comment that alibi witness was lying).

- National Prosecution Standards, Rule 6.5 (f), 77.1, 77.6.
- ABA Standards for Criminal Justice, Standard 3-5.7 (a).

c. Commenting on Inability to Call Witnesses Because of Privilege Violates the Constitution and Nevada Law.

A prosecutor may not comment on the state's inability to call people as witnesses because of an assertion of a privilege, or to call a witness so that he will invoke the privilege before the jury. Commenting on the inability to call witnesses also violates the rule against alluding to facts outside the record. See section II (A) (5).

- U.S. v. Sanchez, 1999 WL 343734, at *9 (9th Cir. 1999) ("The prosecutor committed misconduct in revealing to the jury that he could not make [the defendant's wife] testify as a witness for the prosecution.").
- U.S. v. Golding, 168 F.3d 700, 702 (4th Cir. 1999) (improper for prosecutor to comment on wife's failure to testify when has a privilege not to testify).
- U.S. v. Chapman, 866 F.2d 1326, 1334 (11th Cir. 1989) (improper for a prosecutor to comment on a spouse's assertion of the marital privilege).
- Nezowy v. U.S., 723 F.2d 1120, 1121 (3d Cir. 1983) (holding that it was error to allow state attorney to cross examine defense witness about invocation of self-incrimination privilege), cert. denied, 467 U.S. 1251 (1984).
- U.S. v. Tsinnijinnie, 601 F.2d 1035, 1039 (9th Cir. 1979) ("[I]t is improper to comment adversely on a defendant's exercise of the marital privilege, or to permit the jury to draw adverse inferences.").
- Courtney v. U.S., 390 F.2d 521, 526-27 (9th Cir. 1968) (holding that prosecutor committed plain error by commenting on the failure to call wife as witness where defendant gave notice of intent to invoke privilege), cert. denied, 393 U.S. 857 (1968).
- Robbins v. Small, 371 F.2d 793, 795 (1st Cir. 1967) (holding that prosecutor's questioning of witness despite invocation of privilege violates Confrontation Clause), cert. denied, 386 U.S. 1033 (1967).

- San Fratello v. U.S., 340 F.2d 560, 562-63 (5th Cir. 1965) (holding that court erred in permitting prosecuting attorney to call wife to the stand where knew that she would invoke privilege and reversing and remanding).

- Franco v. State, 109 Nev. 1229, 1243, 866 P.2d 247, 256 (1993) ("We have reversed criminal convictions where the prosecutor commented on the defendant's failure to call certain witnesses, and where the state commented upon a wife's failure to take the stand either for or against her husband.").

- Hylton v. State, 100 Nev. 539, 541, 688 P.2d 304, 304-05 (1984) (explaining that it was "flagrant misconduct" for prosecutor to comment on inability to call wife of accused as witness).

- George v. State, 98 Nev. 196, 197, 644 P.2d 510, 511 (1982) (holding that it was improper for prosecution to comment on state's inability to call defendant's spouse to the stand).

- Emerson v. State, 98 Nev. 158, 162, 643 P.2d 1212, 1215 (1982) (reversing and remanding because of prosecutorial misconduct, including improper comment on exercise of marital privilege).

- ABA Standards for Criminal Justice, Standard 3-5.7 (c) (improper to "call a witness who the prosecutor knows will claim a valid privilege for the purpose of impressing upon the jury the fact of the claim of privilege.").

- See also 8 Wigmore on Evidence § 2243 at 259-61 (McNaughton rev. ed. 1961); McCormick on Evidence § 66 at 255.

7. ARGUMENTS ABOUT THE VICTIM WHICH VIOLATE THE CONSTITUTION AND NEVADA LAW.

a. Putting Jurors in Victim's Shoes.

A prosecutor may not make remarks putting jurors in the victim's shoes. Normally, such inflammatory comments also violate the rule against alluding to facts not in evidence since evidence of the victim's reaction before death is not before the jury. See section II (A) (5), above.

- Rhodes v. State, 547 So.2d 1201, 1205-06 (Fla. 1989) (per curiam) (remanding for new sentencing hearing where prosecutor improperly asked jurors to place themselves at crime scene), cert. denied, 513 U.S. 1046 (1994).

- Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985) (condemning prosecutor's suggestion that jurors put themselves in victim's position and imagine the "final pain, terror and defenselessness.").
- Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991) (holding that it is improper for a prosecutor to place the jury in victim's shoes).
- Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1991) ("We have held that arguments asking the jury to place themselves in the shoes of a party or the victim (the Golden Rule argument) are improper.").
- Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702-03 (1987) (explaining that prosecutor "improperly placed the jury in the position of the victim by stating the following: Can you imagine what she must have felt when she saw that it was the defendant and he had a gun?").
- Jacobs v. State, 101 Nev. 356, 359, 705 P.2d 130, 132 (1985) (reversing and remanding where prosecutor committed misconduct in describing murder and remarked to the jury "I will not tell you to put yourselves in Mrs. Jacobs' position looking down the barrel of this shotgun, because that would be improper.").[14]
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

b. Identifying The State With the Victim Is Improper.

A prosecutor may not put himself or herself in the victim's shoes or otherwise ally himself with a victim. Such comments also violate the rules against expressing personal opinions and invoking the authority of the state. See sections II (A) (3), above; II (B) (9), below.

- Hawthorne v. U.S., 476 A.2d 164, 172 (D.C. 1984) ("A prosecutor may no more represent the victim ... than he may urge the jurors to place themselves in the victim's shoes.").

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[14] The Nevada Supreme Court has recently contravened its own "golden rule." In Williams v. State, 113 Nev. 1008, 945 P.2d 438, 445 (1997), the court explained that the "'Golden Rule' argument asks the jury to place themselves in the shoes of the victims, and has repeatedly been declared to be prosecutorial misconduct." It nevertheless held that the prosecutor had not committed misconduct even though he asked jurors to "[i]magine the pain that [the victims] went through both physically and mentally" and proceeded to describe in vivid detail from the victims' perspective the murder. See also Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) (holding that prosecutor did not violate the Golden Rule by telling jurors "[f]or a moment, we recreate that crime ... how aggravating is it to sit there and this man get in your car, the vehicle that you own, and begin to perpetrate these crimes on you?"). Neither case is distinguishable from the court's decisions in Williams and Jacobs. Indeed, the supreme court did not attempt to distinguish them factually or to explain its reasoning in either case. See Williams 113 Nev. at 445-46; Witter, 112 Nev. at 927, 921 P.2d at 899.

- Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988) (calling it "inappropriate" for prosecutor to ally himself with the victim by comparing his own relationship with his grandmother to that of the accused with his grandmother who also happened to be the victim).
- Nevius v. State, 101 Nev. 238, 248, 699 P.2d 1053, 1059 (1985) (holding that the prosecutor committed misconduct by telling jurors to return a death sentence for the victims and himself).
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9, 3-5.8 (d).

c. Referring to Victims and Holidays Violates the U.S. Constitution and Nevada Law.

A prosecutor may not seek to elicit an emotional reaction by referring to holidays.

- U.S. v. Payne, 2 F.3d 706 (6th Cir. 1993) (per curiam) (condemning prosecutor's remarks about Christmas time as "part of a calculated effort to evoke strong sympathetic emotions" for victims).
- Williams, 103 Nev. at 109, 734 P.2d at 702 (explaining that "[i]t is quite clear that 'holiday' arguments are inappropriate; they have no purpose other than to arouse emotions" and admonishing prosecutor for telling jury, "Happy Valentine's Day from [accused to victim] with malice. Cupid uses arrows. [The accused] used bullets...").
- Dearman v. State, 93 Nev. 364, 368, 566 P.2d 407, 409 (1977) (labeling "improper" prosecutor's comment that victim would not be able to keep New Year's resolution or to see springtime roses bloom).
- Moser v. State, 91 Nev. 809, 813, 544 P.2d 424, 427 (1975) (condemning as improper and having "no place in a trial" prosecutor's comment to jury, "December 2, 1972, Merry Christmas, from [the accused to the victim's] family").
- Mears v. State, 83 Nev. 3, 422 P.2d 230 n. 4 (1967) (admonishing prosecutor for telling jury that "[t]here was a little girl here that will not be able to hear her daddy say, 'Merry Christmas' this year, or any year in the future because of the inconsiderate, selfish act of this defendant."), cert. denied, 389 U.S. 888 (1967).

- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

d. Arguing that The Victim Did Not Have as Many Rights As The Defendant Violates the Federal Constitution and Nevada Law.

A prosecutor may not compare the victim's rights with those of the accused. Such arguments infringe the defendant's exercise of his constitutional rights to trial by jury, to representation by counsel, to cross-examination and confrontation, and all other trial rights, see section II (A), above; and they also seek to deform the jury's constitutional function, by suggesting that the jury should act the same way as an alleged criminal. See section III (3)(c), below.

- Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (affirming grant of habeas corpus writ where prosecutor remarked that he was offended by defendant's exercise of right to trial by jury).
- Brooks v. Kemp, 762 F.2d 1383, 1411 (11th Cir. 1985) (condemning the prosecutor for impermissibly commenting on the defendant's exercise of his constitutional rights and for remarking that the victim did not enjoy the same procedural protections), cert. denied, 478 U.S. 1022 (1986), vacated on other grounds, 478 U.S. 1016 (1986).
- State v. Cockerham, 365 S.E.2d 22, 23 (S.C. 1988) (reversing sentence where prosecutor violated Sixth Amendment rights to counsel and jury trial by remarking that victim's rights under the Constitution "didn't do much for her that night because [defendant] ... was her judge, jury, and executioner. And she didn't have the right to ... be represented by a lawyer ... to have independent people on her jury.").
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

8. INSINUATING OR STATING THAT JUDGE AND STATE ARE ON SAME SIDE VIOLATES THE FEDERAL CONSTITUTION AND NEVADA LAW.

A prosecutor may not suggest that the judge is on the state's side or otherwise invoke the authority of the court. The Court of Appeals for the Ninth Circuit has explained, "[a] prosecutor must not abuse his position and his duty to see justice done by invoking the authority of the court."

U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992). This is because, as the same court elaborated in another case,

> vouching ... on behalf of the court would pose a clear threat to the integrity of judicial proceedings. That particular form of vouching goes beyond the mere proffer of an institutional warranty of truthfulness; rather, it casts the court as an active, albeit silent, partner in the prosecutorial enterprise. In doing so, it strikes at two principles that lie at the core of our system of criminal justice. The first of these is that '[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary....' The second, long elevated to constitutional significance because it is so closely intertwined with the first, is that 'to perform its high function in the best way 'justice must satisfy the appearance of justice.'

U.S. v. Smith, 962 F.2d 923, 936 (9th Cir. 1992) (citations omitted).

- U.S. v. Frederick, 78 F.3d 1370, 1380 (9th Cir. 1996) (reversing conviction partly because the prosecutor implied that the state and the court agreed in an interpretation of the law by telling jurors that "[t]he Government and the Judge will be asking you to consider all of the evidence in making your decision").
- Kerr, 981 F.2d at 1053 (reversing conviction in spite of the defense's failure to object because the prosecutor insinuated that the judge, by accepting a witness' plea bargain with the state, believed that the witness was truthful).
- Smith, 962 F.2d at 936 (reversing conviction in spite of defense counsel's failure to object where the prosecutor vouched for the credibility of a witness by arguing to the jurors "if I did anything wrong in this trial, I wouldn't be here. The court wouldn't allow that to happen" and explaining that "unlike the other comments that courts have on some occasions reluctantly overlooked, it placed the imprimatur of the judicial system itself on [witness's] credibility. That is something we simply cannot permit").
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.
- National Prosecution Standards, Rule 6.5 (c) ("Counsel should at all times display proper respect and consideration for the judiciary...").
- See section II (A) (3), above; SCR 173 (5).

9. INVOKING THE POWER OF THE STATE OR DISCUSSING THE STATE'S SYSTEM FOR CHARGING A PERSON.

It is impermissible for a prosecutor to invoke the authority of the state. Such comment also constitutes an impermissible reference to facts outside the record., See section II(A)(5).

- Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) (calling "clearly improper" prosecutor's argument that 'we only prosecute the guilty'" because it "is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined the appellant to be guilty on evidence not before them").
- Garza, 608 F.2d at 665 (reversing conviction in spite of failure to object to prosecutor's comment that "those people and the Government [have] no interest whatsoever in convicting the wrong person" because such comment "presumed that the whole government apparatus, and the prosecutor individually, had reached a determination of the defendant's guilt before the trial and implied that the jury should give weight to this fact in making its determination").
- ABA Standards for Criminal Justice, Standards 3-5.8 (d), 3-5.9.
- See section II (A) (4), above; SCR 173 (a).

10. PRESSURING THE JURORS AS A GROUP OR AS INDIVIDUALS VIOLATES THE UNITED STATES CONSTITUTION AND NEVADA LAW.

a. Telling Jurors to "Do Your Job," to Fulfill their Civic Duty, To Act as the Conscience of the Community, To Correct Society's Ills, Or To Send Out a Message (Deterrence) Is Improper.

A prosecutor may not pressure jurors by telling them to do their "job," to fulfill their civic duty, to act as the conscience of the community, to cure society's ills, or to send out a message by finding the defendant guilty.[15] Such comments may also constitute an impermissible assertion of a personal opinion and a reference to facts outside the record. See section II(A)(4,5).

- Simmons v. South Carolina, 512 U.S. 154, 163 (1994) (arguing dangerousness of defendant improper at guilt phase of trial).

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[15] Were deterrence a proper subject for argument, the defendant would have a due process right to present evidence, for example, to rebut allegations that the death penalty deters under Simmons v. South Carolina, 512 U.S. 154, 163-64 (1994) (if state rests its arguments at sentencing at least in part on future dangerousness, due process requires that defendant be allowed to rebut with evidence that he will not be eligible for parole). See also section II (A) (6) (referring to facts outside the record); section III (3)(C)(a) below.

- U.S. v. Young, 470 U.S. 1, 5-7 (1985) (reminding prosecutors to "refrain from improper methods calculated to produce a wrongful conviction" in holding that it was improper for a prosecutor to tell jurors that "[i]f you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law...").
- Viereck v. U.S., 318 U.S. 236, 247 (1943) (holding that the prosecutor's statement, including telling jurors that "[t]he American people are relying upon you ladies and gentlemen for their protection against this sort of a crime" compromised the defendant's right to a fair trial).
- U.S. v. Sanchez, 1999 WL 343734, at *11 (9th Cir. 1999) ("The prosecutor committed misconduct in ... arguing that it was the jury's duty to find the defendants guilty.").
- U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.").
- U.S. v. Tulk, 171 F.3d 596, 599 (8th Cir. 1999) ("A prosecutor should not urge a jury to convict for reasons other than the evidence; arguments intended to inflame juror emotions or implying that the jury's decision could help solve a social problem are inappropriate.").
- U.S. v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997) ("[T]he law does not permit jurors to construe accounts of current events, gleaned from sources extraneous to the case record (such as newspapers), as somehow applicable to the question of a particular defendant's guilt or innocence. A jury cannot appropriately reason that a particular defendant is guilty based on media reports of rampant drug use coupled with the fact that the defendant is accused of a drug crime."), cert. denied, 118 S.Ct. 395 (1997).
- Arrieta-Agressot v. U.S., 3 F.3d 525, 527 (1st Cir. 1993) (comments urging jury to view case as chance to fight war on drugs were "plainly improper" and required reversal in spite of failure to object).

- U.S. v. Beasley, 2 F.3d 1551, 1560 (11th Cir. 1993) (comment that case was "another battle" in the war on drugs "are clearly improper" and "'calculated to inflame'") (quotation omitted), cert. denied, 512 U.S. 1240 (1994).
- U.S. v. Moreno, 991 F.2d 943, 947 (1st Cir. 1993) (reference in closing argument to "protecting the community that has been plagued by violence, senseless violence, shootings and killings" was "patently improper"), cert. denied, 510 U.S. 971 (1993).
- U.S. v. Solivan, 937 F.2d 1146, 1149-50 (6th Cir. 1991) (holding that it violates due process for prosecutor to appeal to community conscience and to suggest that local drug problem would continue unless jurors acted).
- U.S. v. Machor, 879 F.2d 945, 955 (1st Cir. 1989) (comment that cocaine "is poisoning our community and our kids die because of this" designed "to inflame the passions and prejudices of the jury, and to interject issues broader than the guilt or innocence of the accused"), cert. denied, 493 U.S. 1081 (1990).
- U.S. v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) (finding no difference between "urging a jury to do its job and urging a jury to do its duty" because "such an appeal is designed to stir passion").
- Hance v. Zant, 696 F.2d 940, 952 (11th Cir. 1983) (calling improper the prosecutor's comments that, "[h]ow many times have you said to yourself as you pick up your morning newspaper or turn on your radio or television newscast, has the whole world gone crazy, when you read about a crime like this, has the whole world lost its mind?... when have you said to yourself what can I do, just one citizen, just one individual to stop this?"), cert. denied, 463 U.S. 1210 (1983), overruled by Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1983).
- People v. Williams, 238 N.W.2d 186, 188 (Mich.App. 1975) ("[E]motional reaction to social problems should play no role in the evaluation of an individual's guilt or innocence...").
- Flanagan, 104 Nev. at 112, 754 P.2d at 840 (ordering new penalty hearing commented that "if we don't punish, then society is going to laugh at us," which court concluded "serve[d] no other purpose than to raise the specter of public ridicule and arouse prejudice against Flanagan").
- Schoels v. State, 114 Nev. 109, 966 P.2d 735 (1998) (recognizing "well-established

prohibition against" referring to the jury as "conscience of the community").

- Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985) (labeling "misconduct" prosecutor's appeal that the if the jury was not angry with Collier "we are not a moral community"), cert. denied, 486 U.S. 1036 (1988).[16]

- Marshburn v. State, 522 S.W.2d 900, 901 (Tex. Crim. App. 1975) (condemning prosecutor's comment that "the only way that you are going to do any good and help us here in Dallas County is to make examples of each and every one of the five..." as "arguments ... calculated to introduce prejudice into the minds of jurors").[17]

b. Seeking to Make the Defendant a Scapegoat For Asserted Failings of the American Justice System is Improper.

The prosecutor may not seek to make the defendant a scapegoat for asserted failings of the American justice system. Such comment also violates the rule against alluding to facts outside the record and against asserting a personal opinion. See section II (A) (3, 5), above.

- Darden, 477 U.S. at 179-80 (condemning as "improper" the prosecutor's comment that "attempted to place some of the blame for the crime on the Division of Corrections").

- U.S. v. Leon-Reyes, 1999 WL 314682, at *5 (9th Cir. 1999) (calling "unnecessary and largely irrelevant" comments that emphasized importance of the oath in American justice system).

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[16] The Nevada Supreme Court has failed to adhere to the constitutional prohibition against arguments appealing to the civic duty of jurors. In Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997), the court held that "a prosecutor in a death penalty case properly may ask the jury, through its verdict, to set a standard or make a statement to the community." The prosecutor in that case argued to jurors that they should send a "message" to others and reminded them of the "commitment" they had undertaken. Id. at 447. Although these remarks violate well-established law prohibiting appeals to civic duty or to the conscience of the community, the supreme court failed to find any misconduct. See also Witter v. State, 112 Nev. 908, 924, 921 P.2d 886, 896 (1996) (holding that prosecutor did not violate Constitution where commented that failure to impose death "would be disrespectful to the dead and irresponsible to the living," which implies the existence of a duty to society); Mazzan v. State, 105 Nev. 745, 750, 783 P.2d 430, 433 (1989) (recognizing that it is improper to pressure jurors and to threaten them with community opprobrium but refusing without reasoning to find improper comment that jurors needed to "set a standard" for the community); cf. Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126 (1985) (condemning argument that jury must be angry with defendant "or we are not a moral community" as impermissible appeal to community standard).

[17] But see Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (relying on Gregg to hold that "[o]f course, it may be proper for counsel to go beyond the evidence to discuss general theories of penology such as the merits of punishment, deterrence and the death penalty"; note that cited portion in Gregg opinion merely states that "[b]oth counsel ... made lengthy arguments dealing generally with the propriety of capital punishment" and does not hold that this is proper comment for either side in criminal trial), cert. denied, 486 U.S. 1036 (1988); see also Williams v. State, 113 Nev. 1008, 1023, 945 P.2d 438, 447 (1997) (writing that "[t]he United States Supreme Court has held that it is permissible to argue in favor of the purposes of the death penalty, including the objectives of retribution and deterrence"; note that the cited portion of Gregg v. Georgia, 428 U.S. 153, 186 (1976), explains that legislators can properly consider these factors in determining whether to enact a capital sentencing scheme but does not hold that these are proper subjects for argument in criminal trial or for sentencers to consider in deciding whether to impose death).

c. **Telling Jurors They Are Involved in War or Appealing to Patriotism Violates the Federal Constitution And Nevada Law.**

A prosecutor may not allude to a war or appeal to the patriotic sensibilities of jurors. Such comment also violates the rule against alluding to facts outside the record and against asserting a personal opinion. See section II (A) (3, 5), above.

- Viereck, 318 U.S. 236, 247-48 (1943) (holding that it denied defendant right to a fair trial when prosecutor remarked to jurors that "this is war. This is war, harsh, cruel, murderous war" because these comments "were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection.").

- Arietta-Agressot v. U.S., 3 F.3d 525, 526 (1st Cir. 1993) (holding that it was reversible error for prosecutor to tell jurors they are involved in war against drugs and defendants are enemy foot soldiers).

- Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) (affirming grant of habeas corpus writ in spite of defense's failure to object where prosecutor committed misconduct, including resorting to war and self-defense analogies), cert. denied, 497 U.S. 1038 (1990).

- Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985) (condemning use of "the soldier metaphor, and coupling it with a challenge to the jurors' patriotism -- 'When [the soldiers] did a good job of killing ... we decorated them and gave them citations'"), cert. denied, 478 U.S. 1022 (1986), vacated on other grounds, 478 U.S. 1016 (1986).

- Harris v. People, 888 P.2d 259, 265 (Colo. 1995) ("[T]he prosecutor's repeated references to past and present military operations by and against Saddam Hussein were not only irrelevant but constituted improper encouragement to the jurors to employ their patriotic passions in evaluating the evidence.").

- State v. Fitch, 65 Nev. 668, 685, 200 P.2d 991, 1000 (1948) (condemning prosecutor's comment that victim was a veteran who had given defendant freedom by serving in the war), overruled on other grounds by Graves v. State, 82 Nev. 137, 139, 413 P.2d 503, 506 (1966).

- Comm. v. LaCava, 666 A.2d 221, 235 (Pa. 1995) (admonishing prosecutor for saying that

drug dealers "suck the life out of our community" and that they bore the responsibility for ruining neighborhoods and turning children into drug addicts, which "painted a vivid picture that society is under heavy attack and that this jury was in a unique position to respond to that attack...").

d. Speaking to Only a Few Jurors or Otherwise Singling Them Out Violates the Federal Constitution and Nevada Law.

A prosecutor may not single out jurors because "it brings to bear a collateral influence which may tend to prejudice the mind of the juror on the basis of something irrelevant to the issues of the case." Lee v. Bennett, 927 F. Supp. 97, 105-06 (S.D.N.Y. 1996). Such arguments may also constitute impermissible appeals to group bias. See section II (B) (4), above.

- Lee v. Bennett, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (explaining that "[i]t is grossly improper to address individual jurors or less than all of the members of the jury in summation" in ruling that prosecutor made impermissible appeal to female jurors in case involving rape), aff'd, 104 F.3d 349 (1996).
- Dixie Motor Coach Corp. v. Galvan, 86 S.W.2d 633, 633 (Tex. Crim. App. 1935) ("[A]rgument [addressing individual jurors], as well as all other remarks suggestive of an intimate friendly relationship between counsel and jurors, should be scrupulously avoided.").
- SCR 176 (1) ("A member of the state bar should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like.").
- E. LeFevre, Annotation, Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument, 55 A.L.R.2d 1198 (1957).

III.

EXAMPLES OF IMPROPER ARGUMENT AT THE PENALTY PHASE

The prohibition on impermissible arguments described above applies with even greater force to the phase of a capital trial. As the Court of Appeals for the Eleventh Circuit explained, "it is most important that the sentencing phase of a trial not be influenced by passion, prejudice, or any other arbitrary factor .... With a man's life at stake, a prosecutor should not play on the passions of the jury." Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983), cert. denied, 463 U.S.

1210 (1983), overruled on other grounds by Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1985). The Nevada Supreme Court has quoted this passage in stressing the importance of the sentencing phase of a capital trial. See Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988), vacated on other grounds, 504 U.S. 930 (1992).

A prosecutor's impermissible arguments typically violate the constitutional requirement of individualized sentencing. In Woodson, the Supreme Court invalidated North Carolina's mandatory capital sentencing scheme, explaining that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304.[18] In Penry v. Lynaugh, 492 U.S. at 326, the Supreme Court recognized that improper prosecutorial argument poses an unconstitutional impediment to individualized sentencing. The prosecutor in Penry told jurors that "[y]our job as jurors and your duty as jurors is not to act on your emotions, but to act on the law as the Judge has given it to you, and on the evidence that you have heard in this courtroom, then answer those questions accordingly." The Supreme Court concluded that these comments prevented sentencers from considering the defendant's mitigating evidence and therefore violated the Eighth and Fourteenth Amendments. Id. A prosecutor's appeals based on prejudice, by definition, suggest to jurors that they ignore the individual's traits and impose a punishment of death based on stereotype and prejudice. Such appeals, like statutes or arguments suggesting that sentencers ignore the individual characteristics or mitigating evidence of a defendant effectively "treat[] all persons convicted ... not as *uniquely individual human beings*, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson, 428 U.S. at 304 (emphasis added). The task of jurors in determining the appropriate sentence is to make a "reasoned moral response to the defendant's background, character, and crime," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), and

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[18] The Supreme Court invalidated the mandatory portion of the Nevada death scheme in Sumner v. Shuman, 483 U.S. 66 (1987); see also Lockett v. Ohio, 438 U.S. 586, 605 (1978) (striking down a sentencing scheme which restricted the consideration of sentencers to a handful of mitigating factors, elaborating that "we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.")

prosecutorial argument which diverts the jurors' attention from that task violates the Eighth and Fourteenth Amendments.

This Court must ensure that the prosecutor refrain from making improper arguments at the penalty phase of the defendant's capital trial. To safeguard the fairness of the defendant's penalty phase and the specific constitutional rights to which he is entitled, the defendant sets forth some of the improper arguments a prosecutor is forbidden from making in the penalty phase by the federal Constitution, and the laws and ethical rules of this state. This list merely represents some of the most common improper arguments the prosecutor can make and is not exhaustive. The defendant incorporates the arguments made in section II, (A) (1, 2, 3, 4, 5), II (B) (1, 2, 3, 4, 5, 6, 7, 8, 9, 10), as if fully set forth herein, since the forms of misconduct identified in those sections are equally impermissible when they are made in a penalty proceeding.

A. ARGUMENTS INFRINGING THE DEFENDANT'S SPECIFIC CONSTITUTIONAL RIGHTS.

1. ARGUMENTS ABOUT THE DEFENDANT.

a. Comment on the Defendant's Failure to Express Remorse is Unconstitutional.

A prosecutor may not comment on the defendant's failure to express remorse because the Fifth Amendment right against self-incrimination applies to the penalty phase of a capital trial.

- Estelle v. Smith, 451 U.S. 454, 462 (1981) (holding that Fifth Amendment right against self-incrimination applies in penalty phase of capital trial).
- Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995) (explaining that a prosecutor may not comment on the convicted defendant's failure to ask for mercy or to express remorse in holding that prosecutor violated the Fifth and Fourteenth amendments by commenting that the defendant had failed to testify, which showed that he was "tough" and that he did not care about having committed the crime).
- Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir. 1990) (explaining that it violates the Fifth and Fourteenth amendments for prosecutor to comment on failure to ask for mercy or to express remorse during allocution and granting relief in habeas corpus proceedings where prosecutor

paraphrased the defendant's testimony as "I don't want you to put me to death, but I'm not even going to say that I'm sorry" and commented on the defendant's "arrogance" in taking the stand without showing "the common decency to say I'm sorry for what I did").[19]

- Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1560 (reporting that a lack of remorse is "highly aggravating," which means that it is very likely that jurors view a lack of remorse as a reason, albeit an impermissible one, for imposing a death sentence).

b. Invoking Group Bias or Otherwise Disparaging the Defendant is Improper.

As shown in sections II (B) (3) and II (B) (4), above, arguments personally attacking the defendant or seeking to evoke a jury's bias and prejudice against a defendant are improper. In the setting of the penalty phase, these arguments are inconsistent with individualized and reliable sentencing required by the Eighth Amendment and they violate the due process and equal protection guarantees of the Fourteenth Amendment. The authorities cited in those sections are incorporated as if fully set forth herein. Similarly, commenting on the defendant's exercise of his constitutional rights is improper. Sections II (A) (1), II (A) (2).

c. Arguing that the Defendant Should be Sentenced to Death on the Basis of His Beliefs Unrelated to the Appropriate Punishment is Improper.

It is improper under the First Amendment to argue that the defendant should be sentenced on the basis of his abstract beliefs, however "morally reprehensible" they may be, if those beliefs are not related to any issue presented at sentencing.

- Dawson v. Delaware, 503 U.S. 159, 166-167 (1992) (improper to admit evidence of

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[19] The Nevada Supreme Court has failed to adhere to the federal constitutional rule prohibiting comments on the failure to testify, to express remorse, or to ask for mercy. In McNelton v. State, 111 Nev. 900, 903-04, 900 P.2d 934, 936-37 (1995), cert. denied, 517 U.S. 1212 (1996), the court faced the same facts the federal court of appeals faced in Lesko but, unlike the court in Lesko, ruled that the prosecutor could comment on the defendant's failure to express remorse. Like Lesko, the defendant exercised his right of allocution and made a statement to the jury in an attempt to prove the existence of mitigating factors. Id. at 935. Like the prosecutor in Lesko, the prosecutor in McNelton, commented that the defendant had failed to express remorse despite his opportunity to do so. Id. Unlike the federal court of appeals in Lesko, however, the Nevada Supreme Court concluded that the prosecutor had not committed misconduct. Although the court in Lesko explained that a "capital defendant does not completely waive his Griffin rights by testifying at the penalty phase," the Nevada Supreme Court held that "the prosecutor was entitled to comment in rebuttal on McNelton's statement, including commentary on what McNelton did not say which he could properly have said within the bounds of an allocution statement." Id. at 937. The McNelton decision directly contradicts the federal court's holding in Lesko, does not analyze the constitutional issue, and is erroneous.

defendant's membership in Aryan Brotherhood prison gang, where not related to issues presented at sentencing, and admission of evidence of abstract beliefs, without more, as relevant to defendant's "character" violates First Amendment).

2. ASSERTING PERSONAL OPINION OR EXPERTISE VIOLATES THE U.S. CONSTITUTION.

As described above in section II (A) (3), it is unconstitutional for a prosecutor to assert a personal opinion or expertise on any matter. For the same reasons, a prosecutor may not assert a personal opinion on the propriety of the death penalty or an expertise in arguing whether it is the appropriate punishment. An assertion of a personal opinion may also constitute an impermissible attempt to invoke the authority of the state, see section II (B) (9), and an improper reference to facts outside the record. See section II (A) (5).

a. Expressing Opinion About the Propriety of the Death Penalty Violates the Constitution.

A prosecutor may not express an opinion about the death penalty or assert an expertise in determining the propriety of imposing a death sentence on the defendant. Such impermissible expressions of opinion include positive statements about the general deterrent effect of the death penalty, which are always without evidentiary support. See section II (A) (5), above.

- Darden v. Wainwright, 477 U.S. 168, 179 (1986) (condemning as "improper" comments by the prosecutor, including a comment that "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public").
- Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995) (granting habeas relief and ordering new penalty phase where prosecutor expressed his personal belief that death penalty was appropriate punishment based on his experience of working for twenty years with people who commit crimes).
- Newlon v. Armontrout, 885 F.2d 1328, 1335-36 (8th Cir. 1989) (affirming grant of writ of habeas corpus where prosecutor expressed personal belief in the death penalty as appropriate punishment), cert. denied, 497 U.S. 1038 (1990).
- Bowen v. Kemp, 769 F.2d 672, 679-80 (11th Cir. 1985) (holding that it was improper for prosecutor to express personal opinion about the prospects for rehabilitation in support of death

penalty), cert. denied, 478 U.S. 1021 (1986).

- Tucker v. Kemp, 762 F.2d 1480, 1486 (11th Cir. 1985) (en banc) (holding that "[a]n attorney's personal opinions are irrelevant to the task of a sentencing jury" and condemning prosecutor's comment to jurors that, "if he is executed, and if you bring in a verdict of guilty, I'll sleep just as good, or I'll sleep better knowing that one of them won't be on the street. Knowing that one of them will be gone. It's not all of them, but it's better than none."), vacated on other grounds, 474 U.S. 1001 (1985).
- Marshburn, 522 S.W.2d 900, 901 (Tex. Crim. App. 1975) (telling jurors that "[t]here is something special about this case" was "calculated to introduce prejudice into the minds of jurors").
- Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (reversing death sentence and ordering a new penalty hearing in part because the prosecutor's remark while facing him, "Gregory Alan Collier, you deserve to die" amounted to an expression of a personal opinion and was "egregiously improper"), cert. denied, 486 U.S. 1036 (1988).
- Guy v. State, 108 Nev. 770, 786, 839 P.2d 578, 588 (1992) (concluding that it was "improper" for prosecutor to tell the defendant, "you, sir, deserve to die"), cert. denied, 507 U.S. 1009 (1993).
- Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1991) (explaining that prosecutor's statement, "[w]e have to tell you that we believe in what we're telling you, that Sam Howard should be put to death, and we do believe that" was "improper and constituted prosecutorial misconduct.").
- Dearman v. State, 93 Nev. 364, 368, 566 P.2d 407, 409 (1977) (rebuking prosecutor for "improper remarks" where stated "I believe that mercy cannot rob justice even for persons who murder their good friends.").
- SCR 173 (5) (improper to "state a personal opinion as to the justness of a cause...").
- ABA Standards for Criminal Justice, Standard 3-5.8 (b), commentary.

3. COMMENTS MISLEADING JURORS ABOUT THE SENTENCING PROCESS OR ABOUT THE DEATH PENALTY VIOLATE THE CONSTITUTION.

It is essential that jurors recognize "the truly awesome responsibility of decreeing death for a fellow human [so that they] will act with due regard for the consequences of their decision." McGautha v. California, 402 U.S. 183, 208 (1971). When prosecutors attempt to mislead jurors about their role in the sentencing process or to diminish their sense of responsibility, they violate the Eighth and Fourteenth Amendments requirement of reliability in sentencing. Indeed, "[a]rguments that trivialize the task of a capital jury are improper." Tucker v. Kemp, 762 F.2d 1480, 1485 (11th Cir. 1985) (en banc), vacated on other grounds, 474 U.S. 1001 (1985). The following sections describe some examples of impermissible attempts by prosecutors to diminish jurors' sense of responsibility by misleading jurors about the sentence, the sentencing process, or the appeals system.

a. Misstating the Law On Mitigation or Otherwise Misleading Sentencers About the Sentencing Determination Violates the Constitution.

A prosecutor may not misstate the law on mitigation or otherwise mislead sentencers about how to impose sentence. Comments telling jurors that they cannot consider certain factors mitigating or that they cannot show the defendant mercy are unconstitutional. Whenever a prosecutor tells jurors that they cannot consider evidence the defense presents as mitigating, he or she violates the Eighth and Fourteenth Amendments. See also Sections II (B) (5) (denigrating defense theory); II (B) (6) (denigrating witnesses).

- Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) (explaining that it is not enough "simply to allow the defendant to present mitigating evidence to the sentencer," and that there must be no impediment -- including prosecutorial argument -- to sentencer's full consideration and ability to give effect to mitigating evidence in holding that prosecutor's argument that they could not act on their emotions violated the Eighth and Fourteenth Amendments).
- Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that jury must be allowed to consider "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

b. Arguing that Jurors Should Not Show Mercy Violates the Federal Constitution and Nevada Law.

A prosecutor may not suggest to jurors that they refrain from showing the defendant mercy in deciding whether to impose the death penalty. Mercy -- as opposed to "mere sympathy or emotion" -- is a relevant factor in capital sentencing. See California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); see also Nelson v. Nagle, 995 F.2d 1549, 1556 (11th Cir. 1993) ("[T]his court has found that mercy is an implicit sentencing consideration in many United States Supreme Court decisions in capital cases."). It is thus unconstitutional for the state to argue that mercy has no place at a capital proceeding.

- Penry, 492 U.S. at 326 (holding that the prosecutor violated the Eighth and Fourteenth Amendments by telling jurors that they could not act on their emotions and instead had to act on the law as the judge had given it to them).
- Nelson, 995 F.2d at 1556 (concluding that prosecutor committed misconduct where state quoted case to the effect that axe of justice should be stern, unbending and unflinching, which court said rendered sentencing fundamentally unfair).
- Presnell v. Zant, 959 F.2d 1524, 1529 (11th Cir. 1992) (holding that the trial was rendered fundamentally unfair in violation of due process where prosecutor argued to the jury, based on a quotation from a nineteenth century state case, that jurors should not show the defendant mercy).
- Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) ("[T]he suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central considerations, the one most likely to tilt the decision in favor of life"), cert. denied, 478 U.S. 1020 (1986).
- Stanley v. Zant, 697 F.2d 955, 960 (11th Cir. 1983) (concluding that Eighth Amendment creates "asymmetry weighted on the side of mercy").
- Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981) (emphasizing that the Constitution requires clear instruction on mercy option), cert. denied, 458 U.S. 1111 (1982).
- Buttrum v. Black, 721 F. Supp. 1268, 1318 (N.D. Ga. 1989) (holding that it was improper for prosecutor to argue that mercy cannot be considered at penalty phase), aff'd, 908 F.2d 695 (11th Cir. 1990).

c. Arguing that Jurors Should Show Defendant Same Mercy He Showed Victim Violates the U.S. Constitution and Nevada Law.

A prosecutor may not suggest that jurors show the defendant the same mercy he showed the victim. Exhorting the jurors to act in the same way that the perpetrator of a criminal homicide would act is the antithesis of generating a "reasoned moral response" to the defendant and his crime.

- Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991) (holding that it was impermissible for the prosecutor to argue that jurors should make their decision about whether the defendant should receive the death penalty in the "cruel and malevolent manner shown by the defendant when they tortured and drowned William Nicholls and shot Leonard Miller," which court characterized as an attempt to "incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence").[20]

- Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (per curiam) (holding that prosecutor's argument that jury show the defendant same mercy he showed the victim "was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation."), cert. denied, 513 U.S. 1046 (1994).

d. A Prosecutor May Not Argue that the Defendant Is an Improbable Candidate for Rehabilitation or that the Potential for Rehabilitation is an Impermissible Consideration in Mitigation.

A prosecutor may not comment that the defendant is unlikely to be rehabilitated, or that the

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[20] The Nevada Supreme Court has not adhered to the federal constitutional rule prohibiting prosecutors from suggesting that sentencers show the defendant the same sympathy or mercy he showed the victim. In Williams v. State, 113 Nev. 1008, 945 P.2d 438, 444-45 (1997), the prosecutor argued that the jury should show the defendant the same sympathy he had shown the victim. Even though the case fell squarely under the federal constitutional rule enunciated in Lesko, this state's Supreme Court nonetheless held that the prosecutor's argument was not improper because the defense had first raised the issue of mercy. The issue of mercy, however, is a proper consideration by sentencers. There is no rule which permits prosecutors to violate the Constitution in response to proper argument by the defense. The court in Williams appears to have misconstrued and misapplied the United States Supreme Court's holding in U.S. v. Young , 470 U.S. 1, 11 (1985), which upheld in certain circumstances the "invited response" rule, under which appellate courts can consider improper arguments by prosecutors in response to improper arguments by the defense to determine on appeal whether the prosecutor's misconduct amounts to reversible error. The decision in Williams, by contrast, is not limited to the determination of prejudice, but rather, allows prosecutors to respond improperly to proper arguments by defense counsel. The decision contravenes well-established federal law holding that it is a federal constitutional violation for a prosecutor to argue either that jurors show no mercy to the defendant or that they show the same mercy the defendant showed the victim.

Arguing that the jury should act in the same manner as the perpetrator of a criminal homicide is also inconsistent with the Nevada Supreme Court's own jurisprudence. In Collier v. State, 101 Nev. 473, 481, 705 P.2d 1126 (1985), the Nevada Supreme Court held that it is improper to "blatantly attempt to inflame a jury by urging that, if they wish to be deemed 'moral' and 'caring,' the jury must approach their duties in anger and give the community what it needs.'" Urging the jury to show the defendant the same mercy he showed the victim similarly asks the jury to "approach their duties in anger."

defendant's potential for rehabilitation cannot be considered as a mitigating factor.

