**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| BRANDON STARR, | ) | |
| #1165964, | ) | **CASE NO.: 71401** |
| Appellant, | ) | **E-FILE** |
| | ) | D.C. Case: C-14-303022-2 |
| v. | ) | Dept.: XIX |
| | ) | |
| STATE OF NEVADA, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |



# APPELLANT'S OPENING BRIEF

**Appeal from a Denial of Post Conviction Relief**
**Eighth Judicial District Court, Clark County**

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record for BRANDON STARR, hereby certifies pursuant to NRAP 26.1(a) that there are no persons nor entities associated withy my law practice and that I am a sole practitioner. Furthermore, there are no persons nor entities that have any interest or financial interest in Law Office of Terrence M. Jackson. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 19th day of June, 2017.

Attorney of Record For Brandon Starr

*//s// Terrence M. Jackson*

TERRENCE M. JACKSON, ESQ.

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| #1041220, | ) | **CASE NO.: 71401** |
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| STATE OF NEVADA, | ) | |
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| Respondent. | ) | |
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**APPELLANT'S OPENING BRIEF**

**Appeal from a Judgment of Conviction**

**Eighth Judicial District Court, Clark County**

**NATURE OF THE ACTION**

This is an Appeal from a Judgment of Conviction after a jury trial.

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## SPECIFICATION OF ERROR

1. The District Court erred in denying Defendant's Motion to Sever;

2. The District Court committed prejudicial error in denying Defendant's Motion to Challenge the Racial Composition of the Jury Venire Panel;

3. The District Court erred in permitting the lead detective to render improper opinion testimony on the identity of Brandon Starr as one of the participants on the video surveillance tapes;

4. The District Court wrongly denied Defendant's Inverse Flight Instruction; made numerous prejudicial errors in instructing the jury;

5. The Sentence of 1824 months was grossly disproportionate and violated Defendant's Eighth Amendment rights;

6. There was insufficient evidence of guilt to find the Defendant guilty of all the crimes charged in the indictment under the standard of *Jackson v. Virginia.*

7. The accumulation of errors requires reversal of Defendant's convictions;

. . .

## SUMMARY OF THE ARGUMENT

The Court committed prejudicial error when it denied Defendant's pretrial Motion to Sever. This motion was critical because Defendant was greatly prejudiced by joinder when he was unable to cross-examine the co-conspirator Donte Johns adequately concerning admissions the co-defendant Tony Hobson made which implicated him.

The Defendant was also greatly prejudiced because he was denied a fair cross section of jurors. There were only two (2) African Americans included in his jury venire panel of sixty-five (65).

The Court erred in denying Defendant's pretrial challenge of the racially skewed venire panel even though the Defendant met his burden in showing the methods used by the jury commissioner resulted in systemic exclusion of African Americans. The Court erred in permitting the lead detective to testify to his opinion that Brandon Starr was depicted on video surveillance tapes admitted in evidence.

The Court made numerous prejudicial errors instructing the jury. The court erred when it refused each of Defendant's proposed instructions on accomplice testimony. The court erred again refusing Defendant's instruction on lack of flight,

and Defendant's instructions on dual role testimony and circumstantial evidence. The failure to give these critical instructions which each were part of the Defendant's theory of the case denied the Defendant a fair trial.

The aggregate sentence of 150 years given the defendant was excessively harsh and was a violation of the Eighth Amendment. Although the sentence was within the statutory limits the abuse of consecutive sentences violated the Eighth Amendment.

There was insufficient evidence of proof of guilt beyond a reasonable doubt of all the counts for which the defendant was convicted. The cumulation of error requires reversal of this case.

## JURISDICTIONAL STATEMENT

Defendant/Appellant Brandon Starr claims jurisdiction pursuant to N.R.S. 177.015(3), which gives the court jurisdiction to review the appeal from a jury verdict of guilt in a criminal case. Defendant filed a timely Notice of Appeal pursuant to statute on September 23, 2016, within the thirty day time limit established by Nevada Rules of Appellate Procedure 4(b). This is a direct appeal from a judgment of conviction in the Eighth Judicial District Court following a jury verdict of guilt.

. . .

## ROUTING STATEMENT

This is a direct appeal that should be assigned to the Nevada Supreme Court pursuant to NRAP 17(a) because it involves issues of substantial importance to the criminal justice system. Although Defendant did not receive a life sentence, his sentence of 1824 months, with a parole eligibility after 444 months, is the virtual equivalence of a life sentence.

