IN THE SUPREME COURT OF THE STATE OF NEVADA

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NORMAN BELCHER, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 72325

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE OF DEATH
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH PRESIDING

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APPELLANT'S REPLY BRIEF

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ISSUES PRESENTED FOR REVIEW

I. **MR. BELCHER'S RECORDED STATEMENT TO DETECTIVES SHOULD HAVE BEEN SUPPRESSED BASED ON A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

II. **MR. BELCHER IS ENTITLED TO A NEW PENALTY PHASE BASED UPON THE PRESENTATION OF CLEARLY INAPPROPRIATE AND HIGHLY PREJUDICIAL TESTIMONY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION.**

III. **MR. BELCHER WAS DENIED DUE PROCESS WHEN THE DISTRICT COURT FAILED TO STRIKE THE STATE'S THEORY OF AIDING AND ABETTING.**

IV. **MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UPON HIGHLY PREJUDICIAL CHARACTER EVIDENCE BEING ELICITED.**

V. **MR. BELCHER IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS BASED UPON WITNESS VOUCHING.**

VI. **THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. BELCHER OF THE ROBBERY OF NICHOLAS BRABHAM (COUNT NUMBER TWO). MR. BELCHER IS ENTITLED TO A NEW PENALTY PHASE BECAUSE OF THE INVALID AGGRAVATING CIRCUMSTANCE.**

VII. **MR. BELCHER WAS DENIED A FAIR TRIAL WHEN THE STATE INTRODUCED INADMISSIBLE HEARSAY IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE UNITES STATES CONSTITUTION.**

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IX. **MR. BELCHER IS ENTITLED TO A NEW TRIAL AS HE WAS DENIED HIS RIGHT TO CONFLICT FREE COUNSEL DURING THE PRELIMINARY HEARING.**

X. **MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UPON THE FAILURE TO PROPERLY PRESERVE POTENTIALLY EXCULPATORY EVIDENCE IN VIOLATION OF THE UNITED STATES CONSTITUTION.**

XI. **THE DISTRICT COURT ERRED IN DENYING MR. BELCHER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS RESIDENCE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION.**

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XIII. **THE DISTRICT COURT ERRED IN DENYING MR. BELCHER'S MOTION TO SUPPRESS UNNECESSARILY SUGGESTIVE IDENTIFICATION OF THE DEFENDANT BY OFFICER ANTHONY CAVARICCI IN VIOLATION OF THE UNITED STATES CONSTITUTION.**

XIV. **DURING THE TRIAL PHASE, THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 12, 29, 31 AND 55 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

XV. DURING THE PENALTY PHASE, THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 5 AND 12 IN VIOLATION OF THE SIXTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XVI. THE DEATH PENALTY IS UNCONSTITUTIONAL.

XVII. MR. BELCHER IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS BASED UPON CUMULATIVE ERROR.

JURISDICTIONAL STATEMENT

The Jurisdictional Statement stands as enunciated in the Opening Brief.

ROUTING STATEMENT

The Routing Statement stands as enunciated in the Opening Brief.

STATEMENT OF THE CASE

The Statement of the Case stands as enunciated in the Opening Brief.

STATEMENT OF THE FACTS

The Statement of the Facts stands as enunciated in the Opening Brief.

ARGUMENT

I. MR. BELCHER'S RECORDED STATEMENT TO DETECTIVES SHOULD HAVE BEEN SUPPRESSED BASED ON A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In a separate issue, the State conceded that the police had taken Mr. Belcher into custody when police "heard his story..." (ROA Vol. 10 p. 2274). Obviously, when the State was not concerned with the issue of whether the defendant was in a custodial situation, the State inadvertently conceded what is obvious to even a casual observer. The State conceded Mr. Belcher was in custody.

If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel "at liberty to terminate the

interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed.2d 383 (1995), Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997) ("The test for whether one is in custody is if a reasonable person would believe he was free to leave.")

It is obvious from the totality of the circumstances that Mr. Belcher, or any reasonable person would not have felt free to leave. In fact, a reasonable person would have to wonder how they could possibly leave when handcuffed and surrounded by police. Simultaneously, the handcuffed individual is observing the search of his residence. Additionally, the handcuffed individual has been relieved of his keys and phone. Without being flippant, perhaps Houdini would feel free to release himself from his chains and secretly, without detection, leave the scene. Otherwise, Mr. Belcher would suggest that any reasonable person attempting to extract themselves from this situation may be subject to serious physical injury at the hands of the police and an additional charge of escape.

