IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83796

DONTE JOHNSON,
Petitioner,

v.

STATE OF NEVADA, *et al.*,
Respondent.

Appeal From Clark County District Court
Eighth Judicial District, Clark County
The Honorable Jacqueline M. Bluth, District Judge
(Dist. Ct. No. A-19-789336-W)

APPELLANT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing Appendix with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Alexander G. Chen
Chief Deputy District Attorney
Clark County District Attorney's Office

/s/ Celina Moore
Celina Moore
An employee of the Federal
Public Defender's Office

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 36991

APPELLANT'S REPLY BRIEF

ARGUMENT

I.

IT WAS ERROR FOR THE COURT TO DENY APPELLANT'S MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED.

Donte Johnson had a legally sufficient interest in the master bedroom of the Everman residence to claim the protection of the Fourth Amendment. See, **Katz v. United States**, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). The Fourth Amendment protects people not places. Capacity to claim the protection of the Fourth Amendment. A person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion in that place. **Rakas v. Illinois**, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L.Ed.2d 387 (1978); citing **Jones v. United States**, 362 U.S. 257, 263, 80 S. Ct. 725, 732-733 (1960).

Appellant is in accord with the State that the cases it cites (**United States v. Veatch**, 674 F.2d 1217 (1981); **United States v. Sanders**, 130 F.3d 1316 (1998); **United States v. Mangum**, 100 F.2d 164 (1996); **Bond v. United States**, 77 F.2d 1009 (1996); and **United**

States v. Avila, 52 3d 338 (1995)) (RAB, pp. 21-22), support the principle that the Fourth Amendment does not protect personal property abandoned by a defendant. However, Appellant asserts that this principle is not dispositive in the instant matter.

The State also argues that this matter is comparable to **State v. Banks**, 364 S.E.2d 452 (NC 1988). Clearly the holding of the North Carolina court was not understood by the State. **Banks**, Id. supports Appellant's position.

While it is true that in **Banks**, Id., the court of appeals held that the defendant did not have a legitimate expectation of privacy in the common areas of the residence in which he rented a bedroom, it upheld the motion to suppress with respect to his bedroom and despite the fact that he initially denied living in the residence. Here, Appellant lived at the Everman residence, occupying the master bedroom with his then-girlfriend, Charlotte Severs. At the suppression hearing, Appellant testified that he did not recall, while sitting on the curb in cuffs, being asked if he lived in the house. He testified that he was, in fact, living there on August 18, 1998, and had lived there for close to a month.

Charlotte Severs, declared a hostile witness by the court, was called by Appellant. She testified that she had slept at the Everman residence every night for fourteen days prior to being pulled out by the SWAT team on August 14, 1998. Appellant slept there with her (A. App., Vol. 6, pp. 1585-1588, 1590).

Severs also testified that Appellant provided drugs to Armstrong as a way of paying rent to stay in the Everman residence (A. App., Vol. 6, pp. 1585-1589).

Severs had come to the Everman residence to stay there

with Appellant at his request. Appellant stayed in the master bedroom and kept his clothes in there. Severs kept her clothing and personal things in the master bedroom, she considered it her "space." (A. App., Vol. 6, pp. 1585-1590).

In Appellant's Reply Brief, filed after the suppression hearing, the court was advised of the following:

In the opening statement of the related Sikia Smith trial prosecutor Gary Guymon (also the prosecutor herein) stated:

> You will also learn that sometime in early July, Donte Johnson and Terrell Young moved into the house there on Everman. (Attached Exhibit "A", Gary Guymon, Trial of Sikia Smith, Transcript, 6/16/99, p. 13.

Further:

> You will learn that Todd Armstrong has not been arrested yet, but you will learn he is a suspect in this case and that he, too, may be subject to prosecution if and when the evidence comes forward and is available." (Exhibit "A", Gary Guymon, Trial of Sikia Smith, Transcript, 6/16/99, p. 23).

(A. App., Vol. 6, pp. 1633-1634).

The prosecutor's pursuit of fundamentally inconsistent theories in separate trials of defendants charged with the same murder violated due process. **Thompson v. Calderon**, 120 F.3d 1045 (9th Cir. 1997); see also, **Smith v. Groose**, 205 F.3d 1045 (8th Cir. 2000).

It is clear that under the totality-of-circumstances that Donte Johnson lived in the Everman residence. He had standing to assert a legitimate expectation of privacy under the Fourth Amendment.

Any alleged waiver was not voluntary. "If the government exerts undue pressure or improper means to secure consent, instead

of obtaining a warrant as it can easily do, it is going to lose cases." **U.S. v. De Los Santos Ferrer**, 999 F.2d 7, 11 (1st Cir. 1993).

Here, Appellant was drawn out in the middle of the night by the Las Vegas Metropolitan Police Department SWAT Team and homicide bureau detectives. He was handcuffed. Appellant was in custody, and not given Miranda warnings. Under these circumstances, no voluntary waiver or abandonment could have been made. Under the conditions of his custodial inquiry, the alleged response concerning whether he lived in the residence. The trial court should have found that Appellant had "standing" to assert his privacy rights under the Fourth Amendment.

Todd Armstrong was a non-present co-tenant who signed a consent to search form. Numerous courts have found that a joint occupant who was away from the premises lacked the ability to authorize police officers to enter and search the premises when another joint tenant was present at the time of search. See, **Tompkins v. Superior Court**, 378 P.2d 113 (1968), **Silva v. State**, 344 So.2d 559 (Florida 1977); **Matter of Welfare of D.A. G.**, 484 N.W.2d 787 (Minnesota (1992); **State v. Matias**, 451 P.2d 257 (Hawaii 1969).

The State sets forth **Snyder v. State**, 103 Nev. 275, 738 P.2d 1303 (1987) for the proposition that a person who possesses common authority or other sufficient relationship can consent to a search. **Snyder**, is inapplicable. In **Snyder**, Id., the consenting individual was present at the residence, and the defendant was absent. Also, in **Snyder**, the consenting individual was the brother of the absent defendant. Here, Armstrong was not present, Appellant was and there was no family connection between Armstrong and

Appellant.

The State also cites **Taylor v. State**, 114 Nev. 1071, 968 P.2d 315 (1998). This case is also distinguishable. It is a luggage case and does not address the issue of residence searches, or the constitutional expectations of privacy of a person present at his home. Further, in **Taylor**, the defendant had given over actual control and possession of the suitcase to the party searched. The instant matter is not analogous. Using the logic of **Taylor**, Appellant could argue that Todd Armstrong abandoned his home in allowing Donte Johnson to have actual control and therefore, lost all right to consent to a search. It is thereby untenable to define a person's real property interest by the actual authority tenants of **Taylor**. The State's argument must fail.

The "good faith, mistaken belief" exception does not exist in the present case. Todd Armstrong, who was not present at the time of the search of the residence, did not have the authority to waive Donte Johnson's expectation of privacy when Donte Johnson was at home and in his bedroom.

The police cannot deliberately turn a blind eye to the obvious facts that Donte Johnson was living in the residence, in the master bedroom. The police specifically went to the residence to search Donte Johnson's bedroom. It is disingenuous to assert that they mistakenly believed that Todd Armstrong had authority to consent to search that bedroom when they knew it was Donte Johnson's.

The State, once again, cites **Snyder v. State**, 103 Nev. 275, 738 P.2d 1303 (1987) for the proposition that apparent authority is sufficient. However, this principle is not applicable

to the warrantless search of a residence when the resident is home. Any representation relied upon by the police came from Todd Armstrong, who was also a suspect. It does not support and cannot be used at this juncture to belie the fact that the police knew Donte Johnson was staying in the Everman residence, and knew in which room of the house he was staying, knew he was there when searching and knew he had an expectation of privacy in his effects.

In **Deroven v. State**, 85 Nev. 637, 640, 461 P.2d 865 (1969) this Court recognized the well-settled principle that search warrants for automobiles should be obtained whenever practicable. Further, in **State v. Parent**, 110 Nev. 114, 867 P.2d 1143 (1994), this Court expressly approved the concept of anticipatory search warrants as an effective tool to fight criminal activity, and to protect individual's Fourth Amendment rights; citing, **United States v. Garcia**, 882 F.2d 699, 703 (2nd Cir), cert denied, sub nom., **Grant v. United States**, 493 U.S. 943, 110 S. Ct. 348, 107 L.Ed.2d 336 (1989).

In **Barrios-Lomeli**, 113 Nev. 952, 944 P.2d 791 (1997), an automobile search case, this Court found under the circumstances therein no exigency existed which justified a warrantless search of the car. Appellant strongly urges this Court to find also that under the circumstances herein, a search warrant should have been attained.

Donte Johnson lived in the residence on Everman. He paid rent to Todd Armstrong in the form of drugs. He had a legally sufficient interest in privacy protected by the Fourth Amendment. Armstrong was not at the residence at 3:00 a.m. when the Las Vegas Metropolitan Police Department SWAT Team and Homicide detectives

entered the home; Donte Johnson was. Armstrong lacked the authority to allow the search of the Appellant's bedroom. Appellant was removed from the home, handcuffed and in custody. The Las Vegas Metropolitan Police Department could have obtained an anticipatory warrant. Failing that, they could have obtained a warrant during the time Appellant was in custody in front of the house. They certainly could have obtained a telephonic warrant. Donte Johnson had a legally sufficient interest in the master bedroom of the Everman residence so that the Fourth Amendment protected him from the unreasonable, warrantless search. The trial court erred in failing to grant Appellant's Motion to Suppress.

II.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ENTER INTO EVIDENCE TWO ASSAULT RIFLES THAT COULD NOT HAVE FIRED THE .38 CALIBER BULLETS THAT OCCASIONED THE DEATHS OF THE FOUR VICTIMS.

All four decedents were killed by a .38 caliber bullet. None of the seized weapons, a .30 caliber rifle, a .22 Ruger rifle, and a V20R .50 caliber pistol; could fire a .38 caliber bullet. The State adduced no proof that the challenged firearms were used in the murders. The court erred in allowing the highly prejudicial firearms into evidence when they had no proper probative value. Their only relevance was to show that Appellant was the kind of person who would carry such weapons; and therefore, more likely that he was the kind of person who committed the crimes. **NRS 48.035** requires a weighing of the probative value against its potential for undue prejudice. As there was no evidence adduced at trial that the guns were actually used it was error for the court to allow the State to enter them into evidence before the jury. Relief is

appropriate.

III.

FUNDAMENTAL FAIRNESS AND DUE PROCESS SUPPORT APPELLANT'S CLAIM THAT A DEFENDANT SHOULD BE ALLOWED TO ARGUE LAST IN THE PENALTY PHASE OF A CAPITAL CASE.

Appellant is not unmindful that this Honorable Court has held that **NRS 200.030(4)** does not shift the burden of proof to a defendant to prove that mitigating circumstances outweigh aggravating circumstances; however, Appellant asserts that in cases such as the instant matter, this simply is not true. See, **Williams v. State**, 113 Nev. 1008, 945 P.2d 438 (1997); **Witter v. State**, 112 Nev. 908, 921 P.2d 886 (1996).

Here, the aggravators were inherent in the jury's finding of guilt. Although **NRS 200.030(4)** appears reasonable on its face, in operation it is discriminatory. Appellant, who was death eligible, in truth, had the burden of persuading the jury that a lesser sentence was appropriate.

Appellant raised the issue by pre-trial motion and argument to the trial court. See, **Riddle v. State**, 96 Nev. 589, 613 P.2d 1031 (1980). The issue, within the specific factual content of this case, should be reconsidered by the court.

Further, Appellant has included this issue on direct appeal to preserve it for possible federal review.

IV.

THE PENALTY PHASE OF APPELLANT'S TRIAL SHOULD HAVE BEEN BIFURCATED INTO TWO SEPARATE AND DISTINCT PROCEDURES.

Appellant acknowledged in Opening Brief that this Court has held that **NRS 175.141**, which mandates that counsel for the

Office of the District Attorney must open and conclude argument, and **NRS 200.030(4)** are constitutional. However, in application to the instant matter, it is apparent that the jury, and later the three judge panel, found, automatically, that Appellant was convicted of more than one offense of murder, (an aggravating circumstance). The State, therefore, had no burden of proof; and bifurcation of the penalty phase would have insured due process for the Appellant.

In **Schoels v. State**, 114 Nev. 109, 966 P.2d 735 (1998) this Court held that because the penalty hearing is part of the trial, **NRS 175.141(5)** applies and counsel for the State must open and conclude the argument. Bifurcating the penalty phase as suggested by Appellant herein would have allowed for the statutory requirements and afforded Appellant a fair proceeding.

V.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A NEW TRIAL WITHOUT CONDUCTING AN EVIDENTIARY HEARING ON JUROR MISCONDUCT AS REQUESTED BY APPELLANT IN THE MOTION.

Juror misconduct is a broad label which has been used to describe communications with jurors from outsiders, witnesses, bailiffs, or judges and actions of jurors in the unauthorized viewing of premises, or reading of newspaper articles. See, **State v. Felton**, 620 P.2d 813 (Kan. 1980) citing Annot., 9 A.L.R.3d 1275; Annot., 41 A.L.R.2d 227.

The right to trial by jury means a trial by an unbiased and unprejudiced jury free of disqualifying jury misconduct. See, **State v. Tigano**, 818 P.2d 1369 (Wash. 1991).

Improper conduct is imputed to the entire jury panel when one juror is found guilty of improper conduct; the remainder of the

jury is not assumed to have been safeguarded from the contamination in absence of some interrogation addressed to jurors to dispel possibility that prejudice existed. See, **State v. DeGraw**, 764 P.2d 1290 (Mont. 1988).

The ultimate issue in any case involving juror misconduct is whether it can be said beyond a reasonable doubt that the misconduct did not contribute to the verdict. See, **Gibson v. Clanon**, 633 F.2d 851, 854-855 (9th Cir. 1980); **Dyer v. State**, 342 N.E.2d 671, 674 (Ind. App. 1976); **Barker v. State**, 95 Nev. 309, 594 P.2d 719, 721-722 (1979); **Chapman v. California**, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).

It is a fundamental principle that in reaching their verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings. See, **State v. Thacker**, 95 Nev. 500, 502, 596 P.2d 508 (1979) citing **Barker**, supra.

In the present case, following the discharge of the jury, the jurors spoke with counsel regarding their deliberations. Juror Kathleen Bruce asked both the State and Defense attorneys if the media was referring to her on the previous evening news broadcast where it was related that a "hold-out" juror was a woman. Affiant, Kristina Wildeveld, had watched the news broadcast the night before and states that there was an account that the jury was hung and that the "hold-out" was a woman juror. Juror Brice brought these facts out without prompting or previous discussion in the courtroom. Defense counsel for Appellant inquired of Bruce how she knew what was on television regarding the matter. Bruce, appearing nervous, responded that she had discussed the matter with her husband. It appeared to Wildeveld that Bruce had full and complete personal

knowledge of the entirety of the news account. Further, juror Connie Patterson made a statement that implied that she had been discussing the news broadcast and was aware of the media accounts; when she stated, "Really, I heard everyone thought it was me since I was emotional during the return of the verdict (A. App., Vol. 15, pp. 3578-3579).

The statements of jurors Bruce and Patterson clearly negate any presumption that they followed the court's instruction not to expose themselves to media reports, or discuss the case with outside parties. These acts of Bruce and Patterson clearly constituted misconduct. Once evidence has been presented to establish the likelihood of juror misconduct, a decision to disregard the misconduct as inconsequential should not be lightly or hastily made. Before the effects of misconduct may properly be deemed harmless, the court must permit an inquiry that is sufficient in scope to support an informed conclusion, beyond a reasonable doubt, that any misconduct did not contribute to the jury's verdict. See, **Bayramoglu v. Estelle**, 806 F.2d 880, 886 (9th Cir. 1986). Here, the trial court denied the motion for a new trial without affording Appellant an evidentiary hearing to make further inquiry. It was an abuse of the court's discretion. It was error.

It is misconduct for a juror to fail to disclose material information when asked. See, **State v. Briggs**, 776 P.12d 1347 (1989). Appellant contends that juror number 1 was racially biased against Afro-American males, a group to which Appellant belonged. This is supported by the record. On June 16, 2000, the court received a note from juror Bruce which stated, "I have an incident that occurred last week that I need to bring to your attention as

soon as possible." She was interviewed in open court, outside the presence of the other juror. She related an incident that occurred in the parking garage where everyone but her and an Afro-American man carrying a duffle bag got off the elevator. (This occurred prior to the verdict in the guilt phase). This was the day where the duffle bag and guns were in evidence. Bruce was scared. To serve on a jury, a juror must be free of all bias, including racial. See, **Darbin v. Nourse**, 664 F.2d 1109 (9th Cir. 1981); **State v. McClear**, 11 Nev. 39 (1876). Juror Bruce was not fee of bias and was not forthright with the court waiting none (9) days to report an incident "as soon as possible." Appellant's right to challenge Bruce for cause was prejudiced by her failure to reveal her fear of Afro-American men. His right to peremptorily challenge her was also prejudiced.

Here, the question of racial bias was not addressed. Further, the issue of the extent to which extra judicial information could have affected the jury's determination were not addressed by the court. It was error, given the demonstrated misconduct, for the court not to permit inquiry sufficient to resolve the question, beyond a reasonable doubt, that the misconduct did not contribute to the verdict. This matter should be remanded to the district court for resolution fo the juror misconduct issues.

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VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BROUGHT AFTER CLOSING ARGUMENT WHEREIN,

A. THE PROSECUTOR HAD CHANGED HIS FACTUAL POSITION REPEATEDLY REFERRED TO THE EVERMAN HOUSE AS BEING APPELLANT'S PLACE OF RESIDENCE WHEN AT THE SUPPRESSION HEARING THE PROSECUTOR ARGUED THAT APPELLANT DID NOT LIVE THERE; AND

B. ERRED IN NOT ASCERTAINING IF THE JURY HAD BEEN CONTAMINATED AND CALLED IT A "NON-ISSUE" WHEN A FAMILY MEMBER OF ONE OF THE VICTIMS WAS IN THE JURY LOUNGE WHERE A MAGAZINE FEATURING AN ARTICLE ON THE DEATH PENALTY WAS LATER FOUND AND THE JURY SITS IN THAT LOUNGE AREA WHERE THEY ARE ASSEMBLED AND START DELIBERATING.

First, Appellant asserts that the State's answering argument should not be considered by this Court as it is not supported by authority. See, **Mazzan v. State**, 116 Nev. Adv. Op. No. 7, 993 P.2d 25 (2000); **Maresca v. State**, 103 Nev. 669, 748 P.2d 36 (1987).

Defense counsel moved the court for a new trial on the ground that the State, in closing argument, took the position that Appellant lived at the Everman residence, this position was the opposite of his earlier argument at the suppression hearing wherein he argued that the Appellant did not live there. These factually inconsistent arguments violated Appellant's right to due process and a fair trial. See, **Thompson v. Calderon**, 120 F.3d 1045 (9th Cir. 1997). The trial court erred in denying the motion for a new trial.

Further, the trial court erred in failing to make inquiry upon learning that a family member of a victim was in the clearly marked, restricted jury lounge wherein the bailiff found a magazine containing an article on the death penalty. Donte Johnson was

charged with the commission of four murders; the State was seeking his death. A verdict is questionable if there is an unexplained question of juror contamination. As the court did not conduct the necessary inquiry it is unknown whether a private communication with a juror or jurors occurred. "A hearing before the trial court is the proper procedure to determine whether a communication is or is not prejudicial. See, **Abeyta v. State**, 113 Nev. 1070, 1075-76, 944 P.2d 849 (1997) citing **Isbell v. State**, 97 Nev. 222, 626 P.2d 1274 (1981).

Appellant is entitled to relief.

VII.

THE THREE JUDGE PANEL PROCEDURE FOR IMPOSING A SENTENCE OF DEATH IS UNCONSTITUTIONAL UNDER THE DUE PROCESS GUARANTEE OF THE FEDERAL CONSTITUTION PURSUANT TO THE PRECEDENT SET FORTH BY THE UNITED STATES SUPREME COURT IN **APPRENDI V. NEW JERSEY**.

The State's answer is premised upon a misunderstanding of Nevada sentencing law.

Under Nevada's statutory structure a defendant convicted of first degree murder is not death eligible until an aggravating circumstance is found by the trier of fact. See, **NRS 200.030(a)**. The finding of an aggravating circumstance can convert a life sentence penalty into a death sentence. The State's argument ignores the statutory requirement that an aggravator be found in order to make a defendant death eligible (See RAB, pp. 45, ll. 1-7).

In **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), the Court reversed the New Jersey Supreme Court on the ground of violation of the Due Process Clause which required factual determinations to be made by a jury, not by the

court, on the basis of proof beyond a reasonable doubt. In so doing, the Court endorsed the opinion it expressed in **Jones v. United States**, 526 U.S. 227 (1999) wherein it stated:

> With that exception [of fact of a prior conviction], we endorse the statement of the rule set forth in the concurring opinions in that case; "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S. Ct. 1215 (opinion of STEVENS, J.); see also Id., at 253, 119 S. Ct. 1215 (opinion of SCALIA, J.).