- Bowen v. Kemp, 769 F.2d 672, 678 (11th Cir. 1985) (improper for prosecutor to express opinion about prospects for rehabilitation in support of death penalty), cert. denied, 478 U.S. 1021 (1986).
- Flanagan v. State, 104 Nev. 105, 108, 754 P.2d 836, 838 (1988) (concluding that prosecutor's reference to defendant's improbable rehabilitation was "particularly objectionable" and ordering new penalty hearing), vacated on other grounds, 504 U.S. 930 (1992).
- Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (calling "highly inappropriate" prosecutor's comment that rehabilitation was improbable), cert. denied, 486 U.S. 1036 (1988).

e. Referring to the Possibility of Escape Without Presenting Evidence On this Question Is Improper.

A prosecutor may not refer during the penalty hearing to the possibility that the defendant will escape unless the defendant presents evidence on this question.

- Hance v. Zant, 696 F.2d at 951-53 (holding that it was improper to mention James Earl Ray's escape from "[w]hat was thought to be the most secure cell in the most secure prison in the United States").
- Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1991) (holding that, without evidence to prove the statement, it is improper to remark that defendant might escape).
- Collier v. State, 101 Nev. at 480, 705 P.2d at 1130 ("Remarks about the possibility of escape are improper. The prospect of escape is not part of the calculus that the jury should consider in determining a defendant's sentence.").

f. Suggesting, Without Evidence Independent of the Offense, that the Person Will be a Threat to Society If He Is Not Executed, Or Would Endanger Future Victims, Violates the Federal Constitution.

A prosecutor may not suggest that the person convicted will pose a threat to society unless he presents evidence independent of the commission of the capital offense. The constitutional rule that prosecutors cannot suggest at the penalty phase that the defendant poses a continuing threat

unless they present evidence independent of the offense is consistent with the Constitution's requirement that aggravating factors narrow the class upon which sentencers can impose the death penalty. The Supreme Court has long held that aggravating factors must "genuinely narrow the class of death-eligible persons" in a way that reasonably "justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Furthermore, aggravating circumstances must permit the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." Lewis v. Jeffers, 497 U.S. 764, 774 (1990); see also Richmond v. Lewis, 506 U.S. 40, 46 (1992) ("[A] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty"); Clemons v. Mississippi, 494 U.S. 738, 758 (1990) (holding that invalid aggravating circumstance provided "no principled way to distinguish the case in which the death penalty is imposed, from the many cases in which it was not"); Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). In other words, the death penalty cannot be imposed on every defendant convicted of first-degree murder. Were prosecutors permitted to argue, based merely on the offense for which the defendant is convicted, that a defendant poses a continuing threat, sentencers could impose the death penalty on every person convicted of first-degree murder. This would contravene the constitutional requirement that schemes narrow the class of people upon whom sentencers can impose death.

Such arguments may also constitute an impermissible assertion of personal opinion, see section II (A) (3), above, and reference to facts outside the record, see section II (A) (5), above.[21]

- Darden, 477 U.S. at 180 (condemning as "improper" the prosecutor's comment that "*implied* that the death penalty would be the only guarantee against a future similar act")

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[21] While consideration of the defendant's dangerousness is not impermissible in sentencing, see, e.g., Simmons v. South Carolina, 512 U.S. 154, 163 (1994), the vice of the kind of argument cited in this section is that it implies, without evidentiary support, that imposition of the death penalty is the sole means of controlling that danger.

(emphasis added). [22]

- McKenna v. State, 114 Nev. 1944, 968 P.2d 739, 748 (1998) (holding that the prosecutor improperly commented that, whatever the verdict of the jury was, it was "likely to sentence someone to death," suggesting the possibility of a future victim).
- Castillo v. State, 114 Nev. 271, 280, 956 P.2d 103, 109 (1998) (holding that it is improper for prosecutor to present choice between executing the defendant or an innocent person and reaffirming that prosecutor cannot personalize a future victim).
- Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 64-65 (1997) (rebuking prosecutor for personalizing a potential future victim).
- Flanagan v. State, 104 Nev. at 109, 705 P.2d at 838 (explaining that statement, "if I take that chance and give them life, I hope I am right because if you are wrong, there are more [victims] out there waiting to be killed" "impermissibly inflamed the jury's emotion and ... placed undue pressure on the jury to conclude that [the defendant] would undoubtedly kill again unless he himself were put to death").
- McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984) (holding that it is improper to try to identify or personalize the future victim).[23]
- Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?,

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[22] The Nevada Supreme Court has failed to follow federal constitutional law requiring that prosecutors present evidence independent of the offense to prove future dangerousness. In a series of cases, the court has concluded that the prosecution can argue that the defendant will pose a continuing threat even though it presents no evidence other than the offense for which he has been convicted. See, e.g., Jones v. State, 113 Nev. 454, 937 P.2d 55, 65 (1997) (reaffirming that finding of future dangerousness could be based solely on offense itself and need not be based on independent evidence); Witter v. State, 112 Nev. 908, 927, 921 P.2d 886, 889 (1996) (holding that prosecutor could argue that the defendant posed future danger based solely on murder in question), cert. denied, 117 S.Ct. 1708 (1997); Redmen v. State, 108 Nev. 227, 235, 828 P.2d 395, 400 (1992) ("[W]e expand our holding in Riley to allow prosecutors to argue the future dangerousness of a defendant even when there is no evidence of violence independent of the murder in question."), cert. denied, 506 U.S. 880 (1992), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995).

[23] The Nevada Supreme Court has not consistently followed federal constitutional law, or its own jurisprudence, in condemning comments on possible future victims. In Bennett v. State, 106 Nev. 135, 141, 787 P.2d 797 (1996), the court held that it was a permissible reference to future dangerousness for the prosecutor to argue "[y]ou possess the power to guarantee that [the defendant] will never again make a healthy, vibrant, caring woman into a corpse." It does not appear that Bennett is distinguishable from McKenna, Castillo, Flanagan, and Jones, cited above. Further, Bennett demonstrates the fact that this kind of argument is based on speculation and matters outside the record, when there is no evidence to support a future dangerousness argument, and thus it is constitutionally impermissible. There is nothing to suggest that the defendant in Bennett would "again make ... a woman a corpse" if he had been given a sentence less than death. See Simmons v. South Carolina, 512 U.S. 154, 157-58 (1994) (defendant constitutionally entitled under due process clause to inform jury that life sentence meant life imprisonment without possibility of parole, where evidence showed that defendant was dangerous to specific class of potential victims and defendant would not be in contact with that class of people in prison).

98 Colum. L. Rev. 1538, 1559 (1998) (57.9% of the jurors questioned were more likely to vote for death if they thought that the defendant might present a danger to society).

g. Suggesting to Jurors that the Sentence Is Reviewable or that they Do Not Actually Impose the Death Sentence Violates the Eighth And Fourteenth Amendments To the United States Constitution and Nevada Law.

It is improper to suggest that sentencers are not ultimately responsible for imposing the death penalty, either by telling them that the sentence is reviewable or that they do not actually impose the death penalty. Such arguments also constitute an impermissible reference to facts outside the record. See section II (A) (5), above.

- Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) (explaining that it violates the Eighth Amendment to make comments which have the effect of reducing the jurors' sense of responsibility in sentencing the defendant to death in holding that prosecutor improperly told jurors that their decision about the appropriate penalty was reviewable).
- Driscoll v. Delo, 71 F.3d 701, 711 (8th Cir. 1995) (affirming grant of habeas corpus writ because prosecutor remarked that judge was "thirteenth juror" and could overrule them, and that "juries do not sentence people to death in Missouri" even though this was technically accurate), cert. denied, 117 S.Ct. 273 (1996).
- Mann v. Dugger, 844 F.2d 1446, 1457 (11th Cir. 1988) (en banc) (holding that it was reversible penalty phase error to tell jurors that the burden of imposing the death penalty was "not on your shoulders"), cert. denied, 489 U.S. 1071 (1989).
- Wheat v. Thigpen, 793 F.2d 621, 628-29 (5th Cir. 1986) (affirming grant of habeas writ because prosecutor told jury, in violation of Eighth and Fourteenth Amendments, that reviewing court would correct its mistakes), cert. denied, 480 U.S. 930 (1987).
- Tucker v. Kemp, 762 F.2d at 1485-86 (condemning as improper and as having the "effect of trivializing [the sentencing's] importance" the prosecutor's suggestion "that the jury is only the last link in a long decision"), vacated on other grounds, 474 U.S. 1001 (1985).
- Buttrum v. Black, 721 F. Supp. 1268, 1317 (N.D. Ga. 189) (holding that it was error to argue that defendant was only one responsible for death sentence and that the jury was merely a

cog in the criminal process), aff'd, 908 F.2d 695 (11th Cir. 1990).

- Taylor v. State, 116 So. 415, 416 (Ala. Ct. App. 1928) (reversing because prosecutor commented that "[t]hey are laying like vultures to take this case to the Supreme Court").
- Plyler v. State, 108 So. 83, 84 (Ala. Ct. App. 1926) (holding that prosecutor committed reversible error by telling jurors that defendant would seek review if unsatisfied with verdict).
- Beard v. State, 95 So. 333, 334 (Ala. Ct. App. 1923) (ruling that it was improper for prosecutor to argue that appellate court would correct jurors' verdict if it is wrong).[24]

h. Inaccurately Describing, or Misleading Sentencers About, the Death Penalty or Alternative Punishments Is Unconstitutional.

A prosecutor may not mislead jurors about the nature of the death penalty or a lesser sentence. Such argument typically suggests facts outside the record as well, and often relies upon misstatements of the law or the evidence. See sections II (A) (4, 5), II (B) (1, 2), above.

- Darden v. Wainwright, 477 U.S. 168, 179 (1986) ("improper" to tell jurors that "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public.").
- Antwine v. Delo, 54 F.3d 1357, 1362 (8th Cir. 1995) (holding that the prosecutor violated the Constitution by commenting to the jury that the gas chamber meant that the person "would be put to death instantaneously" and explaining that "[t]he danger is that the jurors, faced with a very difficult and uncomfortable choice, will minimize the burden of sentencing someone to death by comforting themselves with the thought that the death would at least be instantaneous, and therefore painless and easy. The prosecutor's argument diminished the jurors' sense of responsibility for imposing the death penalty. This diminution of the jury's sense of responsibility undermines the Eighth Amendment's heightened need for 'the responsible and reliable exercise of

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[24] The Nevada Supreme Court has failed to follow the rule in Caldwell. In Williams v. State, 113 Nev. 1008, 945 P.2d 438, 445-46 (1997), cert. denied, 119 S.Ct. 82 (1998), the court held that it is not a violation of the rule in Caldwell to tell jurors that "the next step in the long process of justice is the jury makes a decision as to what is an appropriate punishment. You are not the last step. You are the next step." (emphasis added). Although, as described above, federal courts have condemned any attempt by prosecutors to suggest that sentencers do not bear the ultimate responsibility for imposing death, the court explained without referring to the holdings in these federal cases or distinguishing them from the case that "an isolated reference to future steps in the case does not amount to prosecutorial error." Id. at 446. See also McKenna v. State, 114 Nev. 1044, 968 P.2d 739, 747 (1998) (holding that prosecutor did not violate Eighth Amendment when elicited testimony from an attorney who represented another inmate about the appeals process and the number of times another inmate on death row had appealed his conviction and sentence).

discretion capital cases'"), cert. denied, 516 U.S. 1067 (1996).

- Clayton v. State, 767 S.W.2d 504, 505 (Tex. Crim. App. 1989) (prosecutor exceeded bounds of permissible argument by telling jurors "how quick he will be back out on the streets").
- Jones v. State, 564 S.W.2d 718, 719-21 (Tex. Crim. App. 1978) (prosecutor's comment in closing that "if you don't assess a punishment for both of these characters for a term of years in the Texas Department of Corrections between seven and ten years it won't mean anything" was improper and "clearly was not a request for appropriate punishment based on the evidence").
- Marshburn v. State, 522 S.W.2d 900, 901 (Tex. Crim. App. 1975) (prosecutor prejudiced jury by urging jury to impose excessive prison term to compensate for, or protect against, action of Board of Pardons and Parolees).

i. Referring to the Cost of Imprisonment Violates the U.S. Constitution And Nevada Law.

A prosecutor may not refer to the cost of imprisonment. As the Court of Appeals for the Eighth Circuit explained, "[t]here is simply no legal or ethical justification for imposing the death penalty on this basis and it is not a proper factor to be considered by the jury, for it does not reflect the properly considered circumstances of the crime or the character of the individual." Blair v. Armontrout, 916 F.2d 1310, 1323 (8th Cir. 1990), cert. denied, 502, U.S. 825 (1991). Such comment also constitutes an improper reference to facts outside the record. See section II (A) (5), above.

- Miller v. Lockhart, 65 F.3d 676, 682-83 (8th Cir. 1995) (concluding that prosecutor's improper arguments, including referring to cost of imprisonment, "violated the Eighth Amendment by minimizing the jury's role and injecting irrelevant factors into the jury's deliberations").
- Antwine v. Delo, 54 F.3d 1357, 1362-63 (8th Cir. 1995) (holding that it violates the due process clause for prosecutor to refer to burden tax payers would bear if jurors imposed life, rather than death, sentence), cert. denied, 516 U.S. 1067 (1996).
- Edwards v. Scroggy, 849 F.2d 204, 210 (5th Cir. 1988) (condemning as "improper" prosecutor's comment that a life sentence would permit the defendant to "live off the taxpayers' money for ten years ... [a]nd get fed and housed and given all the conveniences of life"), cert.

denied, 489 U.S. 1059 (1989).

- Tucker v. Kemp, 762 F.2d 1480, 1486 (11th Cir. 1985) (en banc) (explaining that remarks about cost of life imprisonment or the burden taxpayers will shoulder are "completely alien to any valid sentencing consideration").
- Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985) (holding that it was "clearly improper ... to argue that death should be imposed because it is cheaper than life imprisonment").
- Collier, 101 Nev. 473, 481, 705 P.2d 1126, 1131 (1986) (ordering new penalty hearing where the prosecutor told jurors that the state would spend $35,000 for every year that Collier spent in prison and explaining that "[t]o proffer the issue of saving money through a particular sentence for the defendant is improper").

j. A Prosecutor May Not Comment On Mitigating Factors During Argument Which the Defendant Did Not Raise.

It is impermissible for a prosecutor to comment on mitigating factors which the defendant does not raise for a number of reasons. First, it suggests that jurors are restricted in the sentencing process to only the mitigating factors the prosecution discusses. Second, it suggests that the defendant is more worthy of receiving the death penalty because his case does not present mitigating factors found in other cases, which is fundamentally inconsistent with the principle of individualized sentencing.

- Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) (prosecutorial misconduct in argument violates right to individualized sentencing under Eighth and Fourteenth Amendments).
- Lockett v. Ohio, 438 U.S. 586, 604 (1978) (restricting consideration of sentencers to a handful of specified mitigating factors violates the Eighth and Fourteenth Amendments).
- State v. DePew, 528 N.E.2d 542, 557 (Ohio 1988) (explaining that "[i]f the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution").
- State v. Bey, 709 N.E.2d 484, 497 (Ohio 1999) ("As in State v. Mills, ..., here 'the prosecutor did err by referring to statutory mitigating factors not raised by the defense, when he explained why those statutory mitigating factors were not present.'").

4. INVOKING THE AUTHORITY OF THE STATE OR TELLING JURORS THAT THE STATE RARELY SEEKS DEATH IS UNCONSTITUTIONAL.

A prosecutor may not tell jurors that the state rarely seeks the death penalty. This kind of argument impermissibly invokes the prestige and authority of the state and constitutes an expression of personal opinion and a reference to facts outside the record. See sections II (A) (3, 5), II (B) (4), above.

- Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998) (comment that crime was "disgusting and it's as cold as anything I've ever seen," in support of aggravating factor, was "clearly improper" because "[i]t invited the jury to rely on the prosecutor's personal opinion about the relative coldness of this crime and compared the circumstances of this crime to other crimes that were not in the record").

- Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir. 1985) (holding that it is improper for a prosecutor to suggest to jurors that the prosecution rarely seeks the death penalty and explained, "[i]t is wrong for the prosecutor to tell the jury that, out of all possible cases, he has chosen a particular case as one of the very worst. While facts of the crime can be stressed to show the seriousness of the case, the prosecutor's careful decision that this case is special is irrelevant and is potentially prejudicial. Such comments, made by an experienced prosecutor, may alter the jury's exercise of complete discretion by suggesting that a more authoritative source has already decided the appropriate punishment.").

- Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) ("Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint.").

5. ARGUMENTS PRESSURING JURORS TO IMPOSE THE DEATH PENALTY ARE IMPROPER.

a. Telling Jurors to Do Their Jobs, to Fulfill their Civic Duty, to Act as the Conscience of the Community, To Correct Society's Ills, to Send Out a Message (Deterrence), or To Seek Revenge, in Support of the Death Penalty is Improper.

A prosecutor may not suggest to sentencers that it is their duty to impose death. In U.S. v. Young, the Supreme Court held that a statement by the prosecutor that the jury should do its "job" has "no place in the administration of justice." This kind of argument is inconsistent with the principles of individualized sentencing and the jury's duty of making a "reasoned moral response" to the defendant and his crime, by suggesting that the jury should engage in the kind of "payback" associated with criminal vigilantes. See section II (B) (10), above.

- Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir. 1990) (holding that it was reversible error to suggest at penalty phase that jurors had an obligation to "even the score for two murders"), cert. denied, 502 U.S. 898 (1991).
- U.S. v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) (finding no difference between "urging a jury to do its job and urging a jury to do its duty" because "such an appeal is designed to stir passion").
- Tucker v. Kemp, 762 F.2d 1496, 1508 (11th Cir. 1985) (holding that it was improper for prosecutor to emphasize importance of decision and to tell jurors they were last line of defense against Tucker).
- Hance, 696 F.2d at 952 (holding that it was improper for a prosecutor to appeal to the patriotism and courage of sentencers, "extorting them to join in the war against crime" by returning a death verdict).
- Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985) (holding that the description of jurors as "soldiers in the war on crime" was improper).
- Schoels v. State, 114 Nev. 981, 966 P.2d 735, 740 (1998) (recognizing "well-established prohibition against" referring to the jury as "conscience of the community).
- Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985) ("Gregg in no way supports the view that a prosecutor may blatantly attempt to inflame a jury by urging that, if they wish to be deemed 'moral' and 'caring,' they must approach their duties in anger and give the community what it 'needs.'"), cert. denied, 486 U.S. 1036 (1988).
- Flanagan, 104 Nev. at 112, 754 P.2d at 840 (ordering new penalty hearing where prosecutor commented that "if we don't punish, then society is going to laugh at us," which court

concluded "serve[d] no other purpose than to raise the specter of public ridicule and arouse prejudice against Flanagan.").

Further, the improper arguments seeking to identify the state with the victim, asking the jurors to put themselves in the victim's shoes, or otherwise inflaming the jury on the basis of emotional factors relating to the victim, are equally improper in the penalty phase of the trial. The defendant incorporates the authorities cited in section II (B) (7) as if fully set froth herein. See also Payne v. Tennessee, 501 U.S. 808, 825 (1991) (due process clause limits admission of victim impact evidence that is unduly prejudicial).

b. Equating the Death Penalty with Self-Defense is Unconstitutional.

A prosecutor may not equate the death penalty with an act of self-defense by the community.

- Kirkpatrick v. Blackburn, 777 F.2d 272, 283 (5th Cir. 1985) (explaining that it is impermissible to focus the jury's attention on the law of self-defense as the basis for giving the death penalty. It is thus improper to urge the death penalty "'simply because lethal force could have been used in defense of the victim.'") (quotation omitted).

IV.

CONCLUSION

For all the reasons stated above, the defendant respectfully submits that this Court should enter an order in limine, prohibiting the prosecutor from committing any of the misconduct specified in sections II and III of this motion, or any similar misconduct, and to enforce that order as requested in section I of this motion.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 18th of October, 2004, in District Court Department XVIII.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion in Limine is hereby acknowledged this 14 day of September, 2004.

CLARK COUNTY DISTRICT ATTORNEY

By _____

FILED

2004 SEP 14 P 4:01

Shirley B. Parraguirre
CLERK

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

GLENFORD ANTHONY BUDD,

Defendant.

CASE NO. C193182

DEPT. NO. XVIII

DATE: October 15, 2004

TIME: 9:00 a.m.

MOTION 2: DEFENDANT BUDD'S MOTION FOR EXCHANGE OF JURY INSTRUCTIONS ON THE FIRST DAY OF TRIAL

COMES NOW Defendant GLENFORD ANTHONY BUDD, by and through Deputy Public Defender HOWARD S. BROOKS, and moves that this Honorable Court order the parties to make a good-faith effort to exchange jury instructions on the first day of trial.

This Motion is based upon the attached declaration of Howard S. Brooks.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By Howard S. Brooks
HOWARD S. BROOKS, #3374
Deputy Public Defender

RECEIVED
SEP 14 2004
COUNTY CLERK

DECLARATION OF HOWARD S. BROOKS

HOWARD S. BROOKS makes the following declaration:

1. I am an attorney licensed to practice law in the State of Nevada; I am a Deputy Public Defender assigned to represent Glenford Budd in this case; I am familiar with the allegations made by the State and the procedural history of this case.

2. The State has charged Glenford Budd with three counts of Murder with Use of a Deadly Weapon. The State has filed a Notice of Intent to Seek Death Penalty.

3. Historically, jury instructions are often not exchanged in criminal cases until the day before they are settled, approximately 24 hours before the case is argued.

4. The Defense is not aware of any statutory requirements regarding the exchange of jury instructions. However, Eighth Judicial District Court Rule 2.69 provides as follows:

> "unless otherwise directed by the Court, trial counsel must bring to calendar call: ... (3) jury instructions in two groups: the agreed upon set and the contested set. The contested instructions must contain the name of the party proposing the same, and the citations relied upon for authority."

5. To be frank, I have never heard of Eighth Judicial District Court Rule 2.69 ever being enforced or complied with. Nevertheless, the rule is a good idea.

6. The Defense requests that this Honorable Court order the parties to make a good-faith effort to exchange jury instructions by the first day of trial. The defense also requests that both parties be allowed to supplement the jury instructions they exchange at that time.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 14 day of September, 2004.

Howard S. Brooks

HOWARD S. BROOKS

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 18th day of October, 2004, at 9:00 a.m. in District Court Department XVIII.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By Howard S. Brooks
HOWARD S. BROOKS, #3374
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion for Exchange of Jury Instructions on the First Day of Trial is hereby acknowledged this 14 day of September, 2004.

CLARK COUNTY DISTRICT ATTORNEY

By Karen Miller

FILED

2004 SEP 14 P 4:02

Shirley B. Parraguirre
CLERK

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

GLENFORD ANTHONY BUDD,

Defendant.

CASE NO. C193182

DEPT. NO. XVIII 18
DATE: October 18, 2004
TIME: 9:00 a.m.

MOTION 3: DEFENDANT BUDD'S MOTION FOR RECORDING OF ALL PROCEEDINGS PURSUANT TO SUPREME COURT RULE 250

COMES NOW Defendant GLENFORD ANTHONY BUDD, by and through Deputy Public Defender HOWARD S. BROOKS, and respectfully petitions this court to order that all proceedings in all phases of this case, including pre-trial hearings, legal arguments, voir dire, selection of the jury, in chamber conferences, bench conferences, any discussions regarding jury instructions, and all matters during the trial be recorded pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Nevada Supreme Court Rule 250(5)(a).

This motion is based on these cited authorities and all the information contained in the attached declaration of Howard S. Brooks.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By Howard S. Brooks
HOWARD S. BROOKS, #3374
Deputy Public Defender

13

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COUNTY CLERK

DECLARATION OF HOWARD S. BROOKS

HOWARD S. BROOKS makes the following declaration:

1. I am an attorney licensed to practice law in the State of Nevada; I am a Deputy Public Defender assigned to represent Glenford Budd in this case, and I am familiar with the allegations made by the State and the procedural history of the case.

2. The State has charged Glenford Budd with three counts of Murder with Use of a Deadly Weapon. The State has also filed a Notice of Intent to Seek the Death Penalty.

3. During my 16 years as an attorney, I have noticed that various judges handle the recording of matters in court in various ways. A particular concern to the defense is a custom engaged in by some courts, whereby objections are made at an unrecorded bench conference, and the defense must later make a record before the court reporter at a hearing outside the presence of the jury. This procedure, as I describe it, robs the defendant of a true record of what happens at trial. And the record made later, in front of a court reporter, outside the presence of a jury, may or may not accurately reflect the discussions that occurred before the judge at the bench conference.

4. Supreme Court Rule 250 applies to cases where the State seeks the death penalty. Subsection 5 (a) of Supreme Court Rule 250 states the following:

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

5. Some courts have attempted to comply with Supreme Court Rule 250 by having all bench conferences in the hallway outside the court with a court reporter present. This was the custom in the courtroom of District Court Judge Maupin and also District Court Judge Gibbons, both of whom are now on the Nevada Supreme Court.

6. Any failure to record the entire proceedings in the trial court and make them part of the record violates a defendant's right to full review of his case on appeal, his right to the

assistance of counsel on appeal in post-conviction, and his right to equal access to the courts that would review any conviction on appeal or collateral attack, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the Unites States Constitution. See, E.G. Draper v. Washington, 372 U.S. 487, 499 (1963); Unites States v. Selva, 559 F.2d 1303 (5th cir. 1977); United States v. Brumley, 560 F.2d 1268, 1281 (5th Cir. 1977).

7. The Defense invokes the full protections of these cited cases and also the protections afforded by Supreme Court Rule 250.

8. The Defense objects to any unrecorded bench conference or any unrecorded conference in chambers.

9. The Defense seeks an order that all proceedings in this case be recorded and that Supreme Court Rule 250 be complied with in its entirety.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 19 day of September, 2004.

Howard S Brooks

HOWARD S. BROOKS

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 13th of October, 2004, in District Court Department XVIII.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion for Recording of all Proceedings Pursuant to Supreme Court Rule 250 is hereby acknowledged this 14 day of September, 2004.

CLARK COUNTY DISTRICT ATTORNEY

By _____

FILED

2004 SEP 14 P 4:02

Shirley B. Parraguirre
CLERK

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. GLENFORD ANTHONY BUDD, Defendant.	CASE NO. C193182 DEPT. NO. XVIII 18 DATE: October 13, 2004 TIME: 9:00 a.m.

MOTION 4: DEFENDANT BUDD'S MOTION TO DISQUALIFY ALL POTENTIAL JURORS WHO KNEW OR WERE ACQUAINTED WITH THE VICTIMS OR THEIR FAMILIES

COMES NOW Defendant GLENFORD ANTHONY BUDD, by and through Deputy Public Defender HOWARD S. BROOKS, and respectfully requests, pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I of the Nevada Constitution, that this Court enter an order disqualifying from jury service all members of the jury venire who knew or were acquainted with the victim or with any member of the victim's family.

1. Glenford Budd is before this Court on a charge of capital murder, and because this is a capital prosecution, exacting standards must be met to assure that it is fair. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quoting Gardner v. Florida, 430U.S. 349, 363-64 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, J.,concurring).

2. As a matter of constitutional law, it is well established that individuals who have been exposed to highly prejudicial information regarding a capital defendant must be presumed

14

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biased for purposes of sitting on his capital sentencing jury and thus should be excused from jury service.

3. As early as Blackstone's Commentaries, our forefathers had relinquished the practice of purposefully selecting jurors who knew beforehand the character and credibility of the parties and witnesses. 3 W.Blackstone, Commentaries. This practice was abandoned because "jurors, coming out of the immediate neighborhood, would be apt to intermix their prejudices and partialities in the trial of right." Id. Thus, for centuries now, juries have been selected "only . . . de corpore comitatus, from the body of the county at large, and not de vicineto, or from the particular neighborhood." Id.

4. This long tradition reflects values that are fundamental to our criminal justice system: the right to a fair trial and to impartial and uninterested jurors.

5. "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial,'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). In the language of Lord Coke, for a juror to be impartial he must "be indifferent as he stands unsworn." Reynolds v. United States, 98 U.S. 145, 154(1878).

6. The United States Supreme Court, in Irvin v. Dowd, implied juror bias where there was evidence of community prejudice introduced at voir dire -- even though the jurors insisted that they could render an impartial verdict. Irvin v. Dowd, 366 U.S. at 724. That decision announced a standard of heightened scrutiny for juror bias in capital cases. Id. at 727-28. In a long line of cases, the Court subsequently presumed juror prejudice without considering any evidence of bias.

7. A capital sentencing jury that includes people who knew the victim or his family -- hereinafter referred to as "victim jurors" -- is precisely the kind of "tribunal organized to return a verdict of death" that is prohibited by the Constitution. Witherspoon v. Illinois, 391 U.S. 510, 520-21 (1968). The Supreme Court has indicated that a state would violate a capital defendant's right to an impartial jury if it deliberately --i.e., without a legitimate state purpose -- stacked the capital sentencing jury against the defendant for the purpose of making the imposition of death more likely. Lockhart v. McCree, 476 U.S. 162 (1986).

8. When a trial court allows "victim jurors" to sit on the sentencing jury, there is no doubt that the court"'crosse[s] the line of neutrality' and 'produce[s] a jury uncommonly willing to condemn a man to die.'" Lockhart v. McCree, 476 U.S. at 179 (quoting Witherspoon, 391 U.S. at 520-21).

9. Moreover, when "victim jurors" sit on a capital sentencing jury, the state deprives the defendant of a sentence based on the evidence produced at the penalty phase of his capital trial. It is well settled that the Sixth Amendment guarantees a jury verdict based on the evidence produced at trial. Turner v.Louisiana, 379 U.S. 466, 472 (1965); Irvin v. Dowd, 366 U.S. at 722. This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v.Louisiana, 379 U.S. at 472.

10. "Victim jurors" possess evidence of the victim's characteristics and of the impact of the crime on the victim's family. This evidence is not capable of being subjected to the procedures necessary for a fair trial, and the defendant is accordingly deprived of fundamental protections, including the right of confrontation, the right of cross-examination and the right to counsel. Turner v. Louisiana, 379 U.S. at 473.

11. In addition, "victim jurors" deprive a capital defendant of his right to an "individualized determination"of whether he should live or die based on his character and the circumstances of his crime. Zant v.Stephens, 462 U.S. 862, 879 (1983). Regardless of any statements to the contrary, "victim jurors" simply cannot guarantee a capital defendant an individualized sentence. "Victim jurors" have lived, played, and talked with the victim or have experienced the pain and suffering of the victim's close family. They would therefore be unable to determine impartially whether the man on trial for his murder should live or die, and thus would deprive any sentencing verdict of the reliability required by the Eighth Amendment.

12. For these reasons, potential jurors who are related to the victims -- whether closely or distantly --must be removed from a capital jury if Mr. Budd challenges them. Clearly, "victim jurors" must be removed from the venire at Mr. Budd's capital trial due to implied bias. The failure to remove any such jurors would result in reversible error since Mr. Budd would be forced to use peremptory challenges to remove the jurors himself. Under Nevada law, the defendant's

right to exercise peremptory challenges is absolute: A trial court commits reversible error -- without a showing of prejudice -- if it errs in denying the defendant's challenge for cause and compels the defendant to remove a juror peremptorily.

WHEREFORE, Mr. Budd respectfully requests that this Court enter an order granting the motion and excusing from jury service any person who knew or was acquainted with the victim or the victim's family.

DATED this 14 day of September, 2004.

Respectfully submitted
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By Howard S. Brooks
HOWARD S. BROOKS, #3374
Deputy Public Defender

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 13th of October, 2004, in District Court Department XVIII.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion To Disqualify All Potential Jurors Who Knew Or Were Acquainted With The Victims Or Their Families is hereby acknowledged this 14 day of September, 2004.

CLARK COUNTY DISTRICT ATTORNEY

By _____

FILED

2004 SEP 14 P 4:08

Shirley B. Parraguirre
CLERK

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

GLENFORD ANTHONY BUDD,

Defendant.

CASE NO. C193182

DEPT. NO. XVIII
DATE: October 18, 2004
TIME: 9:00 a.m.

MOTION 6: DEFENDANT BUDD'S MOTION IN LIMINE TO PROHIBIT THE STATE FROM USING PREEMPTORY CHALLENGES TO REMOVE MINORITIES FROM JURY

COMES NOW Defendant GLENFORD ANTHONY BUDD by and through Deputy Public Defender HOWARD S. BROOKS, and respectfully requests, pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I of the Nevada Constitution that this Court enter an order in limine prohibiting from the State from employing peremptory challenges to remove minorities from jury.

This Motion is based upon the authority cited in the attached Declaration of Howard S. Brooks and the attached Memorandum of Points and Authorities.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

CMC

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SEP 14 2004
COUNTY CLERK

DECLARATION OF HOWARD S. BROOKS

HOWARD S. BROOKS makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent Glenford Budd in this case; I am familiar with the allegations made by the State and the procedural history of this case.

2. Mr. Budd is facing three counts of Murder with Use of a Deadly Weapon. The State has filed a Notice of Intent to Seek the Death Penalty.

3. I have no knowledge that either of the deputy district attorneys prosecuting this case have ever used peremptory challenges in an improper manner. However, in two (State of Nevada v. William Christopher Schoels, Case No. C115759X and State of Nevada v. James Montell Chappell, Case No. C131341X) of the four death penalty cases I have taken to trial, prosecutors from the Clark County District Attorney's Office used their peremptory challenges to eliminate all minorities from the jury.

4. The Nevada Supreme Court has previously taken notice of this problem. In an unpublished Order in Cedric Howard v. State (No. 40443 filed October 7, 2003), the Nevada Supreme Court reversed a criminal conviction so the District Court could obtain a more extensive record of precisely why the State was kicking black jurors off the jury. In the Howard Order, the Nevada Supreme Court discusses the reasons offered by the prosecutors for kicking blacks off the jury and commented that these reasons had an "apparent dubious nature." On remand, the trial court concluded the use of peremptories to knock minorities off the jury was legal, but this declarant has never heard of a single Clark County jurist ever concluding that the use of peremptories to knock minorities off a jury was improper.

5. In 2003, the Nevada Legislature passed, and Governor Guinn signed into law, Assembly Bill 13 which requires Nevada district attorneys to file an annual report detailing the "race, ethnicity and gender of each member of the jury." I participated in the hearings before the Assembly Judiciary Committee and Senate Judiciary Committee regarding this legislation, and this legislation arose from a perception that Nevada's prosecutors engage in a pattern of kicking minorities off juries. I personally believe that Clark County prosecutors, because of the reporting

requirement, now take pains to NOT eliminate minority jurors, but this motion is made in an abundance of caution.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 14 day of September, 2004.

HOWARD S. BROOKS

MEMORANDUM OF POINTS AND AUTHORITIES

State and federal law prohibit the exercise of a peremptory challenge against a single juror on the basis of race. Batson v. Kentucky, 476 U.S. 79 (1986). The United States Supreme Court ruled in Baston that a prosecutor may not rebut a prima facie showing of discrimination "merely by denying any discriminatory motive or affirming his good faith in individual selections."

CONCLUSION

The Defense respectfully requests this Court enter an Order prohibiting the State from employing its peremptory challenges to remove minority jurors if such use of peremptories is racially motivated.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By Howard S. Brooks
HOWARD S. BROOKS, #3374
Deputy Public Defender

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 13th of October, 2004, in District Court Department XVIII.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion In Limine To Prohibit The State From Using Preemptory Challenges To Remove Minorities From Jury is hereby acknowledged this 14 day of September, 2004.

CLARK COUNTY DISTRICT ATTORNEY

By _____

comment, despite a corrective instruction, once such statements are made, the damage is hard to undo: 'Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'") (quoting Dunn v. U.S., 307 F.2d 883, 886 (5th Cir. 1962)); Government of Virgin Islands v. Toto, 529 F.2d 278, 282 (3d Cir. 1976) (holding that curative instruction could not cure the violation of the defendant's right to a presumption of innocence).

To the extent that the prosecutor may commit misconduct that is only marginally covered by the cited caselaw, this court should intervene to protect the defendant's rights by instructing the jury in terms which address the real effect of the misconduct. An instruction merely to disregard misconduct would not be adequate and would likely exacerbate the effect of the misconduct. See note 1, above. Only an instruction that explains to the jury what has actually occurred - - that is, that the prosecutor has attempted to influence the jury by impermissible and unconstitutional means, and that it would be a violation of the jurors' duty to consider in any way the substantive basis of the misconduct in its decision - - would arguably correct the harm. Thus, if a court concludes that it can cure misconduct by giving a cautionary instruction, the court "should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks." People v. Bolton, 23 Cal. 3d 208, 589 P.2d 396, 400 n. 5 (1970). In Bolton, the prosecutor's argument insinuated that the defendant had a criminal record when in fact he did not. The court in Bolton indicated that a cautionary instruction sufficient to counterbalance such an argument could take this form:

> "Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks." Id.

To the extent that the prosecutors in this case may commit any misconduct not clearly within the categories of misconduct explicitly identified in this motion, the defendant submits that

only an instruction similar in form to the one described in Bolton could adequately correct the harm such misconduct would cause.

E. CONCLUSION.

The defendant has shown that this court should issue an order in limine directing the prosecutors not to commit misconduct in argument. Such an order is an appropriate use of a ruling in limine; it is not objectionable by the state; it is necessary in light of the Clark County District Attorney's pattern and practice of committing misconduct; and it is imperative in order to furnish actual protection, rather than mere lip-service, to the defendant's rights. Accordingly, this court should issue an order in limine prohibiting the prosecutors from committing any of the kinds of misconduct discussed in sections II and III, below, and any other form of misconduct, and enforce that order as requested above.

II.

EXAMPLES OF IMPERMISSIBLE ARGUMENT AT THE GUILT PHASE

To safeguard the fairness of the defendant's trial and protect the specific constitutional rights to which he is entitled, the defendant sets forth some of the improper arguments a prosecutor is forbidden from making by the federal Constitution, and the laws and ethical rules of this state. This list represents some of the most common improper arguments the prosecutor can make and is by no means exhaustive. The defendant presents these examples of improper arguments to inform the Court of his unequivocal objection to them in advance of trial.

A. ARGUMENTS INFRINGING SPECIFIC CONSTITUTIONAL RIGHTS.

A prosecutor may not under any circumstances make a comment which violates the specific constitutional rights the accused enjoys under the Bill of Rights and the Fourteenth Amendment's Due Process Clause. The Supreme Court has held that "[w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

- Darden v. Wainwright, 477 U.S. 168, 182 (1986) ("The prosecutor's argument [may] not ... implicate other specific rights of the accused such as the right to counsel or the right to remain

silent").

- Mahorney v. Wallman, 917 F.2d 469, 472 (10th Cir. 1990) (explaining that a lower standard applies for the grant of the federal writ of habeas corpus where "the impropriety complained of effectively deprived the defendant of a specific constitutional right").

The following sections identify some, but not all, of the arguments which would violate the defendant's specific constitutional rights. The arguments below also violate the more general right an accused enjoys to a fair trial under the Due Process Clause of the Fourteenth Amendment. Since these arguments infringe specific constitutional rights, however, they are especially intolerable and must be met with extremely strong measures by this Court.

1. ARGUMENTS ABOUT THE DEFENDANT WHICH VIOLATE THE BILL OF RIGHTS.

a. Commenting on Defendant's Post-Arrest Silence Violates the Fifth and Fourteenth Amendments to the United States Constitution And Nevada Law.

A prosecutor may not comment on the accused's post-Miranda silence.

- U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself."); see also Malloy v. Hogan, 378 U.S. 1, 3 (1964) (right against self-incrimination applies to the states through the Fourteenth Amendment's due process clause).
- U.S. v. Robinson, 485 U.S. 25, 32 (1988) ("Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence ... the privilege against compulsory self-incrimination is violated.").
- Darden, 477 U.S. at 182 ("The prosecutor's argument [may] not ... implicate other specific rights of the accused such as ... the right to remain silent.").
- Wainwright v. Greenfield, 474 U.S. 284, 291 (1986) (explaining that the Doyle decision "rests on the 'fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'") (quoting South Dakota v. Neville, 459 U.S. 553, 565 (1983)).
- Doyle v. Ohio, 426 U.S. 610, 619 (1976) (holding that a comment by the State's attorneys about the accused's post-Miranda silence, even during the course of impeachment, violates the due

process clause).