The following uncontested facts overwhelmingly demonstrate that a reasonable person would not have felt free to leave:

1) Mr. Belcher was continuously handcuffed from the time he was seized outside his residence at the Siegel Suites until he was placed inside a homicide interview room (ROA Vol. 14 p. 3057).

2) Mr. Belcher was restrained for approximately one hour and forty-three

minutes before the questioning began at the homicide office at 7:43 p.m. (ROA Vol. 14 p. 3062) (the interrogation concluded 11:15 p.m.)

3) Mr. Belcher was kept in the small homicide interview room for approximately three and a half hours (ROA Vol. 14 p. 3057-3058).

4) Detective Hardy did not inform Mr. Belcher he was free to leave or that he had the right to counsel prior to the inception of the interview (ROA Vol. 14 p. 3058). When police would leave the interview room they ensured that Mr. Belcher was securely locked inside the small room (ROA Vol. 3 p. 658).

5) Mr. Belcher stated that before he got to homicide he had requested a lawyer (ROA Vol. 3 p. 659). In response, Detective Hardy made no comment to Mr. Belcher's complaint that he had requested counsel (ROA Vol. 3 p. 659).

6) Detective Hardy admitted that the police were searching the Siegel Suites apartment contemporaneously with the interview (ROA Vol. 3 p. 661).

7) The district court noted that Mr. Belcher could not freely walk around the interview room (ROA Vol. 4 p. 714).

8) Mr. Belcher could easily have been interviewed outside his residence but police chose to handcuff him and take him to the homicide office.

9) Mr. Belcher was never told he was formally under arrest until two hours into the interrogation. Police did not inform him he was free to leave.

10) For approximately five hours, Mr. Belcher remained either in handcuffs or in a locked interrogation room.

11) At one point during the interrogation, Mr. Belcher allegedly covered his face to avoid an identification.

12) At one point during the interview, Mr. Belcher stated, "I want to leave." (ROA Vol. 14 p. 3061).

> 13) At no time could Mr. Belcher utilize his phone as it had been confiscated by the police along with his Nevada identification at the Siegel Suites (ROA Vol. 15 p. 3225) (they had been laid on an air conditioning unit outside of his residence by police).

Given these uncontradicted facts, a reasonable person would be left pondering how on earth they can possibly be free to leave under the circumstances. In fact, a reasonable person would have to wonder how they could release their hands from the locked chains around their wrists. Is the State suggesting that Mr. Belcher could have simply walked or run away and found a locksmith? Perhaps Mr. Belcher while running could have yelled for the police to leave and make sure his phone and identification was securely placed back in his residence. Again, without appearing sarcastic, the answer to these questions is obvious. No reasonable person would feel fee to leave. To argue otherwise is simply disingenuous. In fact, no jurist could come up with a solution to how the defendant could feel free to leave and carry out that desire to leave without the individual being in great jeopardy.

An analysis of the case law proves the meritorious claim raised in this appeal. Both Mr. Belcher and the State agree this Court will review this issue *de novo* (State's Answering Brief p. 43). Therefore, the district court's ultimate conclusion relied upon a mixed question of law and facts and subjects the decision

to *de novo* review.

In determining whether objective indica of custody exists, these factors should be considered: 1) whether the suspect was told that the questioning was voluntary or was free to leave; 2) whether the suspect was not formally under arrest; 3) whether the suspect could move about freely during questioning; 4) whether the suspect voluntarily responded to questions; 5) whether the atmosphere of questioning was police dominated; 6) whether the police used strong arm tactics or deception during questioning; and 7) and whether the police arrested the suspect at the termination of questioning. State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315 (1998).

The State analyzed the seven factors enunciated by this Court in Taylor. First, the State comically claims that Mr. Belcher voluntary accompanied Detective Hardy to the homicide division for the interview (State's Answering Brief p. 57). The State failed to recognize that the first factor also considers whether the individual was told he was free to leave. The State has conceded that Mr. Belcher was not told he was free to leave. More importantly, how would an individual who is handcuffed be free to leave. The State boldly concludes Mr. Belcher voluntary accompanied Detective Hardy (with handcuffs around his wrists) to the homicide division. Rarely, in an appellate brief, does the State make

such disingenuous claims as they have done in this case. The mental gymnastics necessary for a reasonable person to figure out how they would be free to leave under these circumstances is astonishing. This factor clearly weighs in favor of Mr. Belcher.

The State argues that Mr. Belcher was not formally under arrest until Officer Cavaricci identified him. It is true that Detective Hardy claimed that Mr. Belcher was formally under arrest after the identification.