(**Jones**, at 252-253, **Apprendi**, at 2362-2363).

It is the position of Appellant, that under **Apprendi**, supra, the three-judge panel procedure of **NRS 175.556(1)** violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The State argues that **Apprendi**, supra, is not applicable to Nevada's three-judge panel procedure of **NRS 175.556(1)** because of the opinion of the court in the pre-**Apprendi** case of **Walton v. Arizona**, 497 U.S. 639 (1990). Appellant strongly suggests that the ruling in **Apprendi**, Id., that due process and jury protections did not only go to guilt or innocence but also involve the sentence when a fact assessment increases the prescribed range of penalties to which a criminal defendant is exposed; will be controlling. Specifically, Appellant posits that **Walton**, supra, which dissenting Justice O'Connor regards as questionable in light of the majority's opinion in **Apprendi**, Id. at 2387-2388, will cease to be controlling in capital jurisprudence. **NRS 175.554(3)**; **NRS 200.030(4)(a)** require a factual finding of aggravating circumstances and a determination

that any mitigating circumstances do not outweigh the aggravators for the imposition of capital punishment. Clearly, under these statutes, factual findings are the determinant. **Apprendi**, Id. requires this assessment of fact be made by a jury; it cannot be made by a judicial panel.

The State cites **Almendarez-Torres**, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998) in support of its position that Nevada's capital sentencing procedures are valid. This reliance is misplaced. The **Apprendi** decision raises a serious question of the continued viability of **Almendarez-Torres**. In **Apprendi**, Justice Thomas, in a concurring opinion, admits he was wrong in **Almendarez-Torres** where he was the deciding fifth vote for the majority, Id. at 2379. Due process mandates that factual determinations for sentence enhancement be made by a jury.

The **Apprendi** decision in stating that **Almendarez-Torres**, was arguably incorrectly decidedly limited the holding in **McMillan v. Pennsylvania**, 477 U.S. 79, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986). **Apprendi** at 2360.

The State asserts that "in **Apprendi**, supra, the Court did not intend to undo twenty years of precedent in capital sentencing and further the **Apprendi** decision does not require a review of Nevada's sentencing procedure." Neither of these statements is correct. **Apprendi** changes previous ruling by the court and requires a re-examination of Nevada's capital sentencing procedure in accordance with due process.

Appellant's death sentence should be reversed and the matter remanded to the district court for a jury determination fo the appropriate penalty.

VIII.

THE THREE-JUDGE PANEL SENTENCING PROCEDURE IS CONSTITUTIONALLY DEFECTIVE.

The United States Supreme Court decision in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) renders unconstitutional all sentencing schemes where the legislature has vitiated the irrevokable responsibility of a jury to find or utilize the percipient elements necessary to impose a maximum sentence after conviction on the underlying offense. **NRS 175.556** is such a sentencing scheme.

In Appellant's Opening Brief, Appellant presented a three part argument in support of his position totaling fourteen (14) pages (AOB, pp. 44-58) containing in excess of thirty-two citations as supporting authority for his position. The State, in response filed a 2 page argument (RAB, pp. 51-53) which adhered only one citation from Appellant's argument; and included seven pre-**Apprendi** decisions of this Court in which the sentencing procedure of **NRS 175.556** were constitutionally valid. Appellant maintains his argument as set forth in Appellant's Opening Brief, and based upon the authorities cited therein submits that Nevada's three-judge panel sentencing procedure is constitutionally defective.

IX.

THE ABSENCE OF PROCEDURAL PROTECTIONS IN THE SELECTION AND QUALIFICATION OF THE THREE-JUDGE JURY VIOLATES THE APPELLANT'S RIGHT TO AN IMPARTIAL TRIBUNAL, DUE PROCESS AND A RELIABLE SENTENCE.

The Nevada Capital structure is unique. The Nevada legislature clearly mandated that if a jury finds a defendant guilty of first degree murder, then automatically the jury must conduct the

penalty hearing. **NRS 175.552(1)(a)**. The charge of the jury is to find the existence or absence of the alleged aggravators and mitigators and then weigh the impact of these findings of fact. **NRS 175.554**. In Nevada, the aggravators are fact specific and oftentimes indistinguishable form the type of fact finding made during the trial or guilt phase.

As the Court made clear in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 1219, 140 L.Ed.2d 350 (1998), the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence be made by a jury on the basis of proof beyond a reasonable doubt. It is clear that in Nevada the existence of an aggravator and the subsequent weighing are elements and not mere sentencing factors. As such, under **Apprendi**, supra, the Court has deemed Nevada's three-judge panel component to an unconstitutional granting of authority to the judges.

Further, Appellant's conviction and sentence violate the constitutional guarantees of due process of law, and a reliable sentence because petitioner's capital trial and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. **U.S. Const., Amends. VIII, XIV; Nev. Const., Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.**

The tenure of judges of the Nevada State district courts and of the Nevada Supreme Court is dependent upon popular contested elections. **Nev. Const., Art. 6 §§ 3, 5.**

The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of

unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. **NRS 177.055(2).**

At the time of the adoption of the United States Constitution, see, **Apprendi v. New Jersey**, 530 U.S. 466, 478-484 (2000) (analysis of common law practice at time of adoption of constitution as basis of due process protection); **Montana v. Egelhoff**, 518 U.S. 37, 43-44 (1996) (analysis of whether fundamental due process principle exists primarily guided by historical practice); **Medina v. California**, 505 U.S. 437, 445-446 (1992); the common law definition of due process of law included the requirement that judges who presided over trials in capital cases, which at that time potentially included all felony cases, have tenure during good behavior.[1] All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from

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[1]The tenure of judges during good behavior was firmly entrenched by the time of the adoption: almost a hundred years before the adoption, a provision requiring that "Judges' Commissions be made quamdiu se bene gesserint. . . ." was considered sufficient important to be included in the Act of Settlement, 12, 13 Will. III c.2 (1700); W. Subbs, Select Charters, 531 (5th Ed. 1884); and 1760, a statute ensured their tenure despite the death of the sovereign, which had formerly voided their commissions. 1 Geo. III c. 23; 1 W. Holdsworth, History of English Law, 195 (7th Ed., A Goodhart and H. Hanbury Rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." 1 W. Blackstone, Commentaries on the Laws of England, 258 (1765). The framers of the constitution, who included tenure during good behavior for federal judges under Article III of the Constitution, would not likely have taken a looser view of the importance of this requirement to due process than George III. In fact, the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" was one of the reasons assigend as justification for the revolution. Declaration of Independence ¶ 11 (1776); see, Smith, An Independent Judiciary: The Colonial Background, 124 U. Pa.L.Rev. 1104, 1112-1152 (1976). At the time of the adoption, there were no provisions for judicial elections in any of the states. Id. at 1153-1155.

the influence of the sovereign that would otherwise have improperly affected their impartiality.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian, "lynch mob," pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." **Tumey v. Ohio**, 273 U.S. 510, 532 (1927). Judges or justices who are subject to these pressures cannot be impartial within due process standards in a capital case, because subjection of judicial officers to popular election are always under a threat of removal as a result of unpopular decisions in favor of a capital defendant.[2]

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[2]See, e.g., Bright, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 Boston U.L.Rev. 759, 776-780, 784-792, 822-825 (1995); Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U.L.Rev. 308, 312-314, 316-326, 329 (1997); Johnson and Urbis, Judicial Selection in Texas: A gathering Storm?, 23 Tex.Tech.L.Rev. 525, 555 (1992); Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 Stan.L.Rev. 449, 478-483 (1988); Note, Safeguarding the Litigant's Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers, 86 Mich.L.Rev. 382, 399-400, 407-408 (1987).

X.

USE OF NEVADA'S THREE-JUDGE PANEL PROCEDURE TO IMPOSE SENTENCE IN A CAPITAL CASE PRODUCES A SENTENCER WHICH IS NOT CONSTITUTIONALLY IMPARTIAL AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Nevada procedure of appointing a panel of three judges for determination fo the appropriate punishment under **NRS 175.554**, **NRS 175.556** does not comply with the constitutional standard implicit in the Due Process Clause of the Fourteenth Amendment or reflect "a reasoned moral response." See, **Penry v. Lynaugh**, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989).

The three-judge panel procedure violates a capital defendant's right to an impartial tribunal, due process and a reliable sentence as it does not allow challenges to the selection and qualifications of panel members. The Nevada procedure results in the defendant by a tribunal that does not reflect the "conscience of the community," see, **Witherspoon v. Illinois**, 391 U.S. 510, 519, 112 S. Ct. 1770, 20 L.Ed.2d 776 (1968).

The State mistakenly relies on **Baal v. State**, 106 Nev. 69, 787 P.2d 391 (1990) for its position that Appellant's challenge to the constitutionality of the three-judge panel (RAB, p. 57). **Baal**, supra, was pre-**Apprendi** as are the six cases cited sequentially as additional support. Further, the three arguments raised in **Baal**, Id., are not dispositive of the instant matter. In **Baal**, Id., two of the arguments challenged the three-judge capital sentencing procedure following a guilty plea which is not applicable. The other argument, that sentencing by a three-judge penal deprived him of his right to a jury was derived by this Court relying on **Cabana v. Bullock**, 474 U.S. 376, 385-86, 106 S. Ct. 689, 88 L.Ed.2d 704

(1986) and **Hill v. State**, 103 Nev. 377, 724 P.2d 734 (1986). Given the courts decision in **Apprendi**, supra, it is clear that the reasoning and ruling in **Cabana**, supra, and **Hill**, supra, are no longer controlling.

The State's power to establish capital sentencing proceeding does not include the power to establish sentencing bodies which are selected without procedural protections consistent with due process principles. The statutory scheme for convening a three-judge panel is not valid.

XI.

THE STATUTORY REASONABLE DOUBT INSTRUCTION IS UNCONSTITUTIONAL.

Appellant acknowledged in Appellant's Opening Brief that this Court has consistently found the reasonable doubt instruction of **NRS 175.211** to be constitutionally valid citing **Lord v. State**, 107 Nev. 23, 806 P.2d 548 (1991).

In remains the position of the Appellant that the statutory reasonable doubt jury instruction as given does not provide a jury with meaningful principles or standards to guide it in evaluating the evidence. Appellant includes this issue to preserve it for possible federal review.

XII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SETTLE THE RECORD REGARDING POSSIBLE FAILURE OF THE TWO APPOINTED PANEL JUDGES TO READ THE TRANSCRIPTS OF THE GUILT PHASE OF APPELLANT'S TRIAL.

Assuming arguendo that Appellant is correct in his assertion, under **Holloway v. State**, 116 Nev. Adv. Op. No. 83, 6 P.3d 907 (August 23, 2000), that a three-judge panel in a capital case

has a duty to consider all evidence adduced at the guilt phase in determining the appropriate penalty; this Court is unable to ascertain that the two judges appointed to the panel reviewed the transcripts of the guilt phase in their entirety.

This determination cannot be made as the trial court erred in denying Appellant's motion to settle the record. This Honorable Court should hold that a three-judge panel has a duty to consider all evidence adduced during the guilt phase in order to determine the appropriate penalty in a capital case. The case should be remanded to the district court to settle the record.

XIII.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HELD FIFTY-NINE (59) OFF THE RECORD BENCH CONFERENCES THUS DEPRIVING APPELLANT OF A COMPLETE RECORD FOR PURPOSES OF DIRECT APPEAL AND POST-CONVICTION HABEAS RELIEF.

First, Appellant asserts that the State's answering argument should not be considered by this Court as it is not supported by authority. See, **Mazzan v. State**, 116 Nev. Adv. Op. No. 7, 993 P.2d 25 (2000); **Maresca v. State**, 103 Nev. 669, 748 P.2d 36 (1987).

Effective appellate review, to which Appellant is entitled, depends on the availability of an accurate record covering lower court proceedings. See, **Lopez v. State**, 106 Nev. 68, 85, 769 P.2d 1276, 1287 (1989).

A trial record which demonstrates the court had 59 off-the-record conferences is not an accurate, complete record.

When a trial record is incomplete, reconstruction is the procedure followed in most cases. See, **Lopez**, Id. at 85, 1287-88, citing to **Butler v. State**, 264 Ark. 243, 540 S.W.2d 272, 274-275

(1978 et al).

In **Lopez**, this Court observed that in **VanWhite v. State**, 752 P.2d 814, 821 (Ok. Cr. 1988) the court held that a complete stenographic record is required in all capital proceedings. Id. at 85 n. 12, 1287 n. 12). Fundamental fairness mandates that Appellant, a capital defendant, be provided with a reconstructed transcript so as not to be prejudiced in his direct appeal or other remedies.

This matter should be remanded to the district court to ascertain if the court and the parties can reconstruct the trial transcript so as to no preclude Appellant a meaningful record for review.

CONCLUSION

For the reasons more fully articulated above, this case should be reversed and remanded to the district court for a new and fair trial.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 11th day of January, 2002.

PHILIP J. KOHN
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By 

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DECLARATION OF MAILING

DONNA POLLOCK, an employee with the Clark County Special Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 11th day of January, 2002, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Appellant's Reply Brief in the case of Donte Johnson vs. The State of Nevada, Case No. 36991, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Frankie Sue Del Papa, Nevada Attorney General, 100 North Carson Street, Carson City, Nevada 89701, that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 11th day of January, 2002.

DONNA POLLOCK

RECEIPT OF A COPY of the foregoing **Appellant's Reply Brief** is hereby acknowledged this 11th day of January, 2002.

STEWART L. BELL
CLARK COUNTY DISTRICT ATTORNEY

By

EXHIBIT 15

EXHIBIT 15

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200 South Third Street
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(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154

Dept No. V

NOTICE OF MOTION AND MOTION TO AMEND JUDGMENT OF CONVICTION

DATE OF HEARING: 04/12/04

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Notice of Motion and Motion To Amend Judgment Of Conviction.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department

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APR 07 2004
CLERK OF THE COURT

CMC

V thereof, on Monday, the 12th day of April, 2004, at the hour of 9:00 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED this 6 day of April, 2004.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

STATEMENT OF FACTS

On October 9, 2000, a Judgment of Conviction was filed in this case which outlines the defendant's convictions in the above proceedings and the pronounced sentences.

Because the Nevada Supreme Court has reversed and remanded the penalty phase of this case, the State is now prepared to participate in another penalty hearing.

The State seeks to provide this new jury with a copy of the attached Proposed Amended Judgment Of Conviction in this case. The reason that the State is seeking the Proposed Amended Judgment Of Conviction is because the State does not want the new jury to know that a three judge panel previously pronounced death in this case.

The original Judgment of Conviction which is attached as Exhibit 2 clearly sets forth the guilty verdicts and the sentences associated with each of the verdicts. It would be completely improper for this new jury to know what the prior penalty was and as such it would be improper to use the Judgment of Conviction associated with this case as it is currently written here. The Proposed Amended Judgment of Conviction simply states that the defendant was convicted, but says nothing about the penalties which were pronounced.

The State believes that this new jury certainly is entitled to know that the defendant was convicted, but not previously sentenced. As such, the State is asking to file the

Proposed Amended Judgment of Conviction so this jury can be assured that the defendant was convicted, but have no knowledge of a prior pronounced sentence.

CONCLUSION

Based upon the above the State asks that an Amended Judgment of Conviction be signed and filed in this case.

DATED this 16 day of April, 2004.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice of Motion and Motion For Procedural Direction From the Court, was made this 16th day of April, 2004, by facsimile transmission to:

ALZORA JACKSON, DEPUTY
SPECIAL PUBLIC DEFENDER
FAX #455-6273

_____
Secretary for the District Attorney's Office

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

PROPOSED AMENDED JUDGMENT OF CONVICTION

WHEREAS, on the 17th day of September, 1998, Defendant, DONTE JOHNSON, entered a plea of Not Guilty to the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPING AND/OR MURDER (Felony - NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - MURDER WITH USE OF A DEADLY WEAPON (Open Murder) (Felony - NRS 200.010, 200.030, 193.165); and WHEREAS, the Defendant DONTE JOHNSON, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER (Felony - NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY

EXHIBIT "1"

WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), and the Jury verdict was returned on or about the 9th day of June, 2000.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this _____ day of April, 2004, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#98-153154X/kjh
LVMPD EV#9808141600
BURG W/WPN; CONSP ROBB/ KIDNAP/MURDER; 1st ° KIDNAP W/WPN; 1□ MURDER W/WPN - F

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FILED

Oct 9 5 01 PM '00

CLERK

JOC
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V
Docket H

JUDGMENT OF CONVICTION

WHEREAS, on the 17th day of September, 1998, Defendant, DONTE JOHNSON, entered a plea of Not Guilty to the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPING AND/OR MURDER (Felony - NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - MURDER WITH USE OF A DEADLY WEAPON (Open Murder) (Felony - NRS 200.010, 200.030, 193.165); and

WHEREAS, the Defendant DONTE JOHNSON, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER (Felony - NRS

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EXHIBIT "2"

199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), and the Jury verdict was returned on or about the 9th day of June, 2000. Thereafter, a Three-Judge Panel, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found that there were two (2) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered;

(b) Knew or had reason to know that life would be taken or lethal force used.

2. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

That on or about the 26th day of July, 2000, the Three-Judge Panel unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be DEATH as to COUNTS XI, XII, XIII & XIV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of October, 2000, the Defendant being present in court with his counsel, JOSEPH SCISCENTO, Deputy Special Public Defender, and DAYVID J. FIGLER, Deputy Special Public Defender, and GARY L. GUYMON, Chief Deputy District

Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdicts and, in addition to the $25.00 Administrative Assessment Fee, the Defendant is sentenced as follows:

COUNT I - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for BURGLARY WHILE IN POSSESSION OF A FIREARM;

COUNT II - a Maximum term of SEVENTY-TWO (72) months with a Minimum parole eligibility of SIXTEEN (16) months in the Nevada Department of Prisons for CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER, to run consecutive to Count I;

COUNT III - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count II;

COUNT IV - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count III;

COUNT V - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count IV;

COUNT VI - a Maximum term of ONE HUNDRED EIGHTY (180) months with a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for ROBBERY plus an equal and consecutive Maximum term of ONE HUNDRED EIGHTY (180) months with

a Minimum parole eligibility of FORTY (40) months in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count V;

COUNT VII - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VI;

COUNT VIII - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VII;

COUNT IX - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count VIII;

COUNT X - LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for FIRST DEGREE KIDNAPPING plus an equal and consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE in the Nevada Department of Prisons for USE OF A DEADLY WEAPON, to run consecutive to Count IX;

COUNT XI - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON, and pay $33,605.95 Restitution jointly and severally with co-offenders Sikia Lafayette Smith and Terrell Cochise Young;

COUNT XII - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON;

COUNT XIII - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON;

COUNT XIV - DEATH for FIRST DEGREE MURDER plus an equal and consecutive DEATH for USE OF A DEADLY WEAPON.

Credit for time served 776 days.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 9th day of October, 2000, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE
JEFFREY D. SOBEL

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TRUE AND CORRECT COPY
OF THE ORIGINAL FILE

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Shirley B. Parraguirre
CLERK

DA#98-153154X/kjh
LVMPD EV#9808141600
BURG W/WPN; CONSP ROBB/ KIDNAP/MURDER; 1° KIDNAP W/WPN; 1° MURDER W/WPN - F

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
GARY L. GUYMON
Chief Deputy District Attorney
Nevada Bar #003726
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154

Dept No. V

NOTICE OF MOTION AND MOTION TO AMEND JUDGMENT OF CONVICTION

DATE OF HEARING: 04/12/04

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through GARY L. GUYMON, Chief Deputy District Attorney, and files this Notice of Motion and

EXHIBIT 16

EXHIBIT 16

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JOC
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

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CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept. No. V

AMENDED JUDGMENT OF CONVICTION

WHEREAS, on the 17th day of September, 1998, Defendant, DONTE JOHNSON, entered a plea of Not Guilty to the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPING AND/OR MURDER (Felony - NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - MURDER WITH USE OF A DEADLY WEAPON (Open Murder) (Felony - NRS 200.010, 200.030, 193.165); and WHEREAS, the Defendant DONTE JOHNSON, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT I - BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060, 193.165); COUNT II - CONSPIRACY TO COMMIT ROBBERY AND/OR KIDNAPPING AND/OR MURDER (Felony - NRS 199.480, 200.380, 200.310, 200.320, 200.010, 200.030); COUNTS III, IV, V & VI - ROBBERY

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WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); COUNTS VII, VIII, IX, & X - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); and COUNTS XI, XII, XIII & XIV - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), and the Jury verdict was returned on or about the 9th day of June, 2000.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 19 day of April, 2004, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#98-153154X/ddm
LVMPD EV#9808141600
BURG W/WPN; CONSP ROBB/ KIDNAP/MURDER; 1st ° KIDNAP W/WPN; 1st ° MURDER W/WPN - F

EXHIBIT 17

EXHIBIT 17

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ORIGINAL

JOC
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Clark County District Attorney
Nevada Bar #002781
ROBERT J. DASKAS
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200 South Third Street
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(702) 455-4711
State of Nevada

FILED IN OPEN COURT
JUN 06 2005
SHIRLEY B. PARRAGUIRRE, CLERK
BY Sharon Coffman
DEPUTY
SHARON COFFMAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154
Dept No. VIII

JUDGMENT OF CONVICTION

WHEREAS, on the 17th day of September, 1998, Defendant, DONTE JOHNSON, entered a plea of Not Guilty to the crimes of COUNT XI – MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT XII – MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT XIII – MURDER WITH USE OF A DEADLY WEAPON Felony); and COUNT XIV – MURDER WITH USE OF A DEADLY WEAPON (Felony), NRS 200.010, 200.030, 193.165; and

WHEREAS, the Defendant DONTE JOHNSON, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT XI – MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT XII – MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT XIII – MURDER WITH USE OF A DEADLY WEAPON Felony); and COUNT XIV – MURDER WITH USE OF A DEADLY WEAPON (Felony),

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JUDGMENT ENTERED
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in violation of NRS 200.010, 200.030, and 193.165, and the Jury verdict was returned on or about the 9th day of June, 2000.