## LEGAL ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S PRETRIAL MOTION TO SEVER;

II. WHETHER THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION TO CHALLENGE THE RACIAL COMPOSITION OF THE JURY VENIRE PANEL;

III. WHETHER THE COURT ERRED IN PERMITTING THE LEAD DETECTIVE TO RENDER IMPROPER OPINION TESTIMONY ON THE IDENTITY OF BRANDON STARR AS ONE OF THE PARTICIPANTS ON THE VIDEO SURVEILLANCE TAPES;

IV. WHETHER THE DISTRICT COURT WRONGLY DENIED DEFENDANT'S

PROPOSED INVERSE FLIGHT INSTRUCTION;

V. WHETHER THE SENTENCE OF 1824 MONTHS WAS GROSSLY DISPROPORTIONATE AND VIOLATED DEFENDANT'S EIGHTH AMENDMENT RIGHTS;

VI. WHETHER THERE WAS INSUFFICIENT EVIDENCE OF GUILT TO FIND THE DEFENDANT GUILTY OF ALL CRIMES CHARGED IN THE INDICTMENT UNDER THE STANDARD OF Jackson v. Virginia;.

VII. WHETHER THE ACCUMULATION OF ERRORS REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS.

## STATEMENT OF THE CASE

The Grand Jury filed an Indictment charging the Defendant with over 70 (seventy) felony counts. (A.A. 00001) Defendant was arraigned in district court and entered a not guilty plea on December 22, 2014.

On February 20, 2015, (A.A. 00007) the Grand Jury returned a Superseding Indictment and the Defendant appeared in court for initial arraignment on February 25, 2015. The Grand Jury returned a second Superceding Indictment on April 24, 2015. (A.A. 00057)

Defendant was arraigned on the second Superseding Indictment on May 13, 2015. (A.A. 00057) On June 2, 2015, Defendant filed a Motion to Sever. (A.A. 00130) On June 5, 2015, Defendant, Brandon Starr also filed a Joinder in defendant Hobson's Motion to Sever. (A.A. 00107), (A.A. 00144) On June 19, 2015, the State filed an Opposition to Defendant's Motion to Sever. (A.A. 00147) On April 13, 2016, the Court filed Findings of Fact, Conclusions of Law and Order, denying the Motion to Sever. (A.A. 00262)

On April 28, 2016, Defendant Brandon Starr filed Joinder to defendant Hobson's Motion for Discovery and Alternative Motion in Limine. (A.A. 00328-358) On May 7, 2016, the Court heard arguments on Defendant's Motion for Discovery and Alternative Motion in Limine. (A.A. 00328-00359)

Jury trial began May 2, 2016, and continued until May 23, 2016, when the jury returned a verdict of guilt. (A.A. 00473) Sentencing occurred September 8, 2016, and Defendant Starr was sentenced to 1824 months with parole eligibility after 444 months. (A.A. 00532) On September 20, 2016, the Judgment of Conviction was filed. (A.A. 00532) On October 19, 2016, an Amended Judgment of Conviction was filed. (A.A. 00556)

On September 21, 2016, counsel filed a Motion to Withdraw Counsel and Appoint Appellant Counsel. (A.A. 00543) On September 23, 2016, Defendant filed Notice of Appeal and Case Appeal Statement. (A.A. 00540), (A.A. 00545) On October 12, 2016, the Court heard argument on counsel's Motion to Withdraw Counsel and Appoint Appellant Counsel and then the District Court granted Motion to Withdraw and appointed Terrence M. Jackson, Esquire, as appellate counsel for defendant on October 24, 2016. (A.A. 00553)

## FACTUAL STATEMENT

Brandon Starr was convicted of over 70 felony counts including robbery with a deadly weapon, conspiracy to commit robbery, burglary in possession of a deadly weapon, attempt robbery with a deadly weapon, conspiracy to commit kidnapping, second degree kidnapping, false imprisonment with a deadly weapon, false imprisonment by jury verdict on May 23, 2016 after a thirteen day trial with his co-defendant Tony Hobson. (A.A.00473) Prior to trial Defendant sought to sever his case from Tony Hobson because he was concerned about the prejudicial effect of joinder to Hobson. (A.A. 00130) At trial the Defendant challenged the jury venire panel alleging it was not a fair cross section of jurors. (A.A. 00573-575) At that pretrial evidentiary hearing, the Jury Commissioner, Mariah Witt, testified that trial

jurors chosen to participate were selected from a master list from two sources: (1) a DMV list of all licensed drivers, and (2) a list of Nevada Energy customers. (A.A. 00577) Defense counsel argued that these two lists alone were inadequate to get a fair cross-section of jurors. (A.A. 00587-589) The Court however denied the Defendant's challenge to the jury venire panel. (A.A. 00589)

During the trial the State presented evidence of 14 separate incidents involving 43 separate victims of the robberies and burglaries which occurred during a one month period between October 25, 2014 and November 25, 2014. Almost all of these incidents occurred at fast food type restaurants. (A.A. 01754)