Third, the State argues that Mr. Belcher was not handcuffed in the interview room and detectives were not blocking access to the door, which was unlocked while detectives were inside (State Answering Brief p. 57). Again, this is an incredibly disingenuous argument. Is the State contending that Mr. Belcher could have stood up, began walking to the door and the detectives would have sat there and watched him leave? If this is so, why did detectives lock the door keeping Mr. Belcher restrained when they would leave. If he could freely leave there would be no need to lock the door. The answer is simple, because Mr. Belcher would have suffered physical restraint at the hands of one or multiple officers if he had made any furtive movements in an effort to evade the police.

The State claims that Mr. Belcher voluntary responded to questioning and chose what line of questioning he wished to avoid (State's Answering Brief p. 57).

The State failed to acknowledge in their entire Answering Brief that Mr. Belcher complained that he had asked for counsel prior to the interview. Detective Hardy did not appear to dispute that at any time when Mr. Belcher complained. Here, Mr. Belcher had been relieved of his identification, phone, was in handcuffs and had also requested counsel. Yet, the State claims that he was voluntarily responding to the interview. Mr. Belcher was not given a choice.

Fifth, the State claims that the atmosphere of the questioning was not police dominated, and pointed to the fact that Mr. Belcher never mentioned wanting to place a phone call (State's Answering Brief p. 57). Perhaps the State forgot that the police had seized Mr. Belcher's phone at the Siegel Suites. How could Mr. Belcher have made a phone call without access to his phone? The State is so defeated in this legal argument that they have been reduced to arguing frivolous points. In the event a reasonable persons phone and identification have been confiscated and placed in handcuffs, should the standard be whether the reasonable person wanted to make a phone call? Mr. Belcher's phone was on the other side of town.

With regard to the seventh factor, the State concedes that the police arrested Mr. Belcher at the termination of questioning. All of the factors weigh in favor of an indica of custody. Actually, if Mr. Belcher is not considered in custody, a

reasonable person would have to wonder what does "custody" really mean.

In Carroll v. Nevada, 371 P.3d 1023, 132 Nev. Adv. Rep. 23 (2016), this Court focused on three main inquiries in the determination of whether custody for purposes of Miranda exists. The main inquiries were as follows: 1) the site of the interrogation; 2) objective indicia of arrest; and 3) the length and form of the questioning. Id. at 1032. An individual is not in custody for purposes of Miranda if the police are merely asking questions at the scene of a crime or the individual is merely a focus of the criminal investigation. Id.

First, the site of the interrogation occurred at the police station where Mr. Belcher had been taken in handcuffs. Mr. Belcher could have easily been questioned at his residence but the detectives showed their true intention, to place him in handcuffs and take him to the homicide division. Humorously, the State argues that Mr. Belcher was placed in the police car in handcuffs pursuant to Las Vegas Metropolitan Police Department policy (State's Answering Brief p. 58).[1] The State's argument is nonsensical. Is it really the policy of the Las Vegas Metropolitan Police Department to place every free individual in handcuffs? If

[1] Perhaps, is the State implying that the Las Vegas Metropolitan Police Department's policy concerning handcuffing trumps Fourth Amendment protections.

they are escorting a victim of crime to headquarters for an interview do they handcuff the victim? If an innocent witness to a bank robbery or homicide is questioned, are they placed in handcuffs to be transported to the police station for questioning? The answer is obvious, of course not.

The State is so desperate in their attempt to justify the use of Mr. Belcher's statement, they are developing arguments that are borderline ridiculous. Then, the State contends that the interview room was only locked at that time of night for safety purposes, to be "comfortable that their not running around getting into other people's offices or finding weapons or whatever else." (State's Answering Brief p. 49-50). Again, does the State really expect the Court to believe that an elderly lady whose husband just been shot and killed would be handcuffed and then placed in a locked room at homicide. Perhaps yes, but only if they suspected the elderly lady of committing the homicide.

The State concedes that the site of the interrogation would "suggest custody." (State's Answering Brief p. 58). This Court in Carroll noted that he had been driven from his place of employment to the police station by detectives. Whereas, Mr. Belcher was driven from his residence to the police sation. This makes the facts of Mr. Belcher's case more egregious in connection to this point. Second, with regard to objective indicia of arrest, Mr. Belcher was not told he was

free to leave and was handcuffed for approximately thirty to forty minutes prior to being placed in the interrogation room. Mr. Belcher was never told he was formally placed under arrest until hours into the interrogation. Police did not inform him he was free to leave. Whereas, Mr. Carroll was driven home at the end of the interrogation. Carroll, 371 P.3d at 1033–34. At one point, Mr. Belcher stated, "I wanna leave." (ROA Vol. 14 p. 3061). Mr. Carroll's interrogation lasted two and a half hours. Id. at 1034. Mr. Belcher was restrained in handcuffs or in a locked homicide interview room for almost five hours. Mr. Belcher was constantly surrounded by police presence in a police dominated environment.

