreover, the accumulation of the foregoing errors irreparably tainted Mr. Taylor's trial and stacked the deck against him. Such accumulation violated his fundamental Sixth Amendment right to a fair trial. Therefore, Mr. Taylor's convictions should be reversed.

ARGUMENT

I. THE SHOW-UP OF MR. TAYLOR WAS UNNECESSARILY SUGGESTIVE, RESULTING IN UNRELIABLE AND TAINTED OUT-OF-COURT AND IN-COURT IDENTIFICATIONS THAT SHOULD HAVE BEEN EXCLUDED AT TRIAL.

The Fourteenth Amendment of the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. The United States Supreme Court has expressly recognized that the Due Process Clause protects criminal suspects against unnecessarily suggestive pre-trial identification procedures, where those procedures irreversibly taint a subsequent trial with the risk of mistaken identification. *Stovall v. Denno*, 388 U.S. 293, 301-302 (1967). This Court has fully adopted the *Stovall* standard for pre-trial identification challenges. *See Jones v. State*, 95 Nev. 613, 617 (1979). A court reviewing a challenge to the

constitutionality of a pre-trial identification procedure considers: "(1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is [nevertheless] reliable." *Bias v. State*, 105 Nev. 869, 871 (1989). The show-up utilized by the LVPD in this case was impermissibly suggestive and produced a totally unreliable identification that violated Mr. Taylor's fundamental right to due process of law.

A. The LVPD conducted an unnecessarily suggestive identification procedure when they brought Chenault to a one-on-one show-up where only Mr. Taylor was detained in front of a police car, and no exigency existed.

1. The LVPD conducted a show-up between Mr. Taylor and the witness, an impermissibly suggestive identification technique that violated Mr. Taylor's right to due process of law.

The Nevada Supreme court has adopted the *Stovall* test for suggestiveness, "[c]onsidering [whether, in] the totality of the circumstances, the confrontation conducted...was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law." *Bias*, 105 Nev. at 871 (internal citations omitted). Certain identification techniques have been categorized as inherently suspect and suggestive. *See, e.g.*, *Jones*, *supra* (finding an on-the-scene show-up identification to be inherently suspect).

This Court has held, absent exigent circumstances, that a show-up (or a one-on-one confrontation) between a witness and suspect is just such an inherently suggestive technique. *Jones*, *supra*, 95 Nev. at 617. This Court opined that show-ups present the suspect to the witness in such a manner that communicates to the witness that the police have their man. *Id.* In *Bias*, this Court reiterated that show-ups are inherently suggestive but may be permissible under certain circumstances where there are sufficient countervailing policy considerations at play. 105 Nev. at 872.

In *Gehrke v. State*, this Court held a show-up to be unnecessarily suggestive. 96 Nev. 581, 584 (1980). Gehrke was charged with armed robbery of a gas station. *Id.* at 583. The police suspected Gehrke based upon the descriptions given by witnesses and mugshots each had independently chosen. *Id.* Police told the witnesses they "had a suspect in mind" and escorted them to the Gehrke house. *Id.* Gehrke had been placed in front of a police car's headlights when the witnesses identified him as the robber. *Id.* The Court held that, because no countervailing policy considerations were at play, the procedure was unnecessarily suggestive. *Id.* at 584. Almost identical factual considerations led the Court in *Bias* to hold a show-up impermissibly suggestive. *See Bias*, 105 Nev. at 872 (finding the circumstances of the show-up to be "similar to those in [*Gerhke*]," warranting reversal).

The factual circumstances surrounding Mr. Taylor's pre-trial identification are highly similar to those in both *Gehrke* and *Bias*, unequivocally showing it to be impermissibly suggestive. After apprehending Mr. Taylor, Detective Wildemann phoned Chenault to tell her that they had a suspect they wanted her to identify. (AA VOL 3 00673-00674). Like the police in *Gehrke*, Detective Wildemann suggested to Chenault they had their man when he told her he thought they "had him [the perpetrator] over here." (AA VOL 3 00707). Upon arrival at the shopping plaza, he was standing outside near police cars for her to view. (AA VOL 3 00676). As in *Gehrke*, he was the only person being detained and presented to Ms. Chenault and spotlights were shone directly on him because it was dark. (AA VOL 5 01079, AA VOL 5 00147). Chenault remained in the back seat of Wildemann's squad car for the duration of the show-up. (AA VOL 5 01078). These circumstances unnecessarily indicated that Mr. Taylor was in fact the perpetrator. It is clear from these facts, essentially identical to those in *Gehrke* and *Bias*, that the show-up conducted here was therefore unnecessarily suggestive.

2. No exigent circumstances existed to justify the prompt, impermissibly suggestive show-up of Mr. Taylor and evidence of his identification should have been excluded at trial.

There were zero countervailing policy considerations or exigencies at play in the instant case to justify the unduly suggestive show-up of Mr. Taylor. Although show-ups are inherently suggestive, certain factual circumstances can justify using such procedures to identify suspects as the perpetrator of a crime. *Gehrke*, *supra*, 96 Nev. at 584, n. 2. *See also Bias*, *supra*, 105 Nev. at 872 (reiterating this conclusion). These policy considerations are related to the presence of an exigent circumstance making quick identification imperative. *See Gehrke v. State*, 96 Nev. 581, 584, n. 2 (1980). Exigencies sufficient to justify a show-up include: (1) ensuring fresher memory, *Jones*, *supra*, 95 Nev. at 617; (2) the sole eyewitness' inability to attend a line-up, *Stovall*, *supra*; (3) an eyewitness fortuitously being at the scene at the time of arrest, *Moss v. State*, 88 Nev. 19, (1972); and (4) ensuring that those committing serious felonies are swiftly apprehended, *Simmons v. United States*, 390 U.S. 377 (1968). Where these exigencies are absent, however, courts should be reluctant to find a show-up permissible. *See, e.g.*, *Bias*, 105 Nev. at 872. *See also Gehrke*, 96 Nev. at 584. None of these exigencies were present in the instant matter to justify the unnecessarily suggestive show-up of Mr. Taylor.

In *Jones,* for example, the defendant had been charged with robbery of two hotel guests in their room. 95 Nev. at 616. Hotel security had apprehended the defendant and his accomplice before they left the hotel and escorted the victims to the hotel's security office to identify the suspects between thirty and forty-five minutes after the robbery occurred. *Id.* This Court held that, although the procedure was unnecessarily suggestive, an exigency existed to justify it. *Id.* at 617. This Court focused on the short amount of time between the crime and the show-up, stating that even show-ups conducted in close proximity to the commission of the crime tend to be more reliable than a later identification because memory is fresher. *Id.*

This exigency does not exist for the show-up of Mr. Taylor, however. The show-up was conducted around 11:45 P.M., over eight hours after the crime had occurred. (AA VOL 5 01078). This is nowhere near the small timeframe present in *Jones* and therefore ensuring Chenault's "fresh" memory cannot justify the show-up of Mr. Taylor. There was also no indication that Chenault would be unavailable for a later line-up identification. *See Stovall*, *supra* (finding an unnecessarily suggestive show-up justified where it was speculative as to whether the sole remaining eyewitness to a murder, stabbed 11 times by her assailant, would survive to identify her attacker). Furthermore, Chenault was clearly not at the scene at the time of Mr. Taylor's arrest, since Detective Wildemann had to escort her to the scene so she could identify Mr. Taylor. *Compare Moss*, 88 Nev. at 21-22 (finding an unnecessarily suggestive show-up justified because it occurred in the course of a sting operation, using the victim who immediately identified the defendant as the con artist that scammed her). No exigency existed here to justify the highly suggestive show-up of Mr. Taylor.

Mr. Taylor was allegedly involved in a robbery-turned-homicide, a dangerous felony and that show-ups can be justified to if there are exigent circumstances requiring such a show-up of dangerous criminals. *Simmons*, *supra*. For instance, in *Simmons*, the defendant was convicted of participating in an armed bank robbery. 390 U.S. at 381. Federal Bureau of Investigation ("FBI") agents showed bank employees various pictures of only the defendant and his accomplice, akin to a show-up. *Id.* at 382, 384-385. The United States Supreme Court held that because a dangerous felony had been committed, the show-up was justified so that the FBI could quickly apprehend the felons. *Id.* at 384-385.