A principle witness at the trial was the alleged co-offender and accomplice, DONTE JOHNS, who admitted he was the driver during each of the robberies. JOHNS testified against both Brandon Starr and his co-defendant, Tony Hobson, implicating each of them in many of the robberies. (A.A. 02220-2410). JOHNS had made a plea bargain to significantly reduce his sentence. (A.A. 02322-2327)

Almost all of the robberies occurred at fast food type restaurants and the participants in the robberies were captured on videotape. The robbers were usually disguised as each of the robbers were wearing hoodies and a mask. (A.A. 01193,

01340, 01341) On November 25, 2014, all three of the defendants were arrested together after the last robbery. (A.A. 01755-01765)

At trial the State presented testimony from eyewitnesses at the scenes, as well as video surveillance tape evidence from most of the scenes of the crimes. Most of the 'eyewitnesses' could not make positive identification because the perpetrators faces were hidden. *See,* for example the testimony of Jammie Schoebel. (A.A. 01193) *See also* testimony of Trevor Faracone. (A.A. 01340-1341)

Donte Johns, the informant, was actually released on his own recognizance release with house arrest because of his assistance to the authorities. (A.A. 02328)

The State also called several expert witnesses, including a DNA expert, Crystal May, who testified concerning DNA found on a glove in the Defendant's possession (A.A. 02121), (A.A. 02195) and an expert witness, Eric Gilkerson, who testified concerning footwear impression evidence found at the scenes of the crimes. (A.A. 01978), (A.A. 02015).

To supplement the eyewitness testimony, the lead detective Abell testified, over objection, that he believed the person on the video tape committing the robberies was Brandon Starr. (A.A. 02438).

The jury returned a verdict of guilt on over 70 counts of the indictment, 14 robberies, as well as related counts of conspiracy, burglary and kidnapping in each incident. Defendant was sentenced to an aggregate sentence of 1024 months with parole eligibility after 444 months.

## ARGUMENT

### I. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED DEFENDANT'S MOTION TO SEVER DEFENDANTS.

NRS 173.135 states that:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions contributions on offense or offenses.

NRS 174.165 relief from prejudicial joinder states:

> If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may, on an election for separate trials of counts, grant a severance or provide whatever other relief justice requires.
>
> The discretion of the court must be exercised to balance any gain in judicial economy with any possible prejudices to a defendant because of joinder.

It is respectfully submitted the facts of this case are similar to other cases where it was found the defendants joinder for trial resulted in undue prejudice to him. In his pretrial Motion to Sever filed June 2, 2015, Defendant cited the recent case of *Chartier v. State,* 124 Nev. 760, 191 P.3d 1182 (2008), which was reversed because the cumulative prejudicial effects of the joint trial with the co-defendant . . . . was unduly prejudicial.

In *Zafirro v. United States*, 506 U.S. 534, 534 (1993), the Supreme Court held severance should be ordered where:

> "there is a serious risk that a joint trial would prejudice a specific right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* 539 (Emphasis added)

*See also, United States v. Toolick,* 952 F.2d 1078, 1082 (9th Cir.1991); *United States v. Mayfield,* 189 F.3d 895 (9th Cir.1999).

. . .

The joinder of co-defendants in this case guaranteed Starr would be greatly prejudiced by the evidence which was used to convict the co-defendant Hobson. Not coincidently both Starr and Hobson in their pretrial Motions to Sever argued they would be prejudiced if tried jointly. (A.A. 00107), (A.A. 00130).

On July 10, 2015, the court denied both Hobson and Starr's Motion to Sever.

(A.A. 00202) This Court's denial of the Defendants Motions to Sever was error because in this multi-defendant conspiracy prosecution it was especially important to safeguard the individual defendants. Defendant asks this Court to note particularly the concurring opinion in *Krulewitch v. United States,* 336 U.S. 440 (1949) which emphasized how prosecutors may abuse liberal conspiracy statutes. The district court in Starr's case, rather than safeguarding the Defendant's right to a fair trial, which included the fundamental Constitutional right to fully confront and cross examine all witnesses, chose instead to join the defendants for trial. The court apparently valued "judicial economy" more than the defendant's rights. This was error.

In this case, because the co-defendant Donte Johns had made a confession which directly implicated co-defendant Hobson, and the prosecution used that statement against Hobson, and because that statement indirectly implicated Starr, the Defendant should have been able to exclude the confession of Hobson, who could not be cross-examined. Severance was the appropriate remedy. *See, Bruton v. United States,* 391 U.S. 123 (1968).

Cases after the *Bruton* decision have further refined the law establishing that even the redaction of such statements, including the names from statements raising

*Bruton* issues would not serve to cure any prejudice obviating the need for a severance. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987). It is clear that redaction is not always an adequate solution.