Interestingly enough, the district court did acknowledged Mr. Belcher had actually asked to leave on page fifty-one of the transcript (State's Answering Brief p. 54). The district court also mistakenly concluded that:

> There wasn't a circumstance about, you know, keeping him from making a phone call or as in Carroll taking the phone away to make sure he couldn't make any phone calls. (State's Answering Brief p. 54).

Mr. Belcher could not make phone calls because the police had confiscated his phone back at his residence. Additionally, a reasonable person can only speculate how Mr. Belcher could have left the police sation without keys, phone or his Nevada identification.

With regard to the length and form of the questioning, this Court in Carroll

found that detectives had questioned Carroll not as a witness, but as a suspect. The State concedes this point in their Answering Brief (State's Answering Brief p. 55). Here, the police also questioned Mr. Belcher as a suspect and not a witness. To conclude that Mr. Belcher was being treated as a witness, a careful analysis is necessary. Does the Las Vegas Metropolitan Police Department search witnesses houses? Does the Las Vegas Metropolitan Police Department handcuff witnesses and keep them in a locked room for approximately five hours? Are witnesses phones and identifications confiscated from them and left in police control while the witness is taken to the homicide division? The answer is obvious. Mr. Belcher was not being treated as a witness but clearly as a suspect.

During trial, the State effectively utilized statements made by Mr. Belcher (ROA Vol. 25 p. 5526). The State introduced Mr. Belcher's statement as Exhibit 463 (ROA Vol. 25 p. 5567). The State presented evidence from Mr. Belcher's statement in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Failure of this Court to hold as such would amount to a violation of clearly established federal law. See Williams v. Taylor, 529 U.S. 362, 405–06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (finding a state court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if it

"confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent.").

II. MR. BELCHER IS ENTITLED TO A NEW PENALTY PHASE BASED UPON THE PRESENTATION OF CLEARLY INAPPROPRIATE AND HIGHLY PREJUDICIAL TESTIMONY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION.

In the Opening Brief, Mr. Belcher specifically articulated that he had refused to attend the penalty phase and the court had granted his request to be absent (Opening Brief p. 38). Mr. Belcher also informed the Court in the Opening Brief that he desired that no mitigation evidence be presented to the jury (Opening Brief p. 40). The State dedicates almost four pages of the argument on this issue citing transcripts wherein Mr. Belcher admits that he does not want to be present at the penalty phase nor any mitigation presented. Clearly, Mr. Belcher conceded these two points in his Opening Brief.

The State's conclusion proves the validity of Mr. Belcher's argument. The State explained:

> Dr. Roitman framed appellant's desire for the death penalty as a desire to protect other inmates, avoid racial conflict, and based on a preference for death row accommodations. 27 AA 6158-61.

> This argument apparently worked, as the jury found that appellant's desire to die qualified as a mitigating circumstances. 27 AA 6027–28 (State's Answering Brief p. 65).

The State is absolutely correct. Dr. Roitman's testimony provided a rational reason for the jury to consider Mr. Belcher's statement that he desired the death penalty and the jury returned a verdict of death. Essentially, the State is conceding that the defense presented an expert witness who presented calculated reasons why the death penalty was appropriate for Mr. Belcher and that Mr. Belcher agreed.

Suspiciously absent from the State's brief is any concrete argument as to how this evidence assisted Mr. Belcher. In fact, logically the jury would have deliberated and considered the protection of other inmates, the problems with racial conflict and Mr. Belcher's request for death row accommodations. No where in the record does Mr. Belcher consent to the jury being informed of his desire for the death penalty. This is best borne out when the State spends multiple pages citing to the transcript for Mr. Belcher's concession that he wanted to be absent from the penalty phase and did not want mitigation presented. The State can find no evidence that Mr. Belcher consented to an expert and counsel presenting compelling evidence that the death penalty was warranted.

For decades, federal law and Nevada State law have dictated that the breakdown of the adversarial process renders the proceedings fundamentally

unfair. Pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, the finders of fact are entitled to the adversarial process wherein defendant's counsel presents evidence in mitigation and not evidence to assist the jury in determining that a death sentence is warranted and morally acceptable to the defense. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed.2d 657 (1984). In this case, the adversarial process was eroded during the penalty phase.

The State argues that this Court should make a perilous decision. The State requests this Court determine that effective assistance of counsel includes presentation of a rational reason that the defendant should receive a death sentence, without the consent of the defendant. Moreover, in this case the defendant was not even present to make an objection. This amounts to a complete erosion of the adversarial process.