Here, there was no indication that whomever committed the robbery-murder would continue to commit other similar crimes in the Las Vegas area. This is in contrast to the bank robbery at issue in *Simmons*, which are typically not committed in isolation. *Cf. Simmons*, 390 U.S. at 385 (discussing how the FBI

agents needed to promptly determine whether they were on the right track so they could alert officials in other cities). Thus, the exigent circumstances were future the stopping of future crimes, and not just based on one criminal act. Based on the foregoing, therefore, it is clear that there was no exigency at play to justify the impermissibly suggestive show-up of Mr. Taylor. As a result, the failure to suppress evidence of the identification at trial violated Mr. Taylor's fundamental right to due process of law.

B. The unnecessarily suggestive show-up of Mr. Taylor was highly unreliable because it was conducted in a dark parking lot at night, from within a police car with tinted windows, and several yards from where Mr. Taylor was standing.

Mr. Taylor's unjustified, unnecessarily suggestive show-up was not reliable, independently reliable, and evidence of his identification should have been excluded at trial. An impermissibly suggestive identification might not run afoul of due process constraints where it is nevertheless reliable in the totality of the circumstances. *Bias*, 105 Nev. at 871. The United States Supreme Court has outlined several factors to be considered when determining the reliability of unnecessarily suggestive identifications, including: (1) the witness' view of the criminal at the time of the crime; (2) the degree of the witness' attention; (3) the accuracy of any prior description of the criminal as compared to the suspect; (4) the witness' certainty at the confrontation; and (5) the time elapsed between the crime and confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). This Court has expressly adopted the *Biggers* standard. *Gehrke*, *supra*, 96 Nev. at 584. Under the totality of the circumstances of this case, Chenault's identification of Mr. Taylor was totally unreliable and unnecessarily suggestive.

1. Chenault had minimal face-to-face view of the perpetrator at the time of the crime that lasted mere seconds.

First, Chenault's opportunity to view the criminal at the time of the crime was suboptimal for reliability purposes. Chenault did not have extended contact with the perpetrators in her apartment. Chenault testified that she was frying chicken at the time of the crime and had her back turned to the situation. (AA VOL 3 00651, 00664). Even during the ensuing scuffle, Chenault was still facing her stove and away from the scene. (AA VOL 3 00733). Chenault did testify that at one point she came face-to-face with one of the assailants (alleged to be Mr. Taylor) when he was walking around her home. (AA VOL 3 00715-00716). She testified that when he attempted to open her bedroom door, where her grandson was watching television, she stood between the door and the assailant, facing him. (AA VOL 3 00715-00716). However, this was for an extremely short amount of time and it must be considered in light of Chenault's other extensive testimony that she had her back to the situation at the time of the crime and got no "good look at" the perpetrators. (AA VOL 3 00703).

Mr. Taylor's case is distinguishable from others where a witness was found to have more than sufficient time to view the criminal. In *Biggers*, for example, the court found that the witness, a victim of a rape, had more than an optimum amount of time to view the criminal given the intimate nature of the crime. 409 U.S. at 200. In *Gehrke*, this Court found sufficient opportunity to view the victim because the witnesses were victims of a face-to-face hold-up. 96 Nev. at 584. Here, however, the crime at issue was not intimate in nature and did not require close, continuous face-to-face contact between Chenault and the criminal. Chenault herself was not the victim of the crime, making it less likely she would have had sufficient opportunity, or motive, to view the criminal. *See Biggers*, 409 U.S. at 200 (noting that crime victims have special motives to closely note characteristics of the perpetrator) (internal citations omitted). Because she had little opportunity or

motive to view the criminal, Chenault's identification of Mr. Taylor was highly unreliable.

2. Chenault was focused on preparing dinner at the time of the crime, rather than the drug deal leading to the robbery and murder.

Chenault was also too inattentive during and just before the crime to have reliably identified Mr. Taylor as the man from her apartment. The facts outlined above with regard to the first factor are equally applicable here. Chenault's back was turned toward the two strange men at two key points – just after the two entered her apartment and during the crime itself. She testified that when they knocked to come back into her home she unlocked the door and left it for them to open themselves, turning away and back towards her frying chicken. (AA VOL 3 00656, 00664). Furthermore, Chenault had never met either of these men before and neither introduced himself to her. (AA VOL 3 00657; 00663).

Moreover, Chenault testified that she had just returned home from attending her grandmother's funeral in Michigan and that her great aunt had recently died. (AA VOL 3 00651). She was arguably, therefore, highly mentally distressed and preoccupied with her dinner, rather than focused on the situation behind her. Additionally, her only encounter with one of the perpetrators was for a few seconds, when she stood between him and her bedroom door. Again, this situation is highly different from that in *Biggers*, where the victim of a rape was subjected to intimate interactions with the criminal and paid close attention to what was going on around her. 409 U.S. at 200. Furthermore, Chenault was not the victim of a crime that required close contact, such as a hold-up, so the likelihood that she was paying close attention is minimal. *Gehrke*, 96 Nev. at 584. The facts here show that Ms. Chenault was entirely inattentive to the criminals in her home at the time of the crime and her subsequent identification is therefore unreliable.

3. *Chenault was entirely uncertain that Mr. Taylor was the perpetrator when Detective Wildemann conducted a show-up.*

Chenault was not certain that Mr. Taylor was the man she claimed to have seen in her apartment earlier in the day at the time of the show-up. Chenault viewed Mr. Taylor from behind tinted windows, at night and in a car that was stopped several yards from where Mr. Taylor was standing. (AA VOL 5 01079). Even after Detective Wildemann moved closer, Chenault still could not definitively state that Mr. Taylor was the man in her apartment earlier that day. (AA VOL 5 01080). Indeed, Wildemann testified that "[s]he [took] a look and she [said] that she [didn't] think [it was] him; she just [didn't] recognize that to be him." (AA VOL 5 01080). While Detective Wildemann drove Chenault away from the show-up, she again expressed uncertainty about whether Mr. Taylor was the man from her apartment. (AA VOL 5 01080). Significantly, Chenault never definitively and unequivocally identified Mr. Taylor as the man from her apartment until *after* the show-up, when her daughter showed her a photograph of Mr. Taylor that Detective Wildemann sent to her. (AA VOL 3 00677, AA VOL 5 01083-01084). At best, Chenault passively acquiesced to Wildemann's questions that suggested Mr. Taylor was the man from her apartment, without ever stating definitively that she recognized Mr. Taylor.

Chenault's total lack of certainty stands apart from that in other cases. The rape victim in *Biggers*, for example, gave a thorough description of her assailant and later stated that she had "no doubt" that Biggers was her rapist. 409 U.S. at 200. She also testified at trial "that there was something about his face 'I don't think I could ever forget.'" *Id.* at 201. In *Browning v. State*, this Court found an unnecessarily suggestive identification reliable and therefore admissible where one witness stated she was fairly certain the defendant was the perpetrator of a robbery turned murder, the other witness positively identified him as the perpetrator, and one of them had totally rejected another suspect presented. 104 Nev. 269, 273, n. 3 (1988).

Here, even assuming Chenault gave a thorough description of the assailant, her statements following the show-up were riddled with uncertainty. She never unequivocally and definitively identified Mr. Taylor as the man from her apartment until she was shown a photograph on her daughter's cell phone. There is a complete lack of definitive, positive identification of Mr. Taylor as the assailant, unlike in other cases such as *Biggers* and *Browning*. Because she was entirely uncertain as to whether Mr. Taylor committed the crime, her show-up identification of him was unreliable.

4. A great deal of time - more than eight hours - had elapsed between the crime and the show-up.

Lastly, the amount of time that elapsed between the crime and the show-up here undermines any indicia of reliability there may have been in Chenault's identification of Mr. Taylor. In *Gehrke*, *supra*, the identification of the gas station robber was made within one hour of the crime and this Court found such a small amount of time indicative of reliability. 96 Nev. at 584. In *Bias*, the robber was identified about four hours after the crime had occurred and this Court found the identification to be reliable. 105 Nev. at 872. Here, the robbery-murder was reported around 2:30 in the afternoon and the show-up was conducted after 11 o'clock that night, a period of over eight hours. Based on prior cases, such as those above, this might normally weigh in favor of reliability. However, this period of time brings in substantial questions as to the reliability of Chenault's identification of Mr. Taylor in light of her equivocal statements that reveal her level of certainty.

As the amount of time between the crime and the identification increases, courts typically focus on a witness' other statements relating to the identity of the perpetrator to determine reliability. The show-up in *Biggers*, for example, occurred more than seven months after the rape. 409 U.S. at 201. The Court recognized that this factor would normally weigh heavily against finding the identification reliable, but the victim's prior record of certainty and thoroughness outweighed it. *Id.* The

victim had given no other identifications of the perpetrator and she was unequivocally certain that the man she identified was her rapist. *Id.* This Court in *Bias* focused on the facts that the witness was "100 per cent sure" that the defendant was the perpetrator after hearing his voice, had identified him as wearing the same clothes as the perpetrator, and positively identified the robbery weapon. 105 Nev. at 872.