Thereafter, another trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found, as to COUNT XI, that there was one (1) aggravating circumstance in connection with the commission of said crime, to-wit:

1. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

That on or about the 5th day of May, 2005, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance, and determined that the Defendant's punishment should be Death as to COUNT XI - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

That the same jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found, as to COUNT XII, that there was one (1) aggravating circumstance in connection with the commission of said crime, to-wit:

1. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

That on or about the 5th day of May, 2005, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance, and determined that the Defendant's punishment should be Death as to COUNT XII - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

That the same jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found, as to COUNT XIII, that there was one (1) aggravating circumstance in connection with the commission of said crime, to-wit:

1. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

That on or about the 5th day of May, 2005, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance, and determined that the Defendant's punishment should be Death as to COUNT XIII - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

That the same jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found, as to COUNT XIV, that there was one (1) aggravating circumstance in connection with the commission of said crime, to-wit:

1. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.

That on or about the 5th day of May, 2005, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance, and determined that the Defendant's punishment should be Death as to COUNT XIV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the ~~12th~~ 6 day of ~~May~~ June, 2005, the Defendant being present in court with his counsel, ALZORA JACKSON, Deputy Special Public Defender, and BRETT WHIPPLE, Esq., and ROBERT J. DASKAS, Chief Deputy District Attorney, and DAVID STANTON, Deputy District Attorney, also being present; the Defendant having previously been adjudicated guilty by reason of said trial and verdict, the above-entitled Court did sentence Defendant, by virtue of the Jury's determination to DEATH for COUNT XI – MURDER WITH USE OF A DEADLY WEAPON; and to DEATH for COUNT XII – MURDER WITH USE OF A DEADLY WEAPON; and to DEATH for COUNT XIII – MURDER WITH USE OF A DEADLY WEAPON; and to DEATH for COUNT XIV - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON.

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THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 6 day of ~~May~~ June, 2005, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#98F11830X/ddm
LVMPD EV# 9808141600
1° MURDER W/WPN - F

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EXHIBIT 21

EXHIBIT 21

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 45456

2008 JAN 29 A 6:10

District Court Case No. C153154

CLERK OF THE COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "Affirmed."

Judgment, as quoted above, entered this 28th day of December, 2006.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 28th day of January, 2008.

Tracie Lindeman, Supreme Court Clerk

By: Sharon Page
Deputy Clerk

122 Nev., Advance Opinion 113

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45456

FILED

DEC 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a death sentence after a new penalty hearing. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Affirmed.

David M. Schieck, Special Public Defender, and Alzora B. Jackson and Lee Elizabeth McMahon, Deputy Special Public Defenders, Clark County, for Appellant.

George Chanos, Attorney General, Carson City; David J. Roger, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

Appellant Donte Johnson was convicted by a jury in 2000 of four counts of first-degree murder with the use of a deadly weapon, among other crimes, and was sentenced to death by a three-judge panel. On direct appeal, this court affirmed his conviction, but vacated his death

06-26545

sentence and remanded for a new penalty hearing because the three-judge sentencing procedure violated the United States Supreme Court's holding in Ring v. Arizona.[1]

Johnson's new penalty hearing began in April 2005 before a jury and was bifurcated into separate phases: a death-eligibility phase and a selection phase. The jury sentenced Johnson to death. He appeals.

Among the issues on appeal is whether the Confrontation Clause of the Sixth Amendment to the United States Constitution and the Supreme Court's holding in Crawford v. Washington[2] apply to the selection phase of a bifurcated capital penalty hearing. Applying our holding in Summers v. State,[3] we conclude they do not. Neither this issue nor the others Johnson raises warrant reversal. Therefore, we affirm.

FACTS

The facts underlying Johnson's conviction are set forth in detail in this court's 2002 opinion.[4] In this opinion, we recount only those facts necessary to an understanding of the issues presented.

On the night of August 13 or early morning of August 14, 1998, Johnson (whose real name is John White), along with two other

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[1]Johnson v. State, 118 Nev. 787, 801-04, 59 P.3d 450, 460-61 (2002) (citing Ring, 536 U.S. 584 (2002)).

[2]541 U.S. 36 (2004).

[3]122 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 112, December 28, 2006).

[4]Johnson, 118 Nev. at 791-93, 59 P.3d at 453-54.

men, entered a Las Vegas home intending to commit robbery. While inside, Johnson murdered 20-year-olds Tracey Gorringe and Matthew Mowen, 19-year-old Jeffery Biddle, and 17-year-old Peter Talamantez by binding them with duct tape and shooting them execution-style in the head. Stolen during the robbery were a VCR, a video game, a personal beeper, a set of keys, and about $200 in cash.

Johnson was arrested four days later and charged with four counts of first-degree murder with the use of a deadly weapon, four counts of first-degree kidnapping, four counts of robbery with the use of a deadly weapon, and one count of burglary while in possession of a firearm. In 2000, a jury convicted him of all charges but could not agree during his penalty hearing on what sentence to impose. Another penalty hearing was later held before a three-judge panel, which sentenced Johnson to death for each of the four murders.

This court affirmed Johnson's conviction in 2002.[5] But the fact that Johnson was sentenced to death based on findings by a three-judge panel, instead of a jury, violated the Supreme Court's holding in Ring.[6] His death sentence was therefore vacated and his case remanded to the district court for a new penalty hearing.[7]

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[5]Id. at 806, 59 P.3d at 463.

[6]536 U.S. at 609.

[7]Johnson, 118 Nev. at 804, 59 P.3d at 461.

Johnson's new penalty hearing—his third—began in April 2005 before a jury. The district court granted Johnson's pretrial motion to bifurcate it into separate phases: death-eligibility and selection.

I. Death-eligibility phase

Johnson's death-eligibility phase lasted four days. Both parties made opening statements to the jury.

State's case in aggravation

The State presented evidence of a single aggravating circumstance it pursued for each of the four murders—that Johnson had been convicted of more than one murder in the immediate proceeding pursuant to NRS 200.033(12).[8]

Certified copies of the jury verdict forms and transcripts from the original guilt phase were admitted into evidence to establish the quadruple murder by Johnson. The State also presented the testimony of four witnesses. Justin Perkins, a friend of the victims, testified how he discovered their lifeless bodies. Las Vegas Metropolitan Police Department (LVMPD) Detective Thomas Thowsen, who had investigated the four murders since they were first reported in August 1998, gave the bulk of the testimony. He recounted for the jury the criminal investigation and summarized evidence presented through various State witnesses

[8]An aggravator based on NRS 200.033(4) that was found by the three-judge panel during Johnson's previous penalty hearing was stricken during a pretrial hearing by the district court pursuant to this court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

during the guilt phase. He also read portions of the original trial testimony of these witnesses. LVMPD Forensic Crime Lab Manager Berch Henry testified about the DNA analysis linking Johnson to the murders, and Clark County Forensic Pathologist, Medical Examiner Dr. Gary Telgenhoff, summarized the autopsy findings regarding each victim.

Each of the victims, according to Dr. Telgenhoff, died from a single gunshot wound to the back of the head at "very close" range—"about an inch or so away from skin." The wrists and ankles of each victim were bound with duct tape, and none had any "defensive wounds." Unlike the other victims, Talamantez also had a laceration and abrasion on his nose "due to blunt force" consistent with being "pistol whipped."

Defense's case in mitigation

Johnson called only members of his family to testify during this phase. They testified that Johnson's mother, who by her own admission was "a little slow," abused alcohol and illegal drugs, including crack cocaine and PCP, when Johnson was a child. She even did so in his presence. She would sometimes leave Johnson and his sisters alone or lock them in a closet. Johnson's father abused his mother in front of Johnson and his sisters, once knocking her teeth out and attempting to throw her out of a hotel window. Johnson was also beaten.

At one point, Johnson, his two sisters, and several of his cousins were forced to live in a one-room shed for about a month. The shed had no running water, no carpet, and no furniture. The children had to go to the bathroom in a bucket and sleep on the floor with no covers. While living in the shed, the children sometimes did not comb their hair or

eat. Because they had no shower, the children often had to go to school with body odor. They were also hungry at times.

The police were eventually contacted, and the children, including Johnson, were taken into foster care. Johnson and his sisters were thereafter sent to live with their grandmother, who was also caring for about ten other children. Johnson's grandfather, according to Johnson's sister Johnnisha Zamora, did the best he could, but she could not recall any time he ever spent with Johnson.

Johnson's grandmother's house was in the Compton area of Los Angeles, where, as Johnson's sister Johnnisha explained, there was "a lot of violence." Johnson and his two sisters were often chased and beaten up at school. His sister Eunisha White testified that Johnson was short and that they were "picked on a lot by different people for no reason."

Johnson's family testified about the positive aspects of his personality and their love for him. A video and several family pictures were admitted into evidence. Johnson's eight-year-old son Allen White, who was in the third grade, read to the jury a letter he wrote to his father which stated in part: "I will love you in my heart, and you will love me in mine."

Special verdict

The State and the defense made closing arguments, and the State argued in rebuttal. The jury was also given instructions. The jury returned four special verdicts, finding the single aggravating circumstance pursued by the State. Seven mitigating circumstances were found: Johnson's youth at the time of the murders (he was 19 years old); he was

taken as a child from his mother due to her neglect and placed in foster care; he had "no positive or meaningful contact" with either parent; he had no positive male role models; he grew up in violent neighborhoods; he witnessed many violent acts as a child; and while a teenager he attended schools where violence was common.

The jury found the aggravating circumstance outweighed the mitigating circumstances and that Johnson was eligible for death.

II. Selection phase

The selection phase in Johnson's case lasted five days. Both the State and the defense made new opening statements to the jury.

State's case in support of a death sentence

Evidence regarding Johnson's prior bad acts was admitted during this phase of the hearing.

A Los Angeles Police Department lieutenant and a bank manager testified regarding Johnson's participation in an armed bank robbery in 1993, when he was about 15 years old. An LVMPD officer testified that in 1998 Johnson was implicated in the shooting of a man in Las Vegas. That man later died. The district court admitted documents into evidence charging Johnson with attempted murder and battery with the use of a deadly weapon relating to the incident, as well as Johnson's guilty plea and judgment of conviction for the battery charge.

A California Department of Corrections Parole Division officer testified about Johnson's juvenile record in California. The district court admitted Johnson's judgment of conviction for the 1993 armed bank

robbery into evidence, showing that he was sentenced to four years in the California Youth Authority (CYA) program. Johnson was paroled from the CYA program prior to the expiration of his four-year sentence, but he later absconded from parole.

LVMPD Officer Alexander Gonzalez testified that he worked at the Clark County Detention Center in February 2001 in the unit housing high-risk inmates. He described a fight between Johnson and another inmate, Oscar Irias. With help from a third inmate, Johnson threw Irias over a second-tier railing. Irias survived.

LVMPD Detective James Buczek participated in the quadruple murder investigation. He testified on behalf of Nevada Highway Patrolman Sergeant Robert Honea (who had testified in Johnson's 1998 trial). According to Detective Buczek, Sergeant Honea conducted a traffic stop involving Johnson on August 17, 1998, three days after the murders. Johnson was the driver, but identified himself as "Donte Fleck"; a passenger in the car was one of his accomplices in the robbery and murders. During the stop, Johnson and his passenger abandoned the car and fled on foot. A rifle loaded with 20 rounds of ammunition was located in the car, along with a clip of ammunition.

In addition to the prior bad act evidence, the State also admitted impact testimony from the families of Johnson's four victims.

Juanita Aguilar, the mother of Peter Talamantez, testified that Peter "was very smart, very caring. He could have done just about anything he wanted to, but at 17, you don't really think too much about what you want to be in the future because you're still out having fun."

Peter's murder had caused her severe depression. She lamented: "There's not one day I don't think about my baby."

Marie Biddle, the mother of Jeffery Biddle, testified that Jeffery liked to play sports, he was a "wonderful artist," and someday he either wanted to go into law enforcement or the Air Force. She told the jury that Jeffery's murder had "been very devastating."

Sandy Viau, the mother of Tracey Gorringe, testified that Tracey wanted to become an electrical engineer. She added, "He was a great athlete. He played baseball, he snowboarded, he skied, he water-skied, he roller-bladed, he rode motorcycles." She stated that after his murder, "I don't have any goals now. You know, it's one day at a time."

David Mowen, the father of Matthew Mowen, testified that Matthew was his only son and wanted to study medicine. "He was quite a young man. . . . He was one of those special individuals that, for whatever reason, he had that ability to connect with many, many different types of people." Of the impact of Matthew's murder, his father testified: "It's the same pain, the same misery, the same angriness that you have every single day. It doesn't get better." Matthew's younger sister Jennifer also testified that she looked up to her brother, who always gave her comfort and strength.

Defense's case for a sentence less than death and State's rebuttal

The defense again called members of Johnson's family, many of whom had already testified during the death-eligibility phase. These family members, including his young son, again testified about the positive aspects of Johnson's character and their love for him.

Much testimony was presented regarding Johnson's involvement with street gangs beginning when he was about 13 or 14 years old. Johnson joined the Six Duece Brims gang, affiliated with the larger Bloods gang, to stop the harassment of his family. A professor of sociology at the University of California at Berkeley testified about gangs and provided the jury with extensive sociological data.

Several specialists who had worked with Johnson also testified. Johnson's former parole agent for the CYA testified that he supervised Johnson after his release from the juvenile program and found Johnson to be "a small, quiet young man that seemed to be pleasant and workable." A therapist who worked with Johnson in 2000 at the Clark County Detention Center testified that Johnson "was a fairly consistent, decent person in that setting." And a psychologist and clinical neuropsychologist profiled Johnson's personality and summarized his life.

Two inmates testified that they saw inmate Irias fall over the second-tier balcony. Johnson's alleged accomplice in the incident, Reginald Johnson (no relation to the appellant), testified that he alone, without Johnson's participation, "assaulted [Irias] and helped him over the tier" because Irias was a child molester. Reginald's former counsel confirmed that Reginald admitted to her that he did it.

A retired California Department of Corrections officer testified about the life that would be expected for an inmate sentenced to a term of life without the possibility of parole in Nevada's Ely State Prison. To rebut this evidence, the State called the warden of the Southern Desert Correctional Facility.

Johnson made no statement in allocution.

Death sentences

The State made a closing argument, and Johnson's two counsel made closing arguments. The State argued in rebuttal. A new set of written instructions was given to the jury. The jury returned four separate verdicts imposing a sentence of death for each of the murders.

DISCUSSION

I. Do the Confrontation Clause and Crawford v. Washington apply to the selection phase of a bifurcated capital penalty hearing?

Johnson contends that the district court committed reversible error by admitting copies of his inmate disciplinary reports from the Clark County Detention Center during the selection phase of his penalty hearing. Those reports, he asserts, violated the Sixth Amendment's Confrontation Clause and Crawford[9] because they contained testimonial hearsay statements by witnesses who were not shown to be unavailable and whom he had no opportunity to cross-examine. He maintains that he is entitled to a new penalty hearing. We disagree.

We held in Summers that the right to confrontation does not apply to evidence admitted in a capital penalty hearing. Our holding in Summers applies to the entirety of a capital penalty hearing, irrespective of whether the hearing is bifurcated into distinct phases as Johnson's hearing was. Even assuming that statements within the reports were testimonial under Crawford, pursuant to our reasoning in Summers, Johnson did not enjoy a Sixth Amendment right to confront their

[9]541 U.S. 36.

declarants. We conclude that the admission of the reports was not error and reversal is not warranted on this basis.

II. Did the district court abuse its discretion by admitting Johnson's juvenile records into evidence?

Johnson contends that the district court abused its discretion by admitting juvenile records during the selection phase of his penalty hearing. He primarily relies upon the Supreme Court's 2005 decision in Roper v. Simmons[10] for support, arguing that the admission of these records was "highly prejudicial." We disagree.

The Supreme Court in Roper held that it was "cruel and unusual" to execute offenders who were under 18 years old when they committed their crimes.[11] The Court reasoned that juveniles by their very age and lack of development "cannot with reliability be classified among the worst offenders."[12] However, Roper did not prohibit the admission of juvenile records during a death penalty hearing. Because there is no question that Johnson was not a juvenile when he committed the murders, his reliance upon Roper is misplaced.

Rather, "'[t]he decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will

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[10]543 U.S. 551 (2005).

[11]Id. at 568.

[12]Id. at 569.

not be disturbed absent an abuse of that discretion.'"[13] Evidence of character is admissible during a penalty hearing so long as it is relevant and the danger of unfair prejudice does not substantially outweigh its probative value.[14]

Here, the evidence of Johnson's juvenile history primarily consisted of records and testimony regarding his participation in and conviction for the armed bank robbery in California in 1993 as a 15-year-old gang member and his subsequent successes and failures in the CYA program for juvenile offenders. This evidence also concerned his subsequent absconding from that program's parole a few years later.

Johnson's juvenile record was relevant to his character, revealing a pattern of escalating violent criminal behavior that began with his participation in an armed bank robbery and culminated in the quadruple murder he committed in this case. Although this evidence was prejudicial, it was not unfairly so. And it had significant probative value, showing not only his propensity for violence and gang involvement but also his amenability to rehabilitation—all relevant considerations in the

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[13]McConnell, 120 Nev. at 1057, 102 P.3d at 616 (quoting McKenna v. State, 114 Nev. 1044, 1051, 968 P.2d 739, 744 (1998)).

[14]See Hollaway v. State, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); see also NRS 175.552(3).

In an unbifurcated penalty hearing, a cautionary instruction regarding the evidence's proper use must also be given. See McConnell, 120 Nev. at 1057, 102 P.3d at 616-17. Because Johnson's penalty hearing was bifurcated and the evidence in question only came in during the selection phase, such an instruction was neither given nor necessary.

determination of his sentence. Because this evidence was admitted only during the selection phase of his hearing, there are no concerns that it may have improperly influenced the jury's weighing of aggravating and mitigating circumstances. We conclude that the district court did not abuse its discretion in admitting these records, and Johnson's contention in this respect is without merit.[15]

III. Did the district court improperly allow the State to ask potential jurors "stake-out" questions during voir dire?

Johnson contends that the State asked sixteen potential jurors improper "stake-out" questions that caused them "to pledge themselves to a future course of action and indoctrinate[d] them regarding potential issues before the evidence had been presented." He maintains that these questions denied him an impartial jury. We disagree.

The purpose of "jury voir dire is to discover whether a juror 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.'"[16] And its scope rests within the sound discretion of the district court, whose decision will be given considerable

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[15]See Domingues v. State, 112 Nev. 683, 696-97, 917 P.2d 1364, 1373-74 (1996) (affirming the admission of a defendant's juvenile record during a capital penalty hearing).

[16]Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). We recognize that Byford v. State, 116 Nev. 215, 235-36, 994 P.2d 700, 714 (2000), supersedes Witter on the unrelated question of instructing jurors regarding deliberate and premeditated murder.

deference by this court.[17] Here, the State asked prospective jurors about their ability to carry out their responsibilities in accordance with NRS 175.554. Johnson's counsel unsuccessfully objected. We conclude that this line of questioning was within the district court's discretion to permit, and Johnson's contention is without merit.

IV. Did prosecutorial misconduct deprive Johnson of a fair hearing?

Johnson contends that the prosecutor committed misconduct during the penalty hearing that deprived him of a fair hearing. Although we agree with Johnson that some remarks by the prosecutor were improper, the prejudice resulting from them was minimal, and they did not deprive him of a fair hearing.

"'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[18] Remarks by a prosecutor must be read in context[19] and, if improper, will constitute harmless error when there is overwhelming evidence of guilt and this court can determine that no prejudice resulted to the defendant.[20] Prejudice follows from a prosecutor's remarks when they have "so infected the proceedings with unfairness as to make the results a denial of due

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[17]Witter, 112 Nev. at 914, 921 P.2d at 891.