Regarding ineffective assistance of counsel on direct appeal, this Court explained,

> In spite of our stringent standard of review on this issue we do not hesitate to conclude as a matter of law that the performance of Mazzan's counsel at sentencing exceeded the outer parameters of

> effective advocacy, thereby reducing the proceedings to a sham, a farce, or a pretense. Mazzan's cause would have been far better served without benefit of his counsel's presentation during the penalty phase. We are unable to perceive any reason or motive for counsel's actions which would be consistent with even a modicum of effective advocacy. An evidentiary hearing before the district judge as to the motives or strategy behind defense counsel's performance, therefore, is not necessary in this case. Mazzan v. State, 100 Nev. 74, 80, 675 P. 2d 409, 413 (1984).

Here, the State's only argument is that Mr. Belcher did not want to participate in the mitigation process nor in the penalty phase. This does not give counsel the opportunity to concede to the ultimate punishment. The State attempts to distinguish the facts and circumstances of this case and the recent United States Supreme Court decision in McCoy v. Louisiana, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018). In McCoy, the petitioner complained that his attorney had conceded to the guilt of three murders. Mr. Belcher's penalty phase resulted in a more egregious concession. In McCoy, defense counsel attempted strategically to concede guilt in order to gain credibility during the penalty phase. Id. In this case, Mr. Belcher's counsel presented compelling evidence that the death penalty was warranted. This was presented without any consent of the defendant. Both state and federal law dictate and caution against counsel conceding a defendant's guilt without the defendant's consent. Now, the defense has presented evidence through an expert witness conceding the defendant's out of court statements that he should

receive the death penalty without the defendant's consent and without the defendant's appearance. The State's argument, if accepted, would result in an extraordinarily dangerous precedent.

III. MR. BELCHER WAS DENIED DUE PROCESS WHEN THE DISTRICT COURT FAILED TO STRIKE THE STATE'S THEORY OF AIDING AND ABETTING.

This argument stands as enunciated in the Opening Brief.

IV. MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UPON HIGHLY PREJUDICIAL CHARACTER EVIDENCE BEING ELICITED.

This argument stands as enunciated in the Opening Brief.

V. MR. BELCHER IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS BASED UPON WITNESS VOUCHING.

Detective Teresa Mogg repeatedly vouched for the credibility of one of the State's star witnesses, Ashley Riley. Detective Mogg stated, "so I believed what she was telling me." (ROA Vol. 28 p. 6290). Detective Mogg further explained, "so what I did with her was I needed to make sure that I believed what she was telling me." (ROA Vol. 28 p. 6290). Detective Mogg also explained, "and I did believe her statement, and she was consistent in her statement." (ROA Vol. 28 p. 6290). The State acknowledges that there is both Nevada and federal law condemning the vouching of a witness by the prosecution. The State admits that the prosecution may not place the prestige of the government behind the witness.

Lisle v. Nevada, 113 Nev. 540, 543, 937 P.2d 473, 481 (1997) (quoting United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)) (State's Answering Brief p. 81).

The State cites to the defense cross-examination of Detective Mogg attacking the reliability of the investigation and the witnesses, including Ms. Riley. The State then concludes that they were permitted to rebut this attack by Detective Mogg ultimately testifying that in the end, she believed Ms. Riley. First, the State's logic would preclude defense counsel from being able to vigorously examine detectives over the thoroughness of an investigation and alternative suspects. For instance, once defense counsel has attacked the thoroughness of the investigation and the reliability of the accusers, under the State's theory, the State should then be able to have detectives render opinions as to the truthful nature of the State's witnesses. This amounts to a fallacy. In other words, the only way for the defense to avoid witness vouching is to remain silent.

Detective Mogg's testimony could easily have been presented in a manner which did not result in the ultimate conclusion of reliability and truthfulness of one of the State's most significant witnesses.

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VI. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. BELCHER OF THE ROBBERY OF NICHOLAS BRABHAM (COUNT NUMBER TWO). MR. BELCHER IS ENTITLED TO A NEW PENALTY PHASE BECAUSE OF THE INVALID AGGRAVATING CIRCUMSTANCE.

This Court has stated that when the sufficiency of evidence is challenged on appeal, "[t]he relevant inquiry for this Court is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of a fact could have found essential elements of the crime beyond a reasonable doubt." Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)).

The State presented evidence that Mr. Belcher had robbed Mr. Brabham of his laptop and his wallet based on these items being located in a different area than they were at prior to the incident. The State's argument amounts to the contention that Mr. Belcher removed the items from Mr. Brabham's presence even though they were not ultimately taken from the residence (State's Answering Brief p. 90). The State ignores the vast inconsistencies between the testimony of Ms. Riley and Mr. Brabham. Mr. Brabham informed police that he was outside of the residence when he entered and encountered the assailants. Whereas, Ms. Riley provided a completely different scenario, the two were asleep in Mr. Brabham's room.