Here, at least eight hours had elapsed between the crime and Chenault's identification of Mr. Taylor. Unlike in the above cases, Chenault was at all times equivocal in her identification of Mr. Taylor as the perpetrator. She was uncertain that Mr. Taylor was the assailant initially, and remained uncertain even after Detective Wildemann moved his patrol car closer to Mr. Taylor. (AA VOL 5 01080). Her initial response to seeing Mr. Taylor was that she did not think he was the assailant. (AA VOL 5 01080). Moreover, as stated above, Chenault had minimal opportunity or motive to closely observe the assailant at the time of the crime and she was entirely inattentive during the altercation. Based on these facts, it cannot be said with any degree of certainty that the fact that the show-up occurred on the same day of the crime made the identification wholly reliable.

5. Overall, the reliability factors point to the conclusion that Chenault's identification of Mr. Taylor was wholly unreliable.

The *Biggers/Gehrke* analysis makes clear that the ultimate question with regard to unnecessarily suggestive identifications is whether, "under the 'totality of the circumstances,' the identification retains strong indicia of reliability." 409 U.S. 202. Thus, the factors above must be weighed and, as detailed, they tip in favor of finding that the identification here was unreliable. As stated, Chenault had very little opportunity or motive to closely view the men in her apartment at the time of the crime. She was also totally inattentive, focused more on not burning her dinner than the drug transaction going on in the background. She at all times expressed

uncertainty as to whether Mr. Taylor was involved, except when shown a highly suggestive photograph by her daughter. Moreover, eight hours had elapsed between the crime and the show-up and, in light of her overall uncertainty, this shows her identification of Mr. Taylor to be unreliable. Because of the unreliability of the show-up identification here, Mr. Taylor's due process rights were violated and the identification evidence should have been excluded at trial.

C. Chenault's in-court identification of Mr. Taylor should have also been suppressed because it was unreliable and not free from the initial tainted identification.

The United States Supreme Court has held that even where an unnecessarily suggestive pre-trial procedure occurs that produces an unreliable identification, a subsequent in-court identification by the same witness is not necessarily excluded where the in-court identification itself is found to be independently reliable. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The factors to be considered in this analysis are identical to those enunciated in *Biggers*. *Id.* This Court has adopted the same standard. *See Browning, supra*, 104 Nev. at 273-274.

At trial, Chenault made an in-court identification of Mr. Taylor as the perpetrator of the crime that occurred at her apartment. (AA VOL 3 00659-00660). However, as extensively detailed above, the *Biggers* factors in this case tip heavily in favor of finding her identification of Mr. Taylor entirely unreliable because they show that the in-court identification was tainted by not only the impermissibly suggestive show-up but also by Chenault's daughter showing her a photographic text of Mr. Taylor. Thus, in addition to the show-up identification, Chenault's in-court identification should also have been excluded at trial and failure to do so violated Mr. Taylor's right to due process of law.

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II. THE PROSECUTION'S PRESENTATION OF A HIGHLY PREJUDICIAL POWERPOINT SLIDE AND INDIRECTLY COMMENTING ON MR. TAYLOR'S DECISION NOT TO TESTIFY VIOLATED MR. TAYLOR'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND AGAINST SELF-INCRIMINATION.

A. The prosecution's use of a Powerpoint slide that contained a booking picture of Mr. Taylor and that had the word "GUILTY" superimposed on that picture violated his Sixth Amendment right to a fair trial.

Both the United States and Nevada Constitutions guarantee criminal defendants the right to a fair trial. U.S. Const. amend. VI, XIV; Nev. Const. Art. I, § 8. Nevada law also provides those defendants with a presumption of innocence until proven guilty beyond a reasonable doubt. Nev. Rev. Stat. § 175.191 (2013). This presumption and the right to a fair trial are basic building blocks of the American criminal justice system. *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

A component of the right to a fair trial is that the accused's guilt must be based upon the evidence adduced at trial, rather than other circumstances. *See Watters v. State*, 313 P.3d 243, 246-247 (Nev. 2013). One such impermissible circumstance for determining guilt is the prosecution's trial aids. In the recent *Watters* decision, this Court addressed a constitutional challenge to a conviction where the prosecution used Powerpoint slides in its opening argument. *See id.* In ending its opening, the prosecutor displayed a slide containing the defendant's booking photo and then had the words "GUILTY" appear across the picture. *Id.* at 245-246. This Court held the slide violated the defendant's constitutional right to a fair trial because it carried a high risk of "poison[ing] the jury's mind against the defendant" before trial even began. *Id.* at 247 (internal quotations omitted).

The factual circumstances of this case are almost totally identical to those in *Watters* and warrant reversal of Mr. Taylor's conviction. Here, the prosecution also utilized a Powerpoint presentation. *See* Ct.'s Ex. 51. At the end of the presentation

was a slide with a booking photo of Mr. Taylor. *Ibid.* Additionally, this slide had the text "It's all bad" (a statement Mr. Taylor allegedly made to his girlfriend following the murder) and the word "GUILTY" across Mr. Taylor's picture. *Ibid.* This impermissibly and unequivocally communicated to the jury that Mr. Taylor *was* guilty, independent of any of the evidence adduced at trial, rather than allowing the jury to form its own conclusions based solely on admitted evidence. It was also not the same as the prosecution permissibly telling the jury it would be asking them to find Mr. Taylor guilty. The slide was highly inflammatory and, under this Court's decision in *Watters*, reversal of Mr. Taylor's conviction is mandated because the use of the slide violated his constitutional right to a fair trial.

The sole distinction between *Watters* and this case is that the slide at issue in *Watters* was presented during opening argument, while here it was presented during closing argument. 313 P.3d at 245-246. However, the same concerns over the use of prejudicial trial aids in opening argument are at play for closing arguments as well. The *Watters* Court found the slide impermissible in opening not just due to its prejudicial effect on the jury but also because "a PowerPoint may not be used to make an argument visually that would be improper if made orally." *Id.* at 247. In other words, trial aids may not be used to communicate the prosecutor's personal belief as to the accused's guilt, as this is impermissible at any stage of a criminal proceeding. *See Pacheco v. State*, 82 Nev. 172, 179 (1966). *See also* Part II.B, *infra* (discussing the prohibition against prosecutors conveying their personal beliefs of a criminal defendant's guilt at trial).

The slides used by the prosecutor here clearly communicated the belief that Mr. Taylor was without a doubt guilty of the charged murder. The State would have been prohibited from orally making this claim in either opening or closing arguments and the State therefore may not circumvent this bar by using Powerpoint to communicate the exact same view. *See Watters*, 313 P.3d at 248 (stating that the prosecutor would have been barred from stating the defendant was

guilty orally, making improper the slide communicating the same thing). Indeed, this Court has intimated that such prejudicial and improper trial aids are prohibited, regardless of whether they are used in opening or closing argument. *Id.* at 247 (citing *In re Glasmann,* 286 P.3d 673 (Wash. 2012), which reversed convictions where prosecution used a Powerpoint slide in *closing* argument with the defendant's booking photo and the word "GUILTY" superimposed). It is clear, therefore, that the use of the Powerpoint slide here was improper and violated Mr. Taylor's constitutional rights to a fair trial because it improperly tainted the jury's decision. Thus, his convictions should be reversed.

B. The prosecutors violated Mr. Taylor's right to a fair trial when they made comments during closing argument that could only be construed as their personal opinion that Mr. Taylor was guilty.

The Sixth and Fourteenth Amendments protect a criminal defendant's right to a fair trial and restrict the State's case-in-chief to the evidence and any inferences therefrom. U.S. Const. amend. VI, XIV. An extension of the right to a fair trial is that the State is not allowed to imply or declare belief in the defendant's guilt. *Pacheco v. State*, 82 Nev. 172, 179 (1966). This Court has made it clear that "[s]uch an injection of personal beliefs into the argument detracts from the unprejudiced, impartial, and nonpartisan role that a prosecuting attorney assumes in the courtroom." *Collier v. State*, 101 Nev. 473, 480 (1985) (internal quotations omitted). Therefore, prosecutors are prohibited from expressing their personal beliefs on the defendant's guilt. The prosecutors in the instant matter improperly referenced their personal beliefs in Mr. Taylor's guilt in closing arguments, as outlined below.