[18]Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[19]Butler v. State, 120 Nev. 879, 896, 102 P.3d 71, 83 (2004).

[20]See Pellegrini v. State, 104 Nev. 625, 628-29, 764 P.2d 484, 487 (1988).

process."[21] Johnson raises several allegations of prosecutorial misconduct during both phases of his penalty hearing. We will discuss each allegation separately below.

A. Alleged misconduct during the death-eligibility phase

Johnson raises three allegations of prosecutorial misconduct during the death-eligibility phase of the penalty hearing.

First, he contends that the following remarks by the prosecutor during closing arguments improperly compared him to others and "attempted to inflame the jury and invoke social pressure":

> I would submit to you that if you find that his upbringing outweighs this quadruple homicide, that is disrespectful to members of South Central L.A. who didn't commit a quadruple homicide. Common sense tells us that many, many, many people in a similar upbringing haven't done what Donte Johnson has done. If you were to find that his childhood is entitled to a greater weight of this quadruple homicide, it's like telling people—

Johnson's counsel objected. We conclude that the prosecutor's remarks contained improper elements but did not result in prejudice.

This court held in Collier v. State[22] that it was improper to urge the jurors that if they wished to be considered moral they had to give the community what it needed and give the defendant what he deserved.

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[21]Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

[22]101 Nev. 473, 479, 705 P.2d 1126, 1129-30 (1985).

Here, the prosecutor argued that if the jurors found in Johnson's favor it would be "disrespectful to the members of South Central L.A." How the public may react to their verdict, however, has no place in the jurors' deliberative process. And the jurors were so instructed in Jury Instruction 14: "A verdict may never be influenced by prejudice or public opinion."

Pursuant to Collier and Jury Instruction 14, we conclude that telling the jury that if it did not reach a particular verdict it would disrespect a group of people improperly injected public opinion into the deliberative process. Yet any prejudice to Johnson was minimal, given the correct jury instruction and the strength of the State's case against him.

Second, Johnson contends that the prosecutor violated a pretrial order by the district court when he referred to the victims as "boys" or "kids" during rebuttal argument. He is correct that the prosecutor violated the order, but we conclude he was not prejudiced.

The meaning of the terms "boys" or "kids" is relative in our society, depending upon the context of its use. And the terms do not inappropriately describe the victims in this case. One of the four victims was 17 years old; one was 19 years old; and two others were 20 years old. Referring to them as "young men" may have been the most appropriate collective description. But we conclude that the State's handful of references to them as "boys" or "kids" did not prejudice Johnson.[23]

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[23]The State contends that Johnson only raised an objection to one of the references and the others were not preserved for review. We disagree. Johnson filed a pretrial motion in limine regarding these references, which was argued by the parties and ruled on by the district court. We conclude

continued on next page . . .

Third, Johnson contends that the prosecutor also improperly told the jury during rebuttal argument that prior to the crimes Johnson had overheard victim Matthew Mowen saying that he had made money touring with a rock band "selling pizzas and drugs." Johnson objected, arguing that there was no evidence that Mowen ever sold pizzas. Johnson asserts that the argument improperly portrayed "the victims in a more positive light." We agree with Johnson that the prosecutor's remark was improper, but we conclude that he cannot show any prejudice.

"'A prosecutor may not argue facts or inferences not supported by the evidence.'"[24] Here, the State concedes that the evidence did not support its claim that Matthew once said that he made money "selling pizzas and drugs," instead of just "drugs." Thus, its reference to this as a fact was made in error. Nevertheless, the prosecutor's misstatement was immaterial and did not give the State any cognizable advantage. We conclude that Johnson suffered no prejudice.

B. Alleged misconduct during the selection phase

Johnson raises one claim of prosecutorial misconduct during the selection phase of the penalty hearing. He contends that the prosecutor made remarks during his opening statement that referred to

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. . . *continued*
that this entire matter was properly preserved for our review. See Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

[24]Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (quoting Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987)).

inadmissible evidence and were "highly prejudicial," depriving him of a fair trial. We disagree.

This court has stated that a prosecutor "has a duty to refrain from making statements in opening arguments that cannot be proved at trial."[25] But "[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith."[26]

Here, the prosecutor summarized the evidence he planned to present during the selection phase of the hearing:

> You will hear about a phone call [Johnson] made, threatening to kill a young woman, a civilian.
>
> You will hear about a letter he wrote where he put a hit out on Scale. You heard that name in the trial, Mr. Anderson, named Scale.

Johnson's counsel objected, claiming that the State failed to give adequate notice that it would be introducing evidence of the alleged threatening phone call or letter. After reviewing the relevant documents, the district court found that the State had provided inadequate notice to Johnson and the evidence was inadmissible. Johnson does not contend that the remarks were made in bad faith, nor is there evidence to support such a contention. But the question of prejudice remains.

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[25]Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997), modified on other grounds by Richmond, 118 Nev. at 932, 59 P.3d at 1254.

[26]Id. at 1312-13, 949 P.2d at 270.

The prosecutor referred to serious allegations against Johnson, which carried some degree of prejudice because they suggested that Johnson would continue his violent criminal conduct, even while in prison. Yet the remarks were isolated, consisting of three sentences during a five-day selection phase. And there is no indication that the prosecutor again referred to these particular bad acts. Moreover, immediately after the State's opening statement the district court admonished the jury that opening statements are "not evidence and should not be given evidentiary value." Given that the remarks were brief, were not made in bad faith, and occurred during a lengthy selection phase and the district court admonished the jurors, we conclude that any prejudice from these remarks was minimal.

V. Was Johnson's hearing unfair because a victim's brother groaned and passed out in the courtroom?

Johnson contends that his penalty hearing was rendered unfair because during the State's closing argument in the death-eligibility phase, Nick Gorringe, brother of victim Tracey Gorringe, was seated on a bench in the second row in the courtroom and either passed out or fell over when a picture of the crime scene was displayed. Johnson asserts that this incident is analogous to that in Hollaway v. State.[27] We disagree.

Unlike the facts of Hollaway, the incident in this case did not concern a stun belt or any type of device under the State's control causing

[27]116 Nev. 732, 6 P.3d 987.

an effect on Johnson.[28] In fact, it did not involve Johnson at all. Although Nick Gorringe was a victim's brother, he was also a member of the public who had a right to observe the courtroom proceedings. He was not called as a witness, and no further incidents occurred. Moreover, the district court promptly excused the jurors and admonished them. We conclude that Johnson's reliance on Hollaway is misplaced and that any prejudice from this incident was minimal.[29]

VI. Mandatory review

We are required pursuant to NRS 177.055(2)(c)-(e) to review every death sentence and independently consider three issues.

First, we consider whether the evidence supports the finding of the aggravating circumstance. NRS 200.033(12) provides in part that first-degree murder is aggravated when "[t]he defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree." Here, Johnson was convicted of four first-degree murders during the guilt phase of his 2000 trial, and this court affirmed those convictions. Overwhelming evidence supported this single aggravator found by the jury for each of the murders.

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[28]Id. at 740, 6 P.3d at 993.

[29]Johnson also contends that he is entitled to relief because of cumulative errors that occurred during his penalty hearing. However, as discussed above, the errors that occurred during Johnson's hearing resulted in minimal prejudice to him. Even when these errors are considered cumulatively, we conclude that they do not entitle him to relief. See Hernandez, 118 Nev. at 535, 50 P.3d at 1115.

We consider next whether Johnson's death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor. Some unusual things happened during Johnson's penalty hearing. For example, as discussed above, one of the victim's brothers passed out in the courtroom when a photo of the crime scene was displayed. Also, a juror found what appeared to be a crack pipe in the jury box.[30] None of these unusual episodes, however, appears to have influenced the jury's verdict.

Finally, we determine whether Johnson's death sentence was excessive considering both the crime and the defendant. Johnson bound and shot four young men execution-style in the head during a late-night robbery of a Las Vegas home. These young men were dearly loved by their parents, siblings, and friends. In exchange for his murderous deeds, Johnson obtained about $200 in cash, a VCR, a PlayStation, and a beeper. He also bragged about his victims' deaths, callously laughing as he told friends the following morning about how blood squirted out of one victim's head and the sound the victim made when shot.

Johnson was only 19 years old when he committed these crimes, and he unquestionably had an impoverished childhood. But the murders he committed were unprovoked, vicious, and utterly senseless. We conclude that a sentence of death was not excessive.

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[30]During the selection phase, a juror discovered the apparent pipe lying on the floor of the jury box. The juror informed the courtroom bailiff, who prepared a report. The district court and counsel for both the State and Johnson were informed about this matter.

CONCLUSION

Johnson's penalty hearing was not without error, but it was fair. Applying our holding in Summers, we conclude that neither the Confrontation Clause nor Crawford applies to evidence admitted during the selection phase of a bifurcated penalty hearing. We conclude that Johnson's other issues do not establish reversible error.

We affirm Johnson's death sentence.

_____, J.
Hardesty

We concur:

_____, J.
Becker

_____, J.
Gibbons

_____, J.
Parraguirre

ROSE, C.J., with whom, MAUPIN, J., and DOUGLAS, J., agree, concurring:

For the reasons stated in my concurring and dissenting opinion in Summers v. State,[1] I believe that capital defendants have a Sixth Amendment right to confront the declarants of testimonial hearsay statements admitted throughout an unbifurcated capital penalty hearing. Where the hearing is bifurcated into death-eligibility and selection phases, however, I believe that the right to confrontation extends only to evidence admitted during the eligibility phase. Here, because the evidence at issue in Johnson's case—inmate disciplinary reports—was admitted during the selection phase only, I concur in the majority's conclusion that it was not error under the Confrontation Clause and Crawford v. Washington[2] to admit the reports into evidence.

_____, C.J.
Rose

We concur:

_____, J.
Maupin

_____, J.
Douglas

---

[1]122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 112, December 28, 2006).

[2]541 U.S. 36 (2004).

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: 4-28-08
Supreme Court Clerk, State of Nevada
By _____ Deputy

EXHIBIT 22

EXHIBIT 22

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 29, 2007

Clerk
Supreme Court of Nevada
Capitol Complex
Supreme Court Building
Carson City, NV 89710

Re: Donte Johnson
v. Nevada
No. 06-10345
(Your No. 45456)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on March 27, 2007 and placed on the docket March 29, 2007 as No. 06-10345.

Sincerely,

William K. Suter, Clerk

by

Gail Johnson
Case Analyst

07-07162

EXHIBIT 24

EXHIBIT 24

0014
Donte Johnson #66858
NAME, BACK NO.

Ely State Prison
PRISON
(Post offic Box)
1989
ADDRESS

Ely, Nevada 89301
CITY, STATE, ZIP

PETITIONER IN PROPER PERSON

FILED
FEB 13 1 07 PM '08
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

Donte Johnson,
Petitioner,

vs.

WARDEN OF E.K. McDaniel,
and THE STATE OF NEVADA,
Respondent.

CASE NO. C 153154
DEPT. NO. Eight

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL

DATE: _____
TIME: _____

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison White Pine County.

2. Name and location of court which entered the judgment of conviction under attack: Hon. Jeffrey Sobel (Retired) Dept. V

3. Date of judgement of conviction: year 2000

4. Case number: C 153154

5. (a) Length of sentence: Death

RECEIVED
FEB 13 2008
CLERK OF THE COURT

(b) If sentence is death, state any date upon which execution is scheduled:

Execution is in stay status.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes XX No _____

If "yes", list crime, case number and sentence being served at this time:

Some 4-10 years case number (?)

7. Nature of offense involved in conviction being challenged:

Count 1-Burglary, count 2- Robbery, count 3-Robbery, count 4- Robbery, count 5-Robbery count 6-Robbery, count 7- Kidnaping, count 8-Kidnaping, count 9- Kidnaping, count 10-Kidnaping, count 11- First degree Murder (4 counts)

8. What was your plea? (Check one)

(a) Not guilty ✓

(b) Guilty _____

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ✓

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No ✓

12. Did you appeal from the judgement of conviction? Yes ✓ No _____

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: No. 45456

(c) Result: ~~Appeal~~ denied in conviction

(d) Date of result: January 14, 2008

14. If you did not appeal, explain briefly why you did not:

N/A

15. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgement in any court, state or federal? Yes ____ No ✓

16. If your answer to No. 15 was "yes," give the following information:

(a) as to any first petition, application or motion:

(1) Name of court: ____

(2) Nature of proceeding: ____

(3) Grounds raised: ____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ✓

(5) Result: ____

(6) Date of result: ____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: ____

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: ____

(2) Nature of proceeding: ____

(3) Grounds raised: ____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ✓ No ____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No ____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ___ No ____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes: _____ No: ✓

If yes, identify: _____

_____

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL. THESE MATTERS ARE NOT PROPERLY RAISED ON DIRECT APPEAL.

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal?

Yes: ___ No: XX If yes, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

_____

_____

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No ✓

If yes, state what court and the case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

TRIAL ATTORNEY: David Figler and Joseph S. Sciscento

DIRECT APPEAL: David M. Schieck and Lee-Elizabeth McMahon

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack? Yes ✓ No _____ If yes, specify . . .

where and when it is to be served, if you know: N.D.O.C. is where My 4-10 year sentence is to be served, I assume behind my death Sentence (if at all possible). The charge was/is attempt murder under a "Nolo contendere" plea.

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Supporting FACTS (Tell your story briefly without citing cases or law.):

To specify, I do not have a full and complete record to present an effective appeal, as my trial attorney held 59 off the record conferences over my objections.

IN ADDITION, I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION AND POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

(b) Ground two: DENIED RIGHTS UNDER SIXTH AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

Supporting FACTS (Tell your story briefly without citing cases or law.):

IN ADDITION, I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION

AND POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this proceeding; and pursuant to NRS 34.820 moves this Court for an Order to appoint counsel to assist Petitioner in these proceedings.

EXECUTED at Ely State Prison on 2-11-08, 2008.

Dante Johnson
SIGNATURE

Dante Johnson 66858
PRINT NAME INMATE #

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Dante Johnson
SIGNATURE

Dante Johnson 66858
PRINT NAME INMATE #

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition for Writ of Habeas Corpus (Post Conviction) filed in District Court Case number 45456 does not contain the social security number of any person.

DATED: February 11, 2008

Dante Johnson
SIGN

Dante Johnson
PRINT NAME

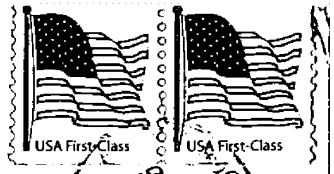
66858
INMATE NO.

Donta Johnson #66858
Ely State Prison
P.O. Box 1989
Ely, Nevada
89301

Legal Mail

Confidential

Clerk of The Court
Eighth Judicial District Court
200 Lewis Ave. 3rd Floor
Las Vegas, Nevada
89155



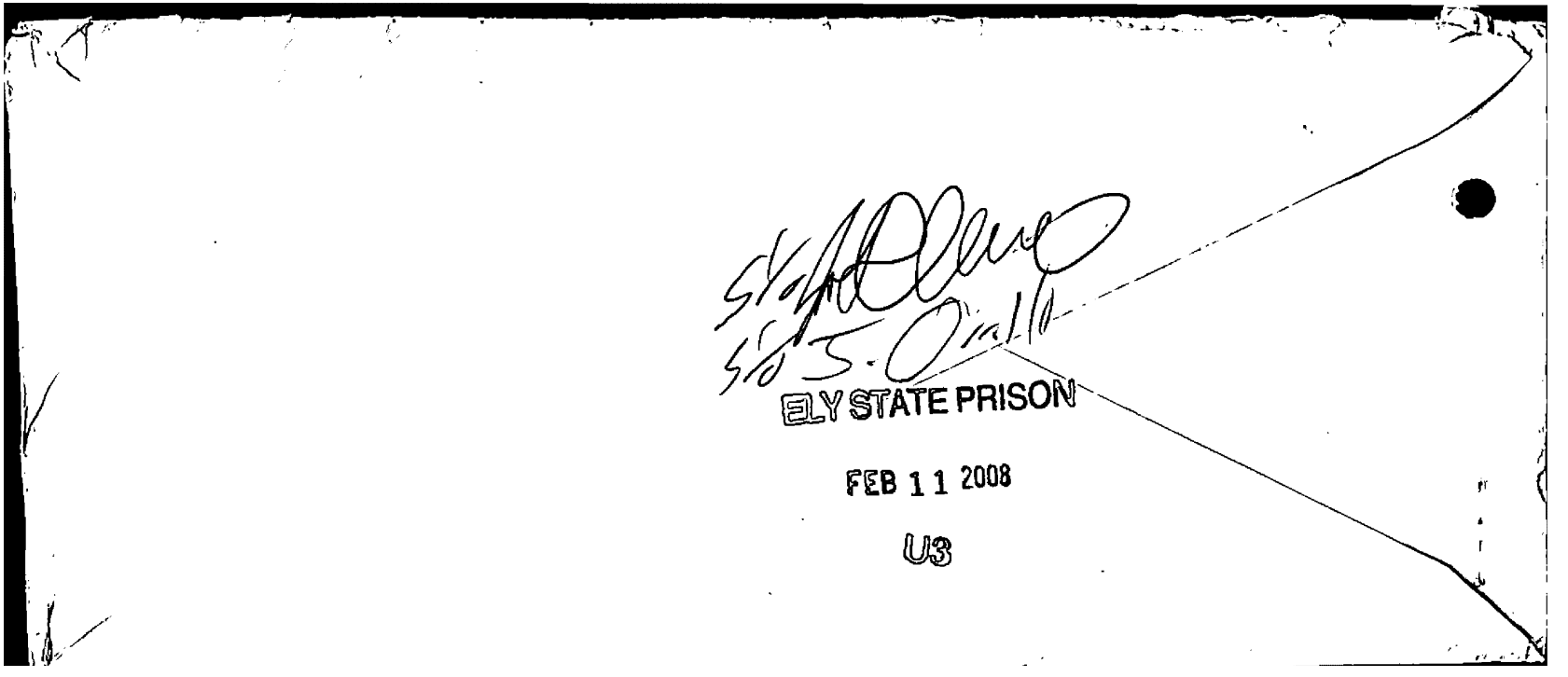

ELY STATE PRISON
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EXHIBIT 25

EXHIBIT 25

IN THE SUPREME COURT OF THE STATE OF NEVADA

Donté Johnson

Petitioner

vs.

The State of Nevada

Respondent

Dist Court case No. 45456

Nev. Sup. Ct case No. 51306

Extraordinary Writ

Petitioner, Donté Johnson appearing prosé, Submits His request for Extraordinary Relief pursuant to N.R.S. 34. ET. seq. This request for extraordinary relief is made and based upon the attached points and authorities, arguments, affidavit of Donté Johnson (see Exhibit #4), and all papers and pleadings on files herein related to case.

A manifest injustice has occurred and Petitioner currently has no adequate, speedy, or effective remedy available to him. Further, in the interest of insuring public confidence in the justice systems ability to recognize and correct errors of the magnitude expressed and shown herein (relief pursuant NRS 34. ET. seq. is required).

Points And Authorities

NRS 34 ET. seq., Arizona V. California, 460 U.S. 605, SCR 250 (5)(a), Lopez V. State, [illegible] P. 2d 1276, 1287 (1989), Bennett V. Eighth Judicial Dist. Ct, 21 P.3d 605

Introduction:

On 12/18/02 this court issued an opinion in case no. 45456 in affirming guilt phase issues. The court opined:

> "According to Johnson, the District court held fifty-nine conferences off the record. He claims that this violated SCR 250(5)(a) and his right to meaningful appellate review. Johnson's trial attorney did not object to these off-the-record conferences or try to make them a part of the record. Thus, Johnson did not preserve the issue for appeal, and he fails to show that any plain error occurred."[48]

This finding was manifestly wrong, directly affected this courts review of His fairness of proceedings and effectively excused enforcement of SCR 250(5)(a), all in violation of Petitioners State and Federal constitutional rights to due process and fair appeal.

Argument

Petitioner did object to off-the-record conferences (See Exhibit #2 at 1628:1-10 of transcript).

Petitioner was further denied and deprived of his substantial rights by counsel's object failure to maintain the objection in the record to this improper conduct over petitioners repeated insistance that he do so (See Exhibit #1 at 1:7 and Exhibit #3 at 14:20 pages 957 and 395 of transcript). In addition to Counsel failing to raise this issue before this court and to support it with the record evidence that was repeatedly pointed out by Petitioner (see Exhibit #4 Affidavit of Donté Johnson). These collective acts of deficient and prejudicial performances by counsel violated Petitioners substantial rights effectively generating no complete record upon which an appeal

could be taken on the myraid of evidentiary disputes resolved during these secret rulings and meetings. "Meaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal. Failure to provide an adequate record on appeal handicaps appellate review and triggers possible Due process violations." see, Lopez v. State, 105 Nev. 68, 769 P.2d 1276, 1287 (1989).