Now, the State requests that this Court accept Ms. Riley's testimony that

Mr. Brabham's laptop was open prior to the incident and Mr. Brabham's recollection that he did not remember placing his wallet in the closet. Ordinary common sense would dictate that a robber who had possession of a wallet could easily remove the item as proceeds of the robbery. This also is true in regards to a laptop. Both a wallet and a laptop are much easier to remove from a residence than a sixty inch television. Additionally, the State's argument would ensure that items rummaged through and moved within a residence, yet not taken, should be considered as proceeds of a robbery. Mr. Brabham could have easily lost possession of his wallet during this extraordinarily stressful incident. Ms. Riley's memory has also been proven to be substantially flawed. Yet, her statement that the laptop was open was found sufficient to convict Mr. Belcher of robbery.

In the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of robbery. Importantly, Mr. Belcher also noted that there would be insufficient evidence to find aggravator number three, which mirrored this robbery with use of a deadly weapon. A reweighing process cannot conclude beyond a reasonable doubt that the jury would have sentenced Mr. Belcher to death absent this aggravator. See State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 678 (2003).

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VII. MR. BELCHER WAS DENIED A FAIR TRIAL WHEN THE STATE INTRODUCED INADMISSIBLE HEARSAY IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE UNITES STATES CONSTITUTION.

During direct-examination of Detective Ken Hardy, Detective Hardy was asked whether he was provided a statement by Ravon Harris (ROA Vol. 25, P. 5532-5533). Detective Hardy testified that Ravon told him that he was at home at the time of the incident (ROA VOL. 25, P. 5533). Ravon did not testify at trial. In the State's Answering Brief, the State acknowledges the prosecution elicited Ravon's alibi testimony on direct examination. The State's argument is that Detective Hardy's statement was not testimonial hearsay and was a fair rebuttal after the defense vigorously attacked the lack of thoroughness in the investigation.

Incredibly, the State contends that Detective Hardy's statement was only elicited to dispel Mr. Belcher's suggestion that Detective Hardy had failed to investigate Ravon (Answering Brief p. 94). The State acknowledged that Mr. Belcher's theory of defense was based on the suggestion that Ravon was the assailant (Answering Brief p. 94). Thereafter, the State counters Mr. Belcher's defense by presenting Ravon's alibi.

The United States Supreme Court reasoned that the only indicia of reliability sufficient to satisfy the United States's Constitution confrontation

clause was "actual confrontation". Crawford v. Washington, 541 U.S. 36, 124 S.C. 1354, 158 L. Ed. 2d. 177 (2004). Pursuant to Crawford, hearsay evidence is to be separated into that which is testimonial and that which is not testimonial. If the statement is testimonial, the statement should be excluded at trial unless: 1) the declarant is available for cross-examination at trial, or 2) if the declarant is unavailable, the statement was previously subjected to cross-examination. Id.

A statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to a later criminal prosecution. Medina v. State, 122 Nev. 346, 143 P.3d 471 (2006); Davis v. Washington, 547 U.S. 813, 822, 25 S. Ct. 2266, 2274 (2006); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527 (2009); Bullcoming v New Mexico, 564 U.S. 647, 131 S. Ct 2705 (2011). Here, the primary purpose of Detective Hardy's interview of Ravon was to investigate the potential suspicion that Ravon had committed the crime. Ravon apparently denied the crime and stated he had an alibi (that he was at home). Then, without providing Mr. Belcher the opportunity to confront Ravon over his self-serving testimonial hearsay statement, the State presented the prestige of Detective Hardy, who single handedly provided the alibi. Now, the State would actually have this Court believe that the statement was only utilized to inform the jury that Detective Hardy had bothered to interview Ravon. If this was true, the State could

simply have asked Detective Hardy if he had in fact interviewed Ravon without providing the substance of the statement.

The substance of the statement is what amounted to a confrontation clause violation with the introduction of testimonial hearsay. The error amounted to plain error and should result in the reversal of Mr. Belcher's conviction.

VIII. MR. BELCHER WAS DENIED A FAIR TRIAL WHEN THE DISTRICT COURT PRECLUDED A FELONY CONVICTION OF RAVON HARRIS TO BE ADMITTED OVER THE DEFENSE REQUEST IN VIOLATION OF THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Opening Brief.

IX. MR. BELCHER IS ENTITLED TO A NEW TRIAL AS HE WAS DENIED HIS RIGHT TO CONFLICT FREE COUNSEL DURING THE PRELIMINARY HEARING.