Even indirect comments that have the tendency to reveal the prosecutor's opinion of a defendant's guilt are improper. In *Owens v. State*, for example, the prosecution stated: "I was brought up to believe that there is some good in all of us.

For the life of me, on the evidence presented to me, I can't see the good in [the defendant]." 96 Nev. 880, 885 (1980). This Court found that comment, although indirect, to be an improper expression of personal belief as to guilt. *Id.* Here, during her closing argument, Ms. Christensen extensively focused on cell phone evidence purportedly linking Mr. Taylor to the crime. (AA VOL 5 01210-01217). She first declared that the cell phone she was discussing was Mr. Taylor's and then shortly thereafter stated, "[t]he defense suggests that it's not his phone...I would submit to you because the person using that phone is guilty of the crimes charged in this case. So he's got to distance himself from that phone. But the evidence is overwhelming. He can't." (AA VOL 5 01217).

Similarly to *Owens*, although not directly stating her belief in Mr. Taylor's guilt, the only logical inference from this statement was that she indeed thought Mr. Taylor was guilty. A simple deductive argument demonstrates the damning effect of Ms. Christensen's comments: (1) the person that owns the phone is guilty of murder; (2) Mr. Taylor owns the phone; (3) therefore, Mr. Taylor is guilty of murder. This is clearly an example of a prosecutor improperly offering her opinion as to the accused's guilt. Additionally, Mr. Diagicomo's stating in closing argument that Mr. Taylor was the only one who knew what happened at the murder scene, outlined extensively below, were also expressions of his belief that Mr. Taylor is guilty. (AA VOL 6 01272). These comments were improper because they carried the risk that "jurors might interpret such opinion as being based on information other than evidence admitted at trial." *Owens*, *supra*, 96 Nev. at 885. Thus, the prosecution's comments were prohibited because they deprived Mr. Taylor of his right to a fair trial.

C. Mr. Diagicomo stating that Mr. Taylor could fill in the gaps in the evidence as to what occurred at the scene of the murder was an impermissible comment on Mr. Taylor's failure to testify, in violation of his Fifth Amendment right against self-incrimination.

The prosecution also made improper comments that violated Mr. Taylor's Fifth Amendment rights. The Fifth Amendment to the United States Constitution expressly grants criminal defendants the right against self-incrimination. U.S. Const. amend. V. The United States Supreme Court has interpreted the self-incrimination clause as giving criminal defendants the absolute choice over whether to testify in their own defense in both federal and state courts. *Malloy v. Hogan*, 378 U.S. 1 (1964). A corollary of this right is that the government is prohibited from commenting at any stage of the proceeding on a criminal defendant's choice not to testify. *Griffin v. California*, 380 U.S. 609 (1965). Nevada follows this same rule. *See Fernandez v. State*, 81 Nev. 276 (1965).

This Court has held that where the prosecution directly comments on a defendant's failure to testify, it is a per se violation of the Fifth Amendment. *Harkness v. State*, 107 Nev. 800, 803 (1991). Where the prosecution's comment is indirect, the relevant test as to its impropriety is whether "the language used was...of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Id.* Here, Mr. Diagicomo, one of the prosecutors, made an improper comment in his closing argument that violated Mr. Taylor's Fifth Amendment rights because it naturally would be considered a reference to his decision not to testify in his own defense.

In *Harkness*, the defendant chose not to testify in his defense and the prosecution commented on gaps in the evidence, intimating that the defendant was the only one that could resolve those gaps by stating "[i]f we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts of this case?" 107 Nev. at 802-803. This Court held those comments to be indirect references to the defendant's failure to testify at trial. *Id.* at 804. It further held that the comments were in violation of the defendant's Fifth Amendment rights because when taken in full context, there was a likelihood that the jury would naturally conclude that the defendant's responsibility for gaps in the

evidence was due to his failure to testify. *Id.* Because of this, the comments were held to be unconstitutional. *Id.*

The situation is similar here. In his closing argument, Mr. Diagicomo insisted to the jury that "[t]here has to be a rational explanation for the evidence. And I challenge you to find it. . . . I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor." (AA VOL 6 01272). Mr. DiGiacomo also opined that the jury had "a duty to find the truth." (AA VOL 6 01272). Mr. DiGiacomo then stated that "there's at least one person in this room who knows beyond a shadow of a doubt who killed Michael [Pearson]." (AA VOL 6 01272). He ended by admonishing the jury that if "you're doing your job...you'll come back here and tell that person [Mr. Taylor] you know [who killed Pearson], too." (AA VOL 6 01272). Just as in *Harkness*, these comments strongly implied that Mr. Taylor could fill in any gaps in the evidence as to what actually occurred in Chenault's apartment and could clear up any confusion regarding who killed Michael Pearson.

In *McNelton v. State*, this Court reviewed whether a prosecutor's comments regarding the defendant's lack of remorse in his statement to the jury during sentencing was an impermissible reference to the defendant's failure to testify. 111 Nev. 900, 903 (1995). The *McNelton* Court concluded that "the jury would not naturally and necessarily" connect those statements with the defendant's lack of testimony at trial. *Id.* at 904. Rather, the natural inference from those comments was "that the defendant was an unfeeling man, not that he failed to testify." *Id.*

Mr. Diagicomo's comments, however, are of a different nature and quality than those in *McNelton*. They implied that Mr. Taylor had knowledge of what happened at the murder scene. (AA VOL 6 01272). The only natural inference from those comments was that Mr. Taylor failed to testify because he had something to hide. This is precisely the impermissible reference at which the *Griffin* rule is aimed. *See Griffin*, *supra*, 380 U.S. at 611 (finding the prosecutor's

statements that "Essie Mae [the victim] is dead, she can't tell you her side of the story. The defendant won't" to be prohibited by the Fifth Amendment). It is clear, based on the foregoing, that Mr. Diagicomo's closing argument violated Mr. Taylor's Fifth Amendment rights because the only natural and logical inference to be drawn from it was that Mr. Taylor failed to testify and was therefore guilty. Thus, Mr. Taylor's convictions should be reversed.

III. MR. TAYLOR'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE STATE ACCESSED AND USED HIS CELL PHONE LOCATION DATA WITHOUT A WARRANT.

The Fourth Amendment to the United States Constitution provides that citizens have a right "against unreasonable searches" by the government, except with a warrant based upon probable cause. U.S. Const. amend. IV. The Fourth Amendment "protects people, and not simply 'areas.'" *Id.* at 353. In other words, the Fourth Amendment protects any interest in which a citizen retains a "reasonable expectation of privacy." *Katz*, 389 U.S. at 360. The inquiry into whether a Fourth Amendment search has occurred, and thus required a warrant, depends upon whether there is an objectively reasonable expectation of privacy in the interest violated. *Id.* at 361 (Harlan, J., concurring).

In this case, the warrantless access and use of Mr. Taylor's historical cell phone location data was a search under the Fourth Amendment because Mr. Taylor had an objectively reasonable expectation of privacy in the access to and use of that data. Because the State did not have a warrant for this search, this Court should find that Mr. Taylor's Fourth Amendment rights were violated and reverse his conviction.

A. There is an objectively reasonable expectation of privacy in historical cell phone location data.

When applying the *Katz* test, this Court should "ask whether the use of [historical cell phone location or GPS data] in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." *Jones v. United States*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring). In this case, the access and use of Mr. Taylor's cell phone location data over a week-long period was an intrusion a reasonable person would not have expected because the nature and quantity of that information is highly sensitive and revealing.

1. There is a reasonable expectation of privacy in historical cell phone data because the nature and quantity of information that can be gleaned from that data is highly sensitive and revealing.

Although it has not yet directly addressed the issue, the United States Supreme Court has confronted the Fourth Amendment implications of the use of cell phone GPS/location technology. In *Jones*, *supra*, the Court found a violation of the Fourth Amendment where law enforcement trespassorily placed a GPS locator on the defendant's car and used that device to track his movements over a month's time. *Id.* at 954. Concurring, Justice Sotomayor extensively noted the privacy concerns implicated by the use of GPS surveillance. *Id.* at 956. In her opinion, Sotomayor noted the "quantum of intimate information [revealed] about any person" the government chooses to track. *Id.* She also took notice of the fact that the aggregate of such [location] data can enable the government "to ascertain, more or less at will, [a person's] political and religious beliefs, sexual habits, and so on." *Id.* Sotomayor's opinion clearly reveals to this Court two important qualities that should be considered when determining whether there is a reasonable expectation of privacy in historical cell phone location data under the Fourth Amendment: the nature and the quantity of information that can be gleaned from such data.