- People of the Territory of Guam v. Veloria, 136 F.3d 648, 652-53 (9th Cir. 1998) (reversing conviction and remanding for a new trial, after concluding that the prosecutor's comment on the defendant's post-Miranda silence amounted to *plain error* since "the Doyle rule prohibiting testimony regarding post-arrest silence has been well-established in the law") (emphasis added).
- U.S. v. Harp, 536 F.2d 601, 602 n. 2 (5th Cir. 1976) (holding that prosecutor violated Constitution when asked, "[n]ow doesn't it make sense that if the facts had been like the defendants said they had been, that they would have told somebody?").[5]
- Nev. Const. art. I, § 8 ("No person shall ... be compelled, in any criminal case, to be a witness against himself.").
- Washington v. State, 112 Nev. 1054, 921 P.2d 1253, 1255 (1996) (ordering new trial where prosecutor asked defendant, "[f]rom the time that you had your Miranda rights read to you till today, have you ever told the police officer or someone in authority your story?").
- Mahar v. State, 102 Nev. 488, 489, 728 P.2d 439, 440 (1986) (reversing and remanding for new trial where prosecutor asked defendant during cross-examination why he had failed to tell the police about his story).
- McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986) (reversing and remanding for new trial where prosecutor in closing argument commented that the defendant "didn't tell anybody in the system, law enforcement. He didn't tell anybody in our offices").
- Bernier v. State, 96 Nev. 670, 671-72, 614 P.2d 1079, 1080 (1980) (reversing and remanding for new trial where prosecutor argued that an innocent person would not have waited two years before telling his story).[6]

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[5] Federal courts have frequently granted relief from convictions because prosecutors commented at trial on the accused's right to remain silent. See, e.g., Franklin v. Duncan, 70 F.3d 75, 76 (9th Cir. 1995) (per curiam); U.S. v. Foster, 985 F.2d 466, 468 (9th Cir. 1994), as amended, 17 F.3d 1256 (9th Cir. 1994); Hill v. Turpin, 135 F.3d 1411, 1417-19 (11th Cir. 1998); Gravley v. Mills, 87 F.3d 779, 790 (6th Cir. 1996); Fields v. Leapley, 30 F.3d 986, 990 (8th Cir. 1996); U.S. v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995); U.S. v. Newman, 943 F.2d 1155, 1158 (9th Cir. 1991); Matire v. Wainwright, 811 F.2d 1430, 1435-36 (11th Cir. 1987); Alo v. Olim, 639 F.2d 466, 467 (9th Cir. 1980); Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975).

[6] The Nevada Supreme Court has frequently recognized that prosecutors cannot comment on the right to remain silent. See, e.g., McCraney v. State, 110 Nev. 250, 255-57, 871 P.2d 922, 925-27 (1994); Neal v. State, 106 Nev. 23, 25, 787 P.2d 764, 765 (1990); Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 291 (1989) (ordering new trial where prosecutor commented on

The Nevada Supreme Court has extended the protection of the Fifth Amendment to include an accused's silence after arrest but before receiving Miranda warnings.

- Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267 (1996) (holding that the prosecution cannot use post-arrest, pre-Miranda silence in case-in-chief).
- Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 656 (1995) (applying Doyle doctrine to post-arrest, pre-Miranda silence).
- Supreme Court Rule 173 (5) ("In trial [the prosecutor shall not] allude to any matter that the lawyer does not reasonably believe is relevant...").
- The American Bar Association, Standards for Criminal Justice, Standards Relating to Prosecution Function, Standard 3-5.6 (b) (3d ed. 1993) ("A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury ... make ... impermissible comments or arguments in the presence of the judge or jury."); see also Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."); Standard 3-5.9 ("The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.").

b. Directly Commenting on the Defendant's Failure to Testify Violates the Fifth and Fourteenth Amendments to the United States Constitution.

A prosecutor may not comment directly on a defendant's failure to testify.

- U.S. Const. amend. V.
- Carter v. Kentucky, 450 U.S. 288, 301 (1981) (a person accused of committing a crime "must pay no court-imposed price for the exercise of the constitutional privilege not to testify").
- Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) ("Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.").
- Griffin v. California, 380 U.S. 609, 612 (1965) (holding that the Fifth Amendment

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silence and argued that it permitted the defense to fabricate plausible defense); Aesoph v. State, 102 Nev. 316, 320, 721 P.2d 379, 382 (1986); McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984); Vipperman v. State, 92 Nev. 213, 214, 547 P.2d 682, 683 (1976); Layton v. State, 87 Nev. 598, 600, 491 P.2d 45, 47 (1975).

prohibits a prosecutor from commenting on the defendant's failure to testify).

- Lesko v. Lehman, 925 F.2d 1527, 1541-42 (3d Cir. 1990) (reversing death sentence and holding that comment on failure to express remorse violated Fifth Amendment's right against self-incrimination), cert. denied, 502 U.S. 898 (1991).
- Flanagan v. State, 104 Nev. 105, 110, 754 P.2d 836, 839 (1988) (finding that prosecutor committed "flagrant" and "reversible error" where he stated "they could or could not take the stand, whatever they wanted"), vacated on other grounds, 504 U.S. 930 (1992).
- In Re Dubois, 84 Nev. 562, 574, 445 P.2d 354, 361 (1968) (holding that it was improper for prosecutor to refer to the defendant's "opportunity to take the stand" in objecting to closing argument).[7]
- See section II (A) (1) (a), above; SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b); 3-5.9.
- Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1560 (1998) (reporting that jurors take into account an absence of expression of remorse when they determine whether to impose death sentence).

c. Indirectly Commenting on the Defendant's Failure to Testify Violates the Fifth and Fourteenth Amendments to the United States Constitution And Nevada Law.

The Fifth and Fourteenth Amendments prohibit a prosecuting attorney from commenting indirectly on the defendant's failure to testify. Federal courts have repeatedly held that where no one but the defendant can refute a witness's testimony, it is improper for a prosecutor to say that the evidence the state presents is "uncontroverted," "undisputed," "unchallenged," "uncontradicted," "undenied," "intact," or "unrefuted," or to otherwise draw attention to the accused's failure to testify.

- U.S. v. Cotnam, 88 F.3d 487, 496-500 (7th Cir. 1996) (holding that the prosecutor committed reversible error in violation of the Fifth Amendment when he commented that the

[7] Both federal and this state's courts have recognized that it is impermissible for prosecutors to comment on the defendant's failure to testify. Burke v. Greer, 756 F.2d 1295, 1300 (7th Cir. 1985); Raper v. Mintzes, 706 F.2d 161, 164 (6th Cir. 1983); Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759 (1991); McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984).

evidence the state had put on was "uncontroverted" since it was unlikely that anyone but the accused could contradict the evidence), cert. denied, 117 S.Ct. 326 (1996).

- U.S. v. Hardy, 37 F.3d 753, 759 (1st Cir. 1994) (reversing a conviction after holding that the prosecutor indirectly commented on the defendant's failure to testify by commenting that the defendant is "still running and hiding today").
- Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) ("Our cases have recognized that a prosecutor may not comment concerning the uncontradicted nature of the evidence when 'it is highly unlikely that anyone other than the defendant could rebut the evidence.'") (quoting U.S. v. Di Caro, 852 F.2d 259, 263 (7th Cir. 1988).
- Floyd v. Meachum, 907 F.2d 347, 353 (2d Cir. 1990) (holding that the prosecutor's question "if there was confusion in this case, from whence did that come?" and "[i]f there were facts left out in this case, from whence did that come?" violated the accused's right under the Fifth Amendment against self-incrimination).
- U.S. v. Sblendorio, 830 F.2d 1382, 1391 (7th Cir. 1987) ("We have taken Griffin to forbid comment on the defendant's failure to call witnesses, when the only potential witness was the defendant himself."), cert. denied, 484 U.S. 1068 (1988).
- Williams v. Lane, 826 F.2d 654, 664 (7th Cir. 1987) (affirming district court's grant of habeas corpus and conclusion that prosecutor's comment that witness "told it to you and nobody else told you anything different" was unconstitutional, explaining that "[t]his Court has on numerous occasions held that prosecutorial references to 'undisputed,' 'unchallenged,' or 'uncontradicted' testimony were indirect references to defendant's failure to testify in violation of the Fifth Amendment."), cert. denied, 484 U.S. 956 (1987).
- Raper v. Mintzes, 706 F.2d 161, 166 (6th Cir. 1983) (affirming district court's grant of relief and holding that prosecutor violated Constitution by arguing that state witness' testimony was "uncontradicted or unrefuted" which constituted indirect reference to failure to testify).
- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (concluding that prosecutor committed error requiring habeas relief where argued that the victim's testimony "stood unchallenged").
- U.S. v. Fearns, 501 F.2d 486, 490 (7th Cir. 1974) ("[W]hen a defendant has not testified a

prosecutor risks reversal by arguing that evidence is undisputed when that evidence was of a kind that could have been disputed by the defendant if he had chosen to testify").

- Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (reversing conviction where the prosecutor asked rhetorically "whose fault is it if we don't know the facts in this case?" and "what is he hiding?").
- Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989) (holding that the prosecutor improperly drew attention to the defendant's failure to testify by pointing out his opportunity to take the stand).
- See section II (A) (1) (a), above; SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

d. Referring to Defendant's Courtroom Demeanor Violates the United States Constitution and Nevada Law.

A prosecutor may not comment on a non-testifying defendant's courtroom demeanor. The defendant's demeanor is not part of the evidence before the jury. See section II (A) (5), below.

- U.S. v. Schuler, 813 F.2d 978, 982-83 (9th Cir. 1987) (holding that the prosecutor violates the Fifth Amendment by commenting on a non-testifying defendant's demeanor at trial or suggesting that the jury can consider his behavior as evidence of guilt).
- U.S. v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) (same).
- U.S. v. Carroll, 678 F.2d 1208, 1209 (5th Cir. 1982) (reversing and remanding for new trial, holding that prosecutor's reference to the defendant's courtroom behavior violated his Fifth Amendment right not to testify, and not to be convicted except on the basis of evidence the state puts on against him, and the Sixth Amendment's right to a trial by jury which prohibited his presence from being taken into account as evidence of guilt).
- U.S. v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (holding that it violates due process clause for prosecutor to comment on non-testifying defendant's demeanor at trial because it is irrelevant to question of guilt).
- People v. Garcia, 160 Cal. App. 3d 82, 91, 206 Cal. Rptr. 468, 473 (1984) ("Ordinarily, a defendant's nontestimonial conduct in the courtroom does not fall within the definition of 'relevant

evidence' as that which 'tends logically, naturally [or] by reasonable inference to prove or disprove a material issue' at trial.") (citations omitted).

- Good v. State, 723 S.W.2d 734, 736 (Tex. Crim. App. 1986) (holding that prosecutor could not comment on *testifying* defendant's demeanor because it was not part of the evidence before the jury).
- See section II (A) (1) (a), above; SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

e. Suggesting that Defendant's Presence At Trial Helped Him Fabricate A Defense Violates the United States Constitution and Nevada Law.

A prosecuting attorney may not suggest that the accused's presence at trial helped him frame his testimony or fabricate a defense. Such comments infringe the defendant's constitutional right to be present at trial and to confront and cross-examine the witnesses against him.

- U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..."); see also Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding that Sixth amendment right to confrontation applies to states through the due process clause of the Fourteenth Amendment).
- Shannon v. State, 105 Nev. 782, 788-89, 783 P.2d 942, 946 (1989) (condemning as "improper," under the constitutional right to appear and defend, the prosecutor's comment that the defendant was putting on a "show" for jurors).
- Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 291 (1989) (reversing conviction where the prosecutor argued that the accused's defense was credible because he could remain silent during trial, listen to other witnesses, and tailor his testimony accordingly).
- Aesoph v. State, 102 Nev. 316, 321, 721 P.2d 379, 382 (1986) (ordering a new trial where the prosecutor told jurors in closing that "[t]hey could just sit here and ... fit their story to ours because we got to go first").

f. Referring to the Defendant's Refusal to Consent to a Search Violates the Fourth and Fourteenth Amendments to the United States Constitution and Nevada Law.

A prosecutor may not comment on the defendant's refusal to consent to a search or seizure.

- U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); see also Mapp v. Ohio, 367 U.S. 643, 654 (1961) (holding that right under Fourth Amendment would be enforced by "the same sanction of exclusion as is used against the federal government"); Ker v. California, 374 U.S. 23, 30 (1963) (holding that searches by state authorities would be judged under same standards as those the Fourth Amendment imposes on federal searches).

- U.S. v. Prescott, 581 F.2d 1343, 1350-51 (9th Cir. 1978) (reversing the conviction where the prosecutor commented on the defendant's assertion of her Fourth Amendment right to refuse to unlock her door when the police sought entry to search her apartment without a warrant because the "[t]he Amendment gives [a person] a constitutional right to refuse to consent to entry and search").

- People v. Keener, 148 Cal.App.3d 73, 78, 195 Cal.Reptr. 733 (Cal. Ct. App. 1983) (holding that prosecutor could not comment on defendant's refusal to leave apartment while a SWAT team searched because defendant enjoyed "privilege to be free from comment upon the assertion of a constitutional right.").

- See section above II (A) (1) (a), above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

g. Arguing that the Defendant is Abusing the System or the Constitution Violates the Constitution and Nevada Law.

A prosecutor may not complain that the defendant has too many constitutional rights or that he is abusing the system.

- Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (affirming grant of habeas corpus writ where prosecutor remarked that he was offended by defendant's exercise of his right to a trial by jury which court calls "outrageous").

- See section II (A) (4) (d) above; SCR 173 (5).

- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

2. ARGUMENTS ABOUT DEFENSE COUNSEL THAT VIOLATE THE FEDERAL CONSTITUTION AND NEVADA LAW.

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of counsel for his defence." U.S. Const. amend. VI. The right to counsel applies to the states through the due process clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

The right "to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error." U.S. v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980). For this reason, certain comments about counsel are a violation of the Sixth and Fourteenth amendments. Examples of these are set forth below.

a. Commenting on the Defendant's Retention of, or Request for, Counsel Violates the Sixth and Fourteenth Amendments to the United States Constitution and Nevada Law.

Under the Sixth Amendment's right to counsel and the Fourteenth Amendment's due process clause, a prosecutor may not comment on the accused's retention of, or request for, counsel.

- Hill v. Turpin, 135 F.3d 1411, 1417-19 (11th Cir. 1998) (granting relief in habeas corpus under Fourteenth Amendment's due process clause where prosecutor referred to petitioner's request for counsel).
- U.S. v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995) (holding that prosecutor violated the due process clause under the rule in Doyle and committed reversible error when prosecutor asked the accused during cross-examination whether he had hired an attorney, whether that attorney was a criminal defense lawyer, and the length of time during which he had retained his services).
- U.S. v. Santiago, 46 F.3d 885, 892 (9th Cir. 1995) ("[U]nder the Sixth Amendment right to counsel, prosecutors may not imply that the fact that a defendant hired a lawyer is a sign of guilt."), cert. denied, 515 U.S. 1162 (1995).
- Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990) ("A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt.... Such statements strike at the core of the right to counsel and must not

be permitted.").

- U.S. v. Daoud, 741 F.2d 478, 480 (1st Cir. 1984) (holding that prosecutor's reference to the defendant's request for the best attorney in Puerto Rico violated the Constitution).
- Bruno v. Rushen, 721 F.2d 1193, 1194 (9th Cir. 1983) (per curiam) (affirming grant of writ of habeas corpus and holding that it violates due process to suggest that jury take into account the hiring of counsel in determining guilt), cert. denied, 469 U.S. 920 (1984).
- U.S. v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980) (holding that prosecutor's conduct "penalized McDonald for exercising his Sixth Amendment right to counsel" by eliciting testimony, and commenting in closing, that attorney was present when Secret Service agents searched defendant's home).
- Zemina v. Solem, 573 F.2d 1027, 1028 (8th Cir. 1978) (affirming habeas corpus relief and district court's conclusion that prosecutor violated the petitioner's right under the Sixth Amendment where suggested in closing that the defendant's phone call to his attorney after his arrest indicated guilt).
- U.S. ex. rel. Macon v. Yeager, 476 F.2d 613, 614 (3d Cir. 1973) (reversing conviction under Sixth Amendment because prosecutor argued that hiring attorney after crime committed supported finding of guilt), cert. denied, 414 U.S. 855 (1973).
- See section II (B) (2), above; SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

b. Disparaging Counsel Violates the Sixth And Fourteenth Amendments to the United States Constitution and Nevada Law.

A prosecutor may not disparage or ridicule the defendant's counsel or criminal defense attorneys in general because defendants enjoy "the right to counsel unstained by unfair disparagement." U.S. v. Rodrigues, 159 F.3d 439, 451 (9th Cir. 1998); see also U.S. v. Santiago, 46 F.3d 885, 892 (9th Cir. 1995) ("[U]nder the Sixth Amendment, prosecutors may not imply that ... all defense counsel are programmed to conceal and distort the truth."), cert. denied, 515 U.S. 1162 (1995). Comments suggesting that defense counsel in general, or the defendant's attorney in particular, are unethical, amoral, sneaky, cunning, or deceptive violate the Constitution's Sixth

Amendment right to counsel and the Fourteenth Amendment's due process clause.

- U.S. v. Richardson, 161 F.3d 728, 735 (D.C. Cir. 1998) (reversing conviction and ordering new trial where prosecutor suggested to jury that defense counsel was "out of touch with the realities and concerns" of the defendant's and the jury's world).
- U.S. v. Rodrigues, 159 F.3d at 451 (ordering new trial in spite of defense counsel's failure to object contemporaneously where the prosecutor told jurors at trial that after listening to defense counsel, "you all must be feeling somewhat confused ... [defense counsel] has tried to deceive you" because the prosecutor "does not speak as a mere partisan. He speaks on behalf of a government interested in doing justice. When he says the defendant's counsel is responsible for lying and deceiving, his accusations cannot fail to leave an imprint on the jurors' minds. And when no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instruction is given, the jurors must necessarily think that the false accusations had a basis in fact. The trial process is distorted.").
- U.S. v. Friedman, 909 F.2d 705, 709-10 (2d Cir. 1990) (holding that it was reversible error for prosecuting attorney to state that defense counsel would "make any argument he can to get that guy off" and that "while some people ... prosecute [drug] dealers ... there are others who try to get them off, perhaps even for high fees").
- Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam) (holding that prosecutor violated defendant's right to due process by commenting that witness changed story after meeting with defense attorney and explaining that, maligning defense counsel "severely damage[s] an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice"), cert. denied, 469 U.S. 920 (1984).
- Manley v. State, 115 Nev. 114, 979 P2d 703 (1999) (calling prosecutor's comment, that "we could do that one exhibit at a time for the mentally challenged" in response to defense counsel's request that the prosecutor admit exhibit more slowly, "inappropriate," and emphasizing that "we direct the prosecutors to refrain from interposing these kinds of remarks").

- Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) (per curiam) (condemning the prosecutor for commenting that defense counsel was "making stuff up" because "it is ... inappropriate for a prosecutor to make disparaging remarks pertaining to defense counsel's ability to carry out the required functions of an attorney"), cert. denied, 514 U.S. 1052 (1995).
- Cuzdey v. State, 103 Nev. 575, 578, 747 P.2d 233, 235 (1987) (reversing and remanding for new trial where prosecutor made disparaging remarks about counsel).
- Yates v. State, 103 Nev. 200, 204, 734 P.2d 1252, 1255 (1987) (labeling the prosecutor's remarks that defense counsel was in "violation of all ethics of any attorney" and that the court should hold him in contempt "gross injustice" and a "foul blow").
- Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (holding that it is improper for the prosecutor to criticize defense counsel for legitimately impeaching prosecution witness in a case where prosecutor commented that impeaching the witness was a "poor reward for testimony of public-spirited citizen").
- McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) ("Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct.").
- See section II (B) (2), above; SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6, 3.5-8 (d), 3-5.9 (b).
- National District Attorneys Association, National Prosecution Standards, Rule 6.5 (b) (2d ed. 1991) ("Counsel should avoid the expression of personal animosity toward opposing counsel, regardless of personal opinion.").

c. Complimenting Defense Counsel Violates the Sixth and Fourteenth Amendments to the United States Constitution and Nevada Law.

A prosecutor may not compliment the defense attorney.

- U.S. v. Frederick, 78 F.3d 1370, 1380 (9th Cir. 1996) (explaining that it was improper for prosecutor to comment that "it is a defense attorney's job to do his best to cross-examine thoroughly the witnesses presented by the Government for the benefit of his client. And you can have admiration for [the defense attorney] because he is a skilled practitioner of that art," and in response to an objection, "I'm trying to compliment him that he did a very good job of confusing

[the witness] on the stand" because they suggested to jurors that the defense counsel's "methods were somewhat underhanded and designed to prevent the truth from coming out.").

- See section II (B) (2), above; SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

d. Commenting On the Cost Of Defense Violates the Constitution and Nevada Law.

A prosecutor may not comment on the cost of the defense, including the fees the state must pay for lawyers and witnesses.

- U.S. Const. amend. VI.
- Gideon v. Wainwright, 372 U.S. 335, 359 (1963) (recognizing that an indigent defendant has a right to have counsel appointed for him by the state).
- Taylor v. U.S., 329 F.2d 384, 386 (5th Cir. 1964) (holding that right as indigent to subpoena witnesses exists under the Sixth Amendment's right to compulsory process).
- Young Bark Yau v. U.S., 33 F.2d 236, 237 (9th Cir. 1929) (holding that the district court erred in denying application to take the testimony of witnesses in China).
- Ake v. Oklahoma, 470 U.S. 68, 70 (1985) (holding that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition").

Prosecutors may not comment on the cost of the defense since this would penalize the accused for the exercise of federal constitutional rights. Were prosecutors permitted to make these comments, they would force the defendant to choose between, first, exercising his rights to the assistance of counsel and the right to present a defense under the federal Constitution and being penalized for it, or second, foregoing these rights in an effort to foreclose the opportunity for the prosecutor to argue improperly. Like other comments which penalize the accused for asserting a constitutional right, comment on the cost of the defense would, as the Supreme Court explained in U.S. v. Robinson, 485 U.S. 25, 30 (1988), "cut[] down on the privilege by making its assertion costly." Under the federal constitution, therefore, a prosecutor may not comment on the cost of the defense.

Nevada's ethical rules similarly prohibit prosecutors from commenting on the cost of the accused's defense. See also section II (A) (1, 2), above; SCR 173 (5); ABA Standards for Criminal Justice, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

3. ASSERTING PERSONAL OPINION OR EXPERTISE.

The prosecutor may not offer a personal opinion or assert an expertise on any matter because it violates the accused's right to confrontation. The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..." This right applies to the states through the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Supreme Court explained in California v. Green, 399 U.S. 149, 158-59 (1970), that the Confrontation Clause requires that a witness be "subject to full and effective cross-examination" and it emphasized that:

> Confrontation: (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

By offering an opinion or asserting an expertise on a matter, the prosecutor performs the role of a witness. As one court explained it,

> [b]y giving his opinion, an attorney may increase the apparent probative force of his evidence by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position.... The prosecutor is not just a retained attorney; he is a public official occupying an exalted station. Should he be allowed to 'testify' in closing argument, jurors hear the 'expert testimony' of a trusted officer of the court on, perhaps, a crucial issue. On the other side may be appointed counsel, laboring valiantly to present all defenses available to the accused, who nevertheless may be unable to respond to the implied challenge by asserting his personal belief in his assigned client's innocence.

U.S. v. Morris, 568 F.2d 396, 401-02 (5th Cir. 1978). When a prosecutor offers "expert

testimony," he or she does not take the stand, testify under oath, or subject himself to the defense's right of confrontation. Indeed, as the ABA Standards for Criminal Justice, Standard 3-5.8, have noted in their commentary, "[e]xpressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office..."[8] They therefore violate the right of confrontation.

The prosecutor also violates the right to a trial by an impartial jury when he or she offers a personal opinion or asserts an expertise on a matter. The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. Const. amend. VI. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court recognized that the accused enjoys the right to have a jury ascertain the facts and determine the ultimate question of guilt or innocence. Id. at 149. When a prosecutor offers a personal opinion, jurors will naturally be swayed. As the Supreme Court explained in U.S. v. Young, 470 U.S. at 18-19, a prosecutor may not offer his personal opinion because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." In U.S. v. Garza, 608 F.2d 659, 663 (5th Cir. 1979), the court of appeals wrote that:

> The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Indeed, the court of appeals emphasized in Morris, 568 F.2d at 401 that "an attorney's statement of his beliefs impinges on the jury's function of determining the guilt or liability of the defendant." See also Aesoph, 102 Nev. at 383, 721 P.2d at 322 (explaining that the expression of personal beliefs and opinions "could only serve to influence the jury to rely upon the prosecutor's expertise

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[8] The Supreme Court, in Donnelly v. DeChristoforo, 416 U.S. 637, 643 n. 15 (1974), briefly and without explanation remarked in a footnote that, although improper, the assertion of a personal opinion itself might not violate the Confrontation Clause. This does not, however, foreclose the argument that the assertion of a personal opinion about a factual matter is tantamount to testifying without taking the stand and would violate this provision of the Sixth Amendment.

and authority, rather than objectively weighing the evidence.").[9]

Ethical rules in this state prohibit the assertion by a prosecutor of a personal opinion. Rule 173 of the Supreme Court Rules forbids "assert[ing] personal knowledge of facts in issue except when testifying as a witness, or stat[ing] a personal opinion as to the justness of a cause, the credibility of a witness ... the guilt or innocence of an accused..." The ABA Standards for Criminal Justice provide, moreover, that "[t]he prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant." Standard 3-5.8 (b). In the explanatory notes, the ABA warns prosecutors to avoid using the first person in describing or remarking on evidence and to instead "restrict themselves to statements such as 'The evidence shows...' or something similar." Id. Commentary.

The unconstitutional and improper assertion of a personal opinion can take different forms. As described below, courts have condemned prosecutors for expressly stating an opinion or a belief. They have also held that pointing at the defendant or facing him melodramatically while stating that he is guilty or deserves the death penalty constitutes an improper assertion of a personal opinion. See, e.g., Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (holding that prosecutor improperly asserted personal belief when melodramatically faced defendant and said, "you deserve to die."), cert. denied, 486 U.S. 1036 (1988). The following arguments are examples of improper assertions by prosecutors of personal opinions or expertise.

a. Expressing A Personal Opinion About the Defendant's Guilt Violates the United States Constitution And Nevada Law.

Under federal constitutional law, a prosecuting attorney may not express a personal opinion about the guilt of the person on trial or assert an expertise in assessing guilt. Asserting a personal opinion also violates the rule against referring to facts outside the record. See section II(a)(5); see also Young, 470 U.S. at 18-19; U.S. v. Francis, 170 F.3d 546, 550-51 (6th Cir. 1999).

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[9] The Nevada Supreme Court has inconsistently followed the federal constitutional rule prohibiting prosecutors from asserting a personal opinion or expertise on any matter. In Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995), for example, the court held that there is a "duty not to inject [the prosecutor's] personal beliefs into argument." As fully described below, it has frequently condemned prosecutors for asserting personal opinions. By contrast, the Nevada Supreme Court suggested recently that prosecutors can assert a personal opinion as long as it concerns a proper subject. Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 446 (1997), cert. denied, 119 S.Ct. 82 (1998). The court fails to grasp that it is the assertion of a personal opinion itself that both federal and state courts have long condemned and not just the assertion of a personal opinion on improper matters as the Williams court apparently believes.

- U.S. v. Young, 470 U.S. 1, 17 (1985) (holding that it is "improper" for prosecutors to express an opinion about the guilt of the accused).
- U.S. v. Leon-Reyes, 177 F.3d 816 (9th Cir. 1999) (calling prosecutor's comments about his experience of 26 years as a lawyer and his story of his grandfather's struggles "irrelevant and unnecessary" as well as "objectionable" and an attempt "to vouch for his own credibility and thereby the credibility of the prosecution's case").
- Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998) (comment that crime was "disgusting and it's as cold as anything I've ever seen," in support of aggravating factor, was "clearly improper" because "[i]t invited the jury to rely on the prosecutor's personal opinion about the relative coldness of this crime and compared the circumstances of this crime to other crimes that were not in the record").
- U.S. v. Molina, 934 F.2d 1440, 1444-45 (9th Cir. 1991) ("[A] prosecutor may not express his opinion of the defendant's guilt...").
- Floyd v. Meachum, 907 F.2d 347, 354-55 (2d Cir. 1990) (explaining that prosecutor's misconduct in requesting that jury consider prosecutor's own integrity before considering and evaluating the evidence against the defendant was reversible error).
- U.S. v. Garza, 608 F.2d 659, 662 (5th Cir. 1979) (reversing conviction and remanding for new trial because prosecutor's comments that "I don't want innocent people going to jail" and "if I thought that I had ever framed an innocent man and sent him to the penitentiary, I would quit" were "so clearly improper and so obviously require reversal").
- U.S. v. Morris, 568 F.2d 396, 401 (5th Cir. 1978) (explaining that it is impermissible for prosecutor to state "I believe that the defendant is guilty").
- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (ordering the district court to grant habeas corpus relief where state's attorney made "highly improper expression of personal opinion" in telling jurors that "[i]f you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home...").
- Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989) ("A prosecutor may not offer his personal opinion of the guilt or character of the accused.").

- Santillanes v. State, 104 Nev. 699, 702, 765 P.2d 1147, 1149 (1988) (holding that it was improper for the prosecutor to tell jurors "the factors that lead me-- and the evidence -- to believe that" the accused is guilty and "I believe the evidence has shown us that Mr. Santillanes is indeed guilty of this crime").

- Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1308 (1987) (condemning prosecutor's statement that "we don't try people that we believe are innocent.").

- Yates v. State, 103 Nev. 200, 203, 734 P.2d 1252, 1253 (1987) ("Any expression of opinion on the guilt of an accused is a violation of prosecutorial ethics.").

- McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) (reversing conviction and remanding for new trial and labeling "highly improper" the state's comment that "I will never want to be accused of trying to send an innocent man to jail. You don't think I got a rape victim out of the street to march here into court and waste your time, do you?").

- Dearman v. State, 93 Nev. 364, 368, 566 P.2d 407, 409 (1977) (labeling "improper" prosecutor's comments that "I feel just as strongly if persons are not guilty that they should be found not guilty ... I happen to revere human life.").[10]

- SCR 173 (5) (provides that lawyers must not "[i]n trial ... state a personal opinion as to the justness of a cause ... or the guilt or innocence of an accused.").

- ABA Standards for Criminal Justice, Standard 3-5.8(b) ("The prosecutor should not express his or her personal belief or opinion as to ... the guilt of the defendant.").

b. Vouching for the Credibility of Witnesses or Offering A Personal Opinion About the Evidence Violates the Sixth and Fourteenth Amendments to the United States Constitution And Nevada Law.

A prosecutor may not vouch for the credibility of any witness. There are two types of vouching and they are both improper. The Ninth Circuit, in U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir. 1996), held that a prosecutor can neither personally vouch for the witness by asserting his belief in him nor bolster his testimony by alluding to facts outside the record tending to support the

[10] The Nevada Supreme Court has repeatedly condemned the assertion of personal opinions by prosecutors. See, e.g., Dawson v. State, 103 Nev. 76, 79, 734 P.2d 221, 222 (1987) (per curiam), cert. denied, 507 U.S. 921 (1993); Emerson v. State, 98 Nev. 158, 163, 643 P.2d 1212, 1215 (1982); Owens v. State, 96 Nev. 880, 885, 620 P.2d 1236, 1239 (1980).

credibility of a particular witness.

- Young, 470 U.S. 1, 18-19 (1985) ("The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.").
- U.S. v. Sanchez, 1999 WL 343734, at *10 (9th Cir. 1999) (holding that prosecutor improperly vouched for government witnesses when commented that "Department of Justice would be put on the line to solicit false testimony just to prove up a case against these two defendants" and "you will have to believe what the two people who have the most to lose here have said happened").
- U.S. v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 283-84 (3d Cir. 1999) (reversing conviction because prosecutor improperly vouched for credibility of witnesses by telling jurors that "[t]hey told the Government they fixed prices twice and I can guarantee you the Justice Department doesn't give two for one deals; they had to plead guilty to both price-fixing conspiracies and their sentence reflected that," which court concluded was an attempt "to buttress the credibility of cooperating witnesses by providing extra-record information").
- U.S. v. Francis, 170 F.3d 546, 550-51 (6th Cir. 1999) (holding that prosecutor's comments about role she would play in recommending whether witnesses' sentences would be lowered were improper vouching because she "made it clear that her recommendation would depend on whether she personally believed [the witnesses] told the truth. Because this could lead a reasonable juror to infer that the prosecutor had a special ability or extraneous knowledge to assess credibility, the statements were improper").
- U.S. v. Garcia-Guizar, 160 F.3d 511, 520-21 (9th Cir. 1998) (calling defendant a "liar" based on state witness' "compelling" testimony constituted improper vouching).
- Frederick, 78 F.3d 1370, 1377 (9th Cir. 1996) (holding that prosecutor's reference to the

consistency of witness' testimony and earlier statement was improper).

- Maurer v. Minn. Dept. Of Corrections, 32 F.3d 1286, 1290 (8th Cir. 1994) (reversing denial of writ and ordering habeas relief where prosecutor improperly bolstered credibility of witnesses by asking witnesses if complainant appeared sincere when she reported rape).
- U.S. v. Manning, 23 F.3d 570, 572-75 (1st Cir. 1994) (holding that it was reversible error for prosecutor to comment that government witnesses could not lie on the stand), cert. denied, 117 S.Ct. 147 (1996).
- U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992) (holding that it was plain error for prosecutor to relay to jurors his opinion about a witness' testimony).
- U.S. v. Simtob, 901 F.2d 799, 805 (9th Cir. 1990) (reversing because prosecutor improperly bolstered witness's credibility by offering to grant immunity to witness and urging to tell the truth).
- U.S. v. Rodriguez-Estrada, 877 F.2d 153, 158 (1st Cir. 1989) (holding that "prosecutor crossed the line" and "was out of bounds" when assured jurors that the witness was telling the truth).
- U.S. v. Shaw, 829 F.2d 714, 717 (9th Cir. 1987) (holding that it was improper for the prosecutor to bolster witness's credibility by remarking to jurors that plea agreement requires truthful testimony because this remark "contains an implication, however muted, that the government has some means of determining whether the witness has carried out his side of the bargain), cert. denied, 485 U.S. 1022 (1988).
- U.S. v. West, 680 F.2d 652, 655 (9th Cir. 1982) (reversing and remanding where prosecutor improperly vouched for witness' credibility by saying to jurors, "[i]f you are willing to believe that an officer of this Court and a member of the U.S. Attorney's Office is going to commit perjury...").
- U.S. v. Garza, 608 F.2d 659, 663-64 (5th Cir. 1979) (reversing conviction and ordering new trial where prosecutor both offered his opinion about the motives of state witnesses and bolstered their credibility by arguing that they were "professional" and "dedicated" and would not have obtained a job with the Drug Enforcement Administration unless they had integrity).

- U.S. v. Morris, 568 F.2d 396, 402 (5th Cir. 1978) (explaining that prosecutor may not say, "[t]he prosecution's witnesses are telling the truth," or "I believe that the prosecution's witnesses are telling the truth.").[11]

- SCR 173 (5) (counsel cannot "[i]n trial ... state a personal opinion as to ... the credibility of a witness...").

- ABA Standards for Criminal Justice, 3-5.8 (b) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence...").

4. MISSTATING THE FACTS VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

A prosecutor may not misstate or misrepresent the facts. The Ninth Circuit recently explained that the rationale of the rule against misstating the facts is that "[w]hen a lawyer asserts that something in the record is true, he is, in effect testifying. He is telling the jury: 'look, I know a lot more about this case than you, so believe me when I tell you X is a fact.' This is definitely improper." U.S. v. Kojayan, 8 F.3d 1315, 1321 (9th Cir. 1993). See sections II (A) (3), above; and II (A) (5), below.

- Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("It is totally improper for a prosecutor ... to misstate the facts.").

- Berger v. U.S., 295 U.S. 78, 84 (holding that, by misstating the facts, "the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense...").

- U.S. v. Mastrangelo, 172 F.3d 288, 298 (3d Cir. 1999) (holding that prosecutor's misstatements about content of stipulation warranted reversal).

- U.S. v. Donato, 99 F.3d 426, 432 (D.C. Cir. 1997) (reversing and remanding for new trial where prosecutor made factually incorrect statement).

- U.S. v. Forlorma, 94 F.2d 91, 96 (2d Cir. 1996) (holding that prosecutor's misstatement, reinforcing the notion that defendant was aware of narcotics concealed in bag, was reversible

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[11] See also U.S. v. Cotnam, 88 F.3d 487, 496 (7th Cir. 1996), cert. denied, 117 S.Ct. 326 (1996); U.S. v. Smith, 962 F.2d 923, 936 (9th Cir. 1992); U.S. v. Eyster, 948 F.2d 1196, 1207 (11th Cir. 1991).

error).

- Davis v. Zant, 36 F.3d 1538, 1544 (11th Cir. 1994) (reversing denial of writ of habeas corpus where prosecutor committed falsehood by objecting to defendant's testimony that there was another confession when in fact there was).
- Kojayan, 8 F.3d at 1321 (holding that misstatement of fact by prosecutor constituted reversible error).
- U.S. v. Foster, 982 F.2d 551, 555 n. 7 (D.C. Cir. 1993) (holding that prosecutor's statement to court that state had not granted immunity to witness was reversible error where untrue).
- Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) (ordering new trial where prosecutor argued false evidence).
- Lee v. Bennett, 927 F. Supp. 97, 101-06 (S.D.N.Y. 1996) (granting writ of habeas corpus where prosecutorial misconduct, including misstating evidence, denied petitioner due process right to fair trial), aff'd, 104 F.3d 349 (2d Cir. 1996).
- Mahan v. State, 104 Nev. 13, 16, 752 P.2d 208, 209 (1988) (reversing a conviction where the prosecutor incorrectly stated that the fingerprints at the crime scene matched those of the defendant which contradicted the testimony of a police officer).
- Layton v. State, 91 Nev. 363, 365, 536 P.2d 85, 87 (1975) (holding that it was improper for prosecutor to call defendant's statements admissions when they were not).
- SCR 172 (prohibiting the knowing making of "a false statement of material fact or law to a tribunal").
- ABA Standards for Criminal Justice, Standard 3-5.8 (a) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.").

5. ALLUDING TO FACTS OUTSIDE THE RECORD VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In Donnelly, 416 U.S. at 645, the Supreme Court explained "[i]t is totally improper for a prosecutor to argue facts not in evidence..." Such arguments also violate the right to confrontation and cross-examination, in the same way that a prosecutor's expression of personal opinion puts unsworn "testimony" before the jury. See section II (A) (3), above.

- Berger, 295 U.S. at 85 ("It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [of the prosecutor to uphold justice], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.").
- Agard v. Portuondo, 117 F.3d 696, 711 (2d Cir. 1997) (holding that alluding to facts that are not in evidence is "prejudicial and not at all probative."), cert. granted on other grounds, 119 S.Ct. 1248 (1999).
- U.S. v. Molina, 934 F.2d 1440, 1446 (9th Cir. 1991) ("The prosecutor's assertions that there were as many as nine other law enforcement officials who would support their testimony is an improper reference to inculpatory evidence not produced at trial.").
- Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir. 1983) (holding that it was improper for prosecutor to imply that he knew more evidence of guilt than had been presented, which partly rendered sentencing hearing fundamentally unfair), cert. denied, 463 U.S. 1210 (1983), overruled on other grounds by Brooks v. Kemp, 762 F.2d 1383 (1985).
- U.S. v. Carroll, 678 F.2d 1208, 1210 (5th Cir. 1982) (calling it "wholly improper" to argue, with no evidence on the proposition, that defendant was at scene of crime because he knew more about pictures than his lawyer did and reversing and remanding for new trial).
- People v. Adcox, 47 Cal.3d 207, 236, 763 P.2d 906, 919 (Cal. 1988) (reaffirming that "'statements of fact not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.'") (quoting People v. Kirkes, 39 Cal.2d 719, 724, 249 P.2d 1 (Cal. 1952)), cert. denied, 494 U.S. 1038 (1990).
- Leonard v. State, 108 Nev. 79, 82, 824 P.2d 287, 290 (1992) (per curiam) (holding that it is improper for a prosecutor to state that defendant committed crime because he "liked it" with no supporting evidence), cert. denied, 505 U.S. 1224 (1992).
- Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (per curiam) (holding that it is improper to argue that defendant purchased alibi testimony based on facts outside record).
- Downey v. State, 103 Nev. 4, 8, 731 P.2d 350, 353 (1987) (calling it "unprofessional

conduct" for prosecutor to suggest that there was evidence he was not permitted to present to the jury).

- State v. Cyty, 50 Nev. 256, 256 P. 793, 794 (1927) ("[I]t is an abuse of the high prerogative of a prosecuting attorney in his argument to make statements of facts outside of the evidence or not fairly inferable therefrom, and that to do so constitutes error. In fact, there is no dissent from this view.").[12]
- SCR 173 (5) (lawyer must not "[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...").
- National Prosecution Standards, Rule 76.2 ("The prosecution should not allude to evidence unless there is a reasonable objective basis for believing that such evidence will be tendered and admitted into evidence at the trial.").
- ABA Standards for Criminal Justice, Standard 3-5.9 ("The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice"); see also Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

B. OTHER ARGUMENTS INFRINGING THE DEFENDANT'S RIGHT TO FAIR TRIAL.

In addition to enjoying specific constitutional rights, the accused enjoys the right to due process of law. The Fourteenth Amendment provides, in pertinent part, that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1. The Supreme Court has held that prosecutorial misconduct may violate the federal constitution when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The following are

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[12] The Nevada Supreme Court has frequently condemned prosecutors for alluding to facts outside the record. See, e.g., Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992), cert. denied, 507 U.S. 1009 (1993); Sanborn v. State, 107 Nev. 399, 408-09, 812 P.2d 1279, 1286 (1991); Jiminez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1368 (1990); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985), cert. denied, 486 U.S. 1036 (1988); Ybarra v. State, 103 Nev. 8, 15-16, 731 P.2d 353, 357-58 (1987).

some examples of arguments which violate the right to a fair trial under the due process clause of the Fourteenth Amendment to the Constitution and Nevada law. In many of these cases, federal courts and the Nevada Supreme Court have granted defendants relief from their convictions and ordered new trials.