The United States Supreme Court has again recently considered this issue previously raised in *Richardson* and *Bruton* in the case of *Gray v. Maryland,* 523 U.S. 185 (1998). In *Gray*, the Supreme Court extended *Richardson*, holding that because the redacted confession still obviously referred directly to someone who was obviously Gray, Gray's confessions must still be included within *Bruton.* The Supreme Court found that merely redacting references to a co-defendant in a confession does not adequately protect that defendant's constitutional rights. In that case, as here, it was impossible for the co-conspirator (Donte Johns) to give a redacted statement (of Hobson's admissions) that would not prejudice the Defendant, Brandon Starr.

In *Gray,* the United States Supreme Court held:

> "Originally, the co-defendant's confession in the case before us, like that in *Bruton*, referred to, and directly implicated, another defendant. The State, however, redacted that confession by removing the non-confessing defendant's name. Nonetheless, unlike *Richardson's* redacted confession, this confession refers directly to the

"existence" of the non-confessing defendant. The State has simply replaced the non-confessing defendant's name with a kind of symbol, namely, the word "deleted" or a blank space set off by commas. The redacted confession, for example, responded to the question "Who was in the group that beat Stacey?," with the phrase, "Me, , and a few other guys." *See,* Appendix, infra, at 1158. And when the police witness read the confession in court, he said the word "deleted" or "deletion" where the blank spaces appear. We therefore must decide a question that *Richardson* left open, namely, whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls within *Bruton's* protective rule. We hold that it does.

523 U.S. at 192.

The *Gray* Court went on to further state:

> That being so, *Richardson* must depend in significant part upon the kind of, not the simple fact of, inference. *Richardson's* inferences involved statements that did not refer directly to the defendant himself and which became incriminating "only when linked with evidence introduced later at trial." 481 U.S. at 208, 107 S.Ct. at 1707.
>
> The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson's* words, "*facially* incriminates" the co-defendant. *Id.* at 209, 107 S.Ct. at 1708 (Emphasis added). Like the confession in *Bruton* itself, the accusation that the redacted confession makes "is more vivid than inferential incrimination, and hence more

> difficult to thrust out of mind." 481 U.S. at 208, 107 S.Ct. at 1707. (Emphasis added)

In *United States v. Mayfield,* 189 F.3d 895 (9th Cir.1999), the Ninth Circuit found that joinder was improper where co-defendants were tried by a jury at the same time and one co-defendant had given a statement implicating the other co-defendant. The trial court had originally ruled that the government could change the co-defendant's name in the confession to "the individual" rather that using the actual name of the co-defendant. The Ninth Circuit found this to be improper because there was no way that the jury would not believe that "the individual" was in fact the co-defendant in the case.

Similarly, the Court in *Ducksworth v. State,* 113 Nev. 780 (1997) reviewed a case where defendant *Ducksworth* made statements implicating his co-defendant Martin and held that because the defendant did not testify, "the introduction of his confession, which probably inculpated co-defendant Martin, violated Martin's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." The Court went on to say, "In confessing, *Ducksworth* mentioned an unnamed accomplice, and we conclude that the jury inevitably inferred that *Ducksworth's* accomplice was Martin." *Id.* Ultimately, the Court reversed and remanded the case against Martin for a new trial. *Id.*

In the instant case, Donte Johns' statements implicated Hobson, as well as Starr, and therefore Starr's Sixth Amendment right to confront the witness against him. *See, Bruton.* Further, since the government could not appropriately redact Johns' statement of Hobson's admissions, the statement or transcript of the audio recording of Johns', so as not to allude to Starr's alleged involvement in these crimes, the joinder was prejudicial.

## II. WHETHER THE DEFENDANT WAS DENIED A FAIR TRIAL UNDER THE SIXTH AMENDMENT BECAUSE THE TRIAL JUDGE IMPROPERLY DENIED HIS MOTION TO CHALLENGE THE JURY VOIR DIRE PANEL BECAUSE IT DID NOT REPRESENT A FAIR CROSS SECTION OF JURORS IN THE AREA.

The right to a fair and impartial jury, chosen from a cross-section of the community is guaranteed by the United States Constitution under the Fourteenth Amendment's Due Process and Equal Protection Clauses, and the Sixth Amendment fair cross-section requirement, as well as by the Nevada Constitution. U.S. Const. Amend. VI; Amend. XIV; Nev. Const. Art. 1, Sec. 1; Art. 1 Sec. 8; *Ballard v. United States,* 319 U.S. 187, 192 (1946) *citing, Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946)

(stating "the American tradition of trial by jury...in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (stating that a "jury from a representative cross-section of the community [is] an essential component of the Sixth Amendment right to a jury trial"); *State v. McClear*, 11 Nev. 39 (1876). Potential jurors have an equal protection right during the jury selection process. *Walker v. State*, 113 Nev. 853, 867 (1998) *citing*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994); *Hernandez v. Texas*, 347 U.S. 475, 477 (1954).