The quantity of information revealed by historical cell phone location data is staggering. Even a passing glance at the record in this matter is illustrative. (AA VOL 7 01556-01567) [State's Exhibit 114D] Mr. Taylor's phone records were obtained from Sprint Nextel. These records show each Sprint cell tower to which Mr. Taylor's phone connected during the requested time period of November 11, 2010 to November 18, 2010. The sheer number of data points itself is foreboding – eighteen spreadsheet pages - and this is only for a week long period. (AA VOL 7 01533-01555) ;(AA VOL 3 00744) [State's Exhibit 114C] It is obvious that, in aggregate, the quantity of information that can be obtained from historical cell phone location data is interminable. This is especially concerning given that most modern day cell phones have GPS communicators and convey location data to providers, which is then automatically recorded and stored. *See State v. Earls*, 70 A. 3d 630, 638-639 (N.J. 2013). Any given person would not reasonably expect to have their every single move available to the government for a mere modicum of justification. *Cf. id.* at 643 (holding that "most people do not realize the extent of modern tracking capabilities and reasonably do not expect law enforcement to convert their phones into precise, possibly continuous tracking tools"). Therefore, the massive amount of information that historical cell phone location data can provide shows there is a reasonable expectation of privacy in that data.

Furthermore, the nature of information revealed by historical cell phone location data can be highly intrusive. Justice Sotomayor hinted as much in her *Jones* concurrence, stating that one's "political and religious beliefs, sexual habits, and so on" could all be determined from this data. *Jones*, *supra*, 132 S. Ct. at 955. For example, had Mr. Taylor visited a church on one of the seven days for which the state obtained records, or a liquor store, or a STD clinic, all of these data points could easily be identified via historical cell phone records. Such data could also reveal whether Mr. Taylor was inside a private residence, around which the

Supreme Court has drawn a "firm but also bright [line]" of Fourth Amendment protection. *Kyllo v. United States*, 533 US 27, 40 (2001). Indeed, the State was in fact able to ascertain that Mr. Taylor had been at several private residences via his historical cell phone data. (AA VOL 7 01504-01513) [State's Exhibits 1-5] The nature of this information is highly private and "involves a degree of intrusion that a reasonable person would not anticipate." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

Based on the foregoing, it is clear that historical cell phone location data is unique evidence in the context of the Fourth Amendment. Both the massive amount of data that can be obtained at a whim and the highly sensitive and private nature of that information show that there is an objectively reasonable expectation of privacy in historical cell phone location data. Therefore, a warrant should be required in order to access it and, since the State here had no warrant, it violated Mr. Taylor's Fourth Amendment rights.

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2. *Despite the fact that historical cell phone location data reveals one's whereabouts upon public thoroughfares, there is still an objectively reasonable expectation of privacy in that data because it can reveal more than publicly observable information.*

The United States Supreme Court, in its seminal case of *United States v. Knotts*, held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. 276, 281 (1983). This conclusion was partially based upon the fact that there is "a lesser expectation of privacy in a motor vehicle because its

function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Id.* at 281 (citations omitted).

Some courts addressing the issue of the use of cell phone location data have focused on the fact that defendants are traveling on public thoroughfares and that therefore, under *Knotts*, there is no reasonable expectation of privacy in those movements. *See, e.g., United States v. Skinner*, 690 F. 3d 772, 778 (6th Cir. 2012) (finding no reasonable expectation of privacy in location data emitted from a cell phone because it revealed only information about travels on public thoroughfares). However, there are material differences in the nature and quantity of data revealed by historical cell phone location data and that which is normally revealed by typical law enforcement tracking methods.

Historical cell phone location data does show locations of a given person along a public thoroughfare. However, it also shows much more than that - it shows the location of a given person *no matter where that person is*. The New Jersey Supreme Court in *State v. Earls*, for example, in finding there to be a reasonable expectation of privacy in cell phone location data, concluded that such data "does more than simply augment visual surveillance in public areas." 70 A. 3d at 643. The *Earls* court noted that this data had been used to pinpoint the defendant to a motel room, which is not a public thoroughfare. *Id.* at 642. Something similar occurred here. Mr. Taylor's cell phone location data was used to track his locations across the city of Las Vegas. (AA VOL 7 01504-011513 and 01533-01555) [State's Exhibits 1-5 and 114C] Additionally, most of the locations to which Mr. Taylor had been tracked were private residences, which historically enjoy heightened privacy protection under the Fourth Amendment. (AA VOL 7 01504-011513 and 01533-01555) [State's Exhibits 1-5 and 114C] It is clear from the foregoing that cell phone location data reveals information that cannot be

otherwise lawfully ascertained. Thus, this Court should find there to be a reasonable expectation of privacy in that data.

3. The third-party disclosure doctrine is inapplicable to historical cell phone location data because the rationale underlying that doctrine is undermined when it comes to the nature and quantity of information revealed by cell phones.

Most of the courts that have specifically addressed challenges to the use of cell phone location data obtained via 2703(d) subpoenas[2] have found that there must be probable cause to support those subpoenas. *See In the Matter of the Application of the United States of America For an Order Relating to Target Phone 2,* 733 F. Supp. 2d 939, n. 1 (N.D. Ill. 2009) (collecting cases denying 2703(d) subpoenas for lack of probable cause, including twelve federal district courts). Many other courts have found there to be a reasonable expectation of privacy in cell phone location data. *See United States v. Davis*, No. 12-12928 (11th Cir. June 11, 2014); *Commonwealth v. Augustine*, 467 Mass. 230 (2014); *State v. Earls*, 214 N.J. 564 (2013). Only a few courts have held there to be no Fourth Amendment protection for cell phone location data. The leading case on this point is *In re Application of the United States of America for Historical Cell Site Data*, 724 F. 3d 600 (5th Cir. 2013). There, the Fifth Circuit primarily relied on the third party disclosure doctrine, as extensively discussed in the United States Supreme Court's decision in *Smith v. Maryland*, to find there to be no Fourth Amendment protection for cell phone location data. *Id.* at 610-614.

In *Smith*, the United States Supreme Court held there to be no Fourth Amendment protection for information that was voluntarily conveyed to a third

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[2] *See infra*, Part III.B, describing the procedure for obtaining such information via subpoena under the Stored Communications Act, the method used by the State here.

party. 442 U.S. 735, 745-746 (1979). The government obtained the consent of a landline telephone company to install a pen register on the defendant's phone line, who was suspected of robbery. *Id.* at 737. This register then recorded all the numbers dialed from the defendant's phone, including obscene and threatening calls made to a witness to the robbery. *Id.* Using this data, the officers then arrested the defendant after a search of his home turned up a phone book marking the page containing the witness's phone number. *Id.*

The defendant sought to suppress all evidence obtained from the pen register. *Id.* The Supreme Court found that there was no legitimate expectation of privacy to be found in landline telephone numbers dialed. *Id.* at 742. In so holding, the high Court focused on several factors. First, the Court noted that registers have "limited capabilities," namely that they only provide telephone numbers dialed. *Id.* at 741-742. Second, the Court opined that no reasonable person could "entertain any actual expectation of privacy in the numbers they dial." *Id.* at 742. Lastly, the Court concluded that any expectation of privacy the defendant had in the numbers he dialed was not one that society was prepared to recognize as reasonable. *Id.* at 743. As will be outlined below, the reasoning underlying each of these factors is distinguishable in the context of cell phone location data.

Unlike pen registers, cell phone location data is not narrowly limited in its capabilities. It does not just provide a cell tower to which the subscriber's phone connects. It also provides the geographic location of that tower and, by extension, that subscriber. Additionally, cell phones can determine not only the places a person *has* been, but also where a person is in real-time. *See Earls*, 70 A. 3d at 638 (describing how GPS-enabled cell phones can be used to locate users within "10 meters of accuracy"). When concerned with cell phone location data, then, this information obviously has wide-ranging capabilities beyond determining to which cell tower a subscriber has connected.

The second factor considered in *Smith* was that the high Court sincerely doubted whether "people in general entertain any actual expectation of privacy in the numbers they dial." 442 U.S. at 742. According to the Court, landline phone users must know they are conveying the number dialed to the phone company since it is the phone company that actually completes the call. *Id.* It also noted that landline phone subscribers get a monthly statement that lists any long-distance numbers called and that people in general know that pen registers are used to ascertain the identity of those making obscene calls because phone companies place such notices in phone books. *Id.* at 742-743. At first blush, it may seem that cell phones, based on these characteristics, are very similar to landlines. Indeed, cell phone companies are the ones completing any calls made or received on a cell phone and monthly statements typically list calls and text messages made and received.