1. MISSTATING THE LAW VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

a. Misstating the Law on the Presumption of Innocence Violates the Constitution and Nevada Law.

A prosecutor may not misstate the law on the presumption of innocence. To do so not only violates the due process clause, but also, the prohibition against alluding to facts outside the record. Such comment may also violate the rule against asserting a personal opinion about the guilt of the accused.

- Mahorney v. Williams, 917 F.2d 469, 473-74 (10th Cir. 1990) (reversing denial of writ of habeas corpus where prosecutor commented, in violation of Fifth Amendment, that presumption protected only the innocent and that it did not apply in petitioner's case).
- Floyd v. Meachum, 907 F.2d 347, 354 (2d Cir. 1990) (reversing denial of habeas relief where prosecutor remarked that the Fifth Amendment is "a protection for the innocent" rather than "a shield" for "the guilty").
- Browning v. State, 104 Nev. 269, 272, 757 P.2d 351, 353 n. 1 (1988) (deeming "outrageous" the prosecutor's reference to the presumption as a "farce," stressing that "[t]he fundamental and elemental concept of presuming the defendant innocent until proven guilty is solidly founded in our system of justice and is never a farce").
- Nevius v. State, 101 Nev. 238, 248, 699 P.2d 1053, 1059 (1985) (emphasizing that remark by prosecutor that the state has right to have defendant convicted "clearly constituted misconduct.").
- SCR 172 (a) (lawyers cannot knowingly "make a false statement of ... law to a tribunal").
- ABA Standards for Criminal Justice, Standard 3-5.8 (a) ("The prosecutor should not ... mislead the jury as to the inferences it may draw.").

b. Misstating the Law About What The State Must Show to Establish Guilt Violates the Federal Constitution and Nevada Law.

A prosecutor may not misstate the law on the meaning of guilt beyond a reasonable doubt.

- Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (holding that misstating law on reasonable doubt is so egregious that it is never harmless).
- Cage v. Louisiana, 498 U.S. 39, 41 (1990) (holding that any equation of reasonable doubt with "substantial doubt" or "moral certainty" as well as any other definition that would confuse jurors or lead them to believe that the state's burden is less significant than it is, is unconstitutional), overruled on other grounds by Estelle v. McGuire, 502, U.S. 62, 73 (1991).
- Holmes v. State, 114 Nev. 1357, 972 P.2d 337, 343 (1998) (holding that any misstatement by prosecutors of the standard is reversible error).
- Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 902 (1996) (holding that it is improper for prosecutors to analogize reasonable doubt with major life decisions since they are different from decision jurors must make in determining guilt of accused).
- Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991) (holding that it is improper to quantify reasonable doubt).
- McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1159 (1983) ("The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify.")

c. Misstating the Law on Who Carries The Burden of Proof or Suggesting that the Accused Bears Any Burden of Proof Violates the Constitution and Nevada Law.

A prosecutor may not suggest that the defendant bears a burden of proof.

- U.S. v. Roberts, 119 F.3d 1006, 1011 (1st Cir. 1997) (holding it is reversible error for the prosecutor to tell jurors the defendant must present a compelling case).
- Lisle v. State, 113 Nev. 540, 937 P.2d 473, 481 (1997) (holding that it was "improper" to insinuate that the defendant must explain the absence of witnesses or evidence), cert. denied, 119 S.Ct. 101 (1998).
- Washington v. State, 112 Nev. 1054, 1059-61, 921 P.2d 1253, 1256-58 (1996) (improper to call attention to the defendant's failure to call witnesses or to present evidence because

"[p]rosecution comments on the failure to present witnesses or to produce evidence unconstitutionally shift the burden of proof to the defense") (citations omitted).

- Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996) (ordering new trial where prosecutor commented on defendant's failure to produce evidence or witnesses and explaining that "it is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense").
- Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (reversing and remanding for new trial where prosecutor asked "whose fault is it if we don't know the facts in this case," which suggested that the defendant bore burden of proving not guilty).
- Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989) ("The tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper. It suggests to the jury that it is the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate.").[13]
- SCR 172 (a).
- ABA Standards for Criminal Justice, Standard 3-5.8 (a).

d. Misstating the Law on Intent Violates the Federal Constitution and Nevada Law.

A prosecutor may not misstate the law on intent.

- Francis v. Franklin, 471 U.S. 307, 317 (1985) (holding that jury instruction which shifted burden of persuasion on intent element to the defendant violates Constitution's Fourteenth Amendment).
- Sandstrom v. Montana, 442 U.S. 510, 520 (1979) (ruling that instruction presuming a person intends ordinary consequences of voluntary acts violated due process clause under which

[13] See also Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) (reversing and remanding for new trial and explaining that it is "outside the boundaries of proper argument to comment on a defendant's failure to call a witness. This can be viewed as impermissibly shifting the burden of proof to the defense"); Cuzdey v. State, 103 Nev. 575, 578, 747 P.2d 233, 235 (1987); Emerson v. State, 98 Nev. 158, 163, 643 P.2d 1212, 1215 (1982) (explaining that it was "clearly inaccurate" for prosecutor to insinuate that defendant had to explain absence of witnesses or to "come up with something" in reversing and ordering new trial).

state must prove each element of offense beyond a reasonable doubt).

- SCR 173 (a).
- ABA Standards for Criminal Justice, Standard 3-5.8 (a).

2. MISCHARACTERIZING THE EVIDENCE VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

A prosecutor may not mischaracterize the evidence. Mischaracterizing the evidence introduces the same kind of unsworn "testimony" before the jury, without cross-examination or confrontation as misstatements of the facts and expressions of personal opinion. See sections II (A) (3, 4), above.

- U.S. v. Donato, 99 F.3d 426, 432 (D.C. Cir. 1997) ("[I]t is clear that it is error for a prosecutor to mischaracterize evidence...").
- State v. Cyty, 50 Nev. 256, 259, 256 P.2d 793, 794 (1927) ("Courts have uniformly condemned as improper statements made by a prosecuting attorney, which are not based upon, or which may not fairly be inferred from, the evidence.").
- SCR 172 (a) (a lawyer "shall not knowingly make a false statement of material fact...").
- ABA Standards for Criminal Justice, Standard 3-5.8 (a) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw."); see also Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

3. ARGUMENTS ABOUT THE DEFENDANT WHICH VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

a. Ridiculing Or Disparaging the Defendant Violates the Federal Constitution and Nevada Law.

It is improper for prosecutors to ridicule or disparage the defendant. Indeed, "the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account." U.S. v. Rodriguez-Estrada, 877 F.2d 153, 159 (1st Cir. 1989). Such comments not only violate the right to due process of law, but may also violate the rule forbidding prosecutors from asserting a personal opinion and from alluding to facts which are not in the record.

- Harris v. People, 888 P.2d 259, 263 (Colo. 1995) (en banc) (the prosecutor bears "the responsibility to refrain from improper methods calculated to produce a wrong conviction as well as to use every legitimate means to bring about a just one. The constitutional basis for this prosecutorial duty is the right to trial by a fair and impartial jury guaranteed by the Sixth Amendment to the United States Constitution...").

- Jones v. State, 113 Nev. 454, 937 P.2d 55, 62 (1997) ("[T]he responsibility of the prosecutor is to avoid the use of language that might deprive a defendant of a fair trial.").

- Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1033 (1995) (recognizing "duty ... not to ridicule or belittle the defendant or his case").

- Barron v. State, 105 Nev. at 780, 783 P.2d at 452 (same).

- SCR 173 (5) (lawyers cannot "[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.").

- ABA Standards for Criminal Justice, Standard 3-5.6 (b) ("A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury ... make ... impermissible comments or arguments in the presence of the judge or jury."); see also Standard 3-5.8 (c) ("The prosecutor should not make argument calculated to appeal to the prejudices of the jury."); Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

b. Calling The Accused An "Animal," or a Particular Animal, "Monster," "Beast," "Creature," or a "Devil" Is Improper.

It is improper to call the defendant a monster, beast, creature, devil, an "animal" or to describe him as a particular type of animal. Such improper descriptions may also constitute a comment appealing to group prejudice. See section II (B) (4), below.

- Darden v. Wainwright, 477 U.S. 168, 180 (1986) (condemning as "improper" the prosecutor's description of defendant as an "animal").

- Miller v. Lockhart, 65 F.3d 676, 683 (8th Cir. 1995) (calling defendant "mad dog" violated due process).

- Volkmor v. U.S., 13 F.2d 594, 595 (6th Cir. 1926) (ordering new trial where prosecutor

referred to defendant as "skunk," "onion," "weak-faced weasel," "cheap, scaly, slimy crook").

- Cassady v. State, 287 So.2d 254, 257 (Ala. 1973) ("[W]e agree with appellant that the prosecuting attorney should never demean a defendant by unwarranted vituperation, abuse, and appeals to prejudice in order to foster convictions upon accused. It was highly improper to refer to appellant as a demon, even though he may have possessed such evil traits of character.").
- Dandridge v. State, 727 S.W.2d 851, 853 (Ark. 1987) (calling defendant "gross animal" improper) (non-capital).
- State v. Couture, 482 A.2d 300, 317 (Conn. 1984) (holding that defendants were entitled to new trial where prosecutor, among other things, referred to them as "murderous fiends," "rats," and "creatures" which was improper), cert. denied, 469 U.S. 1192 (1985).
- People v. Caballero, 533 N.E.2d 1089, 1097 (Ill. 1989) (holding that description of defendant as "animal" was "improper" and explaining that "[w]here a prosecutor's statements in summation are not relevant to the defendant's guilt or innocence and can only serve to inflame the jury, the statements constitute error") (non-capital).
- People v. Williams, 425 N.E.2d 1321, 1324 (Ill. App. 1981) (calling defendants "disgusting animals" and "beasts" "reach[ed] the bounds of propriety" and constituted error) (non-capital).
- State v. Blanks, 479 N.W.2d 601, 603 (Iowa 1991) (reversing conviction because prosecutor referred to the movie, "Gorrillas in the Mist," in a case of black man accused of assaulting white woman which "can be interpreted by the jury as having racial overtones. Additionally, the comparison of a defendant to gorillas, apes, other animals or other demeaning descriptions by itself may constitute reversible error.") (non-capital).
- Sanborn v. Comm., 754 S.W.2d 534, 544 (Ky. 1988) (emphasizing that "[t]here is no place in argument for scurrilous and degrading terminology" in holding that it was improper to characterize defendant as "black dog of the night," "wolf," "monster," and "coyote that roamed the road at night hunting women to use his knife on," and, combined with other forms of misconduct, required new trial) (non-capital).
- State v. Wilson, 404 So.2d 968, 971 (La. 1981) (explaining that, where defendants were black and jurors all white, "the repeated references to ... 'animals' as a description of the

defendants were obviously intended to appeal to racial prejudice, as they had no relevance to the elements of the crime of murder with which defendants were charged, and did not tend to enlighten the jury as to a relevant fact").

- Walker v. State, 709 A.2d 177, 185 (Md. App. 1998) (holding that prosecutor committed misconduct by calling defendant an animal and emphasizing that "[n]ot only is it inappropriate to refer to a defendant in a criminal case as 'an animal,' it may be argued that such a strategy, in some instances, could be counterproductive should the jury view the State as engaging in a personal contest with the defendant. It is incumbent upon the People's representative to maintain an air of dignity and stay above the fray.") (non-capital).
- Comm. v. Collins, 373 N.E.2d 969, 973 (Mass. 1978) (explaining that it "was clearly an impermissible excess" for prosecutor to use the term "animal," which jurors might have understood to refer to the defendant).
- Jones v. State, 113 Nev. 454, 468-69, 937 P.2d at 62 (calling defendant a "rabid animal" constituted misconduct).
- Hilt v. State, 91 Nev. 654, 660, 541 P.2d 645, 649 (1975) (condemning prosecutor's remarks that "I have got dogs at home I wouldn't shoot them and leave them out in the parking lot").
- Pacheco v. State, 82 Nev. 172, 178-80, 414 P.2d 100, 103 (1966) (holding that description of defendant as "mad dog" was improper).
- State v. Jerrett, 307 S.E.2d 339, 355 (N.C. 1983) (holding that it was improper for prosecutor to state that defendant was a "disciple of Satan" and a "con man").
- People v. Burke, 566 N.Y.S.2d 169, 169 (N.Y. App. Div. 1991) (referring to accused as "predatory animal" in murder case, combined with other misconduct, required reversal of conviction); see also People v. Rivera, 426 N.Y.S.2d 785, 786-87 (N.Y. App. Div. 1980) (holding that, although defendants were conclusively shown to have committed a brutal and singularly senseless murder, convictions had to be reversed because of improper closing argument, during which prosecutor referred to defendants as "wolves of this society" and victim as "sheep" and emphasizing that "prosecutor must speak with special care to insure that the right of a defendant to

a fair trial is not destroyed. Such was not here the case. Here, the purple passages were used as a tool to inflame the passions of the jurors to the end that a conviction would be assured.").

- State v. Keenan, 613 N.E.2d 203, 208 (Ohio 1993) (by calling defendant an animal, the "prosecutor's histrionic approach to this case crossed the line that separates permissible fervor from a denial of a fair trial") (non-capital).
- Comm. v. McGeth, 622 A.2d 940, 944 (Pa. Super 1993) (reversing conviction because prosecutor "exceed[ed] reasonable latitude extended to counsel in arguing their case" when commented that "creeps like this should not be allowed to treat others like this.... We're dealing with animals..."); see also Comm. v. Lipscomb, 317 A.2d 205, 207 (Pa. 1974) (calling defendants "hoodlums" and "animals" improper and "interjected his personal belief in the guilt of the accused") (non-capital); Comm. v. Balles, 50 A.2d 729, 731 (Pa. Super. 1947) (reference to "Beasts of Belsen" improper) (non-capital).
- State v. Bates, 804 S.W.2d 868, 881 (Tenn. 1991) ("rabid dog" argument "patently improper") (capital).
- State v. Music, 489 P.2d 159, 170 (Wash. 1971) (holding that prosecutor improperly referred to the defendant in closing argument as a "mad dog" in murder trial and stressing that "[w]e do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.").
- Tompkins v. State, 774 S.W.2d 195, 218 (Tex. Crim. App. 1987) (calling defendant "animal" improper).
- State v. Brown, 853 P.2d 851, 860 (Utah 1992) ("Referring to a defendant as a "mad dog" is the type of personal invective that reflects a lack of objective detachment a prosecutor should maintain in carrying out prosecutorial responsibilities. It should not be part of the prosecutor's rhetoric on remand.") (non-capital).
- Rosser v. Comm., 482 S.E.2d 83, 86-7 (Va. App. 1997) (reversing conviction because prosecutor called shackled defendant "in every sense an animal" which "deprived appellant of the

'scrupulously fair and impartial trial' to which he was entitled.") (quotation omitted) (non-capital).

c. Calling the Defendant Evil, Sadistic, Wicked, Depraved, a Maniac, a Psychopath, a Liar, Scum, Filth, or Dirt Is Improper.

It is improper for a prosecutor to call a defendant evil, sadistic, wicked, depraved, a maniac, a psychopath, scum, filth, or dirt. Such comments may represent an impermissible assertion of a personal opinion. See section II (A) (3). Where a defendant is from a minority group, such comments are also racially and ethnically inflammatory. See section II (B) (4), below.

- Martin v. Parker, 11 F.3d 613, 616 (6th Cir. 1993) (condemning prosecutor's improper remarks that referred to accused as "dictator," a "disturbed individual," and "one of the most obnoxious witnesses you'll ever hear").
- Drew v. Collins, 964 F.2d 411, 419 (5th Cir. 1992) (calling "inflammatory" prosecutor's reference to the defendant as "sadistic killer" and to trip during which murder took place as "rolling torture chamber"), cert. denied, 509 U.S. 925 (1993).
- Floyd v. Meachum, 907 F.2d 347, 355 (2d Cir. 1990) (explaining that prosecutor's references to defendant as "liar" were "clearly excessive and inflammatory").
- Rodriguez-Estrada, 877 F.2d at 158-9 (emphasizing, in recounting prosecutor's comments that defendant was a "liar," a "crook" and that prosecutor "had the courage" to call the accused these names "that these statements were improper is so clear as not to brook serious discussion ... the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account").
- U.S. v. Prantil, 764 F.2d 548, 555 (9th Cir. 1985) (holding that prosecutor's description of defendant as "corrupt," "dishonest, sleazy, and greedy" were reversibly prejudicial and represented an assertion of personal knowledge in a testimonial, rather than an argumentative manner).
- U.S. v. Weatherless, 734 F.2d 179, 181 (4th Cir. 1984) (holding that it "well beneath the standard which a prosecutor should observe" to call the accused a "sick man" with "problems), cert. denied, 469 U.S. 1088 (1984).
- Patterson v. State, 747 P.2d 535, 537-38 (Alaska 1987) (reversing conviction because, among other errors, prosecutor referred to defendant as "crud").

- Biondo v. State, 533 So.2d 910, 911 (Fla. 1988) (holding that prosecutor's reference to the defendant as "slime" was improper).
- Green v. State, 427 So.2d 1036, 1038 (Fla. 1983) (reversing conviction after holding that prosecutor improperly referred to defendant as "Dragon Lady, beautiful, cunning, and evil" and emphasizing that "[i]t is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them. There is no reason, under any circumstances, at any time for a prosecuting attorney to be rude to a person on trial; it is a mark of incompetency to do so").
- People v. Terrell, 310 N.E.2d 791,795 (Ill. App. Ct. 1974) (concluding that prosecutor's characterization of defendant in closing argument as a "maniac" exceeded the bounds of propriety).
- People v. Nightengale, 523 N.E.2d 136, 141-42 (Ill. 1988) (reversing conviction after holding that state's attorney violated right to fair trial by telling jurors to sweep "scum" like the defendant off of the streets); People v. Hawkins, 410 N.E.2d 309 (Ill. 1980) (holding that it was improper for prosecutor to characterize the defendants as "evil men"); People v. Smothers, 302 N.E.2d 324 (Ill. 1973) (prosecutor in murder trial improperly referred to defendant in closing argument as a "sociopath").
- Bridgeforth v. State, 498 So.2d 796, 801 (Miss. 1986) (reversing in part because prosecutor characterized the defendant as "scum" that should be removed from the streets and emphasizing that "[t]here is no justification for such an argument to the jury. While an attorney has a right to argue his case a prosecutor should not indulge in personal abuse or vilification of the defendant.... The interest of the State of Mississippi is best served by the orderly rational lawful presentation of the facts and the law. That is the way the criminal justice system is designed to operate. Justice is not served by attorneys who use closing argument to express inflammatory personal ideas or engage in personal vilification. The purpose of closing argument is to enlighten the jury, not to enrage it.").
- Barron, 105 Nev. at 780, 783 P.2d at 452 (holding that it was improper to comment that "I

got some ocean front property for you in Tonopah" if jurors believed defendant's testimony).

- State v. Rodriquez, 31 Nev. 342, 102 P. 863, 864 (1909) (explaining that "we are of the opinion that [calling defendant a "macque"] unduly influenced the jury in arriving at their verdict.").

- Comm. v. MacBride, 587 A.2d 792, 796-97 (Pa. 1991) (holding that prosecutor committed reversible error when he referred to defendant as "nut," which "insinuates that defendant is a mindless and dangerous individual who had no reason whatsoever for his conduct," was "stigmatizing" and tantamount to an expression of "personal opinion of defendant's character -- and, indirectly, defendant's guilt or propensity to act recklessly").

- Comm. v. Smith, 385 A.2d 1320, 1322 (Pa. 1978) (reversing denial of post-conviction relief where prosecutor told jurors that the defendant was a "vicious" criminal who would "kill for a nickel," explaining that it is impermissible for prosecutor to assert personal belief as to defendant's guilt).

- State v. Moss, 376 S.E.2d 569, 574 (W. Va. 1988) (trial judge reversibly erred in first-degree murder case by failing to intervene in the prosecutor's closing argument and correct improper description of the accused as a "psychopath" with a "diseased criminal mind").

d. Comparing the Defendant to Notorious Figures is Improper.

It is improper for a prosecutor to compare the defendant to a notorious figure; it is thus impermissible to compare him to terrorists, murderers, movie characters, and so forth. Such comments can also constitute impermissible appeals to racial, ethnic, and other group prejudices. See section II (B) (4), below. They also constitute improper assertions of personal opinion, see section (11)(A)(4), above, and references to facts outside the record, see section II (A)(5).

- Young v. Bowersox, 161 F.3d 1159, 1161 (8th Cir. 1998) (calling "improper" prosecutor's comparison of defendant's crime to other murders which the court remarked "invited the jury to rely on the prosecutor's personal opinion about the relative coldness of this crime and compared the circumstances of this crime to other crimes that were not in the record").

- Martin v. Parker, 11 F.3d 613, 616 (6th Cir. 1993) (per curiam) (ordering habeas corpus relief in part because of highly improper comparisons by prosecutor of defendant to Hitler and a

dictator).

- U.S. v. North, 910 F.2d 843, 895 (D.C. Cir. 1990) (holding that prosecutor's comment that compared defendant's strategy to that of Adolf Hitler was "[u]nquestionably inflammatory"), cert. denied, 500 U.S. 941 (1991).
- Newlon v. Armontrout, 885 F.2d 1328, 1341 (8th Cir. 1989) (affirming grant of habeas corpus writ where prosecutor compared the defendant to Charles Manson in violation of the Constitution), cert. denied, 497 U.S. 1038 (1990).
- U.S. v. Steinkoetter, 633 F.2d 719, 720-21 (6th Cir. 1980) (holding that the comparison by prosecutor of accused to Pontius Pilate and Judas Iscariot warranted reversal of conviction).
- Steele v. U.S., 222 F.2d 628 (5th Cir. 1955) (referring to defendant as "doctor Jekyll and Mr. Hyde" as well as "cunning," "crafty," and "smart," held improper and reversibly prejudicial).
- Lee v. Bennett, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (condemning as "completely irrelevant or totally unsupported by the evidence," in granting habeas corpus writ, prosecutor's remark that victim's mental state was similar to that of "our flyers shot down over Iraq and captured"), aff'd, 104 F.3d 349 (1996).
- People v. Bedolla, 94 Cal.App.3d 1, 8, 156 Cal.Rptr. 171 (Cal. Ct. App. 1979) (condemning prosecutor's comparison of defendant's actions with those of Hitler's Brown Shirts, Mussolini's loyalists in Italy, and Tojo's in Japan, the Ku Klux Klan, and George Lincoln Rockwell's people).
- Harris v. People, 888 P.2d 259, 263 (Colo. 1995) (ordering new trial in spite of failure to object where prosecutor compared defendant to Saddam Hussein soon after President announced military strikes against Iraq).
- Mathis v. U.S., 513 A.2d 1344, 1348 (D.C. 1986) (holding that repeated reference to defendant as "the Godfather," had "strong prejudicial overtones," and along with other misconduct, constituted reversible error).
- Comm. v. Graziano, 331 N.E.2d 808, 812-13 (Mass. 1975) (holding that repeated references to one or both defendants as "Al Capone," constituted reversible error because "those references were calculated to appeal to prejudice based on national origin, and thus 'to sweep

jurors beyond a fair and calm consideration of the evidence'").

- Browning v. State, 104 Nev. 269, 272, 757 P.2d 351, 353 (1988) (admonishing the prosecutor for referring in argument to the horror movie, "Friday the 13th," which the court explained "served no purpose other than to divert the jury's attention from its sworn task").
- Flanagan v. State, 104 Nev. 105, 110, 754 P.2d 836, 839 (1988) (labeling, in ordering a new sentencing hearing, "patently prejudicial" and "serv[ing] to divert the focus of the juror's attention" the prosecutor's comments about a murderer who had no connection to the defendant), vacated on other grounds, 504 U.S. 930 (1992).
- Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1129 (1985) (condemning the prosecutor's references to a notorious inmate), cert. denied, 486 U.S. 1036 (1988).
- Comm. v. Valle, 362 A.2d 1021, 1023 (Pa. 1976) (holding that defendant was entitled to new trial because prosecutor remarked in closing that defendant was "vicious" and was an "Al Capone").

e. Calling the Defendant a "Professional Criminal" is Improper.

It is improper for a prosecutor to refer to the accused as a "professional criminal."

- U.S. v. Blakey, 14 F.3d 1557, 1560 (11th Cir. 1994) (ordering new trial because prosecutor committed reversible error by referring to the defendant as "a professional, professional criminal").
- Hall v. U.S., 419 F.2d 582, 587 (5th Cir. 1969) (reversing conviction after holding that it was misconduct to refer to defendant as "hoodlum," explaining that "[t]his type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises--succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government").
- Cox v. State, 465 So.2d 1215, 1216 (Ala. 1985) (reversing conviction after holding that repeated references to defendant as "bad boy in the community" "constituted a direct attack on the character of the appellant and the remark was highly improper in light of the fact that there had ben no attempt by the appellant to present evidence of his good character").
- Ellis v. State, 254 So.2d 902 (Miss. 1971) (holding that prosecutors cannot refer to

defendant as a "professional criminal" where there is no proof in the record to that effect).

- State v. Teeter, 65 Nev. 584, 200 P.2d 657, 686 (1948) (holding that it was improper to refer to defendant as a "hoodlum").
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (c), 3-5.8 (d).

f. Suggesting that the Defendant Poses a Threat to Society or to Individual Jurors is Improper.

A prosecutor may not tell jurors that the person on trial is a threat to society in general or to jurors in particular. Such comments can also be racially inflammatory. An academic study reports that 57.9% of the jurors he questioned were more likely to vote for death if they thought that the defendant might present a danger to society. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1559 (1998). Since jurors will likely be influenced by a prosecutor's improper suggestion that the defendant will pose a future threat unless he is found guilty and executed, this Court must prevent the prosecutor from making such comments. See section II (B) (4), below.

- Darden, 477 U.S. at 180 (condemning as "improper" comment that "implied that the death penalty would be the only guarantee against a future similar act").
- Commonwealth of the Northern Mariana Islands v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992) (reversing conviction because prosecutor's remark that if jurors acquitted him, he would follow them out of the courtroom and retrieve the gun, denied him his right to a fair and impartial jury), overruled on other grounds by George v. Camacho, 119 F.3d 1393 (9th Cir. 1997).
- Rodriguez v. Peters, 63 F.3d 546, 566 (7th Cir. 1995) (condemning as "inflammatory" and "improper" the prosecutor's remark that the defendant would "scurr[y] off into the night to do it again").
- Tucker v. Kemp, 762 F.2d 1496, 1508 (11th Cir. 1985) (holding that prosecutor made improper comment emphasizing to jurors the importance of their decision and that they were last line of defense since it implied that they were the only ones who could stop him from killing again).

- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (ordering habeas relief because of prosecutorial misconduct, including "[h]ighly inflammatory and wholly impermissible appeal to racial prejudice" in which prosecutor told jurors that "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know. And maybe the next time he'll use the knife").
- Russell v. State, 233 So.2d 154, 155 (Fla. App. 1970) (reversing and remanding after finding that the district attorney's comment that if the defendant was not convicted there would be "people getting stabbed all over" the region was highly prejudicial and required a new trial).
- Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (calling "clearly inflammatory" and stating that "we admonish the prosecutor for suggesting that Jones' violent tendencies could be visited upon individual jurors").
- McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984) (reversing and remanding for new trial where prosecutor suggested to jurors that if they acquitted him, he would rape again, saying, "these comments [were] exceedingly improper in and of themselves").
- Cosey v. State, 93 Nev. 352, 354, 566 P.2d 83, 85 (1977) (condemning as "improper" comment that "[i]f you cut [the defendant] loose, you are going to be cutting loose a person who is going to be out there to rob you or I.").
- Lime v. State, 479 P.2d 608, 609 (Okl. Crim. 1971) (holding that it was reversible error for prosecutor to tell jurors that if they did not convict "there will be somebody else's relative that will be killed by these two men within I will say, a year or two").
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (c), 3-5.8 (d).

g. Referring to the Defendant's Gang Involvement Violates The U.S. Constitution and Nevada Law.

A prosecutor may not refer to a person's gang involvement when gang involvement is not relevant to the proof of the charged offense. Such comments both violate the rule against referring to facts outside the record and can be racially or ethnically inflammatory. See section II (B) (4), below.

- U.S. v. Williams, 496 F.2d 378, 384 (1st Cir. 1974) (prosecutor's comment that he did not know the names of "characters of the underworld" was "utterly unacceptable" and "inconsistent with 'the dignity of the government' and cannot be permitted") (quotation omitted).
- McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984) (reversing the conviction where the prosecutor called the defendant an "Aryan warrior," since "[t]hese comments were completely irrelevant to the issues in this case, and could only have impermissibly served to inflame the emotions of the jury, therefore clearly constituting misconduct on the prosecutor's part").
- People v. Billingsley, 425 N.Y.S.2d 139, 141 (N.Y. App. Div. 1980) (holding that new trial was required where prosecutor commented that during the defendant's confession, "[t]hey had big bright lights shining on his face. Just like we see in the movies with all the gangsters," which the court deemed an extremely prejudicial use of the gangster idiom).
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (c), 3-5.8 (d).

h. Referring to Prior Convictions Violates the U.S. Constitution and Nevada Law.

A prosecutor may not refer to the defendant's prior convictions which are not in evidence or suggest in any way to the jury that the defendant has a criminal record.

- Stewart v. Duckworth, 93 F.3d 262, 267 (7th Cir. 1996) (holding that it was improper to refer to past convictions).
- U.S. v. LeQuire, 943 F.2d 1554, 1571 (11th Cir. 1991) (holding that prosecutor's elicitation of testimony about defendant's prior convictions was reversible error), cert. denied, 505 U.S. 1223 (1992).
- Witherow v. State, 104 Nev. 721, 723, 765 P.2d 1153, 1154 (1988) (reversing the conviction because of the prosecutor's references to the defendant's relationship with inmates while he was in prison and to his filing a habeas petition, explaining that "[r]eference to prior criminal history is reversible error.").
- McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984) (explaining that the

prosecutor's remarks about defendant's felony convictions were a "highly improper use of character evidence.").

- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (c); 3-5.8 (d).

4. ARGUMENTS BASED ON GROUP PREJUDICE VIOLATE THE UNITED STATES CONSTITUTION AND NEVADA LAW.

"A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991). Such comments not only violate the right to due process of law, but also, as the federal court explained in Lee v. Bennett, 927 F. Supp. 97, 101 (S.D.N.Y. 1996), aff'd, 104 F.3d 349 (1996), "[d]eliberate injection of extrinsic or prejudicial matter which has no relevance to the case and no basis in the evidence is not an appropriate element of a prosecutor's summation because it impinges on the jury's function for determining guilt or innocence." The American Bar Association has similarly condemned such arguments, providing in one of its standards that "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury," and elaborating:

> Remarks calculated to evoke bias or prejudice should never be made in a court by anyone, especially the prosecutor. Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence.

American Bar Association Standards for Criminal Justice, Standard 3-5.8. The National District Attorneys Association also states that it is impermissible for prosecutors to make "prejudicial or inflammatory argument..." National Prosecution Standards, Rule 6.5 (g) (5). Such comments may also violate the rule against singling out jurors. See section II (B) (10) (d), below.

Arguments explicitly or implicitly urging the jury to make a finding of guilt, or to impose punishment, based on group bias violate the defendant's right to equal protection of the laws under the State and Federal Constitutions. U.S. Const. amend. XIV; Nev. Const. Art. 4 § 21.

a. Comments, Whether Explicit or Veiled, About Race Violate the U.S. Constitution and Nevada Law.

A prosecutor may not make a comment which appeals to the racial prejudices jurors may hold. A recent study about the reactions of jurors to certain factors highlights the need for prosecutors to refrain from, and for courts to prevent, improper comments about race. Jurors take into account the race of an accused in deciding at sentencing whether aggravating factors, like future dangerousness, exist. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1560 (1998). When prosecutors make comments appealing to racial prejudice, they evoke or reinforce any racial prejudice jurors may hold and confirm in their minds that race is a proper consideration at a capital trial. Comments referring to race, whether explicit or veiled, thus compromise the accused's right to a fair trial and to equal protection of the laws.

- U.S. v. Richardson, 161 F.3d 728, 735 (D.C. Cir. 1998) (reversing the conviction where prosecutor attempted to rebut defense of misidentification by stating to predominantly black jurors "we don't all look alike, ladies and gentlemen," which court held was attempt to appeal to racial prejudices of jurors).
- U.S. v. Cannon, 88 F.3d 1495, 1502-03 (8th Cir. 1996) (holding that it was reversible error for prosecutor to refer to black people as "bad people" and to comment on fact that defendants were not from region).
- U.S. v. Doe, 903 F.2d 16, 25 (D.C. Cir. 1990) (racial bias appeal in prosecutor's closing argument constitutes reversible error).
- Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (ordering habeas relief because of prosecutorial misconduct, including "[h]ighly inflammatory and wholly impermissible appeal to racial prejudice" in which prosecutor told jurors that "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know. And maybe the next time he'll use the knife").
- State v. Blanks, 479 N.W.2d 601, 605 (Iowa 1992) (holding that reference to movie, "Gorrillas in the Mist," in case of black man was racially prejudicial and emphasizing that "[r]egardless of the prosecutor's good faith intentions and what he claims to be an innocent remark, there is the prejudicial possibility that from the jury's standpoint an attempt was made to

compare the behavior of the defendant with that of apes and gorillas").

- State v. Wilson, 404 So.2d 968, 971 (La. 1981) (explaining that, where defendants were black and jurors all white, "the repeated references to ... 'animals' as a description of the defendants were obviously intended to appeal to racial prejudice, as they had no relevance to the elements of the crime of murder with which defendants were charged, and did not tend to enlighten the jury as to a relevant fact").
- Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221 (1987) (per curiam) (emphasizing that, in recounting prosecutor's comment to jurors that the defendant, a Black man, had a "preference for white women" and a "relationship" with them, "we unhesitantly declare such conduct to be prejudicially improper even if there were some logic to it and even if, as claimed, no racial bias was intended to be elicited by the remarks"), cert. denied, 507 U.S. 921 (1993).
- SCR 173(5) (a lawyer shall not "[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...").
- ABA Standards for Criminal Justice, Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."); see also Standard 3-5.8 (c) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.").

b. Comments Appealing to Gender Bias Violate the United States Constitution and Nevada Law.

A prosecutor may not appeal to gender bias in argument.

- Lee v. Bennett, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (prosecutor improperly appealed to gender bias by commenting that defense witness's testimony helped explain "why so many rapes go unreported in this country" and was "completely insensitive" because the term "insensitive" is "a current buzz word used on TV talk shows and soap operas to describe masculine reactions to complaints by women. This statement itself was an appeal to gender bias among the jurors."), aff'd, 104 F.3d 349 (1996).
- SCR 173(5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (d), 3-5.8 (c).

c. Comments Appealing to Class Bias Violate the United States Constitution and Nevada Law.

A prosecutor may not appeal to class bias.

- U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 239 (1940) ("[A]ppeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them.").
- Sizemore v. Fletcher, 921 F.2d 667, 670-72 (6th Cir. 1990) (explaining that "appeals to class prejudice must not be tolerated in the courtroom" in holding that prosecutor committed reversible error where referred to the accused's "money," "multitude of attorneys," and made the statement that the defendant "would rather kill" two people than increase their salaries).
- SCR 173 (5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (d); 3-5.8 (c).

d. Comments About Region Violate the Federal Constitution and Nevada Law.

A prosecutor may not appeal to regional prejudice.

- U.S. v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996) (reversing conviction after holding that it was improper for prosecutor to point out to jurors that defendants were not locals).

- Miranda v. State, 101 Nev. 562, 569, 707 P.2d 1121, 1126 (1985) (condemning the prosecutor's comment about the accused's Cuban nationality and his mode of entry into the U.S.), cert. denied, 475 U.S. 1031 (1986).
- SCR 173(5).
- ABA Standards for Criminal Justice, Standards 3-5.8 (d); 3-5.8 (c).

e. Comments About Religion Violate the Federal Constitution and Nevada Law.

A prosecutor may not appeal to religious authority in support of an argument. Such comment also constitutes an impermissible reference to facts outside the record.

- Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991) (affirming grant of habeas corpus writ and condemning prosecutor's "outrageous" appeals to religious beliefs and statement

that "How do you know that if you let him go this time it won't be done again? You know, Judas Iscariot was a good person, the most trusted of them all and you all know what he did.").

- Cobb v. Wainwright, 609 F.2d 754, 756 n.2 (5th Cir. 1980) (calling "clearly objectionable" prosecutor's references to the Bible to support his proposition that there was no reason to show the defendant mercy).

- People v. Wrest, 3 Cal.4th 1088, 1091, 839 P.2d 1020 (Cal. 1992) (holding that it was "improper" for prosecutor to refer to the bible for support), cert. denied, 510 U.S. 848 (1993).

- People v. Poggi, 45 Cal.3d 306, 340, 753 P.2d 1082 (Cal. 1988) (calling "inappropriate" prosecutors' statement that a higher authority would judge the defendant, that victim would testify against him, and that the defendant would suffer eternal damnation and hell).

f. Comments About Beliefs Protected by the First Amendment Violate the Federal Constitution and Nevada Law.

Arguments stigmatizing the defendant on the basis of beliefs protected by the First Amendment, or membership in unpopular organizations, when those facts are not relevant to issues presented at trial, are improper.

- Dawson v. Delaware, 503 U.S. 159, 166-167 (1992) (impermissible to admit evidence of defendant's membership in Aryan Brotherhood prison gang at sentencing, where not relevant to issues presented and defendant's abstract beliefs protected by First Amendment and not admissible to show "character").

- Keyeshian v. Board of Regents, 385 U.S. 580, 606 (1967) ("[M]ere knowing membership without a specific intent to further the unlawful aims of [Communist Party]" not adequate basis for exclusion from university employment).

- Schware v. Board of Bar Examiners, 353 U.S. 232, (1957) (previous membership in Communist Party not basis for denying admission to bar where no connection to requirement of "good moral character").

5. RIDICULING OR DENIGRATING THE DEFENSE THEORY VIOLATES THE CONSTITUTION AND NEVADA LAW.

A prosecutor may not ridicule the defense theory.

- U.S. v. Sanchez, 1999 WL 343734, at *11 (9th Cir. 1999) (holding that the prosecutor

"committed misconduct in ... denigrating the defense as a sham" and reversing the conviction).

- Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (reversing the conviction where the prosecuting attorney called the defendant's testimony "malarkey," explaining that "[t]his remark by the prosecutor violated his duty ... not to ridicule or belittle the defendant or the case").
- Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989) (recognizing a duty not to ridicule the defense theory and condemning prosecutor for telling jurors that the defense "tried to hustle you" and that if "you accept what Barbara Barron and Carol Tomlinson told you, I got some ocean front property for you in Tonopah").
- Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 629 (1979) (holding that prosecutor's comment, referring to defense theory as "red herring," was improper).

6. ARGUMENTS ABOUT WITNESSES WHICH VIOLATE THE CONSTITUTION AND NEVADA LAW.

a. Disparaging, Complimenting, or Ridiculing Defense's Expert Witness Violates the Federal Constitution And Nevada Law.

A prosecutor may not disparage or ridicule an expert witness. As the Nevada Supreme Court has explained:

> The District Attorney may argue the evidence and inferences before the jury. He may not heap verbal abuse on a witness nor characterize a witness as a perjurer or a fraud.... Such characterizations transform the prosecutor into an unsworn witness on the issue of the witnesses [sic] credibility and are clearly improper.

Yates v. State, 103 Nev. 200, 204-05, 734 P.2d 1252, 1255 (1987) (citations omitted).

- People v. McGreen, 107 Cal.App.3d 504, 514-19, 166 Cal.Rptr. 360 (Cal. Ct. App. 1980) (explaining that "character and professional assassination is misconduct" in holding that it was improper for prosecutor to suggest that defense expert was habitual liar, the subject of an ethics investigation, and prostituted his expertise for $50 per hour), overruled on other grounds by People v. Wolcott, 665 P.2d 520, 34 Cal.3d 92 (1983).
- Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1308 (1987) (admonishing prosecutor for disparaging defense's expert as one who "goes to the highest bidder.").
- Yates, 103 Nev. at 204, 734 P.2d at 1255 (condemning prosecutor's statement that expert

had "crawl[ed] up on the witness stand" and that testimony was "melarky" [sic] "an outright fraud," and that he had violated his "oath to God").