It is axiomatic that an incomplete record equally handicaps the Petitioner in any post-conviction habeas corpus petition.

Petitioner does not have access to his full record. Thus, the fairness of the entire appellate process was skewed substantially affecting the fairness of subsequent district court proceedings in response to the courts 12/18/02 opinion. Petitioner is not currently represented by counsel and asks that counsel be appointed by this court in the interest of justice. The issue that this writ raises directly puts into question this courts prior ruling on appeal.

Conclusion

Accordingly, in the interest of justice, the writ should issue either vacating the prior appeal, or via the court revisiting this issue and enforcing SCR 250 (5)(a) by ordering a new and fair trial.

Dated the 20 day of March, 2008.

Respectfully Submitted,

Donté Johnson

Donte Johnson

Donte Johnson #66858
Ely State Prison
P.O. Box 1989
Ely, Nevada
89301

Affidavit of Donte Johnson (Exhibit #4)

On repeated occasions I asked appointed counsel to keep all proceedings on the record and each time my requests were ignored or brushed off. And when they began to grow tired of my making these request, they would then try to assure me that I would have a complete record. I tried to take preventative measures by requesting that motions be filed for full recordation of all proceedings (see Exhibit #1 at 1:7 page 957 of transcript). Still I was ignored in my request. There were a total of 59 off-the-record conferences that the record can reflect. These does not include the countless meetings in Chambers. Again, there is a clear violation to SCR 250(5)(a) in this case and through the writs herein I would like to point this court to my recorded objections.

Verification

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing writ and Affidavit. And to the best of his knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

Dated the 20 day of March, 2008.

Respectfully Submitted,

Donté Johnson

Donte Johnson

Donté Johnson #66858
Ely State Prison
P.O. Box 1989
Ely, Nevada
89301

(1.) of 5 Pages

144

FILED

Nov 15 4 56 PM '99

CLERK

Donte Johnson
—VS—
State of Nevada
Plaintiff

case no. C153154

Dept. No.

Docket No. H

Exhibit #1.

Memorandum TO
The court For requested
Motions to Be Filed By Counsels

Comes now Defendant, Donte Johnson, through and by himself, with this memorandum to the court, making record of Defendants request to defense attorney's.

Through this Memorandum defendant is requesting that the following motions be filed:

#1. Motion for change of Venue. Reason being. As a result of nature pertainin the amount of media and news coverage in this matter, and the number of person in the Las Vegas area regularly reading, viewing, and hearing the news media in proportion to the area's total population, it appears that virtually every household in Las Vegas, and thus virtually every prospective juror, has been exposed to a constant barrage of inflammatory accounts, detailing in a manner highly prejudicial to defendant every occurrence in this matter that has arisen since the defendants arrest.

*2. Motion for full recordation of all proceedings. This motion should contain a respectfull request to direct the court reporter to record and transcribe all of the proceedings in all of the phase's, including pre-trial hearings, legal arguments, Voir Dire, selection of jury, in chambers, at bench confrances, any discussions regarding jury instructions and all matters during trial. This will insure the rights to full review on appeal and assistance of counsel in post-conviction.

*3. Motion in limine to bar improper prosecutional arguments. This motion should as requested contain the court to enter an order in limine prohibiting the state from engaging in improper arguments before the jury and from violating my constitutional rights in the ways discussed listed below or any way that may prejudice the defendant before the jury or the court. This should stop undue attention to my counsel by making numerous objections during the opening statement and closing argument. Defendant also ask that attorney's of record request to the court they be allowed to make formal objections to any misconduct outside the presence of the jury at every opportunity. The defendant prays that this attorney's of record also include relevant law and argument in the following areas to protect his rights under the 6th 8th and 14th amendments: A. Misleading the jury as to the law. B. Misstating the law on intent. C. Misstating the law concerning the corrabation of accomplice testimony. D. arguing facts not in evidence. Referring to Defendants right to a freedom of any prosecutional misconduct.

*4. Motion in limine to preclude state from introducing evidence of any uncharged misconduct. Also to protect the defendant by being notified in advance to prepare for a petrocelli hearing. In addition, to allow the state to inform any and all witnesse's from ingaging in this misconduct.

#5. Motion and notice for the prosecution to produce Grand Jury records to assure that the Grand Jury was not selected in a discriminatory manner. The defendant prays the attorney's of record will make this request to the court for the state to produce the records concerning the gender and racial make-up of the Grand ~~Jury~~ Jurors selected to sit for the years of 1985-1999 Clark County Grand Juries. As well as those who were potential jurors not selected through the same years. The defendant request this under the equal protection clauses, the due process clauses of the U.S.C. and the 6th amendment as well.

#6. Motion for disclosure of juvenile records of the states witnesse's. This motion would be beneficial for thourough research and preparation for effective cross-examination of the states witnesse's. NRS 62.360 governs the release of these records for this purpose.

#7. Motion for disclosure of any possible basis for disqualification of the District Attorney the defendant would ask the attorney's of record pursuant to the 4th, 5th, 6th, 8th, and 14th amendments of the U.S.C., article 1 of Nevada's State constitution and the Nevada Supreme court Rules, that a request be made to order the Clark county District Attorney to reveal on record any and all possible basis for his recusal or his office. This being a capital case, exact standards are to be met to provide a fair trial and prosecution with due process of the law.

#8. Motion for discovery of institutiona records and all files necessary to a fair trial. The Defendant request the attorney's of record pursuant to NRS. 174.235 Et. section 9, article 1 of the Nevada State Constitution, the 6th, 8th, and 14th amendments to the U.S.C. and relevant case law, that the attorney's of record will outline and file this motion in order to be fully prepared, informed, aware and vividly effective on Defendants case arguements and pleadings from expotion to conclusion.

9. Motion for list of names and addresse's of persons who may have evidence favorable to the Defendant and for disclosure of all other discovery material. The Attorney's of record should request this order requiring the prosecution to search and furnish documents, files, names, and addresses of persons known to them which may be favorable to the Defendant or present any incosistencies to the prosecution's theory in this case.

10. Respectfully request Motion be filed to have state's witnesses evaluated for prior inconsistant statement's, Drug addiction, and prior felony arrest. This Motion should be filed pursuant to Rule 26.2 discovery request.

11. Respectfully request that a Motion be filed to control prejudicial publicity, this Motion should have been filed so that anyone related to the prosecution would be prohibited from releasing any information in any way, shape, or form concerning this case. Pursuant to the 4th, 5th, 6th, and 8th Amendments, "Not to forget article 1 of the Nevada State Constitution along with the 14th Amendment."

12. Request counsel file Motion for disclosure of juvenile records of state's witnesses, which could be beneficial for thorough research and preparation for effective cross-examination of the States witnesses. NRS 62.360 governs the release of these records for this purpose.

13. Defendant request that counsel correct altered voluntary statements. Required pursuant to NRS 171.198 (Reporting testimony of witnesses) Line (3).

14. Request that counsel provide Defendant with a copy of "all" transcripts and documented evidence. Pursuant to NRS. 171.198 / for counsel not to comply with NRS. 171.198 would be a clear violation to Supreme court (Rule 151) professional conduct. Not to forget (Rule 154) it quotes that "A lawyer shall keep a client reasonably informed about status of matter promptly comply with resonable request for information."

(15.) of 5 pages

Note

These Motions should contain relevent case law so that the Defendant's rights are protected under the U.S.C. and Nevada's State constitution and laws. These motions will insure a fair trial and total awareness of all possible circumstances and scenarios surrounding the crimes that the Defendant is charged with.

Prayer and Conclusion

Defendant, Donte Johnson, prays that by expressing his request to the court and his Attorney's of record, that it shall be recognized that his best interests has been filed with the court within this Memorandum. Also, that he request that all of the above listed motions be filed in a timely manner and on his behalf to insure all of his rights are protected under the law so he may recieve a fair and unprejudiced trial with due process of the law.

Respectfully Submitted,
Donte Johnson
Donte Johnson

Attorney's
Joseph S. Sciscento
&
Dayvid Figler

Dated this 11-4-99

FILED

FEB 2 10 51 AM '00

CLERK

Donte Johnson
Defendant
-VS-
State of Nevada
Plaintiff

Case NO: C153154

Dept. NO: V

Docket NO: H

Exhibit Memo #2

Memorandum To The Court

Comes now defendant, Donte Johnson, by and through this Memo. to the court. Giving rise and making record of defendants request to counsels, Dayvid Figler and Joseph S. Sciscento, to file a motion pursuing the disqualification of the Honorable Jeffrey Soble as trial judge.

Judge Soble is clearly, extremely, prejudice against the defendant, Donte Johnson. By numerous decisions and unfair comments during different court proceedings; prior court proceeding transcripts would show and prove the unfairness of many comments made by Judge Soble. Also the record could reflect the many unfair decision.

Attached hereto is an article of Judge Sobles decision granting the prosecutions motion, in request to make the videotaped deposition of Charla Severs live testimony against defendant, Donte Johnson.

RECEIVED
FEB 07 2000
COUNTY CLERK

CE31

Charla Severs was in custody under a material witness bond. Charla was arrested in Ney York under a material witness warrant, in the case of Terrell Young and "not" Donte Johnson. The state filed a motion to videotape the deposition of Charla Severs. which was granted by Judge Jeffrey Sobie. (see exhibit A for article). The motion was clearly granted out of the courts fear that Charla Savers live testimony may not be available for trial if she was released from custody. The court took no pains to force the state to prove that the witness was not going to/or could not appear at the trial.

Also attached is an article of Floyd's simular situation. Tracie Rose Carter, 21, was released from custody, simular to Charla Severs, Carter was released with restrictions, such as to call authorities once a week. Carter was released in August after pledging to remain in contact with prosecutors in the capital murder case. Later in the time of November, Tracie Rose Carter was again, unable to be found by authorities. After disappearing on two occasions, Carter was again located and taken into custody.

Prior to her release the third time, Prosecutors asked Judge, Jeffrey Sobie, for permission to take the videotaped deposition of Carter.

In denying the request, Sobie said; "videotaped depositions are properly reserved for more dire circumstances, such as a serious illness that prevents a person from attending a court proceeding." which I would like to point out for the record, was not the case at all with Charla Severs. (see exhibit B for Floyd's article).

This is merely one of the many prejudice situations that I would like to make record of on the behalf of the defendant, Donte Johnson.

The defendant believes that in an advasary proceeding, the discharge of counsels, Dayvid Figler and Joseph S. Sciscento's duties required that they

call to the court's attention the possible unconscious resolution of the factual and legal matters by the court, which in defendants opinion has interfered with fundamental due process.

Upon bringing this matter to the courts attention, the conduct of Judge, Jeffrey Sobie, has resolved all doubt in the mind of the defendant as to the possibility of having a fair trial.

The State is seeking the Death Penalty. Since this is to be a capital prosecution, exacting standards must be met to assure that it is fair. "The fundamental respect for humanity underlying the 8th Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson VS. Mississippi, 486 U.S. 578, 584 (1988)(quoting Gardner VS. Florida, 430 U.S. 349, @ 363-64 (1977) (quoting Woodson VS. North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring))).

[redacted]

Dated :

(Note)

On the date of 12-13-99 a meeting was held between both ~~prosecuting~~ Prosecuting attourneys, counsel's of the defendant (Dayvid Figler and Joseph S. Sciscento) and Jeffrey Soble, in Sobles chambers. This meeting was off the record and out of the presence of the defendant, (Donte Johnson). although counsel, (Dayvid Figler) assured me that it was only a small meeting ~~concerning~~ about a motion, although I was assured that it was a harmless meeting, I would still like to object for the record, to the unrecorded meeting that was held between both District Attorneys Judge Soble, and the Attorneys of the defendant in this case. Attorneys being Joseph S. Sciscento and Dayvid Figler.

Dated: 1-22-2000

Even the possibility of prejudice on the "part of the Judge.... is to high to be constitutionally tolerable." withrow -VS- United States, 255 U.S. 22, 33-34 (1921); Potashnick -VS- Port City construction Co, 609 F.2d 1101, 1111 (5th Cir. 1980) ("Any question of a Judge's impartiality threatens the purity of the Judicial process and its institutions."); Health Services Acquisition corp. VS. Liljeberg, 796 F.2d 796, 800 (5th Cir. 1986); Chimtacha Tribe -VS- Harry L. Laws Co., 690 F.2d. 1157, 1165 (5th Cir. 1982); King -VS- State, 271 S.E.2d 630, 634 (Ga. 1980)

Respectfully Submitted,

Donte Johnson

Donte Johnson

Defendant

Dated: 1-28-2000

35

-1-

Shirley B. Parraguirre

Donte Johnson #1586293
330 S. Cabino Center 9-C-7
Las Vegas, Nev. 89101

MAR 23 12 01 PM '99

Case No: C153154
Dept. No: V
Docket No: H

State of Nevada
~VS~
Donte Johnson

Exhibit #3

Memorandum To The Court

Comes Now, the defendant, Donte Johnson in this above cited case through this memo to the court making a record and giving rise to the district court to take notice of the Attorney's of Record failure to file the defendants following motions. The motions contained here listed athrun are fundamental motions that defendant Johnson has forwarded to his Attorney's of Record and thus were the center of attention of on 3-13-99 on the above case number. The Defendant now pray's that the motions listed and spoke of on record (which counsel has copies of) will now diligently be filed on the Defendants behalf to insure his rights are protected as well as he recieve a fair and unprejudiced trial with due process of the law.

FILED
MAR 23 1999

RECEIVED
MAR 24 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

CC:31

1. The Defendant Respectfully request that the Attorney's of record file the following motions to preserve his legal rights.

A. Motion for permission to file other motions. The request is pursuant to the 4th, 5th, 6th, 8th, and 14th Amendment's of the U.S.C. and article 1 of the Nevada constitution. These motions will be needed as issues arise and/or new legal precedent is established or made known.

B. Motion to reveal any identities of informant's and reveal any deals, promise's or inducements. This request should be a full [redacted] explaination of the revealing of any and all threats or inducements. This motion should also contain the definition of all state organizations as well as county agencies and all entitie's involved. A hearing should also be requested. This motion will insure due process pursuant to the 6th, 8th, and 14th amendments of the U.S.C.

C. Motion for full recordation of all proceedings. This motion should contain a respectfull request to direct the court reporter to record and transcribe all of the proceedings in all of the phase's, including pre-trial hearings, legal arguments, Voir Dire, selection of jury, in chambers, at bench confrences, any discussions regarding jury instructions and all matters during trial. This will insure the right's to full review on appeal and assistance of counsel in post-conviction.

D. Motion in limine to bar improper prosecutional arguements. This motion should as requested contain the court to enter an order in limine prohibiting the state from engaging in improper arguement before the jury and from violating my constitutional rights in the ways discussed listed below or any way that may prejudice the Defendant before the jury or the court. This should stop undue attention to my counsel by making numerous objections during the opening statement and closing argument.

Defendant also ask that attorney's of record request to the court they be allowed to make formal objections to any misconduct outside the presence of the jury at every opportunity. The Defendant prays that his attorney's of record also include relevant law and arguement in the following areas to protect his rights under the 6th, 8th and 14th amendments. 1. Misleading the jury as to the law. 2. Misstating the law on intent. 3. Misstating the law concerning the corrabation of accomplice testimony. 4. Reducing the state's burden of establishing guilt beyond a reasonable doubt. 5. Inflaming the passions and prejudices of the jury. 6. victim impact arguement. 7. consciance of the community. 8. all inflamatory arguements. 9. Misleading the jury as to responsibility. 10. arguing facts not in evidence. 11. commenting - expressly or by implication - on the defendants failure to testify and call witnesse's. 12. Asserting prosecutorial expertise. 13. - expressing personal opinions. 14. Arguing deterrance. 15. General appeals to prejudice. 16. claims of intimidation. 17. Referring to Defendants Right to a trial free of any prosecutional misconduct.

E. Motion in limine to preclude State from introducing evidence of any uncharged misconduct. also to protect the Defendant by being notified in advance to prepare for a petrocelli hearing. In addition, to allow the state to inform any and all witnesse's from engaging in this misconduct.

F. Motion and notice for the prosecution to produce Grand jury records to assure that the Grand jury was not selected in a discriminatory manner. The Defendant prays the attorney's of record will make this request to the court for the state to produce the records concerning the gender and racial make-up of the Grand jurors selected to sit for the years of 1995-1999 Clark county Grand Juries. As well as those who were potential jurors not selected through the same years. The Defendant request this under the equal protection clauses, The due process clauses of the U.S.C.

and the 6th amendment as well.

G. Motion to dismiss states notice of intent to seek Death Penalty because Nevada's Death Penalty is unconstitutional. The Defendant pray's his attorney's research Nevada's Death Penalty statutory scheme and realize that it fails to marginally narrow the categories of persons eligible. Therefore, concluding that it is unconstitutional. Nevada's Death Penalty scheme is unconstitutional due to its lack to create meaningful distinction between 1st degree and 2nd degree murder. also, the Death Penalty is cruel and unusual punishment and is prohibited by the 8th amendment of the U.S.C. as well as article 1, section 6 of the Nevada state constitution.

H. Notice of assertion of right to be present

The Defendant gives notice to the attorney's of record to file this notice invoking his right to be present every step of the way of his trial. Pursuant to the 5th, 6th, 8th and 14th amendments of the U.S.C. and articles 1 and 8 of the Nevad State Constitution.

I. Motion to compell state to disclosure of witnesse's. (List) This motion is pursuant to the 4th, 5th, and 6th amendments of the U.S.C. and through the 14th amendment of Nevada's State constitution to disclose all witnesse's for trial and any Known rebuttal.

J. Motion to control prejudical publicity.

The Defendant pray that his attorney's research and produce case law to enter this motion to protect the trial from anymore publicity that may taint or prejudice potential jurors as was done before the Grand Jury indictment. This motion should be made so that anyone related to the prosecution should be prohibited from releasing any information in any way, shape, or form concerning this case. Pursuant to the 4th, 5th, 6th, 8th, and 14th amendments of the U.S.C. and article 1 of the Nevada State constitution.

K. Motion for disclosure of juvenile records of the state's witnesse's. This motion would be beneficial for [redacted] thourough research and preparation for effective cross-examination of the state's witnesse's. NRS 62.360 governs the release of those records for this purpose.

L. Motion for disclosure of any possible basis for disqualification of the District attorney the Defendant would ask the attorney's of record pursuant to the 4th, 5th, 6th, 8th, and 14th amendments of the U.S.C., article 1 of Nevada's State constitution and the Nevada Supreme Court Rules, that a request be made to order the clark county District atterney to reveal on record any and all possible basis for his recusal or his office. This being a capital case, exact standards are to be met to provide a fair trial and prosecution with due process of the law.

M. Motion for discovery of institutional records and all files necessary to a fair trial. The Defendant request the attorney's of record pursuant to NRS. 174.235 Et section 9, article 1 of the Nevada State constitution, the 6th, 8th, and 14th amendments to the U.S.C. and relevant case law, that the attorney's of record will outline and file this motion in order to be fully prepared, informed, aware and vividly effective on Defendants case arguments and pleadings from expotion to conclusion.

N. Motion for list of name's and addresse's of persons who may have evidence favorable to the Defendant and for disclosure of all other discovery material. The attorney's of record should request this order requiring the prosecition to search and furnish documents, files, names, and addresse's of persons known to them which may be favorable to the Defendant or present any incosistencies to the prosecution's theory in this case.

This motion should contain relevant case law so that the defendant's rights are protected under the U.S.C. and Nevada's State constitution and laws. This motion will insure a fair trial and total awareness of all possible circumstances and scenarios surrounding the crimes that the Defendant is charged with.

In conclusion, Defendant, Donte Johnson, prays that by expressing his request to the court and his attorney's of record, that it shall be recognized that his best interests has been filed with the court within this memorandum. Also, that he request that all of the above listed motions be filed on his behalf to insure all of his rights are protected under the law so he may recieve a fair and unprejudiced trial with due process of the law.

Respectfully Submitted,
Donte Johnson
Donte Johnson

SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

DONTE JOHNSON,
Petitioner,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 51306
District Court Case No. C153154

RECEIPT FOR DOCUMENTS

TO: Donte Johnson #66858
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

03/24/08	Filing Fee Waived: Criminal.
03/24/08	Filed Proper Person Petition for Writ. Extraordinary Writ.

DATE: March 24, 2008

Tracie Lindeman, Clerk of Court

By: _____
Deputy Clerk

EXHIBIT 26

EXHIBIT 26

8

ORIGINAL

RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

CLERK OF THE COURT

APR 29 2 15 PM '08

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#1586283

Defendant.

Case No. C153154

Dept No. VIII

RESPONSE TO MOTION FOR APPOINTMENT OF COUNSEL AND PRO PER PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: 4/30/08
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and files this Notice of Motion and Motion Enter Title of Motion.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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RECEIVED
APR 29 2008
CLERK OF THE COURT

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Donte Johnson was convicted by a jury in 2000 of four counts of First-Degree Murder with the Use of a Deadly Weapon, among other crimes, and was sentenced to death by a three-judge panel. On direct appeal, the Nevada Supreme Court affirmed his conviction, but vacated his death sentence and remanded for a new penalty hearing because the three-judge sentencing procedure violated the United States Supreme Court's holding in Ring v. Arizona. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002).