However, it must be remembered that this case is not concerned with phone *numbers* themselves – it is concerned with cell phone subscriber *locations*. Cell phone users don't normally know they are conveying their location data to cell phone companies. *See In re Target Phone 2* 733 F. Supp. 2d at 939 (stating that "[c]ell phones, unbeknownst (this court suspects) to many of their users, send out signaling information that can be used to identify the phone's physical location). This conclusion is supported by the fact that "[c]ell phones can be tracked when they are used to make a call, send a text message, or connect to the Internet — or when they take no action at all, so long as the phone is not turned off." *Earls*, 70 A. 3d at 637. Moreover, cell phone billing statements do not currently show location data that has been conveyed to the phone company. Indeed, providing such information would be highly burdensome, given that this data is generated each time a cell phone scans for and connects with the nearest cell tower – which is typically every seven seconds. *Id.* Additionally, cell phone companies typically do

not publicly disclose to their consumers that such location data is automatically recorded. Thus, Mr. Taylor, as well as all citizens, did have an actual expectation of privacy in their location data because they "probably had no idea that by bringing [his] cell phones with [him] to these [crimes], [he was] allowing [his service provider] and now all of [the members of the jury] to follow [his] movements on the days and at the times of the [crimes]." *Davis*, *supra*, No. 12-12928 (11th Cir. June 11, 2014).

Lastly, the *Smith* Court concluded that any expectation of privacy the defendant could have had in the numbers he dialed was not objectively reasonable. 442 U.S. at 743. The Court supported this proposition by analyzing its other third party disclosure cases in which it held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-744. On this point, the Court discussed *United States v. Miller*, 425 U.S. 435 (1976) at length. In *Miller*, the government subpoenaed records of all of the defendant's accounts held at a local bank, which were produced. *Id.* at 437-438. These records were used to link the defendant to illegal alcohol production. *Id.* at 438. On appeal, the Fifth Circuit found a Fourth Amendment violation for compelling production of one's private papers without a warrant. *Id.* The Supreme Court, in reversing the Fifth Circuit's decision, focused on the fact that *Miller* had "voluntarily conveyed [this financial information] to . . . banks and exposed [it] to their employees in the ordinary course of business." *Id.* at 442.

It was this same rationale that led the Court in *Smith* to find no objectively reasonable expectation of privacy in landline telephone numbers dialed – because those numbers are knowingly and voluntarily revealed to third parties. 442 U.S. at 744-745. The same discussion above regarding whether subscribers knowingly convey location information to cell phone companies is equally relevant on this point and renders the *Smith*/third party disclosure rationale inapplicable to cell

phone location data. Most phone subscribers are likely unaware of the fact that they are conveying historical location data to their service providers. *See In the Matter of the Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F. 3d 304, 317 (3rd Cir. 2010). When making a phone call from a cellular phone, the "only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed." *Id.* Moreover, modern day cell phones convey this information to providers *even when they are not in actual use* – the only way to keep this from happening is to turn one's phone off. *Earls*, *supra*, 70 A. 3d at 637. Thus, there is an objectively reasonable expectation of privacy in cell phone location data, unlike the pen registers at issue in *Smith*.

From the foregoing, cell phone users obviously neither knowingly nor voluntarily convey location data to providers. Therefore, just as the reasonable expectation of privacy analysis did not work in *Jones*, the framework for the third party disclosure line of cases does not work for challenges to law enforcement use of historical cell phone location data. This Court should apply the standard *Katz* test to this case to find that Mr. Taylor had an objectively reasonable expectation of privacy in his cell phone location data and that the State's access of this information was therefore a search under the Fourth Amendment.

B. The search that occurred here was neither done pursuant to a warrant based upon probable cause nor does it fall within an exception to the warrant requirement.

Where a search occurs, the Fourth Amendment requires there to be a warrant based upon probable cause for the search to be valid. Warrantless searches are generally per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. Where a search was not

performed pursuant to a valid warrant and does not fall within an exception to the warrant requirement, a Fourth Amendment violation has occurred.

Here, the State obtained approximately one week of Mr. Taylor's cell phone records, including location data, near the time of the robbery-murder. (AA VOL 7 01514-01555). As outlined above, the State's access and use of Mr. Taylor's cell phone location data was a search under the Fourth Amendment. This information was obtained via subpoena under the Stored Communications Act, 18 U.S.C. §§ 2701-2712. (AA VOL 1 00096-00144). Title 18, Section 2703(d) of that Act provides, in relevant part:

> "[a subpoena for such material] shall issue only *if the governmental entity offers specific and articulable facts* showing that there are *reasonable grounds* to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

18 U.S.C. § 2703(d) (emphasis added). This standard - that the government offer "specific and articulable facts" - is more akin to the *Terry* standard of reasonable suspicion and does not meet the Fourth Amendment's requirement of a warrant based upon probable cause. *See Terry v. Ohio*, 392 U.S. 1, 37 (1968) (stating that the "term probable cause rings a bell of certainty that is not sounded by phrases such as reasonable suspicion") (internal quotations omitted). Therefore, in order for the search in this case to be valid, it must fall within one of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Katz, supra.*

The Supreme Court has recognized seven exceptions to the warrant requirement to date. These are: (1) exigent circumstances, *Brigham City v. Stuart*, 547 U.S. 398, 403-404 (2006); (2) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383 (1914); (3) consented to searches, *Schneckloth* v.

Bustamonte, 412 U. S. 218 (1973); (4) automobile searches, *Carroll v. United States*, 267 U.S. 132 (1925); (5) evidence in plain view, *Coolidge v. New Hampshire*, 403 US 443, 465 (1971); (6) special needs searches, *Camara v. Municipal Court,* 387 U.S. 523 (1967); and (7) a *Terry* stop and frisk, *Terry*, 392 U.S. 1. The facts of this case do not fit within any of these well-defined exceptions to the warrant requirement. Therefore, because the State had no warrant to access Mr. Taylor's cell phone location data and this search does not meet with an exception to the warrant requirement, Mr. Taylor's Fourth Amendment rights were violated. As a result, the location data and all evidence obtained from it should have been excluded at trial. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

IV. MR. TAYLOR'S CONVICTIONS SHOULD BE REVERSED BECAUSE THERE WAS ENTIRELY INSUFFICIENT, PROPERLY ADMITTED EVIDENCE TO ESTABLISH MR. TAYLOR AS THE PERPETRATOR OF THE CRIMES FOR WHICH HE WAS CONVICTED.

In a criminal appeal arguing insufficiency of evidence, the standard of review is "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt by *the evidence that was properly before it.*" *Lay v. State*, 110 Nev. 1189, 1192 (1992) (emphasis added). The evidence properly before the jury must be construed "in the light most favorable to the prosecution" and it must be asked whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Guy v. State*, 108 Nev. 770, 776 (1992) (internal citations omitted). Considering the evidence properly before the court in Mr. Taylor's trial, no reasonable jury could have found the elements of the crimes for which Mr. Taylor was convicted to be proven beyond a reasonable doubt because there was entirely insufficient evidence establishing identity.

Mr. Taylor was convicted of the following criminal offenses: (1) burglary while in possession of a firearm under NRS 205.060; (2) conspiracy to commit robbery under NRS 200.380; (3) robbery with use of a deadly weapon under NRS 200.380; and (4) murder with use of a deadly weapon under NRS 200.030. (AA VOL 7 01501-01503) Establishing the identity of the accused as the perpetrator is an inherent element of any criminal offense. *Cf. Tucker v. State*, 82 Nev. 127, 130 (1966) (discussing identity as an element of a criminal offense in the context of the identity exception to the rule excluding evidence of other criminal acts). In this case, no jury, "acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt by the evidence that was *properly* before it" because there was essentially no evidence establishing Mr. Taylor as the perpetrator. *Lay*, *supra* (emphasis added).

As detailed above, the court below erroneously admitted several key pieces of evidence at trial. First, law enforcement conducted an impermissibly suggestive identification procedure with Chenault. Evidence of this identification should have been excluded at trial. Second, due to the impermissibly suggestive procedure, Chenault's in-court identification should also have been suppressed because it had no independently reliable basis. As stated, identity is a requisite element of a criminal offense. *Tucker*, *supra*. These two eyewitness identifications were essential to the prosecution's case in order to establish that Mr. Taylor was the person that, in fact, committed the crimes of which he was convicted. Indeed, the prosecution stressed the role of the identification evidence in establishing the identity of the perpetrator. (AA VOL 5 01230; AA VOL 6 01271). A reasonable jury considering the prosecution's case without these identifications, therefore, would be hard pressed to find the identity element for the instant crimes established, even construing the remaining evidence in the light most favorable to the prosecution.