- Aesoph v. State, 102 Nev. 316, 323, 721 P.2d 379, 383 (1986) (holding that it was improper for prosecutor to compliment expert witness by saying, "you will see the definition of an expert. That was [expert witness] and that was his job here and he did it in my opinion very well...").
- Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234 (1986) (reversing and remanding for new trial in spite of failure to object in part because of prosecutorial misconduct, including disparaging and ridiculing defense expert by calling him "[t]he hired gun from Hot Tub Country. Have stethoscope, will travel.").
- National Prosecution Standards, Rule 6.5 (f) (prosecutors "should treat witnesses fairly and with due consideration .... should take no action in taking testimony of a witness to abuse, insult, or degrade the witness. Examination of a witness's credibility should be limited to accepted impeachment procedures"); see also Rule 77. 1 (providing that "[t]he examination of all witnesses should be conducted fairly, objectively, and with due regard for the reasonable privacy of witnesses").
- ABA Standards for Criminal Justice, Standard 3-5.7 (a) ("The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity ... of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.").

b. Calling Lay Witness a "Liar" Violates The Constitution And Nevada Law.

A prosecutor may not call a lay witness a "liar." Such comment is also an assertion of a personal opinion, see section II (A) (3), and of a fact outside the record, see section II (A) (5).

- Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) ("[P]revious decisions of this court clearly state that it is improper argument for counsel to characterize a witness as a liar.").
- Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) (reversing and remanding, in part because prosecutor improperly stated that witness was lying).
- Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 703 (1987) (condemning prosecutor's

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DAVID P. SCHWARTZ
Chief Deputy District Attorney
Nevada Bar #000398
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD,
#1900089

Defendant.

CASE NO: C193182

DEPT NO: XVIII

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 28 day of July, 2003, by facsimile transmission to:

PUBLIC DEFENDER
FAX#455-5112

BY M. B
Employee of the District Attorney's Office

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NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
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Attorney for Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD,
#1900089

Defendant.

CASE NO: C193182

DEPT NO: XVIII

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through DAVID P. SCHWARTZ, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. NRS 200.033(12) The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

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2. NRS 200.033(5) The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

DATED this 23 day of July, 2003.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
DAVID P. SCHWARTZ
Chief Deputy District Attorney
Nevada Bar #000398

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing NOTICE OF INTENT TO SEEK DEATH PENALTY is hereby acknowledged this _____day of July, 2003.

PUBLIC DEFENDER
ATTORNEY FOR DEFENDANT

BY _____
309 S. Third Street #226
Las Vegas, Nevada 89101

mb

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*** TX REPORT ***
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DAVID ROGER
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD,
#1900089

Defendant.

CASE NO: C193182

DEPT NO: XVIII

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 28 day of July, 2003, by facsimile transmission to:

PUBLIC DEFENDER
FAX#455-5112

BY M. B.
Employee of the District Attorney's Office

CASE NO. C193182

DEPT. NO. 3

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Shirley A. Longsworth

CLERK

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	Case No. 03F09137X
	)	
-vs-	)	
	)	
GLENFORD ANTHONY BUDD,	)	
	)	
Defendant.	)	

REPORTER'S TRANSCRIPT
OF
PRELIMINARY HEARING - VOLUME II

BEFORE THE HONORABLE TONY L. ABBATANGELO
JUSTICE OF THE PEACE

Wednesday, June 25, 2003, 10:00 a.m.

APPEARANCES:

For the State: DAVID SCHWARTZ, ESQ.
TALEEN PANDUKHT, ESQ.
Deputies District Attorney
200 So. Third Street
Las Vegas, Nevada 89155

For the Defendant: HOWARD BROOKS, ESQ.
Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155

Reported by: RENEE SILVAGGIO, C.C.R. NO. 122

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INDEX

WITNESSES ON BEHALF OF THE STATE: PAGE

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Las Vegas, Nevada, Wednesday, June 25, 2003, 10:00 a.m.

* * * * *

THE COURT: At this time, we will call Glenford Budd, who is present, in custody, 03F09137X. He is present with Mr. Brooks. The defense is ready to proceed.

And we have -- excuse me -- Miss Pandukht for the State and Mr. Schwartz for the State.

And just for the record, we've had four witnesses testify, 1 through 3, all State's exhibits, are in evidence.

And the State's next witness.

MR. SCHWARTZ: Dr. Morrell.

THE COURT: And, Dr. Morrell, please come up to the chair on my right and we will have you sworn in.

(Witness sworn.)

THE CLERK: You can be seated.

And if you would state your first and last name and spell them both for the record, please.

THE WITNESS: My name is Rexane Morrell; R-e-x-e-n-e, M-o-r-r-e-l-l.

THE CLERK: Thank you.

REXENE MORRELL

called as a witness on behalf of the State, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q By whom are you employed?

A The Clark County Coroner's Office.

Q In what capacity?

A As a medical examiner.

Q And how long have you been so employed?

A Just under two years.

Q And have you testified as an expert in the field of forensic pathology here in Clark County?

A Yes, I have.

MR. SCHWARTZ: Your Honor, I believe Mr. Brooks would stipulate to Dr. Morrell's expertise in the field of forensic pathology for the purposes of this preliminary hearing.

MR. BROOKS: That's correct, Your Honor.

THE COURT: That will be noted.

MR. SCHWARTZ: Thank you.

BY MR. SCHWARTZ:

Q Doctor, directing your attention to May the 28th, 2003, did you have occasion to perform an autopsy on an individual by

the name of Jason Moore?

A Yes, I did.

Q And during the course of the autopsy on Mr. Moore, did you perform an external examination on the body?

A Yes, I did.

Q And what were the significant findings from that examination?

A The significant findings were that this was a 19 year old male that had been shot three times in the back.

Q In connection with that autopsy, did you perform an internal examination on Jason Moore?

A Yes, I did.

Q And what were the significant findings from your internal examination?

A The significant findings consisted of the wounds and injuries associated with the -- the three gunshot wounds; and there was no other significant medical problems.

Q Okay. Now, based upon the autopsy you performed, as well as your expertise in the field of forensic pathology, do you have an opinion as to Jason Moore's cause of death?

A Yes.

Q And what is your opinion on that?

A He died of multiple gunshot wounds.

Q Let me direct your attention again to that same date of May the 28th, 2003.

Did you perform a second autopsy that day?
A Yes, I did.
Q And was that autopsy on an individual by the name of DaJon Jones?
A Yes, sir.
Q Okay. During the course of the examination of DaJon Jones, did you perform an external examination on his body?
A Yes, I did.
Q And what were the significant findings from that examination?
A DaJon was shot twice in the left neck -- or the left side of the neck.
Q In your opinion, were both or either of those two gunshot wounds fatal?
A Yes, sir.
Q Both or --
A Oh, I'm sorry.
One of the wounds of the neck entered his head and that was a fatal wound. The second wound did damage some significant vessels; however, with treatment, those could have been survivable.
Q Based upon your examination, your external examination, were you able to tell whether or not those two gunshot wounds were at close range?
A Yes, they were.

Q Okay. And based -- during the examination of DaJon Jones, did you perform an internal examination?
A Yes, I did.
Q And what were your findings from the internal examination?
A The internal examination, I found the injuries associated with the two gunshot wounds and no other significant findings.
Q Based upon the autopsy you performed on DaJon Jones, what is your opinion regarding his cause of death?
A He died of multiple gunshot wounds.
Q And on that same day of May the 28th, 2003, did you perform yet a third autopsy?
A Yes, I did.
Q And was that on an individual identified to you as Derrick Jones?
A Yes.
A Yes, sir.
Q During the course of Derrick Jones' autopsy, did you perform an external examination on his body?
A Yes, I did.
Q And could you relate to the Court the significant findings from that examination.
A Derrick was shot seven times.
Q Okay. Did you also perform an internal examination on

the body of Derrick Jones?
A Yes, I did.
Q And what were your significant findings from your internal examination?
A The significant findings were the injuries that I found associated with the seven gunshot wounds; and there were no other significant findings.
Q And based upon the autopsy on Derrick Jones, do you have an opinion as to his cause of death?
A Yes, I do.
Q What is that opinion, Doctor?
A Derrick Jones died of multiple gunshot wounds.
MR. SCHWARTZ: Thank you.
I would pass the witness, Your Honor.
THE COURT: Cross.

CROSS-EXAMINATION

BY MR. BROOKS:
Q Dr. Worrell, you did the autopsies yourself?
A Correct.
Q Did someone assist you?
A Yes.
Q Who assisted you?
A Let me -- I'm having trouble reading my writing. I believe it was the tech Danny. It's either Darrell or Danny that

day. I'd have to check my records at the office.
Q What were Darrell's and Danny's last name?
A It's Darrell Cannar and Dan Price, I believe.
Q Price?
A Price.
Q Now, did you do these three autopsies one after another?
A Yes, I did.
Q How long does it take to do an autopsy for one body?
A That's real variable. Derrick Jones took several hours; I believe four or five hours on that case.
I can look at the times and tell you pretty specific. I did Jason Moore at 8:30.
Q 8:30 a.m.?
A Correct.
I did Mr. Jones at 11:30.
Q Is that DaJon Jones --
A Correct.
Q -- or Derrick Jones.
DaJon Jones.
A So Eric Moore took three hours.
Q Eric Moore?
MR. SCHWARTZ: We're getting the names mixed up here.
THE WITNESS: Oh. Okay.
THE COURT: Yeah. I have Jason Moore and Derrick Jones.
THE WITNESS: Right. Jason Eric Moore was the first

case I did that day. I began the autopsy at 8:30.
BY MR. BROOKS:
Q Okay.
A I finished it at 11:30; at which time, I began DaJon Jones at 11:30. I finished him at 1:30, at which time I began, at 1:30, the autopsy on Darrick Morgan Jones and I believe I finished him around five o'clock.
Q Was anyone else present besides yourself and either Darrell Cannar or Danny Pace -- or Price?
A The Las Vegas Metropolitan homicide detectives are always present during the autopsies, as well as their crime scene analysts are doing their things in the next room associated with these cases.
Q Were there two detectives with you during the entire autopsies, during all the autopsies?
A I don't recall.
Q Do they come and go during the autopsies?
A I would not remember. I was focusing on my work.
Q Let's go -- let's go first to the autopsy of Jason Moore.
You have described he was shot three times in the back, correct?
A Correct, yes, sir.
Q Are there any exit wounds?
A Yes. The gunshot wound on the back of the head, the

first one in my report labeled number one, was a through and through gunshot wound, so it was associated with an exit wound, as well as the second gunshot wound I described to the neck, there was an exit wound.
Q Okay. I'm sorry. You got a shot to the neck here as well?
A Well, he was shot three times.
Q Okay.
A Once in the back of the head --
Q Okay.
A -- which exited the body.
Q Okay.
A A through and through wound is what we call it.
He was shot in the right neck. That exited the body.
And then he was shot in the right shoulder and that bullet remained in his body.
Q Could you describe the trajectory of the -- of where he was shot in the right neck?
A I will need to refer to my report for that.
Q Yes, go right ahead, please.
A The wound course was front to back, right to left and downward.
Q Okay. I apologize. Did I misstate that?
He was shot at -- this first wound is in the back and exits out the right neck; is that correct?

A No. The entrance wound is on the right side of the neck.
Q And it's the back side of the neck, not the front, correct?
A No, it's the front. The back of the right neck to me is behind the midline -- you know, the side. It's to the front of the right neck.
Q Okay. That's the entrance?
A Correct.
Q And exits out the back of the neck?
A No. It exits out the back of the chest. This wound entered his right neck, crossed the midline in a downward pattern, entered the left chest cavity and exited his back.
Q Okay.
A So it was front to back, right to left and downward.
Q Okay. Was that particular wound a survivable wound?
A Again, I'll refer to what it -- the structures damaged in the path. This was a lethal wound.
Q And why was it a lethal wound?
A It transected the trachea and the apex, which is the upper part of the left lobe of the lung. So his airway was transected, no air in, and there was a lot of blood dumping into that from the lung.
Q Describe the next wound that you examined of these three.

A We didn't discuss the one that I labeled as number one.
Q Okay. Let's talk about number one.
A Okay. Number one wound entered the back of the head.
Q Where on the back of the head?
A On the left back of the head.
Q The trajectory?
A Back to front, left to right and upwards.
Q Where did it exit, if it exited?
A It did exit the left top of the head through the frontal bone.
Q You describe a bullet as number two.
Is that the one we've already talked about or not?
A The wound that I labeled as number two in my report is the one to the right neck that we discussed.
Q Okay. Let's talk about number three then.
What happened on number three?
A Number three entered the back of the right shoulder, passed behind the shoulder joint, went into the body, passing through the -- the vertebral column and transected his spinal cord.
Q Did that wound exit out -- did that bullet exit out?
A Yes, that -- no, I'm sorry. That one, I recovered the bullet within the musculature of the left neck or within the muscles of the left neck.
Q Was that a survivable wound?

Page 14 of 50

A I did not note in my report exactly the location where the cord was transected, so it may have been survivable; however, he would have been paralyzed. But it also could have been fatal. I didn't note that.

Q Did you do a toxicology report on Jason Moore?

A Yes, I did.

Q What were the results of that?

A His toxicology was negative, except for marijuana.

Q And how much marijuana was in the -- was this from the eyes or the blood or the urine?

A Let's see what they tested.

This was in a blood screen and it's a qualitative test, not a quantitative.

Q What does that mean exactly?

A It's there, but we don't measure how much.

Q Do you have the ability to measure how much?

A I believe the lab can do that. We normally don't measure marijuana.

Q So, basically, you can say that marijuana was there, but you don't know how much?

A Correct.

Q Okay. Was there any stippling on the body of Mr. Jason Moore?

A No.

Q None at all?

Page 15 of 50

A No.

Q Was there any -- did you have a chance to examine the clothes at all?

A No. The crime scene analyst for the Las Vegas police department recovered his clothes.

Q And you are not aware of whether there was any powder on the clothing at all?

A No.

Q Was there anything else on this body that indicated to you anything regarding distance in terms of the gunshots?

A Regarding distance, they weren't contact range wounds and they weren't close, so --

Q When you say they're not contact wounds, what exactly are you saying there?

A The gun was not put right up to the body and pressed against the skin. The gun was not within 18 to 24 inches, because I had no stippling on the body.

However, you've mentioned the the clothing. So examination of the body tells me that the gunshot wounds were greater than 24 inches.

Q Is there anything, in terms of the exit wounds, that suggests to you whether the person was up against a surface?

A No.

Q Let's go on to Mr. DaJon Jones.

You've testified that he was shot two times in the left

Page 16 of 50

neck; is that correct?

A Correct.

Q Did you -- did you label those with a number, each of those wounds?

A Yes, I did.

Q What would those numbers be, one and two?

A One and two, correct.

Q Okay. Could you describe number one, please.

A Number one was a lethal wound into the left neck that transected the spinal cord at the level it just exits the head. The wound then passed upward into his brain, caused significant damage to the cerebellum, which is the back part of the brain, as well as the cerebrum.

Q I'm sorry. Could you describe the trajectory on that.

A This one was left to right, front to back and upward.

Q And the bullet in this case remained lodged in the brain?

A No, it did not.

Q There is an exit wound?

A Yes.

Q Where is that exit wound, please?

A The exit wound is on the right top of the head.

Q Can you describe wound number two.

A Wound number two was also in the left side of the neck, very close to wound number one. This was also a through and

Page 17 of 50

through gunshot wound.

There was an exit wound. This wound -- this bullet passed through the internal/external jugular veins, which are large veins -- oh, I'm sorry -- yes, the internal/external jugular veins and then exited the body. That was the only structures that it -- significant structures that it went through.

Q What is the trajectory of this bullet?

A Left to right, front to back directly.

Q Okay. And up or down?

A Direct -- there was no --

Q Just level?

A -- discernible up or down; just straight through.

Q Again, was there any stippling on this body?

A Yes, there was.

Q Can you describe the stippling?

A The stippling -- the wounds were very close together, so how I described the stippling was I measured from the center point between the two wounds and measured every direction of the stippling. It went as far as 4.5 inches inferiorally and 3.7 inches upward, 3.5 towards the midline and 1.9 inches laterally.

So it formed a fairly large pattern around the wound -- wounds.

Q Now, based on your experience and training, can you estimate how far away the gun was that fired that -- those two

bullets?
A Less than 24 inches.
Q But this is not a contact wound, is it?
A No.
Q In fact, by having the wider pattern, it would suggest that it was at least some distance away, somewhere between zero and 24 inches?
A Correct.
Q Okay. Did you do a toxicology report on DaJon Jones?
A Yes, I did.
Q What were the results of that?
A His results are negative, except for the presence of marijuana.
Q And, again, you are not able to tell how much marijuana?
A No.
Q Let's go to Mr. Derrick Jones.
You described seven entry gunshot wounds; is that correct?
A Correct.
Q And I'm assuming that you labeled those with numbers?
A Yes, I did.
Q One through seven?
A Correct.
Q Let's talk about wound number one.
A Wound number one entered his head on the left forehead.

It exited just to the left of that and a portion of that bullet fragment transversed down the side of his face and exited the front of his face. So there were actually two exit wounds associated with this gunshot wound.
Q Can you describe the trajectory of this bullet that entered the head?
A Right to left and downward.
Q And, essentially, are we saying that the bullet, once it entered the head, split in two?
A Correct. It came at such an angle to the body that it actually caused a continuous entrance and exit wound within the bone of the skull. There is no separation between the two.
And we can tell that by, certainly, characteristics be the wound of the bone. With that bone involvement, it caused a -- a fragment of that bullet to separate off and transverse down.
I recovered a fragment from that -- from that bullet at a different location on his face; and I could tell that by tracking the wound of hemorrhage to see that it came from that same entrance.
Q Describe wound number two, please.
A Wound number two entered the right side of the head, just in front of the ear -- excuse me -- wound number one was a face wound.
Wound number ten -- two entered just the right side of

the ear, crossed the midline, heading downward, and I recovered a bullet in the soft tissues of the chest.
Q Was that a fatal wound?
A Yes.
Q Can you describe wound number three, please.
A Number three was a through and through gunshot wound of his left ear.
Q Where on the left ear did it enter?
A I can't point -- the external ear, the front of the ear, the lower portion; and exited the back of the ear. This was not a fatal wound.
Q I'm assuming there was no discernible trajectory for such a small wound?
A It was front to back directly.
Q Just front to back; not up or down?
A No.
Q Okay. Can you describe wound number four, please.
A Number four was a graze wound on the left shoulder.
Q Where on the left shoulder?
A I would have to refer to the pictures. I didn't measure it.
Q Okay. You say graze. It doesn't even enter the body, correct?
A Well, it takes off the surface of the skin and the -- but it was just barely grazed the -- the skin. I mean, that,

technically, is entering.
Q Okay. Can you describe wound number five.
A Wound number five was to the right upper back. That wound came at such an angle that it went just under the skin, into the fat, transversed along the fat and exited the body -- I'm trying to think right or left -- on the right back as well.
Q Can you describe the trajectory on that?
A This one is right to left and downward.
Q Can you describe wound number six, please.
A Number six was a through and through gunshot wound of the right hand.
Q Where on the right hand?
A It entered the back of the right hand at the base of the first finger; and it exited the front of the right hand at the base of the thumb.
Q Would you characterize this as a defensive wound?
A Could you be more specific?
Q If you can't, that's fine.
I mean, sometimes coroners will say that wounds are defensive wounds. If you -- if you don't believe that or you don't have an opinion on that, that's fine.
A There were some interesting characteristics about this wound. There was stippling with the wound, meaning that it was within 24 inches, but the entrance wound was on the -- the back of the hand.

I would like to see that on the front if I was blocking, you know, but that would be speculation.

Q I understand.

So how much stippling was there on the hand itself?

A It extended 0.6 inches medially and laterally 1.2 inches, so not -- not very large compared to what we saw in the other case; however, the hand is a small area.

Q Now, would this suggest to you that the gun was closer -- from a zero to 24 inch range, would that suggest the gun is possibly closer to the zero than it is to the 24, based on the small amount -- small distance of spread of the stippling?

A That would have to be up to ballistics. I couldn't answer that question.

Q Okay. Was that, what, number six or seven?

A That was number six.

Q How about number seven?

A That was a gunshot wound to the back of the left arm. It was a through and through gunshot wound.

Q Can you describe the trajectory on that?

A No, I cannot. This wound -- I made a comment in my report that examination of these wounds, I could not determine, with a reasonable degree of medical certainly, which was the entrance and which was the exit. So I could not come up with any type of trajectory.

Q You talked about stippling on number six.

Was there stippling on number seven?

A No, there was not.

Q Was there stippling on number five?

A No. The only wound with stippling was the one to the hand.

Q Okay. Was there a toxicology report on Mr. Derrick Jones?

A Yes, there was.

Q What were the results of that?

A His toxicology was negative, except for the presence of marijuana.

Q And, again, you are not able to say how much marijuana?

A No, sir.

Q And does this toxicology report cover alcohol?

A Yes, it does.

MR. BROOKS: I will pass the witness.

THE COURT: Redirect.

MR. SCHWARTZ: No redirect, Your Honor.

Thank you.

THE COURT: And, Doctor, thank you for testifying. Please don't discuss your testimony with anybody until the end of the preliminary hearing.

And you are free to go.

THE WITNESS: Thank you.

THE COURT: You are welcome.

State's next witness.

MS. PANDUKHT: The State calls Celeste Palau.

THE COURT: Come up this way, please.

(Witness sworn.)

THE CLERK: State your first and last name and spell them both for the record, please.

THE WITNESS: Celeste Palau; C-e-l-e-s-t-e, P-a-l-a-u.

THE CLERK: Thank you.

CELESTE PALAU

called as a witness on behalf of the State,
having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MS. PANDUKHT:

Q Do you know a person by the name of A.I.?

A Yes.

Q Is A.I. in the courtroom today?

A Yes.

Q Could you point to him -- could you point to him and tell me something he's wearing today.

A He is in blue.

Q I'm sorry?

A In blue.

Q In blue.

Is he seated at defense table, directly in front of you?

A Yes.

Q Okay. I'm just going to ask if you could keep your voice up and speak into the microphone. Everything that you say is going to be transcribed and we need to get it on record.

MS. PANDUKHT: Your Honor, may the record reflect that the witness has identified the defendant Glenford Budd.

THE COURT: That will be noted.

BY MS. PANDUKHT:

Q How do you know the defendant?

A Just by living in the apartments and him knowing some of the people I know.

Q What apartments do you live at, the address?

A 2895 East Charleston Boulevard.

Q Is that the Saratoga Palms Apartments?

A Yes.

Q Do you know A.I. lives in those apartments?

A Yes.

Q Where does he live or who does he live with?

A I have known that he stayed with a family member.

Q Okay. Now, Saratoga Palms Apartments has how many floors in general in the buildings?

A Two.

Q Do you live on the first or second floor?

Page 26 of 50

A Second.
Q I'd like to ask you about an apartment that is located across from yours.
Are you familiar with who lives in Apartment Number 2068?
A Yes.
Q Who lives in that apartment?
A I have known for the boys to live there and their mom.
Q Do you know any of their names?
A No.
Q Okay. Now, the boys that you have talked about, how did you know them?
A By other people knowing them and seeing them around.
Q So would you characterize yourself as a close friend of those boys?
A No.
Q Acquaintances of the boys?
A Just walking around, passed by each other, something like that.
Q Okay. Now, I'd like to ask you when -- the date of May 26th, a couple weeks ago, around Memorial Day, May 26th, 2003, do you remember what you were doing late that evening?
A I was outside, as usual; every day thing.
Q When you are talking about outside, what are you talking about specifically?

Page 27 of 50

A Down my steps, around my car area, like that.
Q Now, before midnight on May 26th, 2003, were you on your patio at all?
A Yes.
Q About what time were you on your patio when something unusual occurred?
A About five minutes.
Q Do you know what time that was at night?
A I thought it was around maybe 10:45, but I'm not for sure.
Q Were you on your patio with anyone else?
A Yes, my friend.
Q Now, on your patio, somewhere around 10:45 at night, or whatever that you can remember, did you have any lights illuminating your patio?
A No.
Q Are lights normally there?
A Yeah, but people keep busting them out, so it's dark in my area.
Q So on this night, on the night of May 26th, was your light broken?
A Yes.
Q How light or dark was your patio?
A Dark, because my patio light didn't work either.
Q Now, normally, what kind of light illuminates your

Page 28 of 50

patio?
A Either my patio light or the big bright one in the middle of the two top apartments.
Q Okay. Could you describe this big bright light, where it's located?
A It's in between the two bedrooms, the master bedrooms.
Q Is it on every building?
A Yes.
Q So above Apartment Number 2068 where the three boys lived, was there a big light on that building?
A Yes.
Q On the night that I've asked about, May 26th, was that light working?
A Uh-huh.
Q How far above the apartment was that light?
A It's right by the -- the main bedroom. It's in between the two, so it's -- it's right in between.
Q How lit up did the stairs, door and patio of Apartment 2068 look?
A It was bright on the steps; and then it kind of glares onto the patio.
Q Now, how well could you see what was taking place, if anything, by the front door and by the patio?
A I could see.
Q Do you wear glasses?

Page 29 of 50

A No.
Q Now, where were you sitting on your patio, in terms of being able to look at the front of Apartment 2068?
A My chair was facing directly towards that direction.
Q About 10:45 that night, or the time that you remember, did something unusual take place on May 26th, 2003?
A Yes.
Q What happened?
A It sounded like fireworks. I thought somebody was just messing with fireworks and I looked--
Q How many noises did you hear?
A It was quite a lot.
Q Could you estimate how many?
A To me, when I heard it, it was about seven or eight times, but I don't know for sure.
Q How many times did you hear the noise before you tried to look to see where it was coming from?
A As soon as I heard it.
Q How many had you heard when you first started looking?
A I heard about -- on the sixth time that I heard it, I started looking.
Q Where did you look?
A First, I looked across the street in the Charleston Village, because I thought something was going on over there; but then something made me look the other way.

Q And what way was that?
A Towards the direction of Apartment 2068.
Q What did you see?
A When I looked over there, I saw the door open up and I saw a female and the younger -- the other boy starting to run down the steps.

And I thought they were just messing around, you know. They had balloon fights and stuff, you know, a daily thing, so I thought they were just playing around.

So I was like, oh, you know, they were just playing around, maybe they were doing fireworks, because a little bit of smoke looked like was in the apartment when the door opened up.

Q Okay.
A So I said: Oh, definitely they're doing fireworks, you know. They were playing around. But then it all changed when the other person came out.
Q Who came out?
A The defendant.
Q Where did he come out from, did you see?
A The front door.
Q What did he do?
A I didn't see anybody on the patio, so I thought the other two were just -- were just running off and playing, but they got away.

I didn't see nobody on the patio, but then he started

shooting the gun.
Q How did you know it was a gun?
A I heard it and then the -- the second time it went off, I saw him pointing it. And then I realized that somebody was on that patio and had been shot; and I didn't think nothing of it and I was like: Oh, I can't believe this.

After the third shot on the patio, he left and went down the steps, like an every day thing, just walked down and just leave.

I waited a few minutes and I told my friend I need to go over there, because I don't -- I don't know what's going on. I need to go over there.

By then, the boys from downstairs were going up there to see who -- I mean, who was it, any of them alive. And I wanted to go up there to see, you know, can any of us do anything to hold them off until people came to help them.

But they wouldn't let me up there because, by then, it wasn't, I guess, good for me to go up there and see what was going on up there.
Q I'd like to ask you a couple more questions, if I could, back a little bit about what you said.

I asked you how you knew it was a gun and you said that you heard it.

Could you describe what it looked like?
A From the view, it just looked like a small, regular gun,

like a pistol or something. But I don't know my guns, so I can't say what type of gun it was.
Q Could you tell what color it was?
A No.

(Whereupon, a sotto voce at this time.)

BY MS. PANDUKHT:
Q Now, you said that you couldn't see anybody on the floor of the patio.

Is there a wall on the patio?
A Yes.
Q And what is that wall made of? Can you see through it?
A No.
Q Is it made of --
A Like concrete, I guess. I don't know.
Q So it's a wall that you can't see through; there is no bars or anything?
A All you could see is the -- the bars on the steps and the front entry of the door, but you can't see nothing on the patio unless somebody was standing up on the patio, which I didn't see.
Q And you described A.I. as holding the gun and pointing at somebody -- or something down on the patio.
A Yes.
Q Could you describe a little bit more specifically exactly how the defendant was holding that gun and how he was

pointing it?
A He was pointing it as if -- whoever was on the patio, he was following that person as if he was trying to get away, because he went -- he was moving from angles.
Q What direction was the defendant moving from?
A When you step out the door, that was the first shot. The second shot was more going towards the corner. The third shot was by the -- the storage area.
Q Where would the storage area be in relation to the wall?
A It was in the corner of the patio, where the door is at. You have the heater or something like that.
Q So that would be the end of the patio there by the storage area?
A Yeah.
Q Did you ever see anyone, other than the defendant, come out onto that patio?
A No.
Q At the time the defendant comes out onto the patio, where was the female and the male you had seen running down the stairs? Were they still around?
A No.
Q Do you know who the male was?
A It's their brother.
Q One of the people that lives there?
A Yes.

Q Okay. Do you know who the female was?
A Yes.
Q Who is she?
A Christy.
Q Does she have a relationship to the defendant?
A From what I have heard, yeah.
Q Could you describe what she looks like?
A She -- when I saw her last, she had braids in her hair, had some little shorts on and a T-shirt and walked around.
Q Could you describe what A.I. looked like on May 26th, 2003?
A He had braids in his hair.
Q How long was his hair?
A I don't know for sure, but it was a good length, probably shoulder length or a little shorter.
Q Did he have any hair on his face?
A That I don't -- I didn't -- you know, know him that well, but -- I had seen him around, but, at that time, he had little facial hair.
Q Could you tell what the defendant was wearing this night?
A I remember like a basketball jersey; and I don't know if the shorts were blue or black, because it's at night.
Q What color was the basketball jersey, could you tell?
A It was like red and white.

Q Could you tell if there was any writing on it?
A No.
Q Do you know what A.I. stands for?
A They said Alan Iverson.
(Whereupon, a sotto voce at this time.)
MS. PANDUKHT: I'll pass the witness.
THE COURT: Cross.

CROSS-EXAMINATION

BY MR. BROOKS:
Q Ma'am, how old are you, please.
A Twenty-three.
Q Do you have children?
A Yes, I do.
Q How many children do you have?
A Two girls.
Q How long have you lived at Saratoga Apartments?
A A year and a half.
Q And do you recall the month you moved in there?
A January of 2002.
Q Do you still live there now?
A No, I don't.
Q You've moved out since the shooting?
A Yes.
Q You say that you knew A.I. ?

How long had you known him?
A I got to know him when I had a roommate.
Q Who was your roommate?
A His name was Seven.
Q Seven?
A He used to live with me. Yes.
Q Seven lived with you?
A Yes.
Q What was Seven's real name?
A I don't know his real name.
Q How long did Seven live with you?
A For about two months.
Q And Seven was a friend of A.I.'s?
A I don't know how they met, but, yeah.
Q They hung out together?
A I seen them a couple times; he's came to my house and asked for him.
Q Would -- would A.I. hang out at your house with Seven?
A No.
Q But he would hang out with Seven?
A Yeah. He's came to our door and I guess asked Seven for a ride to take him somewhere and then they'd leave. But he's never hung out at my house.
Q When did Seven move out of your apartment?
A The first week of April.

Q Since April, when Seven moved out of your apartment, has A.I. been inside of your apartment?
A No.
Q Have you hung out with with him at all since -- since April?
A No.
Q Have you yourself ever hung out with A.I.?
A No.
Q You'd never had a conversation with him?
A No.
Q You just knew who he was?
A Uh-huh.
Q And you knew he was a friend of your former boyfriend?
A No, he wasn't my boyfriend. He was just my roommate.
Q He was your roommate.
So you were not involved in a romantic relationship with Seven?
A No.
Q Is the apartment in your name?
A Yes.
Q How many bedrooms were there?
A Two bedrooms.
Q Did you only have one roommate typically?
A Yes.
Q One roommate, plus your children, perhaps?

Page 38 of 50

A Yes.
Q Did you have a roommate as of May 26th?
A No.
Q You've testified that you knew the boys in the apartment across the way who were shot.
Did you know them by name?
A I knew them by name because they knew my other friend.
Q Who is your other friend?
A I'm not going to say her name.
Q I'm sorry?
A I'm not going to say her name.
MR. BROOKS: Judge, I'd ask that she be instructed to say the name.
THE COURT: Why would you not want to say the name?
THE WITNESS: I don't want to bring the name out.
THE COURT: Well, you are going to have to answer the question, because it has nothing to do with her being a witness in the case. It's how you know the victims' names.
What is her name?
THE WITNESS: Eliana.
BY MR. BROOKS:
Q How do you spell that?
A E-l-i-a-n-a.
Q And her last name, please?
A I don't know her last name.

Page 39 of 50

Q And she was living in your apartment as of May 26th?
A No. She lives in the apartments.
Q She was living in the apartments?
A She lived in the apartments.
Q Okay. Did she --
A Not mine.
Q She didn't live in your apartment?
A No.
Q Was she -- she was with you when you were outside -- outside watching May 26th?
A No.
Q She was not.
But she is how you knew the three fellows?
A That's how I got to know about Day Day and Derrick. I don't know nothing about Jason.
Q Okay. Do you know Day Day's real name?
A No, I don't.
Q You just knew him as Day Day and you knew Derrick as Derrick?
A Right.
Q Did you know their last names?
A No.
Q Did you know Jason Moore?
A No, I didn't.
Q Did you know the mother of these three gentlemen -- I'm sorry -- the lady that was living with them?

Page 40 of 50

A I've talked to her once.
Q What was her name?
A I don't know her name.
Q Have you ever been inside their apartment?
A No.
Q So you've never hung out with her? They're acquaintances, correct?
A Just by walking around the apartments and me checking my mail and their playing basketball, stuff like that.
Q On May 26th, this is roughly 10:45 at night, correct?
A Yes.
Q Your kids were in your apartment perhaps?
A Sleeping.
Q And you are sitting outside on the stairs.
A On the patio.
Q You are with someone?
A Yes.
Q Who were you with?
A My friend Michele.
Q I'm sorry?
A My friend Michele.
Q What is her last name?
A Rodriquez.
Q Did she live in the apartment complex with you?

Page 41 of 50

A No.
Q She was just a friend visiting you?
A Yes.
Q How long had you all been hanging out that day?
A She came maybe an hour and a half before.
Q Had you been having anything to drink?
A No.
Q Anything to smoke?
A No.
Q No drugs?
A No.
Q Your -- your apartment is a second story apartment?
A Yes.
Q You are sitting out on your patio and you are in clear view of the apartment across the way?
A Yes.
Q Is that the apartment across the way where the shooting occurs?
A Yes.
Q How many feet, if you know, between their apartment and your apartment?
A I don't know. It's a distance, but it's in plain view.
Q You are sitting in the dark, correct?
A Yes.
Q The apartment across the way, can you see inside the

apartment?
A No.
Q Are their curtains drawn?
A No, they're blinds.
Q They're blinds.
But you cannot see inside that apartment?
A No.
Q The first hint you have of something going on is that you hear the sound you describe as fire crackers.
A Correct.
Q And you describe it as seven or eight sounds, correct?
A Right.
Q They sound like pops?
A Yes.
Q Okay. Is it fair to say that you hear the seven or eight pops roughly all at once?
A No, but they're one after another.
Q They're one after another. They're not all at once.
A No.
Q So there are intervals in between the bullets?
A No. They just kept going.
Q They just kept going.
I'm just going to say this, but I'm just trying to find out had how long it lasted. Just bear with me here.
I'm first going to go pop, pop, pop, pop, pop, pop, pop;

and then I'm going to go -- a second time, I'm going to go pop, pop, pop, pop, pop, pop.
Now, those two things have different times.
Which is it closer to?
A More toward the second one.
Q Is it fair then to say that the second pops I described, which I think was roughly 10 to 15 seconds, is that roughly the time that the first pops lasted?
A I mean, I couldn't fix that for sure, but most likely, yes.
THE COURT: And for the record, the second example of pop sounds had more of a delay between each one.
MR. BROOKS: Correct.
And, Judge, would it be fair to say it was roughly 10 to 15 seconds, the total?
THE COURT: I wasn't timing it.
MR. SCHWARTZ: I'd say about ten.
MR. BROOKS: About ten seconds.
And that's the prosecutor speaking.
BY MR. BROOKS:
Q You hear this sound and this attracts your attention.
Do you stand up?
A Yes.
Q And you are looking around?
A I first looked to my left across the street to the other

apartments across the street.
Q If you looked at that apartment across the way, you can't see anything at that moment, can you?
A No.
Q So you can't see what happens on those first shots?
A No.
Q Your friend is sitting there beside you?
A No. She's near my satellite, facing the opposite direction. We were sitting across from each other.
Q So you are facing that apartment across the way; she is not.
A Right.
Q But she's obviously in a position to hear these shots?
A Yes.
Q You stand up when you hear the shots?
A Yes.
Q You are looking around?
A Yes.
Q Is she standing up and looking around also?
A She's sitting there stuck.
Q I'm sorry?
A She was just stuck. She didn't move.
Q She didn't move.
Q Now, the first thing you see is -- after the pops, you see two people come out of that apartment, correct?

A Yes.
Q And that was the girl and the guy?
A Yes.
Q And the girl, I think, it's Christy?
A Yes.
Q Do you know her last name?
A No, I don't.
Q Did she hang around that apartment complex?
A Yes.
Q Did she live there, that you know of?
A In the complex?
Q Yes.
A Never.
Q She was the girlfriend of A.I., perhaps?
A Yes.
Q Do you know the apartments she lived in?
A No, I don't.
Q They get out -- they run away, correct?
A They're running down the steps.
Q Okay. Then you see somebody come out of the apartment; is that right?
A Yes.
Q And the person coming out is A.I.?
A Yes.
Q You heard no more gunshots from that first of seven or

eight until he comes out of the apartment?
A Right.
Q Now, he comes out of the apartment.
Is he coming out the same way he would leave or is he coming out on a patio where he could not leave from?
A He stepped out the door and looked on the patio.
Q I'm sorry. Just help me here: Is the patio something where you go out on and you had to go back in the apartment from the patio or you could go out where you could leave from it?
A The front door and the patio are connected, so when you step out the front door, the patio is right there.
Q And this patio is on your side of the apartment?
A Yes.
Q Is there somebody out there on the patio?
A I didn't see anybody.
Q So you see him come out and then you see him go out on the patio?
A He stood right where he was at and that's when he fired the first shot.
Q Where is he fighting towards?
A Towards like down on the patio.
Q Okay. But you don't see anybody on the patio?
A No.
Q How many times did you see him fire on the patio?
A He shot three times.

Q Three times.
Did you ever see exactly what he was shooting on the patio?
A After everything happened, when we found out that there was a body on the patio.
Q And there is only one body out there, correct?
A Yes.
Q And there were two or three shots there?
A Yes.
Q Were there -- after the shooting on the patio there, do you see him shoot anybody -- shooting any more after that?
A No.
Q Do you hear any more shots?
A No.
Q Do you hear any shots between that first seven or eight and that shooting on the patio?
A I can't say I did. It happened very fast.
Q After the shooting on the patio, does he leave?
A Yes.
MR. SCHWARTZ: When you say he, Your Honor, I'm assuming he's talking about the defendant?
MR. BROOKS: That's correct. I'm talking about the person who was the shooter.
THE COURT: Was that your understanding?
THE WITNESS: Yes.

MR. BROOKS: Court's indulgence, please.
BY MR. BROOKS:
Q Now, your friend that is sitting there with you, does she not ever turn around and watch this?
A No.
Q She never turns around?
A She looked with me, but then she went in the house.
Q Do you know where she is now?
MS. PANDUKHT: Objection.
MR. BROOKS: Judge, I'd like to talk to her. I'd like to know where she's at. If she knows, she knows.
THE COURT: I will overrule it.
Do you know where she's at?
THE WITNESS: I don't know exactly where to get her at.
BY MR. BROOKS:
Q One other question: When you're sitting there on the patio, is there a light on there illuminating the patio?
A The light that's in the middle of the apartments.
MR. BROOKS: I'll pass the witness.
THE COURT: Redirect.
MS. PANDUKHT: I have no redirect.
THE COURT: And, Miss Palau, thank you for testifying.
Is she free to go or do you want her to remain outside?
MR. SCHWARTZ: She's free to go.
THE COURT: You are free to go.

Any other evidence or testimony from the State?
MR. SCHWARTZ: No, Your Honor. We have no additional witnesses we wish to call today
We would rest.
THE COURT: Any evidence or testimony from the defense today?
MR. BROOKS: No, Your Honor.
We will submit it to the Court. We will be presenting any testimony this morning.
THE COURT: Mr. Budd, if you will stand up.
MS. PANDUKHT: Judge, may we amend the criminal complaint: On or between the 26th and the 27th of May, to add the 26th.
THE COURT: Any objection to that, Mr. Brooks?
MR. BROOKS: No objection.
THE COURT: We put what the last witness testified to on line 11, page one, on or about May 26th to the 27th day of May.
Mr. Budd, there is no closing arguments, so that ends the hearing.
This is a preliminary hearing. I do not determine your guilt. I do not determine your guilty. I just determine if sufficient evidence exists that you committed the alleged crimes, and that has been established.
I do find that there is sufficient evidence that the crime of murder with use of a deadly weapon, three counts, has

been committed by you.