Upon remand, Johnson was given a new penalty hearing in April 2005 before a jury which again returned four separate verdicts imposing a sentence of death for each of the murders. On appeal, the Nevada Supreme Court affirmed the death sentences. Johnson v. State, 122 Nev. ___, 148 P.3d 767 (2006). Johnson unsuccessfully sought a Writ of Certiorari from the U.S. Supreme Court and Remittitur issued on January 28, 2008.

On February 13, 2008, Johnson filed a Proper Person Petition for Writ of Habeas Corpus and Motion for Appointment of Counsel with this court. The State was ordered to respond within 45 days and the matter is currently on calendar for April 30, 2008.

Because Johnson is a capital litigant and this is his first post-conviction petition, the State agrees he is entitled to appointment of counsel per NRS 34.750 and 34.820. Understandably, appointed counsel will want to file a supplemental petition per NRS 34.750(3) as the current pro per petition fails to articulate specific claims to which the State can respond.

WHEREFORE, the State respectfully requests that counsel be appointed and any further response or answer from the State be suspended until after appointed counsel has had a chance to file a supplemental petition.

DATED this 29th day of April, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY W. Lyon Simms for
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Response to Motion for Appointment of Counsel and Pro Per Petition for Writ of Habeas Corpus, was made this 29th day of April, 2008, by facsimile transmission to:

DAVID M. SCHIECK
FAX #(702) 455-6273

Eileen Davis
Employee for the District Attorney's Office

SSO/ed

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OFFICE OF THE DISTRICT ATTORNEY
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TO: DAVID SCHIECK FAX#: 702 455-6273

FROM: STEVEN S. OWENS

SUBJECT: DONTE JOHNSON, C153154

DATE: April 29, 2008

NO. OF PAGES, EXCLUDING COVER PAGE: __3_____

EXHIBIT 27

EXHIBIT 27

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONTE JOHNSON,
Petitioner,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51306

FILED

MAY 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION

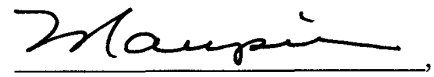
This is a proper person petition for an extraordinary writ in a death penalty case. Petitioner seeks an order vacating this court's decision in his direct appeal after a second penalty hearing[1] or, in the alternative, an order granting him a new trial. It appears that petitioner's claims of error raised in his writ petition are grounded in allegations of ineffective assistance of trial and appellate counsel. We have considered the petition on file herein, and we are not satisfied that this court's intervention by way of extraordinary relief is warranted at this time.[2]

[1]Johnson v. State, 122 Nev. ___, 148 P.3d 767 (2006).

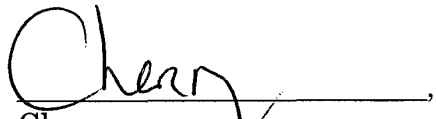
[2]See NRS 34.160; NRS 34.170; NRS 34.320; NRS 34.330.

Petitioner has an adequate remedy to challenge the effective assistance of counsel through post-conviction habeas proceedings.[3] Accordingly, we

ORDER the petition DENIED.[4]



_____, J.
Maupin



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Jackie Glass, District Judge
Donte Johnson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[3]See NRS 34.720 - .830.

[4]We express no opinion concerning whether petitioner has satisfied the procedural requirements detailed in NRS chapter 34 for filing a petition for a writ of habeas corpus or the merits of any claim of ineffective assistance of counsel.

EXHIBIT 28

EXHIBIT 28

ORIGINAL

SUPP

CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
DONTE JOHNSON

FILED
OCT 12 2009
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS WRIT OF HABEAS CORPUS.

COMES NOW, Defendant, DONTE JOHNSON, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., and hereby submits this Supplemental Brief in support of Defendant's Writ of Habeas Corpus.

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This supplement is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 12 day of October, 2009.

Respectfully submitted by:

for

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520 S. Fourth Street, 2nd Floor
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Attorney for Petitioner
DONTE JOHNSON

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STATEMENT OF THE CASE

On September 2, 1998 the Honorable Judge Michael Douglas was informed that the Grand Jury had returned a true bill indicting the defendant. On September 16, 1998 a superceding indictment was filed under case number C153154. On September 17, 1998 the defendant was formally arraigned before the Honorable Jeffery Sobel. The defendant waived his right to a trial within sixty days. The matter was set for trial on July 5, 1999.

On June 29, 1999, the defense informed the trial court that they would not be ready for trial and requested a continuance. The trial date was vacated. On July 13, 1999 the trial court entertained the defendant's motion to compel disclosure of existence and substance of expectation or actual receipt of benefits or preferential treatment for cooperation with the prosecution. This matter was concluded.

On October 14, 1999, the State informed the trial court that Charla Severs would not be prosecuted as an accomplice and would not be prosecuted for perjury. The trial court had appointed Mr. Chip Siegel to represent Ms. Severs. On November 18, 1999, the State agreed to provide the inducements of the witnesses pursuant to the defense's motion to compel the disclosure of existence of benefits or cooperation with prosecution. The motion was denied as long as the State continued to provide all evidence pursuant to the motion. On December 20, 1999, defense counsel requested a continuance of the trial date. The defense's motion to continue was granted. A new jury trial was set for June 8, 2000.

On March 2, 2000, the district court denied the defendant's motion for change of venue, denied the defendant's motion to dismiss the State's notice of intent to seek the death penalty because Nevada's death penalty statute is unconstitutional, denied the defendant's motion for inspection of police officer's personnel files, denied defendant's motion to prohibit prosecution

from committing misconduct during argument, denied defendant's motion in limine to prohibit any reference to the first phase as the guilt phase, denied defendant's motion to apply heightened standard of review and care because the state is seeking the death penalty, denied defendant's motion to exclude autopsy photographs, (the court would consider the photographs individually at trial) denied defendant's motion in limine to preclude the introduction of victim impact evidence, denied motion to bifurcate the penalty phase, denied defendant's motion in limine to prevent the state from telling a complete story, and denied defendant's pro per motion to disqualify the district court without prejudice (so the special public defender's office could re-file the issue and pursue the matter).

On April 18, 2000, the district court denied the defendant's motion to suppress evidence seized during a warrantless search. On May 23, 2000, defense counsel advised the court that there had been an agreement that the parties would not use co-conspirators statements or the co-defendants statements.

On June 5, 2000, voir dire commenced. On June 5, 2000, defense counsel stated that they had a challenge for cause of one of the prospective jurors, which the court overruled. Opening statements occurred on June 6, 2000. On June 8, 2000, the court again denied the defense's request for a change of venue. On June 8, 2000, the defense rested without calling any witnesses. On June 8, 2000, jury instructions were read and closing arguments occurred. On June 9, 2000, the jury began deliberation and returned guilty verdicts as to Count one, burglary while in possession of a firearm; Count two, conspiracy to commit robbery and/or kidnapping and/or murder; Counts three-six, Robbery with use of a deadly weapon; Count seven-ten, first degree kidnapping with use of a deadly weapon; Counts eleven-fourteen, murder with use of a deadly weapon.

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On June 13, 2000, the district court denied a motion to sever or bifurcate the penalty phase. On June 14, 2000, defense counsel requested the court grant a short continuance so he could work on his closing argument. Defense counsel was admonished. On June 15, 2000, the penalty phase instructions and closing arguments were heard. On June 16, 2000, the jury declared that they were unable to reach a verdict as to punishment.

On June 20, 2000, defense counsel requested that the jury verdict forms and special verdict forms be made court exhibits. The court ordered the verdict forms be made special exhibits. On July 20, 2000, the court denied the defense's motion for imposition of a life without the possibility of parole sentence. On July 20, 2000, defense counsel requested that the other two judges from the three judge panel read the trial transcript of the guilt phase. The court advised that it would make the trial transcripts available to the judges.

On July 24, 2000, the three judge panel consisting of Judge Jeffery Sobel, Judge Michael Griffin and Judge Steve Ariat heard the second penalty phase. On July 26, 2000, closing arguments were heard by the three judge panel. The three judge panel returned a verdict, having found the aggravating circumstances outweigh any mitigating circumstance and imposed a sentence of death as to all four murder counts with use of a deadly weapon. On October 3, 2000, formal sentencing was heard. The defendant was sentenced to death for all four murders with consecutive death sentences for the use of a deadly weapon.

Mr. Johnson appealed his convictions and ultimate death sentences. On December 18, 2002, the Nevada Supreme Court filed it's Order of Affirmance in part, vacated in part, and remanded. The Supreme Court affirmed Mr. Johnson's convictions and his sentences other than his death sentences. The Supreme Court vacated his death sentences and remanded for a new penalty hearing. The Nevada Supreme Court overruled Mr. Johnson's death sentences based upon

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the United States Supreme Court's decision in Ring v. Arizona, 536 U.S.584, 122 Sup Ct.2428, 153 L.Ed.2d 556, (2002) ruling that three judge panels are unconstitutional.

On remand, the Special Public Defender was appointed to represent Mr. Johnson at his penalty phase. In April 2005, a jury was impaneled and heard the bifurcated penalty phase. On April 27, 2005, the jury heard closing arguments regarding the first portion of the bifurcated penalty phase. The jury found that there was at least one aggravating circumstance as to all four victims and determined that the mitigating circumstances did not outweigh the aggravating circumstances.

The jury returned for special verdict finding the single aggravating circumstance pursued by the State. Seven mitigating circumstances were found: Johnson's youth at the time of the murders, (he was eighteen years old); he was taken as a child from his mother due to her neglect and placed in foster care; he had no positive or meaningful contact with either parent; he had no positive male role models; he grew up in a violent neighborhood; he witnesses many violent attacks as a child; while a teenager he attended schools where violence was common. Johnson v. State of Nevada, 122 Nev. 1344, at 1350. Therefore, on April 28, 2005, the jury heard opening arguments regarding the second portion of the bifurcated penalty phase.

On May 5, 2005, the jury returned a verdict sentencing Donte Johnson to death for the first degree murder with use of a deadly weapon of Jeffery Biddle, Tracey Corrinage, Matt Mowen, and Peter Talamentez. Mr. Johnson filed a timely notice of appeal. On Decembr 28, 2006 the Nevada Supreme Court affirmed Mr. Johnson's appeal. 122 Nev. 1344,148 P.3d 767, (Dec. 2006).

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STATEMENT OF THE FACTS

In the summer of 1998, Mr. Justin Perkins, had some friends that lived at 4825 Terra Linda, Clark County Nevada.[1] On August 13, 1998, at approximately 7:30-8:00 p.m, Mr. Perkins went to the Terra Linda home and visited with Matt Mowen, Tracey Gorringe, and Jeff Biddle. (Vol. 4, April 22, 2005, A.M. Pp 7-9)

The friends were playing video games and lounging around. (Vol. 4, April 22, 2005, A.M. Pp 9) There was a VCR, playstation and television in the entertainment center. (Vol. 4, April 22, 2005, A.M. Pp 10) Before Mr. Perkins left, he was offered some muscle relaxers, which he refused. (Vol. 4, April 22, 2005, A.M. Pp 11) At approximately 9 p.m. Mr. Perkins left. (Vol. 4, April 22, 2005, A.M. Pp 11) Remaining at the house was Matt Mowen, Jeff Biddle, and Tracey Gorringe. (Vol. 4, April 22, 2005, A.M. Pp 11)

At approximately 6 p.m., on August 14, Mr. Perkins went back to the Terra Linda home. When Mr. Perkins entered the home, he observed Matt Mowen, Tracy Gorringe and Jeff Biddle laying face down with duct tape binding their wrists and ankles. (Vol. 4, April 22, 2005, A.M. Pp 14) Mr. Perkins went to a neighbors home where he requested assistance in contacting authorities. (Vol. 4, April 22, 2005, A.M. Pp 16) Mr. Perkins was informed by a police officer that a fourth victim was also inside. (Vol. 4, April 22, 2005, A.M. Pp 18)

Officer David West and Sargent Randy Sutton were the first responding officers to the crime scene. (Vol. 4, April 22, 2005, A.M. Pp 31-33) The officers had to concern themselves with sweeping the home for possible suspects and any other victims. (Vol. 4, April 22, 2005, A.M. Pp 33) There was no sign of forced entry. (Vol. 4, April 22, 2005, A.M. Pp 41)

Four deceased victims were located inside the Terra Linda residence. (Vol. 4, April 22,

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[1] The Statement of facts is from the defendant's third penalty phase in April and May 2005.

2005, A.M. Pp 33)The four victims were identified as Jeffrey Biddle, Tracey Gorringe, Matthew Mowen, and Peter Talamentez. (Vol. 4, April 22, 2005, A.M. Pp 108) At the feet of Tracey Gorringe, was a box of black and mild cigars. (Vol. 4, April 22, 2005, A.M. Pp 111) The cigar box was processed for fingerprints. (Vol. 4, April 22, 2005, A.M. Pp 111) Donte Johnson's fingerprint was located on the black and mild box located in the Terra Linda residence. (Vol. 4, April 22, 2005, A.M. Pp 114)

According to detective Thomas Thowsen, the perpetrators had been motivated in looking for narcotics and money. (Vol. 4, April 22, 2005, A.M. Pp 43) The home had been thoroughly ransacked. (Vol. 4, April 22, 2005, A.M. Pp 43) No paper currency was located in the entire home. (Vol. 4, April 22, 2005, A.M. Pp 44) Detective Thowsen surmised from observing the entertainment center that the thieves had taken a VCR and Play stations.

During investigation, the police began investigating information connected to the "Everman home". (Vol. 4, April 22, 2005, A.M. Pp 27) The Terra Linda home and Everman home were approximately eight-tenths of a mile apart. (Vol. 4, April 22, 2005, A.M. Pp 27)

On August 18, detectives made contact with three young males of interest, Mr. Todd Armstrong, Bryan Johnson and Ace Hart. (Vol. 4, April 22, 2005, A.M. Pp 49-50) Mr. Armstrong lived at 4815 Everman.[2] The legal owner of that address was his mother.(Vol. 4, April 22, 2005, A.M. Pp 52) Mr. Armstrong was friends with Ace Hart and Bryan Johnson. In early August of 1998, Donte Johnson, Terell Young and Charla Severs (Donte Johnson's girlfriend) moved into the Everman house.

Donte Johnson was known as "Deko" and John White.(Vol. 4, April 22, 2005, A.M. Pp 53) Consent to search the Everman residence was provided by Todd Armstrong. (Vol. 4, April

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[2] During the penalty phase detective Thowsen was permitted to summarize the testimony of Mr. Armstrong and several other witnesses. (Pp 52)

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22, 2005, A.M. Pp 53)

Donte Johnson and his girlfriend occupied the master bedroom.(Vol. 4, April 22, 2005, A.M. Pp 56) Todd Armstrong allegedly occupied a different bedroom because there was a water bed there.(Vol. 4, April 22, 2005, A.M. Pp 56) Ace Hart stayed in a bedroom and Terell Young stayed in the living room.(Vol. 4, April 22, 2005, A.M. Pp 56) The defendant had been seen with a .380 caliber pistol, a six shot revolver, and a .22 caliber rifle that looked like a sawed off shotgun. (Vol. 4, April 22, 2005, A.M. Pp 57) Mr. Armstrong observed these weapons in a black and green duffle bag. (Vol. 4, April 22, 2005, A.M. Pp 57) The duffle bag was located during the search of the Everman home. (Vol. 4, April 22, 2005, A.M. Pp 57)

Also located during the search of the Everman home was a VCR and Playstation. (Vol. 4, April 22, 2005, A.M. Pp 58) Detectives believed the VCR and Playstation located at the Everman home, originated from Terra Linda and were taken during the robbery. (Vol. 4, April 22, 2005, A.M. Pp 58-59)

At first, Donte Johnson was only going to stay at Everman two or three days but stayed longer. (Vol. 4, April 22, 2005, A.M. Pp 62) Todd Armstrong claimed Donte Johnson was not told to leave because he was scared of him. (Vol. 4, April 22, 2005, A.M. Pp 62) Mr. Armstrong had the only key to the residence. (Vol. 4, April 22, 2005, A.M. Pp 64-65) He claimed that the defendant could climb through a broken bathroom window to get into the home. (Vol. 4, April 22, 2005, A.M. Pp 65)

Somewhere between the seventh and tenth of August, Matt Mowen came to the Everman home. (Vol. 4, April 22, 2005, A.M. Pp 65) When Matt Mowen arrived, Mr. Armstrong, the defendant and Terell Young were present. (Vol. 4, April 22, 2005, A.M. Pp 65) Matt Mowen made a comment that he had been following a musical group, called Fish Tour and had made a

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lot of money selling acid. (Vol. 4, April 22, 2005, A.M. Pp 66)

Mr. Johnson apparently looked around as he had formed an idea when he heard Matt Mowen's comment. (Vol. 4, April 22, 2005, A.M. Pp 66) Over the next several days, Mr. Johnson asked Todd Armstrong where Mowen lived. (Vol. 4, April 22, 2005, A.M. Pp 67) Mr. Johnson and Mr. Armstrong were in a vehicle accompanied by Ace Hart, when Mr. Hart pointed out where Mr. Mowen lived. (Vol. 4, April 22, 2005, A.M. Pp 68) Ace Hart pointed out the Terra Linda home between the tenth and twelfth of August. (Vol. 4, April 22, 2005, A.M. Pp 69)

During the search of the Everman home, duct tape was located in the master bedroom. (Vol. 4, April 22, 2005, A.M. Pp 71) Also located during the search was a .22 caliber rifle and black jeans. (Vol. 4, April 22, 2005, A.M. Pp 72) Police also noted freshly dug portion of dirt which caused them to located a blue pager and two motel keys. (Vol. 4, April 22, 2005, A.M. Pp 74-75) The pager was later identified as belonging to Peter Talamentez. (Vol. 4, April 22, 2005, A.M. Pp 74-75)

According to the summary of the evidence provided by Detective Thowsen, on the morning of August 14, Todd Armstrong awoke in the master bedroom and observed Donte Johnson and Terell Young caring the duffle bags containing guns, duct tape, a VCR and a play station. (Vol. 4, April 22, 2005, A.M. Pp 76-77)

When Mr. Johnson and his co-defendant's approached the home one of the individuals was watering the lawn and was ordered inside the home. (Vol. 4, April 22, 2005, A.M. Pp 80) Mr. Armstrong claimed that Donte Johnson admitted to killing one of the men because he was "mouthing off". (Vol. 4, April 22, 2005, A.M. Pp 78-79)

Mr. Armstrong said that Donte Johnson confessed to having to kill the other three individuals after killing the man who thought he was "joking around". (Vol. 4, April 22, 2005,

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A.M. Pp 83-84) Donte Johnson was laughing according to Mr. Armstrong. (Vol. 4, April 22, 2005, A.M. Pp 84)

Bryan Johnson was a friend of Ace Hart and Todd Armstrong[3]. (Vol. 4, April 22, 2005, A.M. Pp 85) Mr. Johnson lived at the Everman home for a brief period. (Vol. 4, April 22, 2005, A.M. Pp 88) According to Mr. Bryan Johnson, he observed Donte Johnson smoke black and mild cigars. (Vol. 4, April 22, 2005, A.M. Pp 91) Bryan Johnson previously testified that he heard Donte Johnson confess to the killings. Bryan Johnson stated that Donte explained that he had to kill one of the individuals who was Mexican because he felt like the robbery was a joke. (Vol. 4, April 22, 2005, A.M. Pp 91-95) He then shot the other individuals. Mr. Bryan Johnson said that Donte Johnson explained that the blood squirted up like it was Niagra Falls. (Vol. 4, April 22, 2005, A.M. Pp 96) Donte mention ed the fact that he had some of the blood on his pants. (Vol. 4, April 22, 2005, A.M. Pp 97)

Ms. Lashawnya Wright is the girlfriend of co-defendant, Sikia Smith(also known as tiny bug). (Vol. 4, April 22, 2005, A.M. Pp 97) Ms. Wright previously testified, she did not testify in the penalty phase.[4] (Vol. 4, April 22, 2005, A.M. Pp 97) On August 13, Ms. Wright entertained Terell Young and Donte Johnson at her apartment. (Vol. 4, April 22, 2005, A.M. Pp 98-99) When Donte and Terell Young left, Donte was caring a duffle bag with duct tape and gloves. (Vol. 4, April 22, 2005, A.M. Pp 99) Prior to leaving the apartment, the two were discussing a "lick," a slang word for robbery. (Vol. 4, April 22, 2005, A.M. Pp 100) When they returned fourteen hours, later Sikia Smith appeared to be scared. (Vol. 4, April 22, 2005, A.M. Pp 101) Ms. Wright

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[3] During the penalty phase detective Thowsen was permitted to summarize the testimony of Mr. Bryan Johnson.