In addition to the erroneously admitted identifications, the State violated Mr. Taylor's Fourth Amendment rights by accessing and introducing as evidence his historical cell phone location data. A Fourth Amendment violation results in exclusion of the impermissibly obtained evidence at trial. *See Mapp v. Ohio*, 367 U.S. 643 (1961). The prosecution used this evidence to establish that Mr. Taylor was at Chenault's apartment, the crime scene, on the day of the murder. 4 RT 102-108. Lack of this evidence entirely undermines the prosecution's case against Mr. Taylor, particularly in light of the fact that Chenault's identifications of Mr. Taylor as the perpetrator should have likewise been excluded. Together, exclusion of the cell phone data and the identifications would have left the prosecution with essentially no evidence to link Mr. Taylor to the scene of the crime.

No "rational trier of fact could have found the essential elements of the crime[s] [proven] beyond a reasonable doubt" from this evidence, even "viewing [it] in the light most favorable to the prosecution." *Guy*, *supra*. Mr. Taylor's situation is easily distinguishable from other cases where this Court has found sufficient evidence. In *Garcia v. State*, for example, Garcia was convicted of two counts of kidnapping with use of a deadly weapon in the course of robbing an automotive parts store. 113 P. 3d 836, 841 (Nev. 2005). On appeal, Garcia challenged the sufficiency of evidence adduced at trial, contending that under Nevada case law a criminal defendant cannot be convicted of kidnapping and robbery where the asportation of the victim was incidental to the robbery. *Id.*

This Court rejected the argument, finding that Garcia failed to "address either the legal standards applicable to kidnapping or how the evidence was insufficient to meet those requirements." *Id.* at 841-842. This Court explained first that a charge of kidnapping in Nevada requires an affirmative showing of asportation of the victim where the charge is incidental to a robbery. *Id.* at 842. In examining the record, it found evidence that Garcia had ordered the victims outside

of the parts store, held them in the back of a truck for fifteen minutes at gunpoint, and then took them back into the office and bound them with duct tape. *Id.* This Court found these facts sufficient to support a finding of asportation and, by extension, Garcia's conviction for kidnapping. *Id.*

In the instant matter, however, there was entirely insufficient, *properly admitted* evidence showing Mr. Taylor was the perpetrator of the crimes at issue, as outlined above. The one set of fingerprints found at the scene was not matched to Mr. Taylor. (AA VOL 5 01018-01019). No gunshot residue was found on Mr. Taylor, as he was never tested for it. (AA VOL 5 01187). The marijuana Mr. Taylor allegedly stole was never found. (AA VOL 5 01189, 01191). The murder weapon was likewise never recovered. (AA VOL 5 01192). Without Chenault's testimony and Mr. Taylor's historical cell phone location data, then, the State simply cannot establish that Mr. Taylor committed any of the charged crimes because it cannot definitively link Mr. Taylor to the scene of the crime on November 18, 2010. This stands in contrast to *Garcia*, where there was affirmative proof of the asportation element of kidnapping and that the defendant did in fact commit the crimes for which he was tried.

Moreover, even if Chenault's testimony and the cell phone data were properly before the jury at trial and assuming *arguendo* that Mr. Taylor was at the scene of the crime at the time, it is arguable whether the State definitively established that he is the one that actually robbed and shot the victim. During Chenault's 911 call, she stated that she did not know who did it. (AA VOL 5 01143). At trial, Chenault again testified that she does not know exactly who pulled the trigger. (AA VOL 3 00724). She also testified, "I believe they both shot. Like I said, my back was turned." When asked, "Did your head whip around in time to see?" she said, "No." (AA VOL 5 01196). These statements are far from certain and no reasonable juror could have found that Mr. Taylor was the source of

the fatal shot. Based upon the foregoing, it is clear that the State presented entirely insufficient evidence to sustain Mr. Taylor's convictions. Therefore, Mr. Taylor respectfully requests this Court to reverse all convictions for insufficient evidence of identity beyond a reasonable doubt.

V. MR. TAYLOR WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY THE ACCUMULATION OF CONSTITUTIONAL ERRORS DURING TRIAL, WARRANTING REVERSAL OF HIS CONVICTIONS.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a fair trial. *See Estes v. State*, 381 U.S. 532, 540 (1965) (holding that the "provisions of the Sixth Amendment require a procedure that will assure a fair trial"). Indeed, the United States Supreme Court has recognized that a fair trial is "the most fundamental of all freedoms." *Id.* An extension of the right to a fair trial, as articulated by this Court, is that "[t]he cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State,* 118 Nev. 513, 535 (2002). Evaluation of a claim of cumulative error takes on a factorial analysis, considering: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State,* 116 Nev. 1, 17 (2000). In the instant matter, appraisal of these factors shows that the errors committed during Mr. Taylor's trial were cumulative and violated his Sixth Amendment rights.

A. The issue of Mr. Taylor's guilt was not close at trial because there was a lack of overwhelming, properly admitted evidence proving his guilt.

The first factor - the closeness of guilt - examines the evidence of guilt available during trial "absent multiple errors." *Valdez v. State*, 196 P.3d 465, 481 (Nev. 2008). The issue of guilt was not close here, given the improperly admitted

evidence at trial. In *Browning v. State*, for example, the defendant was convicted of murder during the robbery of a jewelry store. 188 P. 3d 60, 64 (Nev. 2008). This Court found the evidence of the defendant's guilt to be "overwhelming," given that his fingerprints were found at the scene of the crime, he was found in a hotel room with jewelry taken from the store, and he had confessed to the murder to neighbors. *Id.* at 64, 69. Here, on the other hand, there was entirely insufficient evidence of Mr. Taylor's guilt *properly* before the jury. As described above, Chenault's identifications and Mr. Taylor's cell phone records should not have been admitted at trial. Without these, the State had little evidence definitively establishing Mr. Taylor as the perpetrator of the crime. The one set of fingerprints found at the scene was not matched to Mr. Taylor. (AA VOL 5 01018-01019). No gunshot residue was found on Mr. Taylor, as he was never tested for it. (AA VOL 5 01187). The marijuana Mr. Taylor allegedly stole was never found. (AA VOL 5 01189, 01191). The murder weapon was likewise never recovered. (AA VOL 5 01192). Therefore, the evidence of Mr. Taylor's guilt, "absent [the] multiple errors" identified at length herein, was clearly far from overwhelming enough to "overcome the prejudice caused by the [other] accumulated errors." *Valdez*, *supra*. Thus, this factor weighs in favor of finding cumulative error here.

B. There were multiple substantial errors of constitutional magnitude committed during Mr. Taylor's trial, supporting reversal for cumulative error.

The second factor to be considered in determining cumulative error is the "quantity and character of the error[(s)]." *Mulder,* 116 Nev. at 17. Both the number and character of the errors in Mr. Taylor's trial were grave. In *Valdez*, *supra*, this Court held the quantity of errors substantial where the defendant asserted an Eighth Amendment violation, a Sixth Amendment violation, and a claim of prosecutorial misconduct. 196 P. 3d at 482. Here, Mr. Taylor asserts the following violations of

his fundamental constitutional rights: (1) the State's identification procedure used to identify Mr. Taylor violated his right to due process of law; (2) Chenault's in-court identification of Mr. Taylor likewise violated his right to due process; (3) prosecutorial misconduct violated his Fifth Amendment right against self-incrimination; (4) prosecutorial misconduct violated his Sixth Amendment right to a fair trial; and (5) the warrantless access and use of Mr. Taylor's historical cell phone location data violated his Fourth Amendment rights. In addition to these five errors of constitutional dimension, Mr. Taylor also contends that there was insufficient properly admitted evidence of his guilt to support his convictions. The number of these errors is clearly much more substantial than those in *Valdez* that warranted a finding of cumulative error.

Moreover, the character of the errors in the instant case is likewise substantial. In *Valdez*, for example, the defendant claimed prosecutorial misconduct for comments supporting inferences that "Valdez resisted arrest, felt no remorse for [stabbing] S.E., and should be put to death to compensate for all the other first-degree murderers who will never be put to death." 196 P. 3d at 482. This Court noted that these instances, taken alone, would not have warranted reversal, but together with the other errors reversal was required. *Id.* Here, Mr. Taylor not only asserts claims of prosecutorial misconduct for improper comments, but argues that these comments violated his fundamental guarantees against self-incrimination and a fair trial. Moreover, he further asserts three other violations of his fundamental constitutional rights that go to the heart of a fair trial. The constitutional dimension of the multiple errors at issue here is much more substantial than that in *Valdez*. Thus, this factor also weighs in favor of finding cumulative error, warranting reversal.