I hereby order you to answer to said charges in the Eighth Judicial District Court, State of Nevada, County of Clark, at the following date and time --

THE CLERK: July 16th, nine a.m., District Court XVIII.

MR. BROOKS: Judge, I'm just curious. I'm out of the jurisdiction the week of the 14th through the 18th.

Is there any way to get it the week of the 7th through the 11th?

THE COURT: The only way we can do it is give an in-custody date, which is not what we usually do when we have a prelim, but July 2nd is the other date that we have in Department XVIII.

MR. SCHWARTZ: That's fine.

MR. BROOKS: July 2nd is better.

THE CLERK: July 2nd, nine a.m., District Court XVIII.

THE COURT: And that will be in District Court July 2nd then.

MR. SCHWARTZ: Thank you, Your Honor.

THE COURT: You are welcome.

ATTEST: Full, true and accurate transcript of proceedings.

9

FILED
OCT 27 4 52 PM '03
CLERK

TRAN

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

GLENFORD ANTHONY BUDD,

Defendant.

CASE NO. C193182

DEPT. NO. XVIII

BEFORE THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE

WEDNESDAY, JULY 2, 2003

RECORDER'S TRANSCRIPT RE:
ARRAIGNMENT

APPEARANCES:

For the State: TALEEN PANDUKHT, ESQ.
Deputy District Attorney

For the Defendant: HOWARD BROOKS, ESQ.
Deputy Public Defender

Recorded by: KRISTINE M. CORNELIUS, COURT RECORDER

RECEIVED
OCT 27 2003
COUNTY CLERK

WEDNESDAY, JULY 2, 2003; 9:00 A.M.

THE COURT: Mr. Brooks, what do you have?

MR. BROOKS: Thank you, Judge. Mr. Budd, Glenford Budd on page 11, I believe; it's a not guilty plea.

THE COURT: State of Nevada versus Budd, 193182. The defendant is present in custody. It's the date and time set for an arraignment.

Mr. Budd, your attorney tells me that -- sir, you can be seated. Your attorney tells me that you're going to be entering a plea of not guilty, is that your understanding?

THE DEFENDANT: Yes, ma'am.

THE COURT: What is your true name?

THE DEFENDANT: Glenford Anthony Budd.

THE COURT: If that is not your true name, you must declare to me now your real name. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: How old are you?

THE DEFENDANT: 20 years old.

THE COURT: I'm sorry?

THE DEFENDANT: 20.

THE COURT: How far did you go in school?

THE DEFENDANT: High school.

THE COURT: So, do you read, write and understand the English language?

THE DEFENDANT: Yes, I do.

THE COURT: And you've received a copy of the Information in this case charging you with murder with use of a deadly weapon?

THE DEFENDANT: Yes.

THE COURT: And you've had an opportunity to discuss this with Mr. Brooks, is that correct?

THE DEFENDANT: Yes.

THE COURT: And as to that charge, sir, how do you plead?

THE DEFENDANT: Not guilty.

THE COURT: You have a right to have this matter set for trial within 60 days. Do you wish to waive that right of invoke it?

THE DEFENDANT: Waive.

THE COURT: Very well, let's get it set.

MR. BROOKS: Judge, for the record, is this going to be a death penalty case?

MS. PANDUKHT: The State is going to have to take that to the committee in the next week or two, so we'll let you know --

MR. BROOKS: My preference would be, I think there's a decent chance because this is a triple homicide, the State may in fact file. My preference would be February, March or April of next year.

THE CLERK: You can have a portion of February or a portion of March.

MR. BROOKS: Either one is fine with the defense.

MS. PANDUKHT: And this is Dave Schwartz' case, I'll be trying it

with him, so I don't know what his schedule is but I think next year will be pretty clear.

THE CLERK: Jury trial is February 16th, 1:30, calendar call is February 11th, 9:00.

MS. PANDUKHT: The only thing I would ask, the only thing I would ask is that going fall in a four day week, because of President's Day, do you know that?

THE CLERK: I don't have the holidays yet for next year.

MS. PANDUKHT: Because that's typically holiday time there.

THE CLERK: Well --

MS. PANDUKHT: Do you know what day the 16th is?

THE COURT: Let's just leave it --

MR. BROOKS: The 16th is President's Day.

MS. PANDUKHT: It's a Monday.

MR. BROOKS: In fact, the 16th is in fact the holiday.

THE CLERK: It is, okay.

MS. PANDUKHT: Oh, okay.

THE CLERK: Well, let's go the next week then, February 23rd for trial

. . .

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and February 18th for calendar call.

MR. BROOKS: Thank you.

THE COURT: You're welcome.

(Whereupon the proceedings concluded)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above-entitled case.

Debra Van Blaricom

DEBRA VAN BLARICOM
Court Transcriber

ORIGINAL

24

001
RALPH E. BAKER, INTERIM PUBLIC DEFENDER
NEVADA BAR No. 3909
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED
JAN 27 3 43 PM '04
Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. GLENFORD ANTHONY BUDD, Defendant.	CASE NO. C193182 DEPT. NO. XVIII DATE: February 11, 2004 TIME: 9:00 a.m.

DEFENDANT'S MOTION TO VACATE AND CONTINUE TRIAL DATE

COMES NOW the Defendant GLENFORD ANTHONY BUDD, by and through Deputy Public Defender HOWARD S. BROOKS, and moves this Honorable Court to vacate the trial of this matter currently scheduled for February 23, 2004, and reset the trial in ordinary course, preferably for sometime in July or August, 2004.

This Motion to Continue is made and based upon the attached Declaration of Howard S. Brooks.

DATED this 27 day of January, 2004.

RALPH E. BAKER, Interim
CLARK COUNTY PUBLIC DEFENDER

By Howard S Brooks
HOWARD S. BROOKS, #3374
Deputy Public Defender

(4)

RECEIVED
JAN 29 2:00 PM
COUNTY CLERK

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DECLARATION

Declaration of HOWARD S. BROOKS ;

1. I am an attorney licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent Glenford Anthony Budd in this case; and I am familiar with the allegations made by the State and the procedural history of the case.

2. The State of Nevada filed an Information on June 26, 2003 alleging three counts of murder with use of deadly weapon against defendant Glenford Anthony Budd.

3. On July 25, 2003 the State of Nevada filed a Notice of Intent to Seek the Death Penalty alleging two aggravating circumstances.

4. The trial for this matter is currently set for February 23, 2004 with a calendar call date of February 18, 2004.

5. Since November of 2003, my case load has exploded from approximately five cases set for trial to eleven cases set for trial. I am a member of the Murder Team, and all of these cases are murder cases. Furthermore, three of these cases are death penalty murder cases.

6. Because of the explosion in my case load, I have been completely been unable to focus on preparing for the Glenford Anthony Budd murder case. This means that I have not worked with my client to prepare a defense to the charges; this means that I have not done the necessary investigation to prepare a mitigation case for possible penalty phase. The process of obtaining records so that a mitigation case can be prepared has also been hindered because my client is from the nation of Belize. We are currently in contact with the Belize Consulate in Los Angeles, and are trying to expedite the obtaining of records necessary to prepare a mitigation case. Those records have not been received as of this date.

7. Because of my lack of preparation, because I have not received necessary records, and because we have not been able to prepare a mitigation case yet, this is case is not ready to go to trial.

8. I have orally informed Deputy District Attorney David Schwartz of my situation, and I have also informed him of my intent to continue the trial date.

9. I currently have murder cases set for virtually every month through June of 2004. The best date for me to have this trial reset is sometime in July or August, 2004.

10. Based on all of the above, I am respectfully asking this Honorable Court to vacate the trial currently set for February 23, 2004, and reset the trial in ordinary course. This motion is made in good faith and not merely for the purposes of delay.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 27 day of January, 2004.

HOWARD S. BROOKS

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 11th day of February, 2004, at 9:00 a.m.

DATED this 27 day of January, 2004.

RALPH E. BAKER, Interim
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion to Vacate and Continue Trial Date is hereby acknowledged this 27 day of January, 2004.

CLARK COUNTY DISTRICT ATTORNEY

By _____

ORIGINAL

13

RAO

Shirley B Parraguirre

District Court
Clark County, Nevada

JAN 28 9 22 AM '04

FILED

State of Nevada
Plaintiff,
vs.
Glenford A. Budd
Defendant

Case No.: 03-C-193182-C
Dept No.: 18

MEDIA REQUEST AND ORDER FOR CAMERA ACCESS TO COURT PROCEEDINGS

Nicole Cordova or KVVU, requests permission to broadcast, record, photograph or televise proceedings in the above-entitled case in the courtroom of Dept. No. 18, the Honorable Nancy M. Saitta, commencing on the 18 day of February, 2004.

I certify that I am familiar with the contents of Nevada Supreme Court Rule 230, et sec., and understand this form MUST be submitted to the Court at least SEVENTY-TWO (72) hours before the proceedings commence, unless good cause can be shown.

DATED this 22 day of January, 2004.

Nicole Cordova
Media Representative

The Court determines camera access to proceedings ☐ WOULD ☒ WOULD NOT distract participants, impair the dignity of the court or otherwise materially interfere with the achievement of a fair trial or hearing herein;

Therefore, the Court hereby ☐ DENIES ☒ GRANTS permission for camera access to Nicole Cordova of KVVU as requested for each and every hearing on the above-entitled case, unless otherwise notified. This Order is in accordance with Nevada Supreme Court Rule 230, et seq., and is subject to reconsideration upon motion of any party to the action.

IT IS FURTHER ORDERED that this entry shall be made a part of the record of the proceedings in this case.

DATED this 26th day of January, 2004.

District Court Judge

Fax form 72 hours prior to the hearing to (702)386-9104

RECEIVED
JAN 28 2004
COUNTY CLERK

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CERTIFICATE OF SERVICE BY FACSIMILE TRANSMISSION

I hereby certify that on the 27 day of January, 2004, service of the foregoing was made by facsimile transmission only, pursuant to Nevada Supreme Court Rule 230, et seq., this date by faxing a true and correct copy of the same to each Attorney of Record addressed as follows:

Plaintiff	Defendant
David Roger	Public Defender
455-2914	455-5112

District Court Employee

Case #

C193182

Media

KVVU

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED

2004 SEP 14 P 3:59

Shirley B Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. GLENFORD ANTHONY BUDD, Defendant.	CASE NO. C193182 DEPT. NO. XVIII DATE: October 13, 2004 TIME: 9:00 a.m.

MOTION 1: DEFENDANT BUDD'S MOTION IN LIMINE FOR ORDER PROHIBITING PROSECUTION MISCONDUCT IN ARGUMENT; AND FOR ORDER THAT COURT TAKES JUDICIAL NOTICE OF AUTHORITY CITED IN THIS MOTION IF DEFENSE OBJECTS AT TRIAL TO IMPROPER ARGUMENT

Defendant GLENFORD ANTHONY BUDD, by and through Deputy Public Defender HOWARD S. BROOKS, moves this Court for an Order enforcing his right to a fundamentally fair trial by directing the Prosecutors in this case to avoid making arguments which the Nevada Supreme Court and United States Supreme Court have ruled are improper in criminal cases. This motion is based upon the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections Three, Four, Six and Eighteen, and Article 4, Section 21, of the Nevada Constitution, and the authorities cited in the attached memorandum of points and authorities.

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The Defense also seeks an Order that the Court take judicial notice of the authority cited in this motion if the Defense objects at trial to improper argument. This prong of the motion is based upon NRS 47.140, which authorizes judicial notice of legal authorities.

DATED this 14 day of September, 2004.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
HOWARD S. BROOKS, #3374
Deputy Public Defender

DECLARATION

HOWARD S. BROOKS makes the following declaration:

1. I am an attorney licensed to practice law in the State of Nevada; I am a deputy public defender assigned to represent Glenford Budd in this case; I am familiar with the procedural history of the case and the allegations made by the State.

2. The State charged Glenford Budd with three counts of Murder with Use of a Deadly Weapon.

3. The trial of this matter is currently set for November 15, 2004 with a calendar call date of November 10, 2004.

4. This motion seeks two forms of relief: a blanket order that the prosecutors in this case avoid making arguments which Courts have ruled are improper; and an Order that the Court takes judicial notice of the authorities cited in this motion when or if the defense objects to improper argument by the State.

5. This is not an "original" motion. This is a standard motion filed in many criminal cases, especially death penalty murder cases.

6. Many prosecutors have responded with indignation when this motion is filed, contending it is "insulting." I want to make it clear I am not calling any individual prosecutor unethical nor am I claiming that the prosecutors in this case routinely make improper arguments. However, the overwhelming majority of the caselaw in Nevada regarding prosecutorial misconduct derives from conduct by prosecutors in the Clark County District Attorney's Office. As a criminal defense attorney who has practiced in Clark County for 16 years, I have personally

witnessed repeated misconduct, including: argument to the jury that the role of the defense attorney is to confuse and mislead the jury; argument to the jury that defendant must be lying because he has had the chance to sit in his cell for more than a year to think up lies; argument to the jury (in death penalty guilt-trial phase) that the dead victim's life must be considered in deciding whether the defendant is guilty; argument to the jury that the defendant is guilty because he is a bad man; and other such arguments. So the factual predicate requiring the filing of this document exists, but no personal insult is intended to any individual person.

7. The Defense also requests that the Court take judicial notice of the authority cited in this motion when or if the Defense objects during trial to improper argument. This prong of the motion is based upon NRS 47.140 which allows the Court the take judicial notice of existing legal authority.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 14 day of September, 2004.

Howard S Brooks

HOWARD S. BROOKS

MEMORANDUM OF POINTS AND AUTHORITIES

I.

A. GRANTING THE MOTION IN LIMINE REQUESTED BY THE DEFENDANT IS AN APPROPRIATE AND NECESSARY MEASURE TO PREVENT IMPROPER ARGUMENT BY THE PROSECUTOR.

This Court should enter an order in limine barring the prosecution from engaging in the types of misconduct identified below and requiring it to abide by the requirements imposed on prosecutors by the federal and state constitutions, laws, and ethical canons. The Court of Appeals for the Ninth Circuit has explained that "[t]he whole purpose of a motion in limine is to prevent the opposing side from asking a question or making comments in opening statements or otherwise bringing before the jury some fact which the movant believes will damage his case by the mere mention of it." Barnd v. City of Tacoma, 664 F.2d 1339, 1343 (9th Cir. 1982). Similarly, McCormick on Evidence §52, at 74 (4th ed. 1992), notes that the "purpose of such motions may be to insulate the jury from exposure to harmful inadmissible evidence or to afford a basis for strategic decisions." As described below, prosecutorial misconduct in argument violates the state and federal constitutions and prejudices jurors against the accused. Entering an order in limine would assist in avoiding violations of these rights by prohibiting prosecuting attorneys from making improper arguments.

Entering the motion in limine would fulfill the role trial judges must play in safeguarding the constitutional rights of defendants at criminal trials. State and federal courts have stressed that trial judges bear the responsibility for preventing prosecutorial misconduct. In United States v. Young, 470 U.S. 1, 10 (1985), the Supreme Court wrote, "[w]e emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; 'the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'" (quoting Quercia v. United States, 289 U.S. 466, 469 (1933)); see also Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (explaining that trial judge should have acted to prevent improper argument instead of overruling the defense's objections, which gave the prosecution's argument an "official imprimatur").

Like federal courts, the Nevada Supreme Court has long recognized and stressed that trial

judges are ultimately responsible for preventing improper argument by prosecutors. In Yates v. State, 103 Nev. 200, 205-206, 734 P.2d 1252, 1256 (1987), the court emphasized that "[t]he district judge is in an especially well-suited position to control the overall tenor of the trial. He can order the offending statements to cease and can instruct the jury in such a manner as to erase the taint of improper remarks that are made." See also Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985) ("Our district courts have a duty to ensure that every accused shall receive a fair trial. This duty requires that trial courts exercise their discretionary power to control obvious prosecutorial misconduct sua sponte."); State v. Cyty, 50 Nev. 256, 259, 256 P.793, 794 (1927) ("[I]t is the duty of the court, unsolicited, to reprimand instantly such [prosecutorial] misconduct"); State v. Moss, 376 S.E.2d 569, 574 (W. Va. 1988) (trial court erred in failing to intervene sua sponte to correct improper argument). The ABA Standards for Criminal Justice similarly provide that "'[i]t is the responsibility of the [trial] court to ensure that final argument to the jury is kept within proper, accepted bounds.'" American Bar Association, ABA Standards for Criminal Justice, Standards Relating to Prosecution Function, Standard 3-5.8 (3d ed. 1993) (citations omitted).

Given the breadth and persistence of such misconduct evidenced by the number of Nevada cases devoted to this issue, see note 2, and sections II, III, below, entering and enforcing such an order is the only adequate means of insuring the fundamental fairness of the proceeding and the reliability of the resulting sentence. The court's duty to ensure the fairness of the proceedings is particularly important in capital cases, which must satisfy a "heightened standard of reliability" under the Eighth and Fourteenth Amendments. Ford v. Wainwright, 477 U.S. 399, 411 (1986). Any improper argument which diverts the jury from imposing a sentence that is a "reasoned moral response to the defendant's background, character and crime," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), or from making an "individualized decision" as to the punishment for the particular defendant and the particular crime, Penry v. Lynaugh, 492 U.S. 302, 326-28 (1989) (prosecutorial misconduct in argument violates right to individualized sentencing under Eighth and Fourteenth amendments); see Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Sumner v. Shuman, 483 U.S. 66, 75 (1987), will violate the requirement of heightened reliability in capital sentencing proceedings imposed by

the Eighth Amendment, as well as the protections of the other amendments cited below.

Entering an order in limine would also reduce the burden of litigation over this issue on this state's highest court and in habeas corpus proceedings in federal courts.[1] The Nevada Supreme Court has consistently expressed frustration about improper arguments and remarks by the state's attorneys, noting both the severe consequences for the defendant and the cost society must shoulder as a result. In Neal v. State, 106 Nev. 23, 25, 787 P.2d 764 (1990), the Nevada Supreme Court emphasized that, "[t]his court has repeatedly condemned such prosecutorial misconduct, and noted the enormous expense borne by the state each time such misconduct necessitates a retrial. Unfortunately, as this case illustrates, the problem continues."[2]

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[1] By filing this motion, the defense preserves the issue of prosecutorial misconduct in argument for appeal. The commission of misconduct places counsel for the defendant in a position in which nothing counsel does will adequately protect the defendant's rights. If counsel objects, he or she runs the risk of drawing attention to, and reinforcing, the prejudicial effect of the misconduct, thus giving the prosecutor a further reward for committing the misconduct. Courts have acknowledged that interrupting a prosecutor's argument to object can draw attention to an offensive argument. See, e.g., United States v. Young, 470 U.S. 1, 13-14 ("[I]nterruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously."); U.S. v. Garza, 608 F.2d 659 (5th Cir. 1979)U.S. v. Garza, 608 F.2d 659, 666 (5th Cir. 1979) ("[O]bjection to these extremely prejudicial comments [by the prosecutor] would serve only to focus the jury's attention on them."); U.S. v. Grayson, 166 F.2d 863, 871 (2d Cir. 1948) ("[T]o raise an objection to [improper] testimony - - and more, to have the judge tell the jury to ignore it - - often serves but to rub it in.") (Frank, J., concurring). Similarly, objections followed by curative instructions risk both drawing attention to and exacerbating a prosecutor's unconstitutional argument. The Supreme Court has recognized, for instance, that a curative instruction to objectionable remarks can compound the error in the eyes of the jury. See, e.g., Bruton v. United States, 391 U.S. 123, 129 (1968) (citing a study finding that "the limiting instruction actually compounds the jury's difficulty in disregarding" inadmissible evidence). Similarly, in the analogous situation of judicial misconduct, the Nevada Supreme Court has recognized:

> Counsel for plaintiffs was placed in the untenable position of silently accepting the judge's [misconduct] or risking the prospect of alienating the judge or the jury...
> Litigants who bear the brunt of [misconduct] by trial judges are faced with a 'Hobson's choice' of either objecting to the misconduct (with the attendant risks of antagonizing the judge and exasperating the jury), or refusing to assume the risks posed by such objections, thereby jeopardizing their right of appellate review.

Parodi v. Washoe Medical Center, 111 Nev. 365, 369, 892 P.2d 588, 591 (1995). By filing this motion in limine, the defendant should be considered to have made an objection to each and every kind of misconduct specified herein, without the necessity of risking further prejudice by objecting at the time of the misconduct, and to have invoked the court's sua sponte duty to grant a mistrial.

[2] See also Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1308 (1987) ("We have less difficulty in determining that [the prosecutor's] misbehavior was non-prejudicial than we do in understanding why it occurred. In both instances, the impropriety of the prosecutor's conduct was beyond speculation."); Williams v. State, 103 Nev. 106, 110, 734 P.2d 700 (1987) ("[W]e are unwilling - indeed, not at liberty - to see the criminal justice system unnecessarily encumbered and extended by inappropriate behavior on behalf of the State. Accordingly, we are constrained to again emphasize that those who violate these rules do so at their peril.") (citations omitted); Yates v. State, 103 Nev. 200, 206, 734 P.2d 1252 n. 7 (1987) ("It is time that this kind of conduct be stopped. We do not see reversal of convictions as an appropriate or useful way to adjudicate prosecutorial misconduct. Reversal may prejudice society more than it does the prosecutor.... We have reached the point where we can no longer look at this problem in terms of isolated examples of 'understandable, if inexcusable overzealousness in the heat of trial.'") (citations omitted); Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985) (describing prosecutorial misconduct as "a burden to the judicial system that is totally unnecessary and, so far as the prosecution is concerned, often self-defeating."), cert. denied, 486 U.S. 1036 (1988); Nevius v. State, 101 Nev. 238, 248, 699 P.2d 1053, 1059 (1985) ("We again admonish the district attorneys of this state to heed the warnings we expressed in McGuire."); McGuire v. State, 100 Nev. 153, 155, 677 P.2d 1060, 1062 (1984) ("In the past we have publicized our concern over the serious nature of the problem of prosecutorial misconduct. We have emphasized not only the problems such misconduct causes in terms of depriving an accused of his or her right to a fair trial, but also the additional public expense

Prosecutorial misconduct is unique among constitutional violations at trial because it results from the prosecutor's unilateral action. The easiest way to avoid the constitutional problems arising from misconduct is for the prosecutor to refrain from committing misconduct. The caselaw cited below establishes the representative kinds of misconduct which the prosecutor should not commit. This court should therefore enter an order directing the prosecutors not to commit misconduct, the prosecutors should obey that order, and no further litigation over this issue should be necessary.

B. ENTRY OF AN ORDER IN LIMINE IS NECESSARY BECAUSE OF THE PERSISTENT PATTERN OF MISCONDUCT ENGAGED IN BY THE CLARK COUNTY DISTRICT ATTORNEY.

Entry of the order in limine is not only appropriate but it is necessary as well. The Clark County District Attorney has a history and practice of violating the constitutional rights of defendants through the commission of prosecutorial misconduct. The most experienced members of that office (who are now retired) were consistent and habitual perpetrators of misconduct. See, e.g., McKenna v. State, 114 Nev. 1044, 468 P.2d 739 (1998) (Mr. Seaton); Howard v. State, 106 Nev. 713, 722-723 and n.1, 800 P.2d 175 (1991) (Mr. Seaton); Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221 (1987) (Mr. Harmon); see note 1, above. Unfortunately, the new generation of prosecutors in the Clark County District Attorney's Office has learned from its seniors to commit the same type of pernicious misconduct. See, e.g., Greene v. State, 113 Nev. 157, 170, 931 P.2d 54 (1997) (Mr. Schwartz); Murray v. State, 113 Nev. 11, 17-18, 930 P.2d 121 (1997) (reversing three Clark County cases for prosecutorial misconduct in commenting on defendants' post-arrest silence).

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needlessly occasioned by such misconduct, especially where such misconduct results in the necessity of a retrial."); State v. Cyty, 50 Nev. 256, 256 P.2d 793, 794 (1927) ("There is no excuse for such misconduct in any kind of a case. If the state has a strong case it is not necessary, and if it has a close case such misconduct is gross injustice to the defendant. Furthermore, prosecutors should remember that such misconduct often leads to the expense of burdensome retrials, which can but be a serious reflection upon their regard for the welfare of the taxpayer."); State v. Rodriquez, 31 Nev. 342, 102 P.2d 863, 865 (1909) (noting that improper argument "caus[es] the necessity of courts of last resort to reverse causes and order new trials, to the expense and detriment of the commonwealth and all concerned").

C. THE STATE CANNOT LEGITIMATELY OBJECT TO THE ENTRY OF AN ORDER IN LIMINE DIRECTING THE PROSECUTORS TO CONFORM THEIR ARGUMENT TO THE DICTATES OF THE LAW ON IMPERMISSIBLE PROSECUTORIAL ARGUMENT.

Given the unique role prosecutors play in the criminal justice system, the state cannot legitimately oppose this motion or raise any objection to the entry of an order in limine. State and federal law, as well as professional ethical standards, not only prohibit prosecutors from committing the type of misconduct described below, but also, obligate them to assist in protecting the constitutional rights of people facing trial. The United States Supreme Court has held that the prosecutor:

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935), overruled on other grounds by Stirone v. United States, 361 U.S. 212 (1960). The Ninth Circuit explained in Commonwealth of the Northern Mariana Islands v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992), overruled on other grounds by George v. Camacho, 119 F.3d 1393 (9th Cir. 1997), that "[i]t is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial." See also Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) ("The proper role of the criminal prosecutor is not simply to obtain a conviction, but to obtain a fair conviction."); National District Attorneys Association, National Prosecution Standards, Rule 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."). In State v. Rodriquez, 31 Nev. 342, 347, 102 P.d 863, 865 (1909), the Nevada Supreme Court agreed that:

> "Prosecuting attorneys ... have a duty to perform equally as sacred to the accused as to the state they are employed to represent, and that is to see that the accused has the fair and impartial trial guaranteed every person by our Constitution, no matter how lowly he may be, or degrading the character of the offense charged..." (emphasis added).

Prosecutors cannot look to the standards applicable to other lawyers to determine the propriety of their conduct, remarks, and argument. The Ninth Circuit has stressed that:

> Prosecutors are subject to constraints and responsibilities that don't

> apply to other lawyers. While lawyers representing private parties may -indeed, must - do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules.

U.S. v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993); see also American Bar Association, Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958) ("The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client.").

Given the obligation prosecutors have to respect the rights of accused under well-established federal and state law, the state has no legitimate basis for opposing entry of the order in limine sought by the defendant: The state cannot contend that its prosecutors have a right to commit the misconduct described below; nor can it legitimately contend that the court should not enter an order which is consistent with the law the prosecutors are obligated to follow. This Court cannot assume that the prosecutors will comply with their obligations in this regard, or credit any self-serving assertions by the prosecutors that an order in limine is unnecessary because they are aware of their ethical obligations.

D. ENTRY AND ENFORCEMENT OF AN ORDER IN LIMINE IS REQUIRED TO ENSURE THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS ARE ACTUALLY, AND NOT MERELY HYPOTHETICALLY, ENFORCED.

In light of the historical practices of the Clark County District Attorney, the defendant and this court must consider the measures to take should the prosecutor nevertheless commit misconduct. That analysis must take into account the intentional character of any such misconduct. While courts sometimes find misconduct to be non-prejudicial on the ground that it was unintentional or inadvertent, see, e.g., Turner v. Johnson, 106 F.3d 1178, 1188 (5th Cir. 1997); United States v. Manning, 56 F.3d 1188, 1199 (9th Cir. 1995), that cannot be the case here: The defendant has compiled below the caselaw illustrating the kinds of misconduct the prosecutor is prohibited from committing; the prosecutors in this case thus cannot claim that any misconduct they commit is a result of ignorance or inadvertence.

There are several reasons militating in favor of a mistrial sua sponte should the prosecutor make an impermissible comment in spite of the filing of this motion. First, the state's knowing,

deliberate and intentional attempt to bolster a weak case by depriving the defendant of a fair trial, prior to the entry of the verdict requires a mistrial sua sponte. As noted above, it is primarily the trial court's obligation to respond to misconduct before it. See, e.g., Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126 (1985). Any act of misconduct in this case must be recognized for what it will be: A deliberate and intentional attempt to violate the defendant's right to a fundamentally fair trial and a reliable sentence; and an acknowledgment of the weakness of the prosecution's case by attempting to win the case by impermissible means. "By resorting to wrongful devices, [the party] is said to give ground for believing that he thinks his case is weak and not to be won by fair means." McQueeney v. Wilmington Trust Co., 779 F.2d 916, 922 (3d Cir. 1985) (quoting McCormick, Handbook of the Law of Evidence § 273 at 660 (2d ed. 1972)); see also United States v. Metcalf, 435 F.2d 754, 758 (9th Cir. 1970) (characterizing commission of misconduct as result of "the careless zeal of a prosecutor conscious of the weakness of the case").

In the habeas corpus context, the United States Supreme Court recognized in Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993):

> [T]he possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

The Court of Appeals for the Ninth Circuit has characterized this type of error as a "hybrid" which is "declared to be incapable of redemption by actual prejudice analysis. The integrity of the trial, having been destroyed, cannot be reconstituted by an appellate court." Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994), cert. denied, 513 U.S. 1130 (1995). The defendant here has provided the state and the court with the caselaw establishing what the prosecutors cannot do, and the defendant has done all he can to prevent misconduct from occurring. If the prosecutors attempt to bolster their case by committing misconduct anyway, they should not be heard to argue that any response less than an immediate mistrial would be an adequate remedy for their intentional and deliberate attempt to deprive the defendant of a fair trial. A mistrial is also necessary to prevent the state from obtaining the further benefit of rubbing in the misconduct by objection and instruction. See note 1, above. Having polluted the trial by prejudicing the jury, the state cannot

properly seek to gain the benefit of having that jury, which it has deliberately poisoned, render a verdict.[3]

Second, the integrity of the court is at stake where the prosecutor commits misconduct in argument. By providing the relevant case authorities to this court in advance of argument, the defendant has also ensured that this court can satisfy its duty to intervene sua sponte to prevent or sanction misconduct. Further, because this court, as well as the state, is on notice as to what constitutes misconduct, this court must fulfill its duty to respond to the prosecutor's misconduct. If the court fails to intervene sua sponte, or fails to sustain defense objections to misconduct, it thereby places its imprimatur on the misconduct; and it invests the prosecutor's violation of the defendant's constitutional rights with the weight and authority of the court, thus necessarily making that misconduct prejudicial. See Bollenbach v. United States, 326 U.S. 607, 612 (1946) ("'[T]he influence of the trial judge on the jury is necessarily and properly of great weight,' [citation] and jurors are ever watchful of the words that fall from him."). As the Nevada Supreme Court recognized in Peterson v. Pittsburg Silver Peak Gold Mining Co., 37 Nev. 117, 121-122, 140 P.519 (1914):

> The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge. Human opinion is ofttimes formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.

Accord Parodi v. Washoe Medical Center, 111 Nev. 365, 368, 892 P.2d 588 (1955); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 416-417, 470 P.2d 135 (1970). If the court refuses to sustain a proper objection to the prosecutor's deliberate and intentional misconduct, based upon the settled caselaw cited in this motion, it will violate its own duty to enforce the law evenhandedly against

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[3] At minimum, any commission of misconduct would have to be analyzed under the Chapman standard of prejudice applicable to further constitutional errors. Chapman v. California, 386 U.S. 18 (1967). This standard requires the prosecution, and not the defendant, to prove beyond a reasonable doubt that its intentional commission of misconduct would not "contribute to the verdict." Id. at 24. If the prosecutor is so desperate to obtain a conviction or death sentence that he commits misconduct after the filing of this motion, this court can only infer that the prosecutor considered the misconduct necessary to achieve his aim, and thus that it could not be shown, beyond a reasonable doubt, to be non-prejudicial.

the prosecution. See, e.g., Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126 (1985); State v. Cyty, 50 Nev. 256, 259, 256 P. 793 (1927).

Third, since a reversal would be required on appeal, granting a mistrial sua sponte will lessen the burden of litigation on this state's highest court and on federal courts in habeas corpus proceedings. A refusal by the court to enforce the law against the prosecution at the proper instance of a defendant would demonstrate judicial bias in favor of the prosecution and thus require reversal. See, e.g., Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (failure of court to act in response to improper argument gave prosecutor's argument "official imprimatur"); Peterson v. Pittsburg Silver Peak Gold Mining Co., 37 Nev. 117, 122, 140 P. 519 (1914) ("[I]f remarks made by the judge in the progress of a trial are calculated to mislead the jury or prejudice either party, it would be grounds for reversal."). Since trial before an impartial tribunal is a fundamental element of due process of law under the Fourteenth Amendment, such a refusal would be prejudicial per se. Tumey v. Ohio, 273 U.S. 510, 535 (1927); see Neder v. United States, 1999 WL 373186, at *5 (June 10, 1999).[4]

Finally, curative instructions cannot adequately repair the damage impermissible arguments inflict on the constitutional rights of the criminally accused. As the Supreme Court explained in Bruton, 391 U.S. at 129 n. 3, "'[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.'" (quoting Krulewitch v. U.S., 336 U.S. 440, 453 (1949) (Jackson, J., concurring); see also Throckmorton v. Holt, 180 U.S. 552, 567 (1901) ("[T]here may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error."); U.S. v. Garza, 608 F.2d 659, 666 n. 7 (5th Cir. 1979) ("[A]s this Court observed in overturning a conviction because of improper prosecutorial

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[4] The judicial response to misconduct objections is a serious problem. In the Jones matter, the trial court failed to sustain an objection to prosecutorial misconduct which was flagrant and obvious under existing authority (although that authority was not cited by the defense), Ex. 1 at II 88-89; but when the prosecutor objected to defense argument, which does not even appear to have been misconduct, the trial court's response in front of the jury was to tell defense counsel "you're out of line." Ex. 1 at II-96. The defendant submits that such a double standard of response to alleged misconduct would be prima facie evidence of judicial bias which violates the due process clause, as well as depriving the defendant of equal protection under the Fourteenth Amendment.

And that's a conversation about marijuana; correct?

A. Yes, sir.

Q. Can you give us any context for why this question would be asked?

A. I don't know why he would ask Derrick or -- or me. I don't know why. I just know he confronted Derrick about it. I don't know what made him do it.

Q. Did Derrick often, or did Derrick ever have marijuana that belonged to Mr. Budd?

A. No, sir.

Q. Had you ever seen Mr. Budd with marijuana?

A. Yes, sir.

Q. Did he have marijuana with him very often?

A. Yes, sir.

Q. Did you guys hang around with him when he had his marijuana?

A. Yes, sir.

Q. And did Derrick ever have marijuana?

A. No, sir.

Q. And the other gentleman, Jason, did he ever have marijuana?

A. No, sir.
Q. Had you ever seen either one of these people take marijuana and hold it for Mr. Budd?
A. No, sir.
Q. None of these people are selling marijuana, are they?
A. No, sir.
Q. None of these people are selling drugs?
A. No, sir.
Q. When you're playing basketball, did you see any evidence that Mr. Budd had a gun?
A. No, sir.
Q. Did you see any evidence before the basketball game that he had a gun?
A. I thought that he did, from the way I seen his walk, but I couldn't -- I never seen a gun.
Q. When was this? When did you think he had a gun?
A. This was way earlier in the day before any of this happened.
Q. Like what time?
A. Around the a.m., in the a.m.
Q. I'm sorry?
A. a.m. sometime.

Q. So in the morning you thought he had a gun?
A. Yeah.
Q. And you thought it because the way he was walking?
A. Yeah.
Q. How was he walking?
A. He was just walking, grabbing his pocket.
Q. I'm sorry?
A. He was walking, holding his pocket.
Q. Because he was holding his pocket, that forced you to think he had a gun?
A. Yeah.
Q. But you didn't actually see him with a gun?
A. No.
Q. In fact, you never saw him with a gun from the basketball game or before?
A. No.
Q. Did anybody else playing basketball have a gun?
A. No.
Q. Were there any guns in the apartment?
A. No.

Q. Were there any knives in the apartment?
A. Of course.
Q. I'm sorry?
A. Of course.
Q. I'm sorry?
A. Of course.
THE COURT: Of course.
MR. BROOKS: A course?
THE COURT: Of course.
BY MR. BROOKS:
Q. Of course? Of course there were knives?
THE COURT: I mean, he's referring --
BY MR. BROOKS:
Q. Kitchen knives; right?
A. Yeah.
Q. What about drugs, were there drugs in the apartment?
A. No, sir.
Q. None at all?
A. No, sir.
Q. How were the four of you guys supporting yourself during this month?
A. My mother lives there. We just -- that night, she wasn't there, but we live with my mother.

Q. Does she live in the apartment with you?
A. Yes, sir.
Q. What's her name?
A. Cheryl Jones.
Q. So, basically, your mother's supporting you?
A. Yeah.
Q. And is your mother supporting all these other people as well?
A. Yes, sir.
Q. None of you have jobs; correct?
A. No, sir.
Q. So after the basketball game, all five of you go to the apartment; correct?
A. Yes, sir.
Q. And how long do you hang out in the apartment together, the five of you?
A. About two hours.
Q. For about two hours.
And during this two hours, is there any more discussion about any marijuana or weed?
A. No, sir.
Q. Is there any argument between my client and anybody else there?
A. No, sir.

Q. Any rough words between anybody?
A. No, sir.
Q. No sign of any trouble?
A. (Shakes head.)
Q. So approximately what time does my client leave?
A. I -- I would say 11:45.
Q. And he --
A. Close to.
Q. -- he tells you he's going where?
A. To the store to get a drink.
Q. So he leaves.
How long is he gone?
A. Ten to fifteen minutes.
Q. Anybody else come into the apartment during this time?
A. No, sir.
Q. He shows back up ten or fifteen minutes later?
A. Yes, sir.
Q. He doesn't hang out with you in the living room at that point?
A. No, sir.
Q. He goes directly to the bedroom?
A. Yes, sir.

Q. Does he say anything to you in the living room?

A. He said he was finna use the bathroom.

Q. Does he ask where -- is it Derrick that's now in the bedroom?

A. Da'Jon.

Q. Da'Jon?

A. Yeah.

Q. Does he ask if Da'Jon is in the bedroom?

A. No, sir.

Q. So he goes into the bedroom where Da'Jon is; correct?

A. Yes, sir.

Q. Closes the door?

A. Yes, sir.

Q. You hear two shots?

A. Yes, sir.

Q. You don't see anybody, because the door is closed?

A. Yes, sir.

Q. But as far as you know, no one else is in there except for Da'Jon and my client?

A. Yes, sir.

Q. When you hear the two shots, what do you say to the friends that you have there?

A. Well, I ran to the door and opened it. And Derrick told me to get back in the house. And I was trying to explain to him that the shots is coming from the room, but --

Q. Did you initially think the shots were coming from somewhere else?

A. No. I knew they was coming from in the house.

Q. When you say you ran to the door, this is the outside door?

A. The front door.

Q. The front door?

A. Yeah.

Q. So you go ahead and run to the door, and then you leave?

A. I didn't leave immediately.

Q. But you went outside the door?

A. No.

Q. You didn't go outside the door?

A. No. I opened the door.

Q. You opened the door?

A. Yeah.

Q. So you've heard two shots.

When do you hear more shots?

A. I heard one shot after the two, one

more.

Q. Now, when you hear the third shot, you can still see in the living room; right?

A. Yeah.

Q. So that third shot is occurring, as far as you know, in the bedroom still?

A. Yeah.

Q. So at that point, you leave and you run away?

A. Yes, sir.

Q. And as you're running away, you hear more shots?

A. No, sir.

Q. You hear no more shots?

A. No, sir.

Q. So you go to the 7-Eleven and call the police?

A. Yes, sir.

Q. And at some point, you return to the apartment?

A. I never went back to the apartment again. I was in the squad car the whole time.

Q. Okay.

MR. BROOKS: I'll pass the witness.

MR. SCHWARTZ: No further questions.

THE COURT: Is Mr. Jones free to go, or do you want him to remain outside?

MR. SCHWARTZ: Yes, he's free to go.

THE COURT: Mr. Jones, you're free to go. Please do not discuss your testimony with anybody until the end of the preliminary hearing today. Thank you for testifying.

Before we call the next witness, let me call two misdemeanors that were scheduled for 10:30.

(Whereupon there was a brief pause in proceedings to handle unrelated matters.)

THE COURT: And we'll go back to Glenford Budd, 3F 9137X. He is still present, has not left the courtroom, with Mr. Brooks.

State's next witness.

We have Ms. Pandukht and Mr. Schwartz present.

MS. PANDUKHT: State calls Tracey Richards.

Thereupon--

TRACEY RICHARDS

was called as a witness and sworn to testify to the

truth, the whole truth, and nothing but the truth.

THE CLERK: Please be seated.