The selection of a jury in violation of the equal Protection Clause or the fair cross-section guarantee is a structural error that allows a defendant relief without a showing of prejudice. *United States v. Rodriguez-Lara*, 421 F.3d 932, 940 (9th Cir. 2005).

Prior to the trial, the defense challenged the disparity which existed between the number of African American jurors called to be on the jury panel to decide Brandon Starr's case and the number of African Americans which were shown by demographic studies to reside in the jurisdiction. There were only two African American's chosen to be in the 65 member panel (A.A. 00573), i.e., only three percent (3%) of the panel.

At the evidentiary hearing before the trial judge on May 4, 2016, the jury commissioner, Mariah Witt, testified that on that day, May 4, 2016, of the 1,011 persons who were called to serve in the Wednesday jury pool, 41 were African Americans, or four percent. (A.A. 00585) The total population of African Americans in Clark County is approximately ten percent.

Ms. Witt was asked how these jurors were chosen and she then explained they came from just two lists: (1) a DMV list, and (2) a Nevada Energy List. (A.A. 00577). The court first questioned Ms. Witt in more detail about the process of selecting jurors. She testified a master list was compiled for jury services based on Nevada DMV and Nevada Energy. (A.A. 00577-581)

Defense attorney, Ms. Lobo, then questioned the jury commissioner in detail to establish how the lists were prepared. (A.A. 00581-584) Through questioning, she established that the Nevada Energy list may have under represented some jurors because many individuals would not have an energy bill such as people on public assistance or renters sharing an apartment. (A.A. 00582).

In *Buchanan v. State,* 130 Nev. Adv. Op. 82, 335 P.3d 207 (2014), the Nevada Supreme Court reversed the defendant's conviction because the trial court refused to

even have an evidentiary hearing on the venire selection process. The Supreme Court recognized the fundamental importance of the fair cross section requirement of the Sixth Amendment. The Court there noted:

> "Here, *Buchanan's* counsel lodged an objection and moved the court to strike the jury venire based on an alleged violation of *Buchanan's* fair-cross-section right. Although "[t]he Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community," a criminal defendant "is entitled to a [jury] venire *selected* from a fair cross section of the community." *Williams v. State,* 121 Nev. 934, 939, 125 P.3d 627, 631 (2005) (emphasis added). To establish a prima facie violation of the fair-cross-section guarantee, a criminal defendant must show:
>
> "(1) that the group alleged to be excluded is a 'distinctive' group in the community;
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;
>
> and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."
>
> *Id.* 209 (Emphasis added)

In this case while there was a brief evidentiary hearing of sorts, it is respectfully submitted that the answers of the jury commissioner were unsatisfactory because they did not show the jury commissioner had made a meaningful effort to resolve racial disparity in the jury pool. The great disparity, i.e., more than 50%

disparity between the number of African Americans in the jury pool venire and the percentage of African Americans in Clark County was not explained at all.

In *Williams v. State,* 121 Nev. 934, 125 P.3d 627 (2005), the court recognized that a jury of one's peers is an important constitutional guarantee. A fundamental requirement is to have a fair cross section of jurors from the community. The Court there stated:

> "This constitutional guarantee is not satisfied by blindly following statutory mandates. To fairly represent the community, there must be an awareness of the makeup of that community. Therefore, jury commissioners should be cognizant of the makeup of their community, should compare this with the makeup of the lists used in the jury selection process and the resulting jury pool, and should strive to create lists of prospective jurors that represent an accurate cross section of the community." *Id.* 943 (Emphasis added)

. . .

The jury commissioner had obviously done nothing significant since *Williams* to remedy the blatant systemic discrimination in juror pool venires. Using just two under inclusive lists did not provide the defendant a fair cross-section of jurors.

It is respectfully submitted that the Jury Commissioner's lack of action since the *Williams'* decision showed a total lack of concern for ameliorating the very significant long lasting underrepresentation of minorities in Clark County juries.

Based on the totality of circumstances, including the historical record, this should be held to have been purposeful or deliberate systemic exclusion of a racial minority. The appropriate remedy for this systemic discrimination of African American jurors which occurred in this case is reversal of Defendant's conviction. *See, Brooks v. Beto,* 366 F.2d 1 (5th Cir.1966); *see also, Miller-El v. Dretke,* 545 U.S. 231(2005). Only the remedy of dismissal will ensure that the constant problem of unconstitutional juries is cured.

## III. THE COURT ERRED IN ALLOWING THE LEAD DETECTIVE TO RENDER IMPROPER OPINION TESTIMONY CONCERNING THE IDENTITY OF BRANDON STARR AS ONE OF THE PARTICIPANTS ON VIDEO TAPE SURVEILLANCE EVIDENCE.