This argument stands as enunciated in the Opening Brief.

X. MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UPON THE FAILURE TO PROPERLY PRESERVE POTENTIALLY EXCULPATORY EVIDENCE IN VIOLATION OF THE UNITED STATES CONSTITUTION.

The defense filed a motion to dismiss based on the failure of the police to take possession of William Postorino's cellular phone (ROA Vol. 13 P. 2916). The court entertained oral argument on the issue and denied the motion (ROA Vol. 14 p. 3038). The issue surrounds the failure of the police to properly preserve the cell phone. Mr. Belcher contended that the text message chain, which would have been contained in the cell phone's data, would have proven that the drug debt was

settled and that there was no motive to attack the victims (ROA Vol. 14 p. 3016). The defense argued that Mr. Postorino believed that the drug debt had been extinguished and this was based upon the text message chain (ROA Vol. 14 p. 3022). The defense bitterly complained that the State was being permitted to select portions of the testimony which was favorable to their theory and leaving the defense without a complete record of the entire story which would have been contained within the cell phone data (ROA Vol. 14 p. 3022).

Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), prosecutors are required to disclose material exculpatory evidence in the government's possession. A Brady violation occurs when: 1) evidence is favorable to the accused because it is either exculpatory or impeaching; 2) evidence was suppressed by the prosecution, either willfully or inadvertently; and 3) prejudice ensued. See also, United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), Kyles v. Whitley, 514 U.S. 419, 436, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 286 (1999).

The State freely admits that there is no record that Billy's phone was ever impounded (State's Answering Brief p. 107). The State acknowledges that this issue surrounds the failure of the State to gather evidence.

To be entitled to relief based upon an alleged failure of the State to gather evidence, appellant must show: 1) that the State failed to gather evidence that is constitutionally material, i.e. that raises a reasonable probability of a different result if it had been available to the defense; and 2) that the failure to gather the evidence was the result of gross negligence or a bad faith attempt to prejudice the defendant's case. Daniels v. State,114 Nev. 261, 266, 956 P.2d 111, 114 (1998).

The State argues that evidence was presented from both Billy and Nick that Billy had reimbursed Mr. Belcher for the $450.00 debt (State's Answering Brief p. 108). Somehow, the State believes that eliciting testimony form Billy and Nick was sufficient to cure the State's gross-negligence which almost rises to bad faith in failing to collect the phone. This was an experienced homicide detective involved in a murder investigation of a juvenile who was sleeping in her home. For the investigator to fail to collect evidence that could be utilized to defeat the State's theory is at a minimum, grossly negligent. The United States Supreme Court has made it clear that under these types of circumstances evidence should be considered favorable to the accused because it is either exculpatory or impeaching. See Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. at 682.

The difficulty with the failure to preserve or gather the evidence was compounded because Mr. Belcher's phone was rudimentary and they were not able to obtain all of the text messages (24 ROA 5297–97) (State's Answering Brief p. 109). The State's failure to gather this evidence should have resulted in the granting of the defense motion or at a minimum, a presumption that the evidence was favorable to Mr. Belcher. Neither of these occurred and reversal is mandated.

XI. THE DISTRICT COURT ERRED IN DENYING MR. BELCHER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS RESIDENCE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Opening Brief.

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XII. MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UP ON THE DISTRICT COURT'S REFUSAL TO SUPPRESS AN IMPERMISSIBLE SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION PROCEDURE.

The district court denied Mr. Belcher's motion to suppress the impermissibly suggestive photographic lineup by Nicholas Brabham. Five weeks after the incident, on January 12, 2011, Mr. Brabham identified Mr. Belcher as one of the assailants from a photographic lineup.

In Manson v. Brathwaite, 432 US 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), the United States Supreme Court held that once an identification procedure is determine to be unnecessarily suggestive, a reliability analysis based up on five factors should be employed. The factors include 1) the opportunity to the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the prior description of the criminal; 4) the level of certainly demonstrate the confrontation; and 5) the time between the crime and the confrontation. These five factors can also be found at Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973).

A) The Opportunity to View

Nicholas initially described being outside the home and then entering the home and seeing the assailants. This testimony was in stark contrast to Ms. Riley who stated that Nicholas was asleep. Additionally, Nicholas informed authorities

that the assailants were wearing ski masks. The State argues that not one witness ever testified that Nicholas told them that the assailants were wearing ski masks.