Would you state your first and last name and spell them both for the record.

THE WITNESS: Tracey Richards.

THE CLERK: Would you spell them?

THE DEFENDANT: I'm sorry. T-r-a-c-e-y R-i-c-h-a-r-d-s.

DIRECT EXAMINATION

BY MS. PANDUKHT:

Q. Ms. Richards, do you know a person by the name of A.I.?

A. Yes, I do.

Q. Is that person in the courtroom today?

A. Yes, he is.

Q. Could you point to him, where he is sitting, and an article of clothing he's wearing today?

A. He's right there. He's right there (indicating).

Q. Could you describe something he's wearing today?

A. He has blue and orange socks on and blue

outfit. That's A.I.

MS. PANDUKHT: May the record reflect the identification of the defendant?

THE COURT: That will be noted.

BY MS. PANDUKHT:

Q. Do you know the defendant by any other name?

A. No.

Q. Do you know what A.I. stands for?

A. No.

Q. Do you know if the defendant has any tattoos?

A. Yes.

Q. What tattoos?

A. Mr. Budd.

Q. That's what it says?

A. That's what it says on his arm. Right or left arm, I'm not sure.

Q. Okay. And how is Mr. Budd spelled, the "Budd" part?

A. B-u-d-d.

Q. Now, how is it that you know the defendant?

A. Well, Saratoga Palms East, II, I used to live over there a couple years ago myself. And I

have a sister that lives over there now.

Q. Is that 2895 East Charleston?

A. Yes.

Q. Is that located here in Clark County, Nevada?

A. Yes.

Q. When was the last time you lived at the Saratoga Palms?

A. Two years ago.

Q. And that's how you knew the defendant?

A. Yes and no. Because I still would go visit, you know. My sister lives over there now. So after I moved out, my sister moved over there and got her an apartment. And I like to play ball a lot, so I play basketball with a lot of guys. So A.I., he's cool, you know, like I say, a homeboy.

Q. How often would you see A.I. when you lived at the apartment complex?

A. Not too much. I mean, he'd be around like everyone else, playing basketball, What's up, A.I.? Hey, what's up, Tracey? You know, stuff like that, you know.

Q. How often had you seen A.I. or the defendant before this incident occurred?

A. How often do I see him before? I went

to my sister's house like every other weekend, so I would see him like every other weekend or so. I always go over. My kids be out of school, and I take my kids over there, we spend the weekend over there; get out of the, you know.

Q. By "over there," you mean the apartment?

A. Yeah, Saratoga Palms East, II.

Q. Now, your relationship with him, then, would be an as acquaintance, as a friend?

A. Good friend.

Q. Did you at any point have a romantic relationship with him?

A. No.

Q. Now, I'd like to draw your attention to the date of May 27th, on a Wednesday.

A. Uh-huh.

Q. Excuse me, that's a Tuesday.

A. Uh-huh.

Q. About 8:00 or 9:00 o'clock in the evening.

A. Uh-huh.

Q. Do you remember what you were doing at that time?

A. Well, like I told the detectives, I was out and about, taking my kids' grandmother out, and

about when I dropped her off at home, I was on my way home. And that's when I was out and about on Eastern and Karen by that Jack in the Box over there. That's when I, you know, came in contact with him. I was in my car with my three young children.

Q. What kind of --

A. Ford, Ford Taurus wagon. Station wagon. Sorry.

Q. As you were driving down -- were you driving down Karen or Eastern?

A. Karen, turning left on Eastern. And I seen -- I seen A.I. A.I. was calling me, and I'm like, What's up? You know; what's going on? Hey. You know when you see somebody.

Q. Where was he?

A. He was standing by the Jack in the Box. He was smoking a cigarette. He had a white tank top, blue jeans, white shoes.

Q. Okay. And what corner was he? Where was he exactly?

A. Karen and Eastern. You know, this is Karen, this is Eastern, okay. The Jack in the Box is right here. Now, if I'm turning left on Eastern, make that left on Eastern, it's -- and you

looking left at the Jack in the Box right here, you see some benches sitting right here (indicating).

He was standing over by some benches, and he was calling my name. And so I turn and I have a conversation. He's telling me how he got into it with this girl and he had a fight or whatever, he hadn't had any sleep. I was like, you know, What's up? You know, What happened? I'm concerned at this point. And then --

Q. Was he sitting or standing?

A. By the time he -- he's standing up. He's smoking a cigarette.

Q. When you first saw him, he -- was he sitting on a bench?

A. No. He was standing, calling me.

Q. How was he calling you? What was he saying?

A. Tracey, Tracey, hey, hey, you know.

Q. Did you pull your car over to him?

A. Yeah, I pulled over there.

THE COURT: One second. Lazon Jones came back in the courtroom, and, actually, one of the investigators just called him to step back outside. I'm sorry, I missed the question, what you just said, and then you had answered. I missed

that.

But go ahead.

BY MS. PANDUKHT:

Q. Did you pull your car over to where he was?

A. Yes. And I talked to him, had a conversation with him, you know.

Q. Did you ever get out of your car?

A. No.

Q. And at this point, was he still standing by the bench?

A. Yes

Q. Was he still smoking the cigarettes?

A. Yes.

Q. And then at what point did something happen that took you away from the intersection of Karen and Eastern?

A. Nothing that took me away from. He just -- he said he hadn't had any sleep. I was like, I'm getting ready to go home, come sleep at my house if you're tired, because he's cool, you know. I know him, you know. And then --

Q. Did he mention anything about another person?

A. No, he didn't mention nothing about

anyone else.

Q. Did he say he had gotten into any kind of an argument with anyone?

A. His girlfriend.

Q. Did he say his girlfriend's name?

A. No. I don't know her.

Q. Did he tell you what her name was, though?

A. No, just, you know how they say "my girl," so always --

Q. Did he tell you what the argument was about?

A. No. I wasn't --

Q. And then you -- when you said it was okay to stay at your house, did he then get in your car?

A. Yeah. We went to my house.

Q. And you drove him to your house?

A. Yes, I did.

Q. And where is your house located?

A. Henderson, 1100 North Center Street.

Q. And when you got over to your house, what did the defendant do?

A. Went to sleep.

Q. And when was the next time you saw the

defendant?

A. Well, the next morning.

Q. When you were in the car or in your apartment before the next morning, so when you're in your car the day before and in the apartment the night before, does the defendant say anything to you that was unusual?

A. Well, he did say something unusual when I was -- I was on my way to pick up my son from school, on my way out the door.

Q. Now, would it be the next day?

A. This is after the overnight, the next day, yes.

Q. So the day before, he didn't say anything unusual?

A. No, we didn't discuss. He was pretty much quiet.

Q. Okay. Then the next morning, about what time were you referring to?

A. The next morning between -- because I went -- I went to the store, and he asked me to get him some cigarettes. So it was about 9:00ish. Early morning.

Q. He asked you to get cigarettes?

A. Yeah. He gave me the money, because I

was going to the store. I was like sure, you know.

Q. He had been smoking a lot of cigarettes?

A. Yeah.

Q. Did he have any breakfast?

A. No. He wouldn't eat anything. I offered, but he wouldn't eat anything.

Q. So when you went to the store, did he give you the money, or did you pay for the cigarettes?

A. He gave me the money.

Q. Did he say why he didn't want to go to the store himself?

A. No, he didn't. It wasn't even an issue of him going because I was on my way. You know, grab cigarettes.

Q. Then when you got the cigarettes, did you come back to the house?

A. Uh-huh.

Q. What happened when you got back to the house, and about what time?

A. I came right back, ten, fifteen. 7-Eleven's on the corner. Got his cigarettes and just kind of like, just probably laid around, kick back. I get my kids off to school. I -- I have four kids. So once one's coming out, the other one

is going in. I'm pretty busy with my kids. And when I was going to take my second, my oldest son, to school, that's when I was -- when A.I. made the statement like he had a dream that --

Q. Now, what time was that, about?

A. 3:00, 3:15.

Q. In the afternoon?

A. My son get out of school at 3:21.

Q. So about 3:15 in the afternoon?

A. That's when I was coming to go get my son from school.

Q. And that would be the next day, on the 28th?

A. Yeah, I suppose.

Q. What is it that the defendant told you?

A. Well, when I was on my way out the door, he had made a statement, said, I had a dream that I killed three people over some weed. And I just thought nothing of it and, you know.

Q. What did you say to him?

A. You crazy. That's what I said.

Q. Did he say anything else?

A. No.

Q. What did you do?

A. Walk out the door, went and got my son

from school. Then when I came back, he was gone.

Q. About how long were you gone?

A. About ten, fifteen minutes.

Q. Now, when you saw the defendant, what did his hair look like?

A. Braids, long braids.

Q. How long did they go?

A. They pretty long, shoulder length.

Q. Shoulder length braids?

A. He had long hair.

Q. And today, the defendant's hair, is that how it looked when you saw him?

A. No. He had long hair when I saw him.

MS. PANDUKHT: I'll pass the witness.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. BROOKS:

Q. Ms. Richards?

A. Yes.

Q. You talked about how you had lived in that apartment complex roughly two years before; correct?

A. Right.

Q. But you didn't know Mr. Budd two years

before?

A. No.

Q. How long had you known Mr. Budd?

A. Couple -- for a while. My sister been living over there about a year and a half. So about a year or so.

Q. So you had known Mr. Budd for roughly a year?

A. I mean, I know -- I mean, I know him. I mean, I don't know him, know him, to be like family know him, but I know him. I know a lot of guys.

Q. You had hung out with him for almost a year?

A. No, not hung out with him.

Q. He was a friend of yours?

A. I -- if I see him, Hey. You know, What's up? I know him.

Q. But he was around that area for roughly a year?

A. I couldn't tell you where he was at. I just know that when I go over there, I would see A.I., just like anybody else, and say what's up to him, play ball, whatever.

Q. And you had been doing this for almost a year?

A. Yeah. My sister lives over there.
Q. But, I mean, you had been doing this with him, saying hello to him --
A. Yeah.
Q. -- for almost a year?
A. Yeah.
Q. And you had been playing ball with him for almost a year?
A. Well, not -- no, I ain't been playing ball with him for almost a year, but I play ball with different people, but I play ball with him before, yes.
Q. How long had you been playing ball with him?
A. Off and on, year. You could say that.
Q. A year?
A. Yeah.
Q. So you had hung out with him there in the apartment complex?
A. Yes.
Q. Did you ever see him smoking marijuana?
A. No.
Q. Did you ever see him with marijuana?
A. No.
Q. Had you ever smoked marijuana with him?

A. No.
Q. Ever drunk alcohol with him?
A. No.
Q. Had you been around the 26th at all?
A. No.
Q. On the 27th, when you picked him up, did you know, had you heard anything about what had happened on the 26th?
A. No. I'm too busy. I got four kids.
Q. You didn't even know about the shooting?
A. Had no idea.
Q. So when he says that he had this dream about killing three people --
A. Uh-huh.
Q. -- did you ask him any questions about it?
A. No. I just told him he was crazy, it's a dream.
Q. When you picked him up on the 27th --
A. Uh-huh.
Q. -- did it appear he had been drinking?
A. No.
Q. Did he show any signs of being high?
A. He showed signs of being nervous, smoking.

Q. Nervous?

A. Smoking all them cigarettes.

MR. BROOKS: I'll pass the witness.

THE COURT: Redirect?

MS. PANDUKHT: No.

THE COURT: And is Ms. Richards free to go, or do you want her to remain outside?

MS. PANDUKHT: She's free to go.

THE COURT: You're free to go. Please do not discuss your testimony. We should be finished within an hour. But thank you for testifying and waiting.

THE WITNESS: Thank you.

THE COURT: Welcome.

State's next witness?

MR. SCHWARTZ: Winston Budd.

THE CLERK: Raise your right hand, please.

Thereupon--

WINSTON BUDD

was called as a witness and sworn to testify to the truth, the whole truth, and nothing but the truth.

THE CLERK: You can be seated.

Would you state your first and last name, spelling them both for the record.

THE WITNESS: Winston Budd.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q. Mr. Budd, I'm going to ask you a few questions, and then Mr. Brooks will ask you some questions. We'd appreciate it if you answer slowly and speak into this microphone so everybody can hear what you're saying.

Mr. Budd, do you know Glenford Budd?

A. Yes, sir.

Q. And do you see Glenford Budd in the courtroom today?

A. Yes, sir.

Q. Could you point to where he is and describe what he's wearing today?

A. A blue outfit.

MR. SCHWARTZ: May the record reflect the identification of the defendant, your Honor?

THE COURT: That will be noted.

MR. SCHWARTZ: Thank you.

BY MR. SCHWARTZ:

Q. How is it that you know the defendant?

A. My nephew.

Q. And do you know the defendant by any other name besides Glenford?

A. Junior.

Q. Junior, okay.

Let me direct your attention now to Tuesday, May 27th, 2003 at about 3:30 in the morning.

Did you receive a phone call from your brother Kirk?

A. Yes.

Q. Without telling us what Kirk said to you on the phone, as a result of that phone call, did you become concerned regarding your nephew Junior?

A. Yes.

Q. Okay. Now, let me direct your attention to May the 27th -- that's Tuesday -- at about 11:00 o'clock in the morning.

Did you receive a phone call from the defendant, your nephew?

A. Yes.

THE COURT: Wait a second. Let me keep this straight. 11:00 a.m.

Is this still the 27th?

MR. SCHWARTZ: Tuesday. Tuesday, yes,

your Honor.

THE COURT: Okay. Still the 27th?

MR. SCHWARTZ: Yes.

THE COURT: That's -- actually, I meant to say Tuesday. Thank you.

BY MR. SCHWARTZ:

Q. Okay. What did the defendant tell you when he called you at about 11:00 o'clock that Tuesday morning?

A. He asked me to get in touch with their mother to get some money so he could get out of here.

Q. And what else did he say when you talked to him on the phone this Tuesday morning?

A. He also told me that he needed me to come pick him up.

Q. Okay. What did he say? What, if anything, did he say regarding why he needed you to pick him up?

A. Could you repeat that again?

Q. Sure.

Why did the -- why did your nephew need you to come pick him up?

A. Because where -- where -- wherever he was, the person didn't want him to stay there no

more.

Q. What did the defendant tell you about any trouble he might be in?

A. Could you repeat it?

Q. What did the defendant say regarding what possible trouble he could be in? What had he done that caused you some concern?

A. I couldn't remember. He told me that he went to get some money.

Q. Uh-huh.

A. Get some -- they was supposed to rob him or something, or something. I don't remember exactly.

Q. About 20 minutes ago, you and I spoke in my office.

And you had a clear memory then, didn't you?

A. Yes.

Q. Why don't you tell us what your nephew told you that Tuesday morning.

A. He told me that he went -- he told me that they was trying to rob him.

Q. What did he do as a result of them trying to rob him?

A. He said he shoot them.

Q. Okay. Did he tell you how many of them he shot?
A. No.
Q. Did you ask him anything about the gun?
A. Yes.
Q. What did you ask him?
A. I asked him where the gun at.
Q. What did he say?
A. He said he give it back to some friend.
Q. Did he mention the name of the friend who he gave the gun back to?
A. No.
Q. Did he indicate what he was being robbed -- robbed of when he shot them?
A. Weed.
Q. Weed?
A. (Nods head.)
Q. Do you know what weed is?
A. Marijuana. Same thing.
Q. Did your nephew, the defendant, indicate where he was when he called you Tuesday morning?
A. Yes.
Q. Where did he say he was?
A. Henderson.
Q. Henderson?

A. Yes.
Q. Okay. Did there come a time when you drove up to and went to Henderson to pick up your nephew, sir?
A. Yes.
Q. And would that have been the following day, Wednesday?
A. Yes.
Q. And when you picked up your nephew, the defendant, on Wednesday, was he alone?
A. Yes.
Q. Did he have anything in his hands?
A. Yes.
Q. What did he have?
A. Plastic bag with some clothes.
Q. Could you notice anything unusual about the clothes that was in the plastic bag?
A. Yes.
Q. What did you notice about the clothes?
A. About the clothes?
Q. Yeah.
A. I didn't see the clothes. I only see in the plastic bag.
Q. Was there anything different about your nephew's appearance when you saw him on Wednesday,

as opposed to a day or two earlier?

A. Yes.

Q. What was different about his appearance?

A. He cut -- cut his hair.

Q. Okay. Where did you -- once you picked up your nephew on Wednesday, where did the two of you go?

THE COURT: Mr. Budd, do you want some water?

THE WITNESS: To get to my house.

BY MR. SCHWARTZ:

Q. And who was at your house when you and your nephew arrived, sir?

A. My family.

Q. Okay. Did there come a time while you were at your house with your nephew when the police arrived?

A. Yes.

Q. And was it obvious to you who they were looking for?

A. Yes.

Q. They were looking for your nephew?

A. Yes.

Q. Did you make any suggestions to your nephew as to what you thought he should do?

A. Yes.
Q. What did you tell him?
A. To turn his self in.
Q. What did he say to that?
A. He say he prefer to run.
Q. Did you talk to him about what possible sentences he could receive?
A. Yes.
Q. What did you say to him?
A. I say he could possibly get death or life, life in prison.
Q. And what, if anything, did he say in response to that?
A. Nothing.
MR. SCHWARTZ: I have no further questions, your Honor.
THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. BROOKS:
Q. Mr. Budd, you speak with an accent.
Are you from Belize?
A. Yes.
Q. But you speak English, that's your native language?

A. Broken English.
Q. Do you speak any foreign language?
A. (Shakes head.)
THE COURT: For the record --
THE WITNESS: No.
THE COURT: Thank you.
BY MR. BROOKS:
Q. You are Glenford's uncle.
Is his father your brother?
A. Yes.
Q. What's the name of his father?
A. Glenford Budd.
Q. And his father, Glenford Budd, lives in Belize still?
A. Yes.
Q. How long was my client, A.I. or Glenford, in Las Vegas before the shooting occurred?
A. I think in December.
Q. I'm sorry?
A. In December.
Q. He came to Las Vegas in December?
A. Yes.
Q. Of last year?
A. Yes.

Q. So he's been here since December of 2002?
A. Yes.
Q. So he's been here roughly six months?
A. Yes.
Q. Was he living with you at your house?
A. No.
Q. Did he live at your house at all during the six months?
A. No.
Q. Do you know where he was living?
A. With my brother.
Q. With your brother?
A. (Nods head.)
Q. What is your brother's name?
A. Kirk.
Q. Is that K-i-r-k?
A. Yes.
Q. And he lives here in Las Vegas?
A. Yes.
Q. Is that where my client was living almost the entire six months, as far as you know?
A. Yes.
Q. You've testified that when you picked him up on Wednesday the 27th, his hair was cut;

correct?

A. Yes.

Q. Prior to that day, when was the last time you had seen him?

A. Memorial Day.

Q. I'm sorry?

A. Memorial Day.

Q. Memorial Day?

A. Uh-huh.

Q. And at that time on Memorial Day, his hair was not cut?

A. No.

MR. BROOKS: Pass the witness.

MR. SCHWARTZ: No redirect, your Honor. Thank you.

THE COURT: And Mr. Budd is free to go, I presume?

MR. SCHWARTZ: Yes, your Honor.

THE COURT: Mr. Budd, thank you for testifying. You're free to leave. And please do not discuss your testimony until the end of the preliminary hearing. And thank you.

THE WITNESS: Thanks.

THE COURT: Welcome.

///

Thereupon--

JAMES CHARLES VACCARO

was called as a witness and sworn to testify to the truth, the whole truth, and nothing but the truth.

THE CLERK: Please be seated.

Would you state your first and last name and spell them both for the record, please.

THE WITNESS: My name is James Charles Vaccaro, V-a-c-c-a-r-o.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q. Sir, by whom are you employed?

A. By the Las Vegas Metropolitan Police Department.

Q. In what capacity?

A. As a homicide detective.

Q. And how long have you been so employed?

A. About ten years now.

Q. Let me direct your attention to, I believe it was May the 27th, in the early morning hours of the 27th.

Did you have occasion to respond to 2895 East Charleston, Building 9, Apartment 2068?

A. 2068, yes.

Q. And what was your purpose in going to that location on that date?

A. Myself and other members -- other homicide detectives were requested to respond there to investigate what started off as a double homicide situation and then turned into a triple homicide.

Q. When you arrived at or when you entered -- strike that.

When you arrived in the area of Apartment 2068, did you see any victims of the homicide present at the location?

A. Yes.

Q. And can you describe for the Court where you saw these individuals?

A. Yes. The apartment complex is the Saratoga Palms East, II apartment complex, and it consists of some two-story apartment buildings. The 2068 apartment that we were at was in Building 9, which was kind of in the south and east corner of the complex. When I went up the stairs into the apartment, I remembered entering the door. The door faced the west. And the layout of the apartment was such that the north bedroom was the

master bedroom and bathroom. And there was a common area, living room, the central area of the apartment, and two additional bedrooms were in the southeast and southwest corners of the apartment. The first deceased that I saw when I got to the top of the stairs of 2068 was a black male who was sort of in the corner by a closet out on a patio landing and was later identified as the body of Jason -- Jason Moore.

Q. Let me show you -- let me interrupt you for one moment.

(Whereupon, State's Exhibits 1-3 were marked for identification.)

BY MR. SCHWARTZ:

Q. Show you State's Proposed Exhibit I. And if you can identify the individual depicted in that proposed exhibit.

A. Yes. This is a photograph taken at the coroner's office, but I recognize this individual. This is the man that I saw on the patio landing when I first arrived at the apartment.

Q. Who was identified to you as Jason Moore?

A. Yes.

MR. SCHWARTZ: Your Honor, we move for

the admission of State's 1.

MR. BROOKS: No objection.

THE COURT: It will come in.

(Whereupon, State's Exhibit 1 was admitted into evidence.)

BY MR. SCHWARTZ:

Q. Please continue, Detective.

A. After I did a brief inspection of that individual, I wanted to walk through the rest of the apartment to see what I was up against there. And so after I walked through the front door, I come into the living room area, and I turned to the left into the master bedroom -- and that was where I found the door to the master bedroom partially opened. And so that required me to step through the small area, and there was a body of another black male on the floor that was preventing the door from opening all the way. This man I came to know to be Da'Jon Jones.

Q. Let me show you State's Proposed Exhibit 2 and ask if you're able to identify the individual depicted in that exhibit?

A. Yes. This is a photograph taken at the coroner's office of that young black male that I came to know him as Da'Jon Jones.

MR. SCHWARTZ: Your Honor, the State would move for the admission of State's Proposed Exhibit 2.

MR. BROOKS: No objection.

THE COURT: It will come in.

(Whereupon, State's Exhibit 2 Was admitted into evidence.)

BY MR. SCHWARTZ:

Q. Detective, did you locate an area within that apartment where there was evidence of perhaps yet another victim having been present at that location?

A. Yes, I did.

Q. Can you tell the Court about that?

A. Yes. Proceeding to the south in the apartment, towards those other two bedrooms that I talked about -- a common hallway that connected those two bedrooms -- on the floor in that hallway, I found a very large pool of blood, which was consistent with the location of where I would have believed the third victim would have been. I found ballistic evidence at this location. And I also learned from detectives that were present that this was where they had found that person before he was evacuated by ambulance to the hospital.

Q. Did you subsequently learn the identity of the third individual?

A. Yes. This would be a black male who I learned was identified as Derrick Jones.

Q. In connection with this investigation, did there come a subsequent time when you attended the autopsy of all three individuals?

A. Yes.

Q. And let me show you State's Proposed Exhibit 3 and ask if you recognize the individual depicted in that exhibit?

A. Yes. This is Derrick Jones.

MR. SCHWARTZ: Your Honor, the State would move for the admission of State's Proposed Exhibit 3.

MR. BROOKS: No objection.

THE COURT: It will come in, as well as Exhibit 2.

(Whereupon, State's Exhibit 3 was admitted into evidence.)

MR. SCHWARTZ: Thank you, your Honor.

BY MR. SCHWARTZ:

Q. Now, Detective Vaccaro, let me direct your attention to May the 29th.

Did you have an occasion to have a brief

conversation with an individual identified to you perhaps as Glenford Budd?

A. Yes.

Q. Do you see that individual in the courtroom today?

A. Sure. He's next to Mr. Brooks here with blue jail clothing on.

MR. SCHWARTZ: Record reflect identification of the defendant, your Honor?

THE COURT: That will be noted.

BY MR. SCHWARTZ:

Q. And where did that conversation take place?

A. It took place there within the Clark County Detention Center.

Q. Who was present during the conversation?

A. Myself and my partner, Detective Marty Wildman.

Q. Prior to your conversation with the defendant, had you advised him of his constitutional rights per the Miranda decision?

A. Yes, I did.

Q. How did you go about doing that, from memory or through a card?

A. I -- I believe I read it from a card on

this occasion.

Q. And did the defendant indicate to you whether or not he understood his rights?

A. Yes, he certainly did.

Q. Did you have a brief conversation with him?

A. Yes, I did.

Q. What did he say?

A. During the conversation, I explained to him that we had a lot of information about the case and that it would be in his best interest if he tried to explain what happened.

He told me that he was present at Apartment 2068 on the night of the shooting. He said that he had gone there because there was a dispute between he and other occupants of the apartment about some marijuana. He said a half a pound of marijuana. I asked him specifically about who was present, and he named the three victims. He named himself. And then he named another young man that I know as Lazon Jones, but I think he called him a different name. I think he referred to a street name or nickname.

Q. Would that have been Casper?

A. Yeah, I think it was Casper. And I

asked him again. So I said, There were only five of you there? And he said yes. And then I said to him, Well, if five people were there and three of them are now dead and one has called the police to report this, could you explain to me how you're role fits into this? What did you do? Are you responsible? And that was when he invoked and said that he'd like to talk to a lawyer.

Q. So you had no further questioning after that; is that correct?

A. That's right.

Q. Okay.

MR. SCHWARTZ: Court's indulgence.

BY MR. SCHWARTZ:

Q. Did the defendant, during this brief conversation with you, indicate whether or not he heard any gunshots?

A. Yes, he did.

Q. What did he say about that?

A. He said that he had heard a gunshot and also ran from the apartment.

Q. Thank you.

MR. SCHWARTZ: I have nothing further, your Honor.

THE COURT: Cross.

MR. BROOKS: No questions, your Honor.

THE COURT: And, Detective, I thank you for testifying. You're free to go. Please do not discuss your testimony with anybody until the end of the preliminary hearing.

MR. SCHWARTZ: Your Honor, there's one possible additional witness, but in view of the hour, I think we'll just rest at this time.

MR. BROOKS: Court's indulgence, your Honor.

MR. SCHWARTZ: I mean, just for today, not rest.

THE COURT: That was going to be my clarification.

So where does that leave us at this stage?

MR. SCHWARTZ: Your Honor, we're going to call Dr. Worell when she gets back from vacation on our next court appearance here and then an additional witness who has just recently been discovered by the police. I had first found out about her about 8:00 o'clock this morning. I think Mr. Brooks probably found out about 8:30 or 8:45. So we'd like to put her on as well.

THE COURT: And this was discussed in

chambers about the continuance for the new witness as well as the coroner to be present.

And I forgot what you said about the vacation time when the coroner would be back.

MR. SCHWARTZ: She's back this Friday, but I think with everything, we thought Monday would be best unless the Court's schedule is --

THE COURT: I'm sure Monday will be busy, if it's been like the last few Mondays. But we'll set it out and see what the schedule looks like.

What about Tuesday?

MR. SCHWARTZ: The only day I'd ask is not Tuesday. But Wednesday. Any day but Tuesday.

MS. PANDUKHT: Wednesday would be fine.

THE COURT: There's a case on Monday that may be going for sure already. So let's do Wednesday, June 25th.

And for the friends and family and people that are in this courtroom, that will be at 10:00 o'clock, because we have our normal 9:00 o'clock calendar, and I don't know if anything will be resolved or not resolved regarding the cases on. But the earliest we'll get started, as you noticed today, will be 10:00 o'clock, June 25th, 10:00 a.m.

This will be continued per agreement of the parties and the Court.

And I know some of the witnesses are outside. I told them not to talk about the case during the prelim. And it's still pending. I told one witness that it would definitely be going. I forgot that we were continuing. I said she could talk about it this afternoon.

MR. SCHWARTZ: The witnesses that we find, we'll urge them not to discuss it.

THE COURT: All right. So we'll see you back here a week from Wednesday, which would be, once again, June 18th.

MR. SCHWARTZ: June 25th.

THE COURT: Wait. I'm sorry, June 25th at 10:00 a.m. Thank you.

(Whereupon the proceedings concluded.)

* * * * *

ATTEST: Full, true, and accurate transcript of proceedings.

Tessa R. Heishman

TESSA R. HEISHMAN, CCR NO. 586

ORIGINAL

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JUL 25 3 16 PM '03
CLERK

NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DAVID P. SCHWARTZ
Chief Deputy District Attorney
Nevada Bar #000398
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD,
#1900089

Defendant.

CASE NO: C193182

DEPT NO: XVIII

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through DAVID P. SCHWARTZ, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. NRS 200.033(12) The Defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

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COUNTY CLERK

P:\WPDOCS\DEATH\309\30913701.doc

2. NRS 200.033(5) The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

DATED this 23 day of July, 2003.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
DAVID P. SCHWARTZ
Chief Deputy District Attorney
Nevada Bar #000398

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing NOTICE OF INTENT TO SEEK DEATH PENALTY is hereby acknowledged this _____day of July, 2003.

PUBLIC DEFENDER
ATTORNEY FOR DEFENDANT

BY _____
309 S. Third Street #226
Las Vegas, Nevada 89101

mb

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD A BUDD,
Appellant,
vs.
THE STATE OF NEVADA
Respondent.

Supreme Court No.:
District Court Case No.: 03C193182

APPELLANT'S APPENDIX – VOLUME I – PAGES 0001-0247

MATTHEW D. CARLING
51 East 400 North, Bldg. #1
Cedar City, Utah 84720
(702) 419-7330 (Office)
Attorney for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
Counsel for Respondent

CATHERINE CORTEZ MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Counsel for Respondent

INDEX
Budd, Glenford

on 01/31/2006	2010
Media Request and Order for Camera Access to Court Room filed on 09/28/2005	411
Media Request to Permit Camera Access To Proceedings filed on 07/03/2003	27
Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus filed on 09/21/2007	2750-2785
Memorandum Regarding Petitioner's Exhibits (In Camera Review) filed on 12/12/2013	2990-2992
Motion 1: Defendant Budd's Motion in Limine for Order Prohibiting Prosecution Misconduct in Argument; and for Order that Court Takes Judicial Notice of Authority Cited in This Motion if Defense Objects at Trial to Improper Argument filed on 09/14/2004	138-230
Motion 10: Defendant Budd's Motion in Limine to Prohibit any Reference in Front of the Jury to the Trial Phase of the Proceedings as the "Guilt Phase" filed on 09/14/2004	276-279
Motion 11: Defendant Budd's Motion to Strike Allegations of Certain Aggravating Circumstances Alleged in State's Notice of Intent to Seek Death Penalty filed on 10/04/2004	374-382
Motion 12: Defendant Budd's Motion to Preclude the Admission During a Possible Penalty Proceeding of Evidence about the Personal Character of the Victims and the Impact of the Victims' Deaths on the Family filed on 10/04/2004	347-352
Motion 13: Defendant Budd's Motion to Bar the Admission of Cumulative Victim Impact Evidence in Violation of the Due Process Law filed on 10/04/2004	369-373
Motion 14: Defendant Budd's Motion to Dismiss State Notice of Intent Because Nevada's Death Penalty Scheme Violates Due Process Guarantees by Failing to Require a Pre-Trial Finding of Probable Casue for Alleged Aggravators filed on 10/04/2004	353-368
Motion 2: Defendant Budd's Motion for Exchange of Jury Instructions on the First Day of Trial filed on 09/14/2004	231-233
Motion 3: Defendant Budd's Motion for Recording of All Proceedings Pursuant to Supreme Court Rule 250 filed on 09/14/2004	234-237
Motion 4: Defendant Budd's Motion to Disqualify all Potential Jurors who knew or were Acquainted with the Victims or Their Families filed on 09/14/2004	238-242
Motion 5: Defendant Budd's Motion to Disqualify all Potential Jurors Who Would Automatically Vote for the Death Penalty in the Event of a First Degree murder Conviction filed on 09/14/2004	263-266
Motion 6: Defendant Budd's Motion in Limine to Prohibit the State from Using Preemptory Challenges to Remove Minorities from Jury filed on 09/14/2004	243-247
Motion 7: Defendant Budd's Motion to Bifurcate Penalty Phase Proceedings filed on 09/14/2004	248-255

Motion 8: Defendant Budd's Motion to Allow the Defense to Argue Last in a Potential Penalty Phase Proceeding filed on 09/14/2004	256-262
Motion 9: Defendant Budd's Motion for Jury Questionnaire to be Completed by Jure Venire one Week Prior to Trial filed on 09/14/2004	267-275
Motion for Leave to Proceed in Forma Pauperis filed on 05/01/2007	2573-2574
Motion for Leave to Proceed in Forma Pauperis filed on 09/21/2007	2786-2790
Motion for Rehearing filed on 08/10/2007	2598-2613
Motion for Withdrawal of Attorney of Record or in the Alternative, Request for Records/ Court Case Documents filed on 05/01/2007	2575-2581
Motion to Hold Howard S Brooks, Attorney of Record in Contempt for Filing to Forward a Copy of the Case File filed on 07/05/2007	2583-2591
Motion to Withdraw as Petitioner's Attorney filed on 09/13/2012	2840-2843
Notice of Appeal filed on 01/23/2008	2825-2827
Notice of Appeal filed on 03/23/2006	2517-2519
Notice of Appeal filed on 08/10/2007	2595-2597
Notice of Entry of Decision and Order filed on 01/08/2008	2816-2824
Notice of Entry of Findings of Fact, Conclusions of Law and Order filed on 10/20/2014	3104-3117
Notice of Evidence in Support of Aggravating Circumstances filed on 10/08/2004	390-391
Notice of Expert Witnesses filed on 09/28/2004	312-344
Notice of Intent to Seek Death Penalty filed on 07/25/2003	99-100
Notice of Witnesses filed on 09/28/2004	345-346
Order for Petition for Writ of Habeas Corpus filed on 09/27/2007	2791
Order for Production of Inmate Glenford Anthony Budd filed on 11/25/2009	2838-2839
Order for Production of Inmate Glenford Anthony Budd filed on 12/23/2013	2998-2999
Order for Production of Inmate Greg Lewis, BAC #82483 filed on 11/28/2005	421-422
Order for Transcript filed on 03/20/2006	2513
Order for Transcript filed on 09/23/2014	3040
Order Granting State's Request for All Thirty-Three (33) Pages of Public Defender Brooks' Case Notes filed on 01/10/2014	3037-3038
Order of Appointment filed on11/05/2012	2844
Order Re: Custody of Material Witness Greg Lewis filed on 04/11/2006	2520-2521
Order Re: Custody of Material Witness Greg Lewis ID filed on 12/15/2005	1507-1508
Order Setting Hearing Appointment of Counsel Re: Supreme Court Remand filed on 10/29/2009	2837
Penalty Verdict Count 1 filed on 12/16/2005	1739
Penalty Verdict Count 2 filed on 12/16/2005	1740
Penalty Verdict Count 3 filed on 12/16/2005	1738
Petition for Writ of Habeas Corpus Post Conviction filed on 09/21/2007	2709-2749

Petitioner's Reply Brief to the State's Response to the Defendant's Petition for Writ of Habeas Corpus Post Conviction filed on 11/20/2013	2959-2985
Petitioners Exhibits in Support of Petition for Writ of Habeas Corpus Post Conviction filed on 09/21/2007	2622-2708
Request for Evidentiary Hearing filed on 09/21/2007	2617-2621
Second Supplemental Petition for Writ of Habeas Corpus Post Conviction filed on 10/25/2013	2919-2927
Special Verdict (Aggravating Circumstance) filed on 12/16/2005	1737
Special Verdict (Mitigating Circumstances) filed on 12/16/2005	1735-1736
State's Response to Defendant's Memorandum Regarding Petitioner's Exhibits (In Camera Review) filed on 12/17/2013	2993-2997
State's Response to Defendant's Petition for Writ of Habeas Corpus (Post Conviction) and First Supplemental Petition for Writ of Habeas Corpus filed on 11/06/2013	2928-2958
States Opposition to Defendant's Motion to Bar the Admission of Cumulative Victim Impact Evidence in Violation of the Due Process Clause filed on 10/12/2004	400-403
States Opposition to Defendants Motion for Jury Questionnaire to be Completed by Jure Venire One Week Prior to Trial filed on 09/22/2004	308-311
States Opposition to Defendants Motion for Recording of all Proceedings Pursuant to Supreme Court Rule 250 filed on 09/21/2004	291-293
States Opposition to Defendants Motion in Limine for Order Prohibiting Prosecution Misconduct in Argument; and for Order that Court Takes Judicial Notice of Authority Cited in this Motion if Defense Objects at Trial to Improper Argument filed on 09/21/2004	284-287
States Opposition to Defendants Motion in Limine to Prohibit any Reference in Front of the Jury to the Trial Phase of the Proceedings as the "Guilt Phase" filed on 09/21/2004	297-299
States Opposition to Defendants Motion in Limine to Prohibit the State from Using Peremptory Challenges to Remove Minorities from the Jury to filed on 10/06/2004	383-386
States Opposition to Defendants Motion to Allow the Defense to Argue Last in a Potential Penalty Phase Proceeding filed on 09/21/2004	288-290
States Opposition to Defendants Motion to Bifurcate Penalty Phase filed on 09/21/2004	304-307
States Opposition to Defendants Motion to Dismiss the State's Notice of Intent because Nevada's Death Penalty Scheme Violates Due Process Guarantees by Failing to Require a Pre-Trail Finding of Probable Cause for Alleged Aggravators filed on 10/14/2004	404-410
States Opposition to Defendants Motion to Disqualify all Potential Jurors who Knew or were Acquainted with the Victim's or Their Families filed on 09/21/2004	294-296
States Opposition to Defendants Motion to Disqualify all Potential Jurors who would Automatically Vote for the Death Penalty in the Event of a First Degree Murder Conviction filed on 09/21/2004	300-303

States Opposition to Defendants Motion to Preclude the Introduction of Victim Impact Evidence Pertaining to Victim and Family Members Characterizations filed on 10/12/2004	396-399
States Response to Defendant Budd's Motion to Strike Allegations of Certain Aggravating Circumstances Alleged in States Notice of Intent to Seek Death Penalty filed on 10/12/2004	392-395
States Response to Defendant's Petition for Writ of Habeas Corpus Post Conviction filed on 11/27/2007	2797-2807
Stipulation and Order Extending Time filed on 07/23/2013	2916-2918
Stipulation filed on 12/12/2005	1299
Stipulation to Enlarge Briefing schedule and Order filed on 03/29/2013	2845-2846
Third Supplemental Petition for Writ of Habeas Corpus (Post Conviction) filed on 12/12/2013	2986-2989
Verdict filed on 12/13/2005	1300-1301

TRANSCRIPTS

2

FILED

JUSTICE COURT, LAS VEGAS TOWNSHIP

2003 JUN 26 P 10:49

Shirley B Parraguirre

CLERK

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
GLENFORD ANTHONY BUDD
Defendant.

District Court Case No.: C193182

Justice Court Case No.: 03F09137X

7/2/03 XVIII

I, hereby certify the foregoing to be a full, true and correct copy of the proceedings as the same appear in the above case.

WITNESS my hand this 26TH day of JUNE, 2003.

Tony Abbatangelo
Justice of the Peace of Las Vegas Township

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JUN 26 2003
COUNTY CLERK

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD

Defendant.

Case No.03F09137X

COMMITMENT and ORDER TO APPEAR

An Order having been made this day by me, that GLENFORD ANTHONY BUDD

be held to answer upon the charge of COUNTS 1, 2 & 3 MURDER WITH USE OF A DEADLY WEAPON Committed in said Township and County, on or about the 26TH day of MAY , 2003 AND BETWEEN THE 27TH DAY OF MAY,2003.

IT IS FURTHER ORDERED that the Sheriff of the County of Clark is hereby commanded to receive HIM into custody, and detain HIM until HE can be legally discharged, and that HE be admitted to bail in the sum of NO BAIL Dollars, and be committed to the custody of the Sheriff of said County, until such bail is given; and

IT IS FURTHER ORDERED that said Defendant IS commanded to appear in Department XVIII of the Eighth Judicial District Court, Clark County Courthouse, Las Vegas, Nevada, at 9 A.M., on the 2ND day of JULY , 2003, for arraignment and further proceedings on the within charges.

DATED this 26TH day of JUNE, 2003.