Detective Abell testified that he reviewed surveillance footage from each incident and that based upon his observation he concluded that the person depicted in the video surveillance tapes were the Defendant, Brandon Starr, Tony Hobson and Donte Johns. (A.A. 02438)

Defendant submits the Court erred in allowing this improper statements of personal opinion that went to the ultimate issue of the Defendant's guilt or innocence.

Detective Abell was not competent to make such a conclusion of fact. Abell had attempted to justify this statement claiming he did observe sufficient similarities in the video to be sure Starr and the other defendants were in fact the persons in those videos and stills shown to the jury. (A.A. 02451), (A.A.02452), (A.A. 02455), (A.A. 02456), (A.A. 02463).

This was later wrongfully argued to the jury by prosecutor in closing argument. (A.A. 02844) Defendant respectfully submits it was however the duty of the jury, not the lead detective, to reach that conclusion if possible. It is respectfully submitted the detective, who was assigned to investigate the case, was not a neutral or an unbiased expert. Defendant further submits it was therefore highly prejudicial for Detective Abell to testify and state his "expert" conclusion to the jury which was the 'ultimate issue' in the case.

At one point defense counsel Tanasi interposed an objection to Abell's testimony, stating: ". . . Best evidence the video speaks for themselves." (A.A. 02463, 2464) That objection was overruled. (A.A. 02464) For many years it has been well established that both an expert and a lay witness should be precluded from giving opinion testimony on the "ultimate issue" in a case because to do so would invade the province of the jury. *See, United States v. Spaulding,* 293 U.S. 498, 55 S.Ct. 273, 79

L.Ed. 617 (1935). *See, McCormick Evidence* § 12 at 47, 48, 4th Ed. 1992. Counsel is aware however that the modern trend in law has liberalized the use or admission of such 'opinion' evidence. However, there still are definite limits to admitting opinion testimony as to the "ultimate issue," especially in criminal cases where the prejudicial impact may be especially great. *See, United States v. Milton,* 555 F.2d 1198, 1203 (5th Cir.1977), which notes:

> "To be sure, Rule 704 does not paint with a broad brush, and expert opinion evidence may still be excluded if its prejudicial impact substantially outweighs its probative value, if it wastes time, see Rule 403, Fed.R.Evid., or if the trial court determines that the expert's specialized knowledge will not assist the trier of fact to understand the evidence." *See also, United States v. Gutierrez,* 576 F.2d 269 (10th Cir.1978), cert. denied, 439 U.S. 954, 99 S.Ct. 351, 58 L.Ed.2d 345 (1978) (caution should be watchword on receiving opinions on the ultimate issue in criminal cases). *Id.* __ (Emphasis added)

. . .

Defendant also directs the Court to the case of *People v. Mixon,* 180 Cal. Rptr. 772 (1982), where although the California Court upheld the admission of a police officer's identification testimony based upon the viewing of surveillance tapes citing an earlier California case, *People v. Perry,* 131 Cal. Rptr. 627 (1976), the court in *Mixon* nevertheless recognized that opinion identification testimony from law

enforcement officers could be highly prejudicial and suggested it should be received with caution, stating:

> *Perry* thus requires two predicates for the admissibility of lay opinion testimony as to the identity of persons depicted in surveillance photographs: (1) that the witness testify from personal knowledge of the defendant's appearance at or before the time the photo was taken; and (2) that the testimony aid the trier of fact in determining the crucial identity issue.
>
> Federal cases interpreting rule 701 of the Federal Rules of Evidence have expressed the latter requirement as one of "helpfulness": the identification or comparison made must be one the jury could not adequately have made for itself. (*United States v. Robinson* (2d Cir.1976) 544 F.2d 110, 113; see also, *United States v. Ingram* (10th Cir.1979) 600 F.2d 260, 261.) Furthermore, although *Perry* does not discuss the issue, and there are no other California cases in point which do, federal cases have expressed another concern where the lay identification testimony comes from law enforcement officials: that such testimony will "increase the possibility of prejudice to the defendant in that he [is] presented as a person subject to a certain degree of police scrutiny." (*United States v. Butcher, supra,* 557 F.2d 666, 669.) Exclusion is thus warranted if the prejudicial effect of such testimony outweighs its probative value. (*Id.*, at p. 670; *United States v. Young Buffalo* (9th Cir.1979) 591 F.2d 506, 513; *United States v. Calhoun* (6th Cir.1976) 544 F.2d 291, 296.) The Ninth Circuit Court of Appeals in *Butcher* expressed this caveat: " . . . use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution." (*Butcher, supra,* 557 F.2d at

p. 670.) Id. 777, 778 (Emphasis added)

. . .

See also, *United States v. Benson,* 941 F.2d 598, which notes that the credibility of witnesses is generally not an appropriate subject for expert testimony. *United States v. Toledo,* 985 F.2d at 1470. *See, Torres v. County of Oakland,*758 F.2d 147 (6th Cir.1985).