The State argues that this information came from a CAD report and Detective Hardy testified this information could include erroneous information (State's Answering Brief p. 120, n. 20). At this point, it is important to recognize the significance of the State's reliance upon Detective Hardy. Here, the State freely acknowledges that Sergeant Sanford's affidavit in support of the search warrant mentioned that the two intruders wore ski masks (Answering Brief p. 117, n 18). The point here is that Sergeant Sanford swore under oath in an affidavit that the assailants were seen wearing ski masks in order to obtain a search warrant. Rather than rely upon Sergeant Sanford to suggest that this information was wrong, the State relies upon Detective Hardy, In fact, in footnote eighteen and again in footnote twenty, the State suggests that Detective Hardy can vouch for the inaccuracy of the information in the affidavit in support of the search warrant. It appears the State believes Detective Hardy will fix the situation and the dilemma for the State.

When the defense suggested that Ravon was the assailant, the State presented Detective Hardy who told the jury that Ravon was at home. When there was a suggestion that Ravon was the assailant, Detective Hardy came to the rescue

and provided an alibi without Ravon having to testify. When the defense suggested that Ms. Riley was unreliable, Detective Hardy was able to assure the jury that he believed in Ms. Riley's truthfulness with regard to her version which fit the State's events. Detective Hardy was able to vouch for Ms. Riley's truthfulness. When the State was faced with the terrible realization that Mr. Belcher was in custody based upon the factors enunciated in argument one, Detective Hardy was able to explain that Mr. Belcher was not in custody and that the restraints were simply Las Vegas Metropolitan Police Department policy.

In sum, Detective Hardy was a highly important individual in this case who was utilized to trample over the constitutional rights of Mr. Belcher. Including the right to confrontation, the right to his Fifth Amendment privileges, and the right to be free from a trial filled with highly prejudicial testimonial hearsay and witness vouching.

Nicholas told authorities the assailants were wearing ski masks. However, Detective Hardy was able to present a photograph lineup and Nicholas allegedly immediately identified Mr. Belcher.

B) The Degree of Attention

At the time of the shooting, Nicholas was under the influence of a controlled substance and alcohol. Nicholas' story was entirely inconsistent with

that of Ms. Riley. Unusually, the State argues that Ms. Riley testified that when Nicholas woke up, it took him two minutes not because he was intoxicated, but because he was waking up (State's Answering Brief p. 121). This directly contrasts with Nicholas' testimony that he was outside the home at the time. Either Nicholas was outside the home at the time of the incident or he was sound asleep and it took him two minutes to wake up. Both cannot be true. The fact that the State relies upon Ms. Riley for this factor provides evidence of the suspicious nature of the ultimate identification.

C) The Accuracy of the Description

Again, Nicholas previously informed police that the two assailants were wearing ski masks. The State's entire argument to counter this dilemma is to suggest that Detective Hardy can conclude that another detective's information contained in an affidavit is probably wrong. Obviously, Nicholas could not have seen the assailants in ski masks yet determine that he saw the face of Mr. Belcher. This is completely inconsistent. The accuracy of the description weighs in favor of Mr. Belcher.

D) The Level of Certainty

Here, Nicholas completely reversed his story regarding what he observed.

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E) The Time Between the Crime and the Confrontation

Again, this factor weighs in favor of Mr. Belcher as five weeks passed from the incident to the time of the identification. The photographic lineup was displayed throughout the media and Nicholas had an opportunity to talk to other individuals while at UMC before the identification (State's Answering Brief p. 118). The factor weighs in favor of Mr. Belcher.

Therefore, Mr. Belcher is entitled to reversal for failure of the district court to suppress the identification.

XIII. THE DISTRICT COURT ERRED IN DENYING MR. BELCHER'S MOTION TO SUPPRESS UNNECESSARILY SUGGESTIVE IDENTIFICATION OF THE DEFENDANT BY OFFICER ANTHONY CAVARICCI IN VIOLATION OF THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Opening Brief.

XIV. DURING THE TRIAL PHASE, THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 12, 29, 31 AND 55 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Opening Brief.

XV. DURING THE PENALTY PHASE, THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 5 AND 12 IN VIOLATION OF THE SIXTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This argument stands as enunciated in the Opening Brief.

XVI. THE DEATH PENALTY IS UNCONSTITUTIONAL.

This argument stands as enunciated in the Opening Brief.

XVII. MR. BELCHER IS ENTITLED TO REVERSAL BASED UPON CUMULATIVE ERROR.

This argument stands as enunciated in the Opening Brief.

CONCLUSION

Therefore, Mr. Belcher respectfully requests that this Court grant this appeal thereby reversing his convictions and sentence of death.

DATED this 30th day of November, 2018.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b), this appellate brief complies because excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 18,500 words, to wit, 6,842 words.

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

DATED this 30th day of November, 2018.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 30th day of November, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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