Justice of the Peace of Las Vegas Township

Justice Court, Las Vegas Township

STATE VS. BUDD, GLENFORD ANTHONY CASE NO. 03F09137X

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES — HEARING	CONTINUED TO:
JUNE 25, 2003 T. ABBATANGELO T. PANDUKHT, DA AND D. SCHWARTZ, DA H. BROOKS, PD R. SILVAGGIO, CR M. MCCREARY, CLK	TIME SET FOR CONTINUATION OF PRELIMINARY HEARING DEFENDANT PRESENT IN COURT IN CUSTODY STATE'S WITNESSES REXENNE WORRELL CLESTE PELAU MOTION BY STATE TO AMEND COMPLAINT TO REFLECT DATE OF INCIDENT AS MAY 26, 2003 AND BETWEEN THE 27TH DAY OF MAY, 2003 - MOTION GRANTED STATE RESTS DEFENDANT WAIVES RIGHT TO MAKE SWORN OR UNSWORN STATEMENT DEFENSE RESTS SUBMITTED WITHOUT ARGUMENT DEFENDANT BOUND OVER AS CHARGED TO DISTRICT COURT APPEARANCE DATE SET DEFT REMANDED TO THE CUSTODY OF THE SHERIFF	7-2-03 9 AM XVIII DISTRICT COURT CASE FORWARDED TO JUN 2 3 2003 COUNTY CLERK'S OFFICE mm

Justice Court, Las Vegas Township

STATE VS. BUDD, GLENFORD ANTHONY CASE NO. 03F09137X

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES — HEARING	CONTINUED TO:
MAY 28, 2003 ,	CRIMINAL COMPLAINT FILED: **COUNTS 1-2-3 - MURDER WITH USE OF A DEADLY WEAPON**	sr
JUNE 2, 2003 T. ABBATANGELO C. OWENS, DA H. BROOKS, PD T. HEISHMAN, CR M. MCCREARY, CLK	INITIAL ARRAIGNMENT DEFENDANT PRESENT IN COURT *IN CUSTODY* DEFENDANT ADVISED OF CHARGES/WAIVES READING OF COMPLAINT DEFENDANT QUALIFIES FOR PD RESPRESENTATION PRELIMINARY HEARING SET COURT APPOINTED PUBLIC DEFENDER TO REPRESENT DEFENDANT REMANDED TO THE CUSTODY OF THE SHERIFF	6-16-03 9 AM #3 sr
JUNE 13, 2003	MEDIA REQUEST AND ORDER ALLOWING CAMERAS IN THE COURTROOM FILED BY KLAS-TV 8	mm
JUNE 16, 2003 T. ABBATANGELO T. PANDUKHT, DA & D. SCHWARTZ, DA ~~A. BROOKS, SPD~~ T. HEISHMAN, CR H. ANDERSON, CLK H. BROOKS, PD	TIME SET FOR PRELIMINARY HEARING DEFENDANT PRESENT IN COURT *IN CUSTODY* CONTINUED BY STIPULATION OF COUNSEL FOR 2 WITNESSES TO BE PRESENT PRELIMINARY HEARING DATE RESET CHANNEL 8 FILED MEDIA REQUEST, CHANNELS 3 & 13 DID NOT AND WERE ASKED TO REMOVE CAMERAS FROM THE COURTROOM NO PHOTOS OF WITNESSES PERMITTED	6-25-03 10 AM #3 CASE FORWARDED TO JUN 2[illegible] COUNTY CLERK'S OFFICE
	MOTION BY DEFENSE TO EXCLUDE WITNESSES - MOTION GRANTED STATES WITNESSES LAZONE JONES - WITNESS IDENTIFIES DEFENDANT TRACEY RICHARDS - WITNESS IDENTIFIES DEFENDANT WINSTON BUDD - WITNESS IDENTIFIES DEFENDANT JAMES VACCARO - WITNESS IDENTIFIES DEFENDANT STATES EVIDENCE EXHIBITS 1 - 3 - PHOTOS = OFFERED - ADMITTED	
	REMANDED TO THE CUSTODY OF THE SHERIFF	ha

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD
#1900089,

Defendant.

CASE NO: 03F09137X

DEPT NO: 3

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), in the manner following, to-wit: That the said Defendant, on or about the 27th (26th) day of May, 2003, at and within the County of Clark, State of Nevada,

COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill DAJON JONES, a human being, by shooting at and into the body of the said DAJON JONES, with a deadly weapon, to-wit: a firearm.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

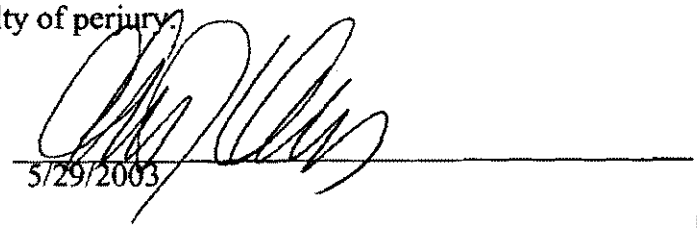
did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill DERRICK JONES, a human being, by shooting at and into the body of the said DERRICK JONES, with a deadly weapon, to-wit: a firearm.

COUNT 3 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill JASON MOORE, a human being, by shooting at and into the body of the said JASON MOORE, with a deadly weapon, to-wit: a firearm.

All of which is contrary to the form, force and effect of Statutes in such cases made

and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.



5/29/2003

03F09137X/kb
LVMPD EV# 0305270001
MWDW - F
(TK3)

NOTICE OF RESERVATION TO SEEK THE DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, pursuant to the Order Amending Supreme Court Rule 250 filed on December 30, 1998, NRS 175.552 and NRS 200.033, reserves the right to file a Notice of Intent to Seek the Death Penalty.

DATED this 29th day of May, 2003.

Respectfully submitted,

BY 

Chris J Owens
Chief Deputy

Page 1 of ____

NEW

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
TEMPORARY CUSTODY RECORD

I.D. #: 900089 Event #: 030527-0001

DATE OF ARREST: 5-29-03 TIME OF ARREST: 1640 I.D. ESTAB. BY: ____

INTAKE NAME (AKA, ALIAS, ETC.) Last	First	Middle	TRUE NAME Last	First	Middle
BUDD, GLENFORD	ANTHONY		Budd	GLENFORD	ANTHONY

ADDRESS NUMBER & STREET	BLDG./APT. #	CITY	STATE	ZIP
2895 E. CHARLESTON	12/2096	L.V.	NV	

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	HAIR	EYES	SOCIAL SECURITY #	Speak English?	PLACE OF BIRTH
12-23-82	B	M	5'3"	130	BLK	BRO		☑ Yes ☐ No	BELIZE CITY, BELIZE

LOCATION OF CRIME (# - Street - City - State - Zip)	Citizen Arrest	LOCATION OF ARREST	PCN #
2895 E. CHARLESTON LV	Y (N)	16 E WEBB #0	

BKG. CODE	CHARGE ORD / NRS #	M	GM	F	ARR TYPE*	EVENT NUMBER	WARR / NCIC NUMBER	COURT LV	JC	DC	OTHER
5045	MURDER WITH DEADLY WEAPON (3 CTS)	☐	☐	☑	P/C	030527-0001		☐	☑	☐	☐
	201.030-1	☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐		03F09137X		☐	☐	☐	☐
	NO BAIL	☐	☐	☐		JA3		☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐

*ARREST TYPE: PC – PROBABLE CAUSE BS – BONDSMAN SURRENDER BW – BENCH WARRANT WA – WARRANT RM – REMAND GJI – GRAND JURY IND.

OTHER COURT:

T. Lee AKKERLEE 1918 LVMPD FBI
Arresting Officer's Signature (Print Name) P # Agency

T. Lee 1814
Transporting Officer's Signature (Print Name) P # Agency

APPROVAL CONTROL # FOR ADDITIONAL CHARGES:

Time Stamp at BOOKING

☑ FOR PROBABLE CAUSE/NCIC HIT ARREST SEE PAGE TWO FOR DETAILS.

☐ BENCH WARRANT SERVED ON ____ BY ____

☐ WARRANT SERVED ON ____ BY ____

☐ GRAND JURY INDICTMENT SERVED ON ____ BY ____

TYPE OF I.D. FOR VERIFICATION ____

FIRST APPEARANCE: DATE: 5-30-03 TIME: 8:30

COURT

☑ JUSTICE

☐ MUNICIPAL

☐ JUVENILE

☑ No Bail STANDARD BAIL

☐ O.R. RELEASE

☑ PROBABLE CAUSE

☐ I.A.D.

JUDGE: Tony Abbatangelo

CONT ABBATANGELO

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2003 MAY 29 18 58
CSD RECORDS
P #: 03

LVMPD 22 (REV. 7-98) (2) COURT • ORIGINAL

SID ☑ FBI ☑

EM 000008

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Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

DECLARATION OF ARREST

I.D. #: NEW 1900089

True Name: BUDD, GLENFORD ANTHONY Date of Arrest: 5-27-03 Time of Arrest: 1640

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with LVMPD. (Department), Clark County, Nevada, being so employed for a period of 15 (years) ~~(months)~~. That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense of THE ABOVE at the location of 2895 E. CHARLESTON # 2068 (ADDRESS / CITY / STATE / ZIP)

and that the offense occurred at approximately 0001 hours on the 27 day of MAY 2003, in the county of ☐ Clark or ☒ City of Las Vegas, NV.

DETAILS FOR PROBABLE CAUSE:

* PLEASE SEE ARREST REPORT *

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Declarant must sign second page with original signature.

Declarant's Signature

M. WILDEMANN 3516

Print Declarant's Name P #

LVMPD 22 – A (REV. 8-01) (1) ORIGINAL – COURT

VEGAS METROPOLITAN POLICE DEPARTMENT

ARREST REPORT

[ ] City [X] County [X] Adult [ ] Juvenile Sector/Beat _____

ID/EVENT#	ARRESTEE'S NAME (Last, First, Middle)	S.S.#
030527-0001	BUDD, GLENFORD ANTHONY	

ARRESTEE'S ADDRESS (Number, Street, City, State, Zip Code)

CHARGES: MURDER WITH A DEADLY WEAPON 3 COUNTS

OCCURRED: DATE	DAY OF WEEK	TIME	LOCATION OF ARREST (Number, Street, City, State, Zip Code)
MAY 27TH 2003	TUESDAY	0001 HRS.	

RACE	SEX	D.O.B.	HT	WT	HAIR	EYES	PLACE OF BIRTH
B	M	12-23-82			BLK	BRN	

CIRCUMSTANCES OF ARREST

That on May 27th 2003, Tuesday morning at approximately 0001 hours, the Las Vegas Metropolitan Police Department received several 911 emergency calls reference gun shots being fired in building 9, apartment 2068 at the Saratoga Palms Apartments II, located at 2895 E. Charleston Boulevard. One of the callers, a Lazon Jones, stated he was in the apartment when the shots were being fired. Lazon Jones stated his brother, along with two other friends were in the apartment with a man he knows as "A.I." Jones said when the shooting started he fled and he believed A.I. shot everyone in the apartment.

At the same time L.V.M.P.D. was receiving the 911 calls, two L.V.M.P.D. Gang Crimes Section Detectives, Detective Patricia Spencer and Detective Michael Wallace, were patrolling in the Saratoga Palms II apartment complex when the shots were fired. Detective Spencer heard the shots being fired and both Detectives Wallace and Spencer went to the area where she heard the shots. As they were en route, Detective Spencer noticed a black male juvenile, later identified as Lazon Jones, running from the area where the shots were fired. Detectives Spencer and Wallace were directed by citizens to apartment 2068 who informed the Detectives, "People are dead up there." Detectives Spencer and Wallace went up the stairs to apartment 2068 and could see the body of Jason Moore lying on the balcony in front of the door to the apartment .

Detectives Spencer and Wallace decided to enter the apartment to check for surviving victims, locate any suspects or witnesses and to secure the crime scene. Both Detectives stated as they entered the apartment they could still smell and see smoke from the gunfire. Upon further entry into the apartment, Detectives Spencer and Wallace discovered Derrick Jones lying on the hallway floor which led to the back bedrooms. Derrick Jones was suffering from several gunshot wounds including several gunshot wounds to the head, but was still alive at the time detectives entered the apartment. Detectives Spencer and Wallace discovered the body of 14 year old DaJon Jones lying on the floor of the master bedroom. DaJon Jones had gunshot wounds to his head and neck area. Detectives requested emergency medical services respond to the apartment.

ARRESTING OFFICER(S)	P#	APPROVED BY	CONNECTING RPTS. (Type or Event Number)
J. VACCARO	1480		030527-0001
M. WILDEMANN	3516		

LVMPD 602 (REV. 12-90) • AUTOMATED

Paramedics determined both DaJon Jones and Jason Moore were dead at the scene but had vital signs from Derrick Jones. Jones was subsequently transported to the University Medical Center.

At approximately 0100 hours, Detective Sergeant K. Manning contacted Detectives Vaccaro, Wildemann and Mesinar and requested they respond to a double homicide that could potentially turn into a triple homicide at 2895 East Charleston, apartment 2068. Homicide Detectives responded and it was decided Detective Vaccaro would work the crime scene along with Crime Scene Analysts and Detectives Wildemann and Mesinar would interview any potential witnesses.

Detectives Spencer and Wallace were able to locate Lazon Jones after back up officers arrived, **(Lazon Jones was the person Detective Spencer saw running from the scene when they arrived.)** Detective Wildemann and Mesinar conducted a taped interview of Lazon Jones. Jones informed Detectives he, his brother DaJon Jones and their friends, Derrick Jones and Jason Moore, were all in their apartment, apartment 2068, watching television on the evening of May 26th. A friend who Lazon knew only as "A.I." joined the four and was hanging out at the apartment but left to go get a drink. Lazon described "A.I." as a black male approximately 20 years old, 5'5" tall and a thin build. Lazon stated "A.I." was wearing a red "Clippers" jersey with the number 21 on it, a pair of blue jeans and a blue "doo rag". Lazon also stated "A.I." had shoulder length hair that was in braids. Lazon stated shortly before midnight "A.I." returned to the apartment and walked directly to the master bedroom where DaJon Jones was watching television. Lazon said DaJon was the only person in the bedroom at the time. Lazon said he was lying on a couch in the living room and Derrick and Jason were lying on the adjacent couch watching television when he heard two gunshots. Lazon stated he jumped up but Derrick told him to come back inside the apartment. Lazon said he told Derrick the gunshots were from inside the apartment and as he said that he heard one additional shot from inside the bedroom where DaJon and "A.I." were. Lazon said after he heard the third shot he heard the master bedroom door open so he ran out of the apartment and didn't look back.

Detective Wildemann asked Lazon if he has ever seen "A.I." carry a gun. Lazon replied he thought "A.I." was carrying a gun that evening because of the way he was walking. Detective Wildemann asked Lazon how "A.I." was walking and Lazon stated he was walking with his hand in his pocket as if hiding something.

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Detectives Wildemann and Mesinar met with the mother of Lazon and Dajon Jones, Sheryl Jones. Mrs. Jones stated "A.I." had dated her daughter for a short period of time. Mrs. Jones had a Nextel phone and was able to contact her daughter in California with the walkie talkie option as Detectives stood by. Mrs. Jones' daughter stated "A.I.'s" name was

Glenford Anthony Budd. She further stated he had a tattoo of "Mr. Budd" on his arm, "Only God can judge me" on his back and his mother's name on his chest. Mrs. Jones' daughter further stated she thought "A.I." was staying with his Aunt and Uncle in building 12 in the Saratoga Palms II. She stated the apartment was an upstairs apartment and faced the pool. Mrs. Jones' daughter further stated "A.I." lived in Los Angeles, California and would probably head straight for the bus station and head back to L.A.

At approximately 0315 hours, Detective's Wildemann and Mesinar, along with Sgt. Manning went to building 12 of the Saratoga Palms II. Detectives observed there were four upstairs apartments in building 12 that faced the pool, one of which was apartment 2096. Detectives knocked on the door to apartment 2096 and contacted Rosalie Bishop. Detective Wildemann asked Miss Bishop if Anthony was living there and she replied "Glenn lives here." Detective Wildemann asked if Anthony was Glenn and Miss Bishop replied yes. Miss Bishop said Detectives could look in the apartment and see where Glenn sleeps. Detectives looked through the apartment and did not locate Glenn. Miss Bishop's husband, Kurt Budd, came out of the master bedroom and said Glenn Budd was his nephew and had been staying in the apartment since December. Miss Bishop took Detective Wildemann to where Glenn slept and showed him the duffle bag where Glenn kept his clothes. Detective Wildemann saw a luggage tag on the handle of the duffle bag from Greyhound Bus Lines. The tag stated the originating city was Los Angeles California and the destination was Las Vegas Nevada. The tag also had the name Glenn Budd written on it. Mr. Budd stated Glenn had left the house on the evening of the 26th and had not returned home.

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On May 28th, Wednesday morning at approximately 0930 hours, Detective Wildemann and Sergeant Manning attended the autopsies of DaJon Jones, Derrick Jones and Jason Moore at the Clark County Coroner's Office. Dr. Rexenne Worrell determined that all three victims died of multiple gunshot wounds and the manner of their deaths was homicide.

ON 5-29-03 AT APPROXIMATELY 1640 HRS., MEMBERS OF THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT CRIMINAL APPREHENSION TEAM CONTACTED GLENFORD ANTHONY BUDD AT A RESIDENCE IN NORTH LAS VEGAS, NEVADA.

MR. BUDD IDENTIFIED HIMSELF TO THOSE DETECTIVES AS GLENFORD ANTHONY BUDD. DETECTIVES NOTICED HE HAD CHANGED HIS APPEARANCE BY CUTTING OFF THE LONG BRAIDED HAIR HE WAS SEEN WITH ON THE NIGHT OF THE MURDERS. THE C.A.T. DETECTIVES TRANSPORTED MR. BUDD TO C.C.D.C. WHERE THEY WERE MET BY HOMICIDE DETECTIVES WILDEMANN AND VACCARO. DETECTIVES MIRANDIZED MR. BUDD AND ASKED HIM IF HE WISHED TO TALK ABOUT WHAT HAPPENED IN THE APARTMENT. MR. BUDD SAID HE WAS PRESENT IN THE APARTMENT WITH JASON MOORE, DERRICK JONES, LAZON JONES AND DAJON JONES WHEN HE HEARD A GUNSHOT. MR. BUDD SAID HE AND THE OTHER FOUR WERE THE ONLY ONES IN THE APARTMENT AT THE TIME. HE SAID HE WAS THERE TO TALK TO THE OTHERS TO FIND OUT WHO HAD STOLEN ONE HALF POUND OF MARIJUANA

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LAS VEGAS METROPOLITAN POLICE DEPARTMENT

ARREST REPORT

03F09137X
TK-3

[ ] City [X] County [X] Adult [ ] Juvenile Sector/Beat

ID/EVENT#	ARRESTEE'S NAME (Last, First, Middle)	S.S.#
030527-0001	BUDD, GLENFORD ANTHONY	

ARRESTEE'S ADDRESS (Number, Street, City, State, Zip Code)

Fel Arrgn 6/2/03

CHARGES: MURDER WITH A DEADLY WEAPON 3 COUNTS

OCCURRED: DATE	DAY OF WEEK	TIME	LOCATION OF ARREST (Number, Street, City, State, Zip Code)
MAY 27TH 2003	TUESDAY	0001 HRS.	

RACE	SEX	D.O.B.	HT	WT	HAIR	EYES	PLACE OF BIRTH
B	M	12-23-82			BLK	BRN	

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CLARK COUNTY PRETRIAL QUESTIONNAIRE AND FINANCIAL AFFIDAVIT

Defendant: BUDD, Glenford Anthony	
Arrest Date: 5-29-2003	Arraign. Date:
S.S.N: 10k	I.D.: 1900089
D.R. #:	D.O.B. 12-23-82
M J Charge:	Bail:
M J Charge: PC JC-3 03F09137X 3Counts	Bail:
M J Charge: Murder with Deadly Weapon	Bail: NO BAIL
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:

BASED ON _____ VERIFIED POINTS THIS DEFENDANT HAS RECEIVED, AND THE INFORMATION GATHERED BY INTAKE SERVICES, THE FOLLOWING RECOMMENDATION IS MADE:

_____ Supervised Release with Conditions as Directed by Intake Services: _____

_____ Bail Reduction To: _____

XX Not Recommended for an O/R Release or Bail Reduction Because: _____

NI Chrg

Release Granted: _____ Date: _____

Bail Reduction To: _____

Release Denied: _____ Date: _____

JC-1 (Intake Services)
Rev. 04/02
WHITE – Court CANARY – Intake Services

000020

Justice Court, Las Vegas Township
CLARK COUNTY, NEVADA

FILED

THE STATE OF NEVADA

2003 JUN 13 P 1:50

JUSTICE COURT LAS VEGAS NEVADA

BY DEPUTY

PLAINTIFF CASE NO: 03F09137X

-VS-

Glennford Budd

DEFENDANT

MEDIA REQUEST & ORDER ALLOWING CAMERAS IN THE COURTROOM

Eric Darensburg of KLAS-TV Hereby requests

Permission to videotape Proceedings on the above entitled case, in Courtroom No. 3

Judge Abbatangelo Presiding, on the 16th Day of June, 20 03

At the hour of 9:00 .M.

I certify that I am familiar with the Supreme Court Rules 229-247 (inclusive) on Cameras and Electronic Media Coverage in the Courts. I also understand that this request must be submitted to the Court at least seventy-two (72) Hours before the proceedings commence unless good cause can be shown.

It is further understood any pooling arrangements necessitated among the media shall be the sole responsibility of the media and must be arranged prior to coverage, without calling upon the Court to mediate any disputes.

DATED this 9th Day of June, 20 03

3228 Channel 8 Dr, LV 792-8870

Media Representative, address & Telephone Number

IT IS HEREBY ORDERED by this Honorable Court that _____ be

Permitted to _____ In accordance with Supreme Court Rules 229-247 (inclusive)

And that this entry shall be made a part of the record of the proceedings in this case.

DATED this 13 Day of June, 20 03

Tony Abbatangelo

JUSTICE COURT JUDGE

Plaintiff Attorney Noticed Dave Schwartz Date 6-13-03

Defendant Attorney Noticed Howard Brooks Date 6-13-03

Media Noticed Eric Darensburg Date 6-13-03

JC-18(Criminal) Rev. 04/01

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

INTAKE SERVICES INFORMATION SHEET

CASE NO.03F09137X
DEPT NO.JC 3

NAME: BUDD, GLENFORD **ID#: 1900089**
CHARGES: MURDER WDW 3 CTS
CURRENT BAIL: NO BAIL

VERIFIED: ADDRESS: NOT INTERVIEWED
WITH WHOM/HOW LONG:

VERIFIED: EMPLOYMENT: UNEMPLOYED:
DISABLED: STUDENT:

VERIFIED: RELATIVES: LOCAL NOT LOCAL

FELONY CONVICTIONS: -0-

MISDEMEANOR CONVICTIONS: -0-

FAIL TO APPEAR: -0-

PENDING CHARGES/HOLDS/COMMENTS:
ALSO HAS IMMIGRATION VIOL.

RECOMMENDATION:

DATE: 060203 **INTAKE SERVICES S. HIATT**
JC-18 (INTAKE SERVICES) Rev. 10/00

CONFIDENTIAL

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

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FAIL TO APPEAR: -0-

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RECOMMENDATION:

DATE: 060203 6/8 DH **INTAKE SERVICES S. HIATT**

JC-18 (INTAKE SERVICES) Rev. 10/00

CONFIDENTIAL

ORIGINAL

FILED

2003 JUN 26 P 3:41

INFO
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DAVID P. SCHWARTZ
Chief Deputy District Attorney
Nevada Bar #000398
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

I.A. 7/2/03
9:00 A.M.
PD

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD,
#190089

Defendant.

Case No: C 193182
Dept No: XVIII

INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That GLENFORD ANTHONY BUDD, the Defendant(s) above named, having committed the crime of MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), on or between May 26, 2003 and May 27, 2003, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill DAJON JONES, a human being, by shooting at and into the body of the said DAJON JONES, with a deadly weapon, to-wit: a firearm.

RECEIVED
JUN 26 2003
COUNTY CLERK

P:\WPDOCS\INF\309\30913701.DOC

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill DERRICK JONES, a human being, by shooting at and into the body of the said DERRICK JONES, with a deadly weapon, to-wit: a firearm.

COUNT 3 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill JASON MOORE, a human being, by shooting at and into the body of the said JASON MOORE, with a deadly weapon, to-wit: a firearm.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY _____
DAVID P. SCHWARTZ
Chief Deputy District Attorney
Nevada Bar #000398

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
CUSTODIAN OF RECORDS	LVMPD – DISPATCH
HORN, D.	LVMPD #1928
JONES, LAZON	C/O REG WEAVER, D.A.'S OFFICE
LEE, T.	LVMPD #2566
PALAU, CELESTE	C/O REG WEAVER, D.A.'S OFFICE

P:\WPDOCS\INF\309\30913701.DOC

SPENCER, P.	LVMPD #4852
VACCARO, J.	LVMPD #1480
WALLACE, M.	LVMPD #4761
WILDEMANN, M.	LVMPD #3516
WORRELL, REXENE	CCME

DA#03F09137X/mb
LVMPD EV#0305270001
MWDW - F
(TK3)

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
ORIGINAL

JUL 3 9 48 AM '03

Shirley B. Parraguirre

State of Nevada
Plaintiff,

vs.

Gianfaro Budd
Defendant.

Case No. 03C193182
Dept. No. 18

C193182

MEDIA REQUEST TO PERMIT CAMERA ACCESS TO PROCEEDINGS

Shannon Clayton of KVBC-TV hereby requests permission to broadcast, record, photograph or televise proceedings in the above-entitled case in the courtrooms of Department 18 Judge Nancy Saitta, commencing on the 2nd day of July, 2003.

I certify that I am familiar with the contents of Nevada Supreme Court Rule 230 and Standards of Conduct and Technology ADKT 26.

I also understand that this form must be submitted to the Court at least seventy-two (72) hours before the proceeding commences unless good cause can be shown.

DATED this 30th day of June, 2003.

MEDIA REPRESENTATIVE

PHONE NUMBER

ORDER GRANTING PERMISSION OF CAMERA ENTRY

The court having determined that approval of this request ___ would /X would not distract participants, impair the dignity of the proceedings or otherwise materially interfere with the achievement of a fair trial or hearing herein.

IT IS HEREBY ORDERED that permission is X granted / ___ denied as requested for each and every hearing on the above-entitled case unless otherwise notified. This order is in accordance with Nevada Supreme Court Rule 230, et seq. and Standards of Conduct and Technology ADKT 26, and all applicable sections of the NRS. It also is subject to reconsideration upon motion of any party to the action.

IT IS FURTHER ORDERED that this entry shall be made a part of the record of the proceedings in this case.

DATED this 1st day of July, 2003.

DISTRICT JUDGE

RECEIVED
JUL 3 2003
COUNTY CLERK

Case No.: C193182

Department No.: 3

FILED

JUL 7 10 50 AM '03

CLERK

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

ORIGINAL

STATE OF NEVADA, Plaintiff, vs. GLENFORD ANTHONY BUDD, Defendant.	CASE NO.: 03F09137X

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE TONY L. ABBATANGELO
JUSTICE OF THE PEACE

Taken on Monday, June 16, 2003

APPEARANCES:

For the State: DAVID P. SCHWARTZ, ESQ.
TALEEN R. PANDUKHT, ESQ.
Deputy District Attorney

For the Defendant: HOWARD S. BROOKS, ESQ.
Deputy Public Defender

REPORTED BY: TESSA R. HEISHMAN, RPR, CCR NO. 586

I N D E X

INDEX TO EXHIBITS

STATE'S			MARK/ADMIT
1	-	Photograph	62/63
2	-	Photograph	62/64
3	-	Photograph	62/65

LAS VEGAS, NEVADA, MONDAY, JUNE 16, 2003

A.M.

-oOo-

THE COURT: For the record, Glenford Budd, 3F 9137X.

MR. BROOKS: Judge, Howard Brooks on behalf of Mr. Budd. Originally, Judge, there were three cameramen here, one from Channel 3, one from Channel 8, one from Channel 13. Channel 8 is the only channel that filed the notice required by the statute, and so I brought that to the Court's attention.

THE COURT: And my bailiff informed the cameramen as well as the photographers. There's no objection to the still photography. Also there was an objection because 3 and 13 did not file on time. And 8 is present.

And, also, Mr. Schwartz?

MR. SCHWARTZ: Schwartz.

THE COURT: Schwartz wanted to say not to have the witnesses photographs or have -- and that goes for the still photographs as well as the video, for redacting or dedacting, whichever word we're supposed to use.

And as soon as Mr. Budd comes back, we'll get started.

And when we get started, who will the State's first witness be?

MR. SCHWARTZ: Lazon Jones.

THE COURT: Mr.? Or is it Mr. or Mrs.?

MR. SCHWARTZ: Mr.

THE COURT: Mr. Jones, you'll be the first witness to come up. All the other witnesses will go outside, and we'll just wait. Remain seated.

MR. BROOKS: For the record, Judge, the defense does invoke the exclusionary rule.

THE COURT: The exclusionary rule is invoked.

THE COURT: This is 3F 9137X, Glenford Budd. He's present in custody. Mr. Brooks representing him. Mr. Schwartz for the State and Ms. Pandukht for the State as well.

Tell him to come in now; otherwise, he's going to have --

MS. PANDUKHT: Well, until he finishes talking to her, we are not ready.

THE COURT: He said it was resolved.

MS. PANDUKHT: It was until he realized

there was an amendment made sometime back.

THE BAILIFF: He's not ready.

THE COURT: Actually, earlier in the record, Mr. Brooks did request the exclusionary rule.

And I believe you said Lazon Jones.

Mr. Jones, come up to the chair on my right. We'll have you sworn in.

Once again, any witnesses that are present, please have a seat outside.

And I presume they are outside?

MR. SCHWARTZ: Yes, your Honor.

THE COURT: Raise your right hand.

THE BAILIFF: Raise your right hand. Stay right there.

Thereupon--

LAZON JONES

was called as a witness and sworn to testify to the truth, the whole truth, and nothing but the truth.

THE CLERK: Please be seated.

Please state your first and last name and spell them for the record, please.

THE WITNESS: Lazon Jones, L-a-z-o-n

J-o-n-e-s.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q. Lazon, can you scoot up and speak into this microphone so everybody can hear you. Do the best you can.

Lazon, directing your attention to May 26th, 2003. That was a Monday.

Were you living at the Saratoga Palms Apartments?

A. Yeah.

Q. What apartment were you living in?

A. 2068.

Q. 2068?

A. Yes, sir.

Q. Is that in Building Number 9?

A. Yes, sir.

Q. Let me direct your attention to shortly before midnight on May the 26th, 2003.

Were you inside your apartment when something terrible happened?

A. Yes, sir.

Q. Who else was in the apartment with you at that time?

A. Me, my brother, my two friends, and A.I.

Q. Now, you have to name the individuals. You were there.

Who else was there?

A. Derrick Jones, Da'Jon.

THE COURT: Derrick.

THE WITNESS: Da'Jon Jones and Jason Moore.

BY MR. SCHWARTZ:

Q. So Derrick Jones, Da'Jon Jones, and Jason Moore; is that right?

A. (Nods head.)

Q. And yourself. So that's four of you.

You also mentioned A.I.; is that right?

A. Yes, sir.

Q. Do you see A.I. in the courtroom today?

A. Yes, sir.

Q. Could you point to where he is sitting and describe what he's wearing today?

A. He's sitting to the right in front of me, and he has on orange socks and a blue jumpsuit.

MR. SCHWARTZ: Could the record reflect the identification of the defendant, your Honor?

THE COURT: That will be noted.

///

BY MR. SCHWARTZ:

Q. Okay. Did you know the defendant by any name other than A.I.?

A. No, sir.

Q. Okay. Did you know what A.I. stood for?

A. I assume what it stood for, but I never --

Q. What did you think it stood for?

A. Allen Iverson.

Q. And he's a basketball --

MR. BROOKS: I'm sorry, I didn't hear the answer.

BY MR. SCHWARTZ:

Q. You have to speak up.

A. Allen Iverson.

Q. Allen Iverson.

Now, shortly before midnight on May the 26th, could you tell the Court what happened?

A. What happened?

Q. In the apartment.

A. I was laying on the couch, and there was a knock at the door. And Derrick answered the door, and it was A.I. And he had came in, supposedly coming back from the store from getting a drink. And he wanted to use the bathroom, so he

walked in the room where my brother was at and closed the door.

Q. Okay. Let's slow down for a second.

A.I. knocked on the door and came back into the apartment?

A. Yes, sir.

Q. So he had left, you said, to get a drink?

A. Yes, sir.

Q. Okay. And he asked to use the rest room?

A. Yeah.

Q. The bathroom?

A. Yes, sir.

Q. What room did he then go into?

A. The master bedroom.

Q. And who was in the master bedroom?

A. My brother, Da'Jon Jones.

Q. Okay. Where were you located at this time?

A. In the living room on the couch.

Q. And where was Derrick Jones?

A. In the living room on the other couch.

Q. And how about Jason Moore?

A. In the living room on the couch.

Q. Okay. So there's three of you in the living room and your brother Da'Jon is in the master bedroom?

A. Yes, sir.

Q. What happened after A.I. went into the master bedroom?

A. He closed the door. And I heard two gunshots. And I jumped up and ran to the door and opened it. And I hesitated before I ran out, and I ran when I heard the third shot from in the room.

Q. What door did you run to?

A. The front door.

Q. So you heard a total of three shots?

A. Yes, sir.

Q. What did you do after you got to the front door?

A. After I got to the front door, I waited for a minute to see if I'd hear anything. And then I heard A.I. say -- after the first two shots, I heard him say, Where my stuff at? And then I heard another shot, and then I ran after that shot.

Q. Where did you run to?

A. I ran down the stairs into the back of the building towards the 7-Eleven.

Q. And what, if anything, did you do when

you arrived at the 7-Eleven?

A. I called the police.

Q. Okay. Was that a 911 call?

A. Yes, sir.

Q. When you heard the first two shots after the defendant had gone into the master bedroom, was there anyone else in the apartment besides you the defendant, your brother Da'Jon, Derrick Jones, and James Moore?

A. No, sir.

Q. So only the five of you in that apartment?

A. Yes, sir.

Q. As you were running to the 7-Eleven store, did you hear any other gunshots?

A. No, sir.

Q. Did you see the defendant A.I. again after he went into the master bedroom?

A. In the apartment?

Q. Yes.

A. No, sir.

Q. Did you see him -- okay.

How long have you known the defendant, A.I.?

A. For about a month.

Q. Do you know if he lived in the same apartment complex where you were living?

A. Yes.

Q. He did live there?

A. Yes, sir.

Q. Did you ever play basketball with the defendant?

A. Yes, sir.

Q. Did you play basketball with him earlier that night?

A. Yes, sir.

Q. Were all the people who were in your apartment at the time of the shooting also playing basketball with the defendant earlier that night, James, Derrick, and Da'Jon?

A. Da'Jon was not, but Derrick and Jason was.

Q. Jason. I'm sorry, I said James.

Now, while you, the defendant, Jason, and Derrick were playing basketball earlier that night, was there any type of an argument between the defendant and anybody else?

A. Yes, sir.

Q. What was the argument? Who was the argument between?

A. The first argument was between A.I. and Derrick, because A.I. had asked him did he take his weed.

Q. Did he take his weed?

A. Yes, sir.

Q. And what do you think "weed" means?

A. Marijuana.

Q. Okay. What was the second argument about?

A. It was over a foul between him and Jason while they were playing.

Q. Jason. I'm sorry.

So there was a foul that occurred when the defendant and Jason were playing basketball?

A. Yes, sir.

Q. And was the argument between the defendant and Jason at that time?

A. Yes, sir.

Q. What was said?

A. A.I. told Jason that he wasn't going to fight him, he would put some slugs in him.

Q. And that was over just a foul in a basketball game?

A. Yes, sir.

Q. Now, earlier, you mentioned that there

was an argument over some weed?

A. Yes, sir.

Q. And who was that argument between?

A. Derrick and A.I.

Q. Did that take place also on the basketball court?

A. Yes, sir.

Q. Did it seem to resolve or end peacefully?

A. Yes, sir.

Q. And then was it after the basketball game that the five of you went to your apartment?

A. Yes, sir.

Q. Did everything seem to be okay while the five of you were in the apartment?

A. Yes, sir.

Q. And you said before the shooting had occurred, the defendant had left to get a drink?

A. Yes, sir.

Q. Did he indicate where he was going to get the drink?

A. To the store.

Q. How long was he gone before he came back and knocked on the door?

A. Ten, fifteen minutes.

Q. And then how long would you say it was from the time he entered the apartment till you heard the shots coming from the master bedroom?

A. Two minutes at the most.

Q. Okay. You see the defendant in court today?

A. Yes, sir.

Q. Does his appearance look any different than from the time you saw him on May the 26th, 2003, when the shooting occurred?

A. Yes, sir.

Q. How does he look different?

A. His hair is cut. And he had more facial hair on the side.

Q. Okay. Thank you.

MR. SCHWARTZ: I have nothing further, your Honor. Thank you.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. BROOKS:

Q. Is it Lazon Jones?

A. Yes, sir.

Q. How old are you, sir?

A. Sixteen.

Q. And your brother is Derrick?
A. Da'Jon.
Q. Da'Jon is your brother?
A. Yes, sir.
Q. How old was Da'Jon?
A. Thirteen.
Q. Derrick is not your brother?
A. No, sir.
Q. Is Derrick a brother of Da'Jon?
A. No, sir.
Q. But they both have the Jones last name?
A. Yes, sir.
Q. And you're not related to Jason Moore?
A. No, sir.
Q. Who actually lived in this apartment?
A. All of us lived there.
Q. The four of you lived there?
A. Yeah.
Q. My client did not live there?
A. No.
Q. You say my client lived in the same apartment complex?
A. Yes, sir.
Q. Where did he live there?
A. I've never actually been to his

apartment, but I know he stayed in the complex.

Q. But so you don't know which apartment he stayed in?

A. No, sir.

Q. Do you know who he lived with?

A. His aunt and uncle.

Q. Do you know their names?

A. No, sir.

Q. Was there anyone else that lived there, that you know of?

A. No, sir.

Q. You say that you knew Mr. Budd for approximately one month; correct?

A. Yes, sir.

Q. He was your friend?

A. Yes, sir.

Q. You hung out with him?

A. Yes, sir.

Q. And he hung out with Derrick, Da'Jon, and Jason as well --

A. Yes, sir.

Q. -- for that month time?

A. Well, Jason haven't been there for a month. He was there for at least two weeks before it happened. He moved out there later, after we

moved out there.

Q. How long had you been in Las Vegas?

A. About a month.

Q. Where did you come from?

A. Hesperia

Q. I'm sorry?

A. Hesperia.

Q. Hesperia, California?

A. Yeah.

Q. Did you come here with your brother?

A. No.

Q. How long had your brother been in town?

A. He had came the same day, just the following night. I got there before him.

THE COURT: Following night after you got here originally?

THE WITNESS: The night I got there.

THE COURT: In Las Vegas?

THE WITNESS: Yeah. He came just later on in the day.

THE COURT: Okay.

BY MR. BROOKS:

Q. So the four of you are living in this apartment together?

A. Yes, sir.

Q. But only one of you, one of the four, has only been here two weeks?
A. Yes, sir.
Q. And the other three have been in town roughly a month?
A. Yes.
Q. And during this time at the apartment complex, you would hang out with Mr. Budd?
A. Yes, sir.
Q. As far as you know, was there any bad blood between Glenford Budd and any of the other three individuals?
A. No, sir.
Q. There was no bad blood between him and you?
A. No, sir.
Q. Do you have a nickname?
A. Yes, sir.
Q. What is your nickname?
A. Casper.
Q. Casper?
A. Yes, sir.
Q. Did Derrick Jones have a nickname?
A. Not to my knowledge, no.
Q. Did Da'Jon James (sic) have a nickname?

A. No.
Q. What about Jason Moore?
A. No, sir.
Q. When you are that day playing basketball earlier, what time were you playing basketball?
A. I don't really know, but the sun had just started to go down. Late afternoon.
Q. Had the five of you been together earlier that day?
A. Yes, sir.
Q. Had you been together most of the day?
A. Yes, sir.
Q. What had y'all been doing before the basketball game?
A. Just at the house, kicking it, listening to some music, playing dominos, rapping, just regular activities.
Q. Were you drinking?
A. No, sir.
Q. Were you smoking your marijuana?
A. No, sir.
Q. Did you smoke marijuana with Mr. Budd occasionally?
A. No, sir.
Q. You had never smoked marijuana with him?

A. No, sir.
Q. Had you ever seen any of your brothers smoke marijuana with him?
A. No, sir.
Q. Had you seen Jason Moore smoke marijuana with him?
A. No, sir.
Q. Had you seen Derrick James -- Derrick Jones smoke marijuana with him?
A. No, sir.
Q. Had anybody been smoking marijuana that day, of those five people?
A. To my knowledge, no, sir.
Q. And that's true for that evening as well?
A. Yes, sir.
Q. So nobody is high?
A. No, sir.
Q. Nobody is using other drugs?
A. No, sir.
Q. Did y'all ever use other drugs with Mr. Budd?
A. No, sir.
Q. You're playing basketball and there's a conversation about weed.