It is respectfully submitted that under the facts of this case, where opinion testimony by a law officer was improperly used to reinforce particularly weak identification testimony, it should be found to have been prejudicial error.

## IV. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S PROPOSED INVERSE FLIGHT INSTRUCTION.

A criminal defendant is entitled to complete and accurate instructions on the law. Failure to give such necessary instructions requires reversal. *Dougherty v. State,* 86 Nev. 507, 471 P.2d 212 (1970); *Harvey v. State,* 78 Nev. 471, 375 P.2d 225 (1962); *United States v. Main,* 113 U.S. 1046, 109 (9th Cir. 1997); *United States v. Smith,* 217 F.3d 746 (9th Cir. 2000).

The Defendant prepared the following instruction on Inverse Flight, or Lack of Flight instruction which the court denied: (A.A. 02702)

> The fact that the defendants did not flee, leave the scene, or leave the area does not in itself prove that the defendant is not guilty, but is a fact that may be considered by you in light of all other proved facts in deciding the question of whether the defendant is guilty or not guilty.

. . .

Defendant submits this was an appropriate instruction grounded in his 'theory of the case' that because he did not flee the jurisdiction to avoid prosecution, it could be reasonably inferred he was innocent. This is the logical inverse of the standard flight instruction from which one can infer consciousness of guilt from fleeing the scene to avoid arrest.

Defendant was arrested in Las Vegas, Nevada, on November 25, 2014. (A.A. 01760) He never left the jurisdiction.

Defendant directs the court to the cases of *Weber v. State,* 121 Nev. 554 (2005), which noted: . . . " 'Flight' signified more than a mere going away. It embodies the idea of going away with a consciousness of guilt, for the purpose of evading arrest." The jury should have been instructed as requested his lack of flight was a fact suggesting his lack of guilt.

It is respectfully submitted the failure to give each of the proposed defense instruction(s) by the District Court in this case was prejudicial and requires reversal.

## V. DEFENDANT'S SENTENCE OF 1824 MONTHS WAS GROSSLY DISPROPORTIONATE AND VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

It is respectfully submitted Defendant's sentence of 1824 months with a minimum parole eligibility of 444 months, or 154 years with 37 years for parole eligibility, was a shockingly excessive sentence for any crime less than murder. The sentence basically condemned the Defendant to the equivalent of life imprisonment with no chance for ever being released. The sentence was reached by running multiple B level (2 to 15) felonies consecutive to each other.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2641, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). In analyzing whether a sentence is cruel and unusual punishment, a court first makes "a threshold determination that the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983). If the sentence is grossly disproportionate, the court then considers "the sentences imposed

on other criminals in the same jurisdiction . . . and the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291

In general a sentence imposed whether statutory limits is not considered either excessive or cruel and unusual. *United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). However, a statutorily-condoned punishment may in rare case exceed the limits of the Constitution. *See, Weems,* 217 U.S. at 382. ("[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. (Emphasis added)

Defendant submits the punishment he received far exceeded what was a just sentence even despite the fact this sentence was statutorily authorized. Even though Defendant Starr and his co-offenders were convicted of over 70 felony crimes, they did this crime spree in a relatively short period of approximately one month, from October 28, 2014 to November 25, 2014. The lengthy sentence the Defendant received occurred because multiple counts were run consecutively to each other. It has long been recognized that multiple consecutive sentences are rarely appropriate for crimes of a similar nature occurring at or near the same time. *See,* ABA Standard Sentencing Alternatives and Procedures, § 3.4(b)(c). The commentary in § 3.4(c) notes limitations on consecutive sentences:

**c. Limitations on consecutive sentences**

> The basic principle underlying subsection (b) is that it is unsound to permit the endless cumulation of multiple sentences. The function of the consecutive sentence should be similar to the function of the sentence imposed on habitual or dangerous offenders. Because of his repeated criminality the offender who has rendered himself to multiple sentences may pose the same type of unusual risk to the safety of the public. It would thus appear that he should be treated in a similar fashion.
>
> The Model Penal Code is the source of the principle which is here adopted. As illustrated in tabular form in comment *c* to section 2.5, *supra,* the Code establishes three degrees of felonies. Each degree carries two sentences: one which is set at a length deemed sufficient for the bulk of offenders; the other set at a length deemed necessary for those who present unusual risks. The second sentence, the so-called extended term, is then available for imposition on the recidivist, the professional criminal, the dangerous offender, and the offender who is subject to multiple sentences the aggregate terms of which would exceed the limits of the extended term. MODEL PENAL CODE § 7.03, Appendix B, *infra.* The Code in turn provides in its section dealing with consecutive sentences (§ 7.06) that the court may in its discretion impose consecutive sentences on a multiple offender so long as they do not exceed the extended term authorized for the most serious of the offenses committed. If that limit would be exceeded, the court would be authorized by § 7.03(4) to impose the extended term.