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C. Although Mr. Taylor was convicted of serious crimes, the properly admitted evidence at trial is not strong enough to support a finding that the result would have been the same absent the errors at trial.

The final factor to be considered for a claim of cumulative error, "the gravity of the crime charged," *Mulder,* 116 Nev. at 17, also weighs in favor of finding for Mr. Taylor. Mr. Taylor was convicted of: (1) burglary while in possession of a firearm; (2) conspiracy to commit robbery; (3) robbery with use of a deadly weapon; and (4) murder with use of a deadly weapon. (AA VOL 7 01501-01503 "Judgment of Conviction.) These crimes are admittedly serious; the conviction for murder with the use of a deadly weapon is itself grievous, independent of the other three convictions. *See Valdez*, 196 P. 3d at 482 (holding a first degree murder conviction to be "very grave").

However, the evidence *properly* before the jury was arguably not even "substantial enough to convict him in an otherwise fair trial." *Big Pond v. State,* 101 Nev. 1, 3 (1985). As extensively detailed above, the improperly admitted identification evidence and cell phone records were key to the prosecution's case in order to establish the identity of Mr. Taylor as the perpetrator of the charged crimes. The other available evidence at trial did not point overwhelmingly in the direction of Mr. Taylor's guilt. Therefore, it "cannot [be said] without reservation that the verdict would have been the same in the absence of error." *Id.* The gravity of the crime charged here cannot outweigh the entire lack of properly admitted evidence to support Mr. Taylor's convictions. Thus, because the factors weigh in favor of finding cumulative error, Mr. Taylor's convictions should be reversed.

//

CONCLUSION

Based on the foregoing, reversal of Mr. Taylor's convictions is warranted on several bases. First, the trial court erroneously admitted evidence of an impermissibly suggestive pretrial identification procedure in violation of the Amendment. Second, the trial court erred in allowing Chenault to offer in-court testimony identifying Mr. Taylor because it was not reliable, nor independently reliable. Third, the prosecution violated Mr. Taylor's Sixth Amendment right to a fair trial by using a Powerpoint that essentially declared Mr. Taylor guilty to the jury, the prosecution engaged in further misconduct in violation of Mr. Taylor's Fifth Amendment right against self-incrimination by making improper comments in closing argument. Fifth, the State violated Mr. Taylor's Fourth Amendment rights by warrantlessly accessing and using his cell phone location data. Sixth, based on the evidence properly available for the jury's consideration at trial, that evidence is wholly insufficient to establish that Mr. Taylor committed the crimes in question. Lastly, it is clear that these errors were cumulative and deprived Mr. Taylor of his Sixth Amendment right to a fair trial. Therefore, Mr. Taylor respectfully requests this Court to reverse all convictions.

DATED this 5 day of November, 2014.

By _____
Craig Drummond, Esq.
Nevada Bar No. 011109
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

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

The brief complies with the formatting requirements of Rule 32(a)(4)-(6).

The brief is formatted in Word, 14 point Times New Roman font, has 14951 words and 46 applicable pages.

The brief exceeds the page limitations and this request is being made with a Motion pursuant to NRAP 32(a)(7)(D) for permission to exceed the page limit for Appellant's Opening Brief.

DATED this 5 day of November, 2014.

By_____
Craig Drummond, Esq.
Nevada Bar No. 011109
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5 November, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General
STEVEN S. OWENS
Chief Deputy District

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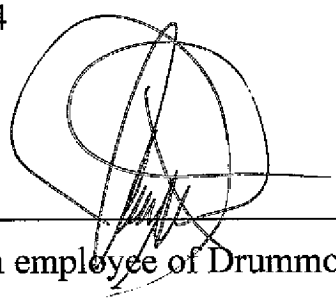

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * *

DONALD TAYLOR,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court No. 65388
District Case No.: C270343-1

MOTION TO EXCEED THE PAGE LIMIT FOR APPELLANT'S OPENING BRIEF

COMES NOW Appellant, DONALD TAYLOR, by and through his attorney of record, CRAIG W. DRUMMOND, ESQ. of the DRUMMOND LAW FIRM, and moves this Honorable Court pursuant to NRAP 32(a)(7)(D) for permission to exceed the page limit for Appellant's Opening Brief. This motion is based on the following declaration and all papers and pleadings on file herein.

DATED this 5 day of November, 2014.

DRUMMOND LAW FIRM

By _____
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DECLARATION IN SUPPORT OF MOTION

1.) That I am the attorney of record for the Appellant, Donald Taylor, in this matter and am writing this Declaration pursuant to NRAP 32(a)(7)(D) requesting to exceed the standard page limitations for Appellant's Opening Brief.

2.) That this case involves the appeal from a Judgment of Conviction entered on March 7, 2014 whereby the Defendant appeals his conviction and sentence for Burglary while in Possession of a Firearm (Category B Felony), Conspiracy to Commit Robbery (Category B Felony), Robbery with Use of a Deadly Weapon (Category B Felony), and Murder with Use of a Deadly Weapon (Category A Felony).

3.) This is an appeal from a jury trial where the Defendant was sentenced to Life Without the Possibility of Parole, consecutive to other sentences.

4.) There were extensive pre-trial motions litigated in this case at the trial level. In review of the motions, the trial transcript, and the voluminous exhibits, it became clear that there are a number of legitimate appellate issues in this case.

5.) I have taken significant and diligent actions to decrease the size of the brief to conform with the standard thirty (30) page limitations, however, have not been able to due to real and significant legal errors that occurred in this caser. The significant legal errors should be able to be raised on behalf of the Defendant and brought to this Honorable Court's attention for appellate review.

6.) Given the above and that the Defendant is serving a life sentence following a jury trial, this is a request for an exception to the rule and that leave be granted to file the attached forty-six (46) page brief. The brief is attached hereto as Exhibit 1.

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MEMORANDUM OF POINTS & AUTHORITIES

Pursuant to NRAP 32(a)(7)(D) and Appellant may request permission to exceed page limit or type-volume limitation. The rule reads as follows:

> (i) The court looks with disfavor on motions to exceed the applicable page limit or type-volume limitation, and therefore, permission to exceed the page limit or type-volume limitation will not be routinely granted. A motion to file a brief that exceeds the applicable page limit or type-volume limitation will be granted only upon a showing of diligence and good cause. The court will not consider the cost of preparing and revising the brief in ruling on the motion.
>
> (ii) A motion seeking an enlargement of the page limit or type-volume limitation for a brief shall be filed on or before the brief's due date and shall be accompanied by a declaration stating in detail the reasons for the motion and the number of additional pages, words, or lines of text requested. A motion to exceed the type-volume limitation shall be accompanied by a certification as required by Rule 32(a)(7)(C) as to the line or word count.
>
> (iii) The motion shall also be accompanied by a single copy of the brief the applicant proposes to file.

CERTIFICATE OF COMPLIANCE

I am the attorney of record and have read this brief, to the best of my knowledge, based on information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. The brief complies with the formatting requirements of Rule 32(a)(4)-(6).

The brief is formatted in Word, 14 point Times New Roman Font, has 14951 words and 46 applicable pages.

The brief exceeds the page limitations and this request is being made with a Motion pursuant to NRAP 32(a)(7)(D) for permission to exceed the page limit for Appellant's Opening Brief.

CONCLUSION

WHEREFORE, the Defendant respectfully requests that given the facts and circumstances of this case that he be able to file his complete Appellant's Opening Brief attached hereto as Exhibit 1.

DATED this 5 day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5 November, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General
STEVEN S. OWENS
Chief Deputy District

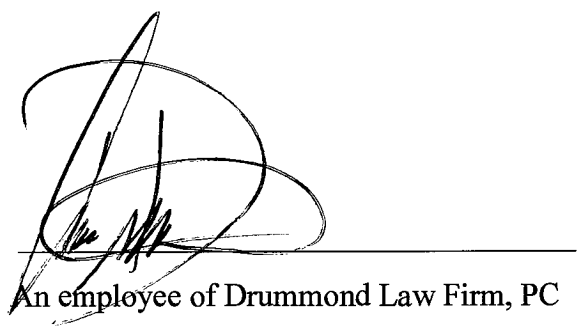

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EXHIBIT 1