[4] During the penalty phase, detective Thowsen was permitted to summarize the testimony of Ms. Lashawnya Wright.

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explained that Sikia Smith sold .380 caliber handgun on approximately August fifteenth or sixteenth of 1999. (Vol. 4, April 22, 2005, A.M. Pp 104)

Allegedly, when Mr. Johnson saw the Review Journal newspaper he stated, "we made the front page." (Vol. 4, April 22, 2005, A.M. Pp 105) He appeared excited. (Vol. 4, April 22, 2005, A.M. Pp 106) Four empty bullet casings were located at the Terra Linda address. (Vol. 4, April 22, 2005, A.M. Pp 109) Mr. Richard Goode tested all four shell casings and determined that they were all fired by the same weapon. (Vol. 4, April 22, 2005, A.M. Pp 109)

On August 17, 1998, at approximately 10:40 Trooper Robert Honea conducted a traffic stop on a vehicle. (Vol. 4, April 22, 2005, A.M. Pp 117) Later, it was determined that Donte Johnson was the driver of the vehicle and Terell Young (Red) was the passenger. During the stop, Donte Johnson used the name Donte Fletch. (Vol. 4, April 22, 2005, A.M. Pp 117) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of both defendants. (Vol. 4, April 22, 2005, A.M. Pp 117-118)(Also see pages 83-86 of April 29th, 2005, Volume 9)

During the search of 4825 Terra Linda, police noted that Peter Talamentez had a loaded handgun on his person. (Vol. 6, April 26, 2005, A.M. Pp 7) Police also located white baggies with methamphetamine at Terra Linda. (Vol. 6, April 26, 2005, A.M. Pp 11-12)

Although police had indications that Mr. Armstrong was involved he was never arrested or charged with the instant offenses. (Vol. 6, April 26, 2005, A.M. Pp 23-24) There was evidence that he told the defendant there was money and illegal mushrooms inside the residence. (Vol. 6, April 26, 2005, A.M. Pp 25) When officers arrived at the Everman residence on August 18th, they located Charla Severs, Donte Johnson and Duane Anderson (A.K.A Scale). (Vol. 6, April 26, 2005, A.M. Pp 2) The defendant denied living at the residence. (Vol. 6, April 26, 2005, A.M. Pp

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3)

The previous testimony of Charla Severs was read to the jury. (Vol. 6, April 26, 2005, A.M. Pp 29-30) Ms. Severs had a moniker "Lala". (Vol. 6, April 26, 2005, A.M. Pp 30) In 1998, Ms. Severs and Donte Johnson were involved in a dating relationship. (Vol. 6, April 26, 2005, A.M. Pp 31-32) Ms. Severs noted that none of the defendants had jobs in the month of July. (Vol. 6, April 26, 2005, A.M. Pp 41) Donte Johnson smoked black and mild cigars according to Ms. Severs. (Vol. 6, April 26, 2005, A.M. Pp 41) Donte Johnson would sell crack cocaine and she had observed Donte put the narcotics in a black and mild box one time and gave it to "DJ". (Vol. 6, April 26, 2005, A.M. Pp 46)

Ms. Severs had seen the defendant with a duffle bag that had guns in it. (Vol. 6, April 26, 2005, A.M. Pp 51-52) Ms. Severs explained that Matt Mowen came by the Everman residence approximately two days prior to the murders looking for some crack cocaine but she did not hear him make any mention of how he made money following a musical group. (Vol. 6, April 26, 2005, A.M. Pp 61-64) After Matt Mowen left, Ms. Severs heard Mr. Armstrong say that there was ten thousand dollars and a lot of mushrooms in the home and they should rob the home. (Vol. 6, April 26, 2005, A.M. Pp 65)

On the day of the murders, Donte was wearing a black pair of jeans. (Vol. 6, April 26, 2005, A.M. Pp 67-68) "Red" is carrying the duffle bag with guns inside when they left. (Vol. 6, April 26, 2005, A.M. Pp 70-71) When Donte returned, he kissed Ms. Severs on the cheek which woke her up. Donte Johnson allegedly stated, "you have to go to sleep after you kill somebody". (Vol. 6, April 26, 2005, A.M. Pp 74) Ms. Severs said that Donte Johnson confessed that he killed the Mexican because he was talking "mess". (Vol. 6, April 26, 2005, A.M. Pp 77-78) Mr. Johnson also said that hekicked the Mexican before shooting him in the back of the head. Mr.

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Johnson allegedly stated the victims made noises when they were shot and blood squirted out of their heads. (Vol. 6, April 26, 2005, A.M. Pp 77-78) Mr. Johnson had been concerned people would hear the gunshots, so he turned the music up very loud. (Vol. 6, April 26, 2005, A.M. Pp 80)

The next day, Ms. Severs said she talked to Donte Johnson, who confessed to killing all four victims by shooting them in the back of the head. (Vol. 6, April 26, 2005, A.M. Pp 81-84) Donte relayed to Ms. Severs that the first two individuals did not have any money or drugs so they called the other two victims over to the house. (Vol. 6, April 26, 2005, A.M. Pp 86)

Ms. Severs admitted that she originally lied to the police to help Donte. (Vol. 6, April 26, 2005, A.M. Pp 93) Ms. Severs also lied to the grand jury to help Donte. (Vol. 6, April 26, 2005, A.M. Pp 95) Ms. Severs had previously stated that Todd Armstrong had gone to the murder scene with the other defendants. (Vol. 6, April 26, 2005, A.M. Pp 104) She claimed that Todd Armstrong had set everything up. (Vol. 6, April 26, 2005, A.M. Pp 104) However, she later claimed that Mr. Armstrong did not go to the murder scene and she did it just to get him in trouble. (Vol. 6, April 26, 2005, A.M. Pp 105)

Ms. Severs originally told the Grand Jury that the defendant did not have black jeans on. She knew that there was blood on them and she didn't want to get him in trouble. (Vol. 6, April 26, 2005, A.M. Pp 107) Ms. Severs told Channel 8 news that Donte did not go to the murder scene and in fact she had gone to the murder scene. (Vol. 6, April 26, 2005, A.M. Pp 113)

Eventually, Ms. Severs was arrested on a material witness warrant and a warrant for possession of a stolen vehicle. Ms. Severs was promised that if she stayed out of trouble the case for possession of a stolen vehicle would be dropped against her. (Vol. 6, April 26, 2005, A.M. Pp 119) Ms. Severs admits she has approximately five aliases. (Vol. 6, April 26, 2005, P.M. Pp 37)

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When Ms. Severs was arrested and placed in the Clark County Detention Center she hoped her testimony would gain her release. (Vol. 6, April 26, 2005, P.M. Pp 8) Ms. Severs admitted that she committed perjury in front of the Grand Jury even though she had told the Grand Jury at least three times that she promised to tell the truth. (Vol. 6, April 26, 2005, P.M. Pp 28) Ms. Severs was never charged with perjury for her lies to the Grand Jury. (Vol. 6, April 26, 2005, P.M. Pp 29)

Todd Armstrong smoked crack cocaine on a daily basis. (Vol. 6, April 26, 2005, P.M. Pp 18-19)

When the defendants came home from Terra Linda after the robbery, Ms. Severs explained that Mr. Armstrong was upset there was no cocaine or money in the house and Mr. Armstrong expected some. (Vol. 6, April 26, 2005, P.M. Pp 32-33) In fact, Mr. Armstrong said where is my cocaine. (Vol. 6, April 26, 2005, P.M. Pp 33)

Mr. Berch Henry works for the DNA laboratory with the Las Vegas Metropolitan Police Department. (Vol. 6, April 26, 2005, P.M. Pp 58) Mr. Henry had analyzed the work conducted by Mr. Thomas Wahl. (Vol. 6, April 26, 2005, P.M. Pp 59) A cigarette butt located at the Terra Linda residence had the DNA of Donte Johnson identified on it. (Vol. 6, April 26, 2005, P.M. Pp 70-71) There is no way to tell when the DNA was left on the cigarette butt. (Vol. 6, April 26, 2005, P.M. Pp 71) A pair of black Calvin Klein jeans was tested and the DNA was determined to originate from Tracey Gorringe. (Vol. 6, April 26, 2005, P.M. Pp 72-73)

An autopsy of the victims provided evidence that the barrel of the murder weapon was within about an inch of the skin of the victims. (Vol. 6, April 26, 2005, P.M. Pp 90) All four victims died as a result of a single gunshot wound. (Vol. 6, April 26, 2005, P.M. Pp 92-104)

Mr. Talamentez also had a laceration behind his left ear and an abrasion to his nose. (Vol.

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6, April 26, 2005, P.M. Pp 106) These injuries were caused by blunt force trauma. The toxicology report of all victims demonstrated the presence of methamphetamine, amphetamine, and cocaine. (Vol. 6, April 26, 2005, P.M. Pp 113-114) Mr. Matthew Mowen also had alcohol in his system. (Vol. 6, April 26, 2005, P.M. Pp 114) At the conclusion of the medical examiners testimony, the State rested.

The defense case in mitigation.

The defense called Moises Zamora. Mr. Zamora is married to Dante Johnson's sister, Johnnisha Zamora. (Vol. 6, April 26, 2005, P.M. Pp 118) Mr. Zamora knew Donte Johnson by his real name, John White. (Vol. 6, April 26, 2005, P.M. Pp 118) Mr. Zamora is half Hispanic and explained that the defendant did not treat him any differently because of his background. (Vol. 6, April 26, 2005, P.M. Pp 120-122) Mr. Zamora felt that Donte accepted him like a brother. (Vol. 6, April 26, 2005, P.M. Pp 122) Mr. Zamora briefly lived with Donte Johnson and described him like a family member who he loved. (Vol. 6, April 26, 2005, P.M. Pp 123-124)

Donte Johnson has a child named Allen. Allen's communication with his father while he has been incarcerated, was very important to him. (Vol. 6, April 26, 2005, P.M. Pp 127)

The defense called Arthur Cain, Mr. Johnson's uncle. (Vol. 6, April 26, 2005, P.M. Pp 132) Mr. Cain described Donte's mother, Eunice as "slow" and she attended special ed classes in school. (Vol. 6, April 26, 2005, P.M. Pp 139) People often teased Donte Johnson's mother because she was "slow". (Vol. 6, April 26, 2005, P.M. Pp 139) They referred to her as "retarded or stupid". (Vol. 6, April 26, 2005, P.M. Pp 139) Eunice eventually married John White (the defendant's father). (Vol. 6, April 26, 2005, P.M. Pp 140) Mr. Cain became aware that Eunice had begun to use alcohol and drugs. (Vol. 6, April 26, 2005, P.M. Pp 142) He was also aware that there was physical violence between Mr. White and Eunice. (Vol. 6, April 26, 2005, P.M. Pp

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42) Eventually, Donte Johnson was taken from his mother and went to live with his grandmother, "big momma". (Vol. 6, April 26, 2005, P.M. Pp 145)

Eunice and Cain testified for the defense. (Vol. 6, April 26, 2005, P.M. Pp 151) Eunice described Donte Johnson as her oldest child. (Vol. 6, April 26, 2005, P.M. Pp 152) Eunice stated that she drank alcohol when she was pregnant with Donte. (Vol. 6, April 26, 2005, P.M. Pp 152) Eunice described her husband as violent and that her children would see her being beaten by him. (Vol. 6, April 26, 2005, P.M. Pp 156) Donte would try to defend his mother but he was too little. John White actually knocked Eunice's teeth out. (Vol. 6, April 26, 2005, P.M. Pp 156) John White also attempted to throw her out of a window at the Frontier and Donte ran for help, which she believed saved her. (Vol. 6, April 26, 2005, P.M. Pp 157)

Eunice explained that she was having a problem taking care of her children because she was smoking PCP at the time. (Vol. 6, April 26, 2005, P.M. Pp 161) She would get high when her kids were present. (Vol. 6, April 26, 2005, P.M. Pp 162) Her children were taken from her and sent to foster care but eventually ended up living with her mother. (Vol. 6, April 26, 2005, P.M. Pp 163)

Johnnisha Zamora is the younger sister of Mr. Johnson. (Vol. 6, April 26, 2005, P.M. Pp 166) Johnnisha remembers her mother would smoke drugs in front of the children and her father would beat her mother in front of the children. (Vol. 6, April 26, 2005, P.M. Pp 168) Sometimes when her mother would see a ghost, the children would be locked in the closet while she was screaming. There were no lights inside the closet. (Vol. 6, April 26, 2005, P.M. Pp 169) At one point, the children were forced to live in a shed. (Vol. 6, April 26, 2005, P.M. Pp 170) There were approximately five or six of them living in a shed with no toilet, running water, or furniture. (Vol. 6, April 26, 2005, P.M. Pp 171-173) Johnnisha observed John White beating Donte Johnson and

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Donte not understanding why he was being beaten. (Vol. 6, April 26, 2005, P.M. Pp 177)

When the Donte went to live with his grandmother, his grandfather did not spend time with Donte. (Vol. 6, April 26, 2005, P.M. Pp 180) Johnnisha and Donte observed a lady who was found dead with a "pole shoved up her private." (Vol. 6, April 26, 2005, P.M. Pp 182) Donte and Johnnisha observed a police shootout where a man was killed upstairs. (Vol. 6, April 26, 2005, P.M. Pp 183)

When the children would walk to school they would be chased almost everyday by bullies. (Vol. 6, April 26, 2005, P.M. Pp 184) They observed a lot of street violence.(Vol. 6, April 26, 2005, P.M. Pp 184) The bullies would throw rocks and beat them up. (Vol. 6, April 26, 2005, P.M. Pp 185) Johnnisha testified that she loved her brother. (Vol. 6, April 26, 2005, P.M. Pp 192)

The defendant's other sister, Eunisha White testified for the defense. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 3) Ms. White observed her mother being abused by her father. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 5) She observed Mr. White strangle her mother with his hands and on one occasion grab her by the neck and hold her over a balcony. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 6) Ms. White remembered having to live in the shack with lots of other people. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 9) Eventually, the children went to live with their grandmother, but even then, sometimes they went without food. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 13-14)

Ms. Keonna Atkins was the cousin of Donte Johnson. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 18) Ms. Atkins remembers how they would be chased by bullies. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 50-51) On one occasion, there was a burglary and a perpetrator came through the window and groped Ms. Atkins. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 52) The perpetrator confronted the children which upset Donte (he was seven or eight years old). (Vol. 7, April 27, 2005, 11:17 A.M. Pp 51-52)

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Donte's grandmother, Jane Edwards testified that she attempted to take care of approximately ten children in her home, including Donte. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 62-64)

The defendant's son, Allen White, told the jury that he loved his father and read a letter to the jury that he had written to his father. (Vol. 7, April 27, 2005, 11:17 A.M. Pp 73-75)

On April 27, 2005 the jury heard closing arguments regarding the first portion of the penalty phase.(Vol. 7, April 27, 2005, P.M.) The jury found that there was at least one aggravating circumstance as to all four victims.(Vol. 7, April 27, 2005, P.M.) The jury began the second portion of the penalty phase on April 28, 2005. On April 28, 2005 opening arguments were heard regarding the second portion of the penalty phase

The State called Los Angeles police officer Jimmy Grayson (second portion of the penalty phase). On June 8, 1993, Officer Grayson was involved in the investigation of a bank robbery at Sen Fed Bank in Marina Del Ray, California. (Vol. 8, April 28, 2005, P.M. Pp 38-40) There were four suspects in a ryder van. There was a police pursuit of the getaway van and Donte Johnson was identified as the driver. (Vol. 8, April 28, 2005, P.M. Pp 41-42) During the bank robbery one of the robbers stood near the door with a sawed off shotgun. (Vol. 8, April 28, 2005, P.M. Pp 43) Ms. Sandra Gatlin worked for Sen Fed Bank on June 8, 1993, as assistant bank manager. (Vol. 8, April 28, 2005, P.M. Pp 59-60) She remembered how she felt fear and described that some of the robbers jumped the counters where the tellers were working. (Vol. 8, April 28, 2005, P.M. Pp 61-62)

Donte Johnson received a total of four years commitment to the California youth authority for the bank robbery. (Vol. 8, April 28, 2005, P.M. Pp 36) Once Donte Johnson was released from custody, he was on parole. (Vol. 8, April 28, 2005, P.M. Pp 38) However, Donte Johnson

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became an absconder and his parole was suspended and a warrant issued. (Vol. 8, April 28, 2005, P.M. Pp 38)

On May 4, 1998, Officer Charles Burgess responded to a shooting call at the 2100 block of east Fremont. (Vol. 9, April 29, 2005, Pp 20) When Officer Burgess arrived he noticed Derrick Simpson lying motionless on the road. (Vol. 9, April 29, 2005, Pp 21) He had suffered from gunshot wounds. (Vol. 9, April 29, 2005, Pp 22) Officer Burgess asked the victim what had occurred and he stated "that a black male named Deko shot him". (Vol. 9, April 29, 2005, Pp 23) The State introduced a judgement of conviction in which Donte Johnson was adjudicated guilty of battery with use of a deadly weapon connected with the shooting. (Vol. 9, April 29, 2005, Pp 28)

On February 24, 2001, Officer Alexander Gonzales was working in the Clark County Detention Center in the disciplinary housing unit. (Vol. 9, April 29, 2005, Pp 47-48) Officer Gonzales claimed that he witnessed a fight wherein Mr. Reginald Johnson and Donte Johnson threw Oscar Irias over the second story tier. (Vol. 9, April 29, 2005, Pp 52-53) Officer Gonzales claimed that he could observe the fight through a window. (Vol. 9, April 29, 2005, Pp 55)

Oscar Irias had disciplinary problems including being written up for masturbating on a toilet and attacking his roommate for no apparent reason. (Vol. 9, April 29, 2005, Pp 65) It was also noted that Oscar was a psych patient with a violent temper. (Vol. 9, April 29, 2005, Pp 71) After being thrown over the tier, Oscar went into his cell and was shaken up but had no other significant injuries. (Vol. 9, April 29, 2005, Pp 75-76)

Prisoner George Cotton observed Oscar Irias fall from the second tier on February 24, 2001. (Vol. 10, May 2, 2005, Pp 8-11) Mr. Cotton heard someone yell help, help, and then saw Oscar fall and then jump up and run in his cell. (Vol. 10, May 2, 2005, Pp 15-16) Mr. Cotton

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indicated that Donte Johnson was not involved in the incident. (Vol. 10, May 2, 2005, Pp 18) Mr. Cotton has two convictions for robbery with use of a deadly weapon. (Vol. 10, May 2, 2005, Pp 19)

Prisoner Permaine Lytle also heard Oscar yell for help. (Vol. 10, May 2, 2005, Pp 30) He explained that the Officers were unable to see what had occurred from their vantage point. (Vol. 10, May 2, 2005, Pp 34) Mr. Lytle is currently serving life without parole consecutive to life without parole for first degree murder with use of a deadly weapon. (Vol. 10, May 2, 2005, Pp 35)

Mr. Reginald Johnson told the jury that he was solely responsible for the attack on Oscar Irias.(Vol. 10, May 2, 2005, Pp 44-48) Mr. Reginald Johnson explained, "I assaulted him and heped him over the tier." (Vol. 10, May 2, 2005, Pp 48) Mr. Reginald Johnson pled guilty for his role in the assault. (Vol. 10, May 2, 2005, Pp 48) Reginald Johnson told the jury he attacked Oscar because he did not like child molesters. (Vol. 10, May 2, 2005, Pp 49) Mr. Reginald Johnson denied that Donte Johnson had any involvement in the crime. (Vol. 10, May 2, 2005, Pp 50-60) Subsequently, Reginald Johnson and Oscar Irias were again placed together in a holding cell and Reginald Johnson beat him up for a second time. (Vol. 10, May 2, 2005, Pp 60) During Reginald Johnson's cross-examination, he became so heated the Court called a recess. (Vol. 10, May 2, 2005, Pp 63-64)

Reginald Johnson's attorney, Ms. Gloria Navarro testified that she is employed with the Clark County District Attorney's Office. (Vol. 10, May 2, 2005, Pp 84) Mr. Reginald Johnson informed her that Donte Johnson was not involved with the crime. (Vol. 10, May 2, 2005, Pp 85-86) Pursuant to an independent investigation, Ms. Navarro concluded that Officer Gonzales was unable to see the fight, as he had claimed. (Vol. 10, May 2, 2005, Pp 94) Ms. Navarro testified

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Reginald Johnson entered a plea of guilty because she guaranteed him that the charges against Donte would be dismissed with prejudice. (Vol. 10, May 2, 2005, Pp 111)

The State called several witnesses to provide victim impact statements. (Vol. 10, May 2, 2005, Pp 99) Juanita Aguilar provided victim impact regarding her son, Peter Talamentez. (Vol. 10, May 2, 2005, Pp 101-103) Marie Biddle provided an impact statement regarding her son Jeff. (Vol. 10, May 2, 2005, Pp 105-112) Sandy Viau provided victim impact regarding her son Tracey Corrinage. (Vol. 10, May 2, 2005, Pp 113-120) Jennifer Mowen provided victim impact regarding her brother, Matthew. (Vol. 10, May 2, 2005, Pp 121-124) Lastly, Mr. David Mowen provided victim impact regarding his son, Matthew. (Vol. 10, May 2, 2005, Pp 124-132)

The State then rested their case in the second part of the penalty phase. (Vol. 10, May 2, 2005, Pp 134)

Penalty Mitigation in the second portion of the penalty phase

Keonna Atkins testified again, for the defense. (Vol. 10, May 2, 2005, Pp 135) Ms. Atkins explained that during their youth, there were Blood and Crip gangs that were very violent in the area. (Vol. 10, May 2, 2005, Pp 137) There were shoot outs and gang members often harassed them. (Vol. 10, May 2, 2005, Pp 138) Donte Johnson became the protector of the family. (Vol. 10, May 2, 2005, Pp 141) Ms. Atkins learned that Donte had become a gang member because of a threat to rape her by Baby Sonny. (Vol. 10, May 2, 2005, Pp 143) Donte had become a member or "jumped in" to the six deuce brims. (Vol. 10, May 2, 2005, Pp 144) Ms. Atkins felt that Donte's participation in the gang had provided protection for her. (Vol. 10, May 2, 2005, Pp 146) Donte's sister also confirmed that he joined a gang to protect the family. (Vol. 10, May 2, 2005, Pp 158) Donte's sister also reported that Donte took care of her growing up and made sure others did not harm her. (Vol. 10, May 2, 2005, Pp 163-164)

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The defense recalled Moises Zamora who told the jury that he was a crip and Donte was a blood. (Vol. 10, May 2, 2005, Pp 172) Mr. Zamora explained he had similar experiences to Donte growing up in South Cental LA. (Vol. 10, May 2, 2005, Pp 173)

The defense called Martin Jankowski, a professor of sociology at the University California, Berkley and an expert in gangs. (Vol. 10, May 2, 2005, Pp 193-194) Professor Jankowski lived and worked with gangs for ten years. (Vol. 10, May 2, 2005, Pp 197) He also authored a book on gang culture entitled, "Islands in the Street". (Vol. 10, May 2, 2005, Pp 198) Professor Jankowski indicated that violence is in an integral part of the gang environment.(Vol. 10, May 2, 2005, Pp 205) Professor Jankowski offered insight into the gang culture throughout his testimony.