Even if this case was treated under the harsh guidelines of a habitual criminal sentencing, Defendant Brandon Starr's sentence would be much less than the

sentence he received except for the rare case where life without is imposed. A sentence of five years to twenty years) for a small habitual NRS 207.010 1(a) or life with possibility after ten years for the large habitual criminal, NRS 207.010 1(b) would have been the likely sentence. It is respectfully submitted although the crimes that were committed in this case were very serious felony offenses, the punishment the Defendant received was nevertheless excessive and disproportionate and violated the Eighth Amendment.

The court erred when it followed the prosecutor's argument for an excessively harsh sentence. (A.A. 02868-671) (A.A. 02890-892).

## VI. THERE WAS INSUFFICIENT EVIDENCE OF GUILT TO FIND THE DEFENDANT GUILTY OF THE CRIMES CHARGED IN THE INDICTMENT UNDER THE STANDARD OF *JACKSON v. VIRGINIA.*

In *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court held that each element of a criminal charge must be proven beyond a reasonable doubt. *See,* also, *In re Winship,* 397 U.S. 358, 90 S.Ct. 1065, 25 L.Ed.2d 368 (1970), "Insufficiency of the evidence occurs where the

prosecution has not produced a minimum threshold of evidence upon which a conviction may be based." *Mejia v. State,* 122 Nev. 487, 492, 134 P.3d 722, 725 (2006) (quoting *State v. Walker*, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993)).

In reviewing whether there is sufficient evidence to support a jury's verdict, this court determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal citations omitted). Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion." *Brust v. State,* 108 Nev. 872, 874-75, 839 P.2d 1300, 1301 (1992) (internal citations omitted).

The Defendant submits under the rigorous standard outlined by the Supreme Court in *Jackson v. Virginia*, the State did not meet its burden of proof on all of the counts.

## VII. THE ACCUMULATION OF ERRORS REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

The accumulation of errors in this case require reversal of the judgment of conviction. It can be argued that even considered separately the errors in this case

were of such magnitude that each error requires reversal. But it is clear, when viewed cumulatively that the case for reversal is overwhelming. *Daniel v. State*, 119 Nev. 498 78 P.3d 890 (2003), *See* also, *Sipsas v. State*, 102 Nev. at 123, 216 P.2d at 235, stating: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial."

Prejudice may result from the cumulative impact of multiple deficiencies. *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), cert. denied, 440 U.S. 970; *Harris by and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir. 1995).

Relevant factors to consider in evaluating a claim of cumulative error are [1] whether the issue of guilty is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State,* 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State,* 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See,* also, *Big Pond v. State,* 101 Nev. 1, 695 P.2d 1228 (1985); *Daniel v. State,* 119 Nev. 498, 78 P.3d 890 (2003). (Emphasis added)

Brandon Starr was sentenced to a lengthy sentence of 1824 months with parole eligibility in 444 months. (A.A. 00532 ) Each motion filed pretrial and every ruling of the court during trial was extremely important. Each of the errors which occurred

pretrial, during trial and post trial led to his wrongful conviction and overly harsh and unjust sentence which violated the Eighth Amendment.

## CONCLUSION

The Defendant was charged with multiple serious felony charges. He was denied all pretrial motions, which may have assisted him in getting a fair trial as guaranteed by the United States Constitution. He was also wrongly denied his challenge to the jury panel because it did not represent a fair cross-section of jurors.

At trial the court denied Brandon Starr his Sixth Amendment and Due Process by allowing improper opinion testimony on the ultimate issue of his guilt when it allowed the lead detective to identify Brandon Starr in video surveillance tapes. The court committed multiple errors in instructing the jury. It is respectfully submitted there was insufficient evidence of guilt adduced under the strict standard of proof beyond a reasonable doubt the United States Supreme Court has demanded since *Jackson v. Virginia.*

These errors were not harmless. The accumulation of error magnify the individual errors and requires a reversal of defendant's convictions.

Wherefore, it is respectfully submitted for the reasons stated above, Defendant

Starr requests the conviction be reversed, the case be remanded and a new trial be granted with such other relief as this Honorable Court deems just.

DATED this 19th day of June, 2017.

Respectfully submitted,

//s// *Terrence M. Jackson*

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this brief does complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[ X ] Proportionately spaced, has a typeface of 14 points or more and contains 6860 words, which is within the word limit, but this brief is over the 30 page limit, at 35 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 19th day of June, 2017.

Respectfully submitted,

*/s/ Terrence M. Jackson*

TERRENCE M. JACKSON, ESQ.

## CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 19th day of June, 2017, I served a copy of the foregoing: Appellant's, Opening Brief as well as Volumes I - XII of the Appendix, as follows:

[X] Via Electronic Service (*eFlex*) to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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