The defendant's first cousin, Donna Revomer explained that she was very frightened to walk in her neighborhood until Donte Johnson joined the gang. (Vol. 10, May 2, 2005, Pp 236) Her fear level improved after Donte joined the gang. (Vol. 10, May 2, 2005, Pp 237)

The defense recalled Donte's grandmother, Jane Edwards. (Vol. 10, May 2, 2005, Pp 239) The defense also recalled the defendant's son Allen White. (Vol. 10, May 2, 2005, Pp 243) Allen told the jury that he loved his father. (Vol. 10, May 2, 2005, Pp 244)

The defense called parole agent, Mr. Craig Clark from the California youth authority. (Vol. 10, May 2, 2005, Pp 153) Officer Clark explained the area in which Donte lived was filled with gang activity and that there was always a chance of being beaten up, ridiculed, or harassed by enemies. (Vol. 10, May 2, 2005, Pp 168) Officer Clark indicated that there were several gangs in the area that Mr. Donte Johnson was raised. (Vol. 10, May 2, 2005, Pp 169) Donte Johnson was always polite, cordial, and respectful to other members of the parole staff. (Vol. 10, May 2, 2005, Pp 179) In fact, Officer Clark like Donte Johnson. (Vol. 10, May 2, 2005, Pp 179)

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Ms. Nancy Hunterton administered a program at the Clark County Detention Center that was attended by Donte Johnson. (Vol. 10, May 2, 2005, Pp 194-195) The class was called life skills, and Donte participated in the class in approximately 2000. (Vol. 10, May 2, 2005, Pp 195)

Mr. James Esten was retired from the California department of corrections. (Vol. 10, May 2, 2005, Pp 216) Mr. Esten personally reviewed the records of Donte Johnson and toured Ely State penitentiary. (Vol. 10, May 2, 2005, Pp 221) Mr. Esten described the type of living conditions and prison environment that Donte would live in for life. Mr. Esten did not notice any significant write-ups on Donte Johnson while at Ely State penitentiary. (Vol. 10, May 2, 2005, Pp 254)

Dr. Thomas Kinsora, a psychologist in clinical neuropsychology, testified on behalf of Mr. Donte Johnson. (Vol. 11, May 3, 2005, Pp 14) Dr. Kinsora explained that the environment that Donte Johnson grew up in and the factors of his environment played an important role in who he became. (Vol. 11, May 3, 2005, Pp 38) Dr. Kinsora explained that Donte Johnson had grown up in an impoverished area of Los Angeles, Donte had even been reduced to looking in trash cans for food. (Vol. 11, May 3, 2005, Pp 46) Dr. Kinsora noted that Donte Johnson's mother would regularly smoke crack cocaine in front of the children. (Vol. 11, May 3, 2005, Pp 47) Social services talked with Donte who complained that he was frequently beaten but didn't know why. (Vol. 11, May 3, 2005, Pp 48)

Dr. Kinsora also noted that Donte was a very small child and he had no father figure or male role model at home. (Vol. 11, May 3, 2005, Pp 66-67) Therefore, Donte felt responsible for protecting the women at home and this was difficult based upon his stature. (Vol. 11, May 3, 2005, Pp 67) At thirteen years old, Donte Johnson witnessed a friend stabbed to death with a screwdriver by a rival gang member. (Vol. 11, May 3, 2005, Pp 69) At age fifteen, he had a friend

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shoot himself in the head in front of Donte because he felt that he had disappointed the gang. (Vol. 11, May 3, 2005, Pp 69) In 1992, Donte witnessed a girl in his neighborhood shot in the face by a Crip gang member as she exited a bus. (Vol. 11, May 3, 2005, Pp 70)

Dr. Kinsora compared South Central Los Angeles to a war zone equivalent of something you would see in a third world country . (Vol. 11, May 3, 2005, Pp 76) Dr. Kinsora explained that Donte committed the bank robbery because an older member of the gang had ordered him to do so and Donte did not want to appear afraid and let the gang down. (Vol. 11, May 3, 2005, Pp 78)

Dr. Kinsora stated "I don't think there is any brain damage in talking to him and reading some of his writings." (Vol. 11, May 3, 2005, Pp 86) The doctor concluded that there is no organic brain disorder. (Vol. 11, May 3, 2005, Pp 101)

Dr. Kinsora admitted that he relied upon a report prepared by Tina Francis a defense mitigation expert. (Vol. 11, May 3, 2005, Pp 112) On page 31 of Tina Francis' report it reflects that Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas than in Los Angeles. (Vol. 11, May 3, 2005, Pp 125) There was an objection by the defense throughout this testimony, that Dr. Kinsora should not be examined over issues in Tina Francis' report. (Vol. 11, May 3, 2005, Pp 126) The Court permitted the prosecutor to cross-examine Dr. Kinsora on Tina Francis' report because he claimed he had relied upon it. (Vol. 11, May 3, 2005, Pp 129) Eventually, the court precluded the state from introducing any more evidence from Tina Francis' report. (Vol. 11, May 3, 2005, Pp 130) At the conclusion of Dr. Kinsora's testimony, the defense rested their mitigation case.

The State called a rebuttal witness, Ms. Cheryl Foster. (Vol. 11, May 3, 2005, Pp 133) Ms. Foster is the warden of Southern Desert Correction Center. (Vol. 11, May 3, 2005, Pp 134)

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Ms. Foster testified extensively regarding the inner workings of the Nevada Penitentiaries.

The defendant informed the Court he did not want to provide allocution. (Vol. 11, May 3, 2005, Pp 196) Thereafter, the jury was once again instructed on the law and closing arguments were heard.

The jury returned a special verdict, finding a single aggravating circumstance pursued by the State. Seven mitigating circumstances were found: Johnson's youth at the time of the murders, (he was eighteen years old); he was taken as a child from his mother due to her neglect and placed in foster care; he had no positive or meaningful contact with either parent; he had no positive male role models; he grew up in a violent neighborhood; he witnessed many violent attacks as a child; while a teenager he attended schools where violence was common. Johnson v. State of Nevada, 122 Nev. 1344, at 1350.

On May 5, 2005, the jury returned a verdict sentencing Donte Johnson to death for the first degree murder with use of a deadly weapon of Jeffery Biddle, Tracey Corrinage, Matt Mowen, and Peter Talamentez. (Vol. 12, May 4, 2005)

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of

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the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington ,466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. In Nevada, the Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the U.S. Supreme Court in Strickland v. Washington, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 Nev. 1996).

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In meeting the prejudice requirement of ineffective assistance of counsel claim, Mr. Johnson must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine confidence in the outcome. Kirksey v. State, 112 Nev. at 980. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,783 P.2d 430 Nev. 1989); Olausen v. State, 105 Nev. 110,771 P.2d 583 Nev. 1989).

The Nevada Supreme Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See Jones v. Barnes, 463 U.S. 745, 751-54, 77 L.Ed. 2d 987, 103 S. Ct. 3308 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); Leaks v. United States, 841 F. Supp. 536, 541 (S.D.N.Y. 1994), aff'd, 47 F.3d 1157 (2d Cir.). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. Heath, 941 F. 2d at 1132.

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In the instant case, Mr. Johnson's proceedings were fundamentally unfair. The defendant received ineffective assistance of counsel. Based upon the following arguments:

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

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

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

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

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

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Love, 109 Nev. 1136, 1137.

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

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

A. FAILURE TO PRESENT ANY MITIGATION ON FETAL ALCOHOL DISORDERS.

Donte's mother, Eunice told the jury that she consumed alcohol when she was pregnant with Donte. (A.A. Vol. 6, April 26, 2005, P.M., Pp 152). In the instant case, counsel for Mr. Johnson failed to present or investigate the prospect that Mr. Johnson had suffered from Fetal Alcohol Disorder. Fetal Alcohol Spectrum Disorders are a group of disorders that can occur in a person who's mother drank alcohol during pregnancy. The effects can include physical problems and problems with behavior and learning. Often, persons with this type of disorder have a mix of these problems. The Center for Disease Control and Prevention has described some of the symptoms of Fetal Alcohol Spectrum Disorder as being shorter than average height, low body weight, and poor judgment and reasoning skills.

A review of the file reveals that counsel failed to obtain or conduct testing on Donte Johnson to determine whether he suffered from Fetal Alcohol disorder. Donte Johnson's mother

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testified she abused alcohol during her pregnancy. Donte Johnson was of very small stature according to the record. Donte Johnson has showed poor reasoning and judgement skills as displayed by the record. Donte Johnson is in the process of requesting funds from the county in an effort to have an expert appointed to determine whether Donte Johnson suffered from Fetal Alcohol Spectrum Disorder. It was ineffective assistance of counsel for counsel to fail to obtain an expert to make such a determination given the fact that the record provides evidence that Mr. Johnson displayed signs of Fetal Alcohol Disorder.

B. FAILURE OF COUNSEL TO OBTAIN A PET SCAN.

In the instant case the defense presented evidence in mitigation regarding the defendant's environment. However, the defense never cause the defendant's brain to be properly analyzed. In fact, the defense called Dr. Kinsora who speculated that the defendant did not suffer from brain damage. It was incumbent upon the defense to have the defendant properly analyzed.

A Positron Emission Tomography Scan (PET Scan) is a nuclear medicine imaging technique which produces a three dimensional picture of the functional process in the body. PET Neuroimaging is based on an assumption that areas of high radioactivity are associated with brain activity. What is actually measured indirectly is the flow of blood to different parts of the brain, which is generally believed to be correlated, and has been measured using the tracer oxygen. It can also assist in examining links between specific psychological processes or disorders in brain activity ("A Close look into the Brain," Julich Research Center, 29 April 2009.)

In the instant case, the defense should have investigated in an effort to determine whether Mr. Johnson suffered from internal difficulties within the brain. A review of the file fails to reveal that counsel attempted to obtain an analysis of Mr. Johnson's brain. Mr. Johnson is currently requesting funding to conduct this testing.

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

In the instant case, the defense failed to properly argue proportionality as an issue in mitigation. The defense failed to present evidence from either Mr. Smith or Mr. Young's attorneys regarding the outcome of their penalty hearings. Neither of the co-defendants received sentences of death.

In fact, on April 27, 2005, defense counsel attempts to argue in the penalty phase that the two other defendants did not receive the death penalty. The State objects and defense counsel argues, "it's mitigation if they receive life." The State's objection was sustained.

In the instant case, a reasonable investigation would have proved that both co-defendants did in fact receive sentences of less than death as Ms. Alzora Jackson attempted to argue to the jury. However, there was no such evidence in the record. Therefore, the State's objection was sustained. A simple investigation would have revealed that both the co-defendants did in fact receive sentences of less than death. The judgment of conviction and sentencing transcripts could have been introduced. Defense counsel for both co-defendants should have been called as witnesses to establish that their clients did not receive death sentences for these acts.

Therefore, it was ineffective assistance of counsel not to introduce evidence of the co-defendants sentences in an effort to argue proportionality. Appellate counsel was also ineffective for failure to raise this issue on appeal.

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

In the instant case, post conviction counsel made contact with Mr. David Figler. Mr. Figler was trial counsel at the first trial and at the second penalty hearing before the three judge panel. Mr. Figler informed post conviction counsel that the first jury filled out a mitigation form

finding more than thirty (30) mitigators including one indicating the defendant's role in the instant case (see attached affadavit).

After discussing the matter with Mr. Figler, Mr. Johnson has made attempts to obtain the penalty phase verdict forms from the first jury trial. Unfortunately, the requested verdict forms provided by the court clerk were the guilt verdict forms from the first trial. Further efforts to obtain the mitigation form have yet to result in the location of the verdict form. However, once an investigator is appointed, the investigator can go through the entire court file in order to locate the mitigation form which the court clerks have not been able to locate (see attached affadavit).

At the third penalty phase, the jury did not find any where near thirty mitigating factors for Donte Johnson. In fact, they only offered eleven mitigators in the third penalty phase. (A.A. Vol. 7 April 27, 2005 Pp. 14, instruction No. 10) Hence, it was ineffective assistance of counsel in the third penalty phase for the failure to offer all of the mitigating factors found by the first jury (the first jury was unable to reach a verdict as to Donte Johnson's penalty).

The failure to properly investigate is compounded during first portion of the penalty phase closing argument where the state explains to the jury,

> "The evidence is unequivocal that it is the defendant, Donte Johnson, that fired the fatal rounds into each one of the victims heads. To argue before you that the evidence is anything else, cite to me the facts". Mr. Whipple then states, "judge, I'll object (A.A. Vol. 7, April 27, 2005, P.M.)

Upon information and belief, Mr. Figler has told post-conviction counsel that he specifically recalls the jury in the first penalty phase finding a mitigator regarding the defendant's role in the crime. If counsel had been effective, in the third penalty phase, counsel would have introduced that citation in the record to dispel the prosecutor's statement that the evidence is unequivocal that Donte Johnson fired the fatal rounds into the victims head.

Additionally, there is no evidence in the file that counsel in the third penalty phase made

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an effort or actually interviewed the hold out juror(s) form the first hung jury. Had defense counsel properly investigated, and interviewed the jury from the first penalty phase, they would have recognized that jurors had found many more mitigators than the jury did in the third penalty phase.

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

In the instant case, the defense presented mitigation evidence that Donte Johnson had been abused by his father and had observed his father be abusive to his mother. Donte Johnson was clearly neglected and abused by his father. The defense should have presented testimony from the father even if the examination was hostile to demonstrate to the jury the type of upbringing Mr. Johnson endured.

In summary, the mitigation evidence that counsel unreasonably failed to investigate and present is the same type of evidence that has been found to have a reasonable probability of a more favorable outcome in the penalty phase of a capital trial. Eg, Rompilla v. Beard, 545 U.S. 374, 390-93 (2005); Wiggins v. Smith, 539 U.S. 510, 533-37 (2003); Tennard v. Dertke, 542 U.S. 274, 284 (2004)(mitigating evidence as capital sentencing hearing defined as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")(citation omitted); Williams v. Taylor, 529 U.S. 362, 396-98 (2000); Boyde v. Brown, 44 F.3d 1159, 1176-80 (9th Cir. 2005)(counsel ineffective for failing to present much larger body of mitigating evidence).

Additionally, the Court should be concerned regarding the failure to properly obtain important experts for the penalty phase as noted above. Eg, Daniels v. Woodford, 428 F.3d 1181, 1209-10 (9th Cir. 2005)(counsel ineffective in selection and preparation of expert and capital

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sentencing); Paine v. Massie, 339 F. 3d 1194, 1202-03 (10th Cir. 2003); Roberts v. Dretke, 356 F.3d 632, 639-41 (5th Cir. 2004); Jennings v. Woodford, 290 F.3d 1006, 1013 (9th Cir. 2002)(failure to provide experts with available medical records constitutes ineffective assistance); Silva v. Woodford, 279 F.3d 825, 841-42 (9th Cir. 2002); Wallace v. Stewart, 184 F.3d 1112, 1118 (9th Cir. 1999); Bloom v. Calderon, 132 F.3d 1267, 1271-72 (9th Cir. 1997); Clayborn v. Lewis, 64 F. 3d 1373, 1385-87 (9th. Cir. 1995); Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995).

Mr. Johnson is therefore entitled to an evidentiary hearing to prove his allegations of ineffective assistance of trial and appellate counsel for failure to investigate and present mitigation evidence in violation of the United States constitution amendments IV, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3,6, and 8; Art. IV, Sec. 21.

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

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated by providing the State a mitigation report from Tina Francis which was used to impeach a defense expert. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

On August 17, 1998, at approximately 10:40 Trooper Robert Honea conducted a traffic stop on a vehicle. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117) Later it was determined that Donte Johnson was the driver of the vehicle and Terell Young (Red) was the passenger. During the stop, Donte Johnson used the name Donte Fletch. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of

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both defendants. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117-118). Defense counsel objects to the introduction of this evidence in the first part of the penalty phase, stating the evidence had never been subject to pre-trial scrutiny even though it was used in the first trial. (A.A. Vol. 4, April 22, 2005, A.M. Pp 117)

Defense counsel claimed it was error to let the evidence into the first trial. The State was permitted to introduce this bad act because a gun was located in the back of the vehicle but it happened not to be the murder weapon. (A.A. Vol. 4, April 22, 2005, A.M. Pp 118)

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Once the court's ruled that evidence is probative of one of the permissible issues under NRS 48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

"The duty placed upon the trial court to strike a balance between the prejudicial effect of

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such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

It is ineffective assistance of trial counsel in the first trial to permit the introduction of this bad act without a Petrocelli hearing and it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal from the first trial. Additionally, it was ineffective assistance of trial counsel not to attempt to preclude this evidence prior to the third penalty phase.

The State argued that the gun should be permitted because it appeared similar to a gun described by Charla Severs in that it looked sort of like a sawed off shotgun. However, the Court asked the prosecution if she ever identified the gun and she did not. (A.A. Vol. 4, April 22, 2005, A.M. Pp 119-120) The court did taken notice that it was not the murder weapon and Ms. Severs never identified the gun. (A.A. Vol. 4, April 22, 2005, A.M. Pp 121) The judge rules, "It's tenuous. Like I said, you can bring it in in the second part. In this part I don't agree." (A.A. Vol. 4, April 22, 2005, A.M. Pp 122) Hence, it was ineffective assistance of trial counsel to not realize that a pre-trial motion was necessary to preclude the evidence. Additionally, appellate counsel was ineffective for failing to raise this issue on appeal.

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

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, , a fair penalty hearing, and a

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right to be free from cruel and unusual punishment were violated by providing the State a mitigation report from Tina Francis which was used to impeach a defense expert. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

Appellate counsel was ineffective for failing to raise the following issue on appeal. The defense presented the expert testimony of Dr. Kinsora, who admitted that he had relied upon a report prepared by Tina Francis, the defense mitigation expert (A.A. Vol. 11, May 3, 2005, Pp.112). Dr. Kinsora was impeached with Tina Franscis' mitigation report regarding there being nothing in the report to suggest that Donte's mother used drugs or alcohol during her pregnancy (A.A. Vol. 11, May 3, 2005, Pp.113). Additionally, Dr. Kinsora was questioned regarding bad act evidence contained in Ms. Francis' report wherein Donte Johnson allegedly took a small caliber gun gave it to a co-defendant in another case because the co-defendant was angry with a cheerleader. (A.A. Vol. 11, May 3, 2005, Pp.121)

Dr. Kinsora was further examined regarding Donte's grandmother stating that he should be treated as an adult by the California authorities. (A.A. Vol. 11, May 3, 2005, Pp.122-123) Dr. Kinsora was cross-examined regarding Tina Francis' report reflecting that Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas than in Los Angeles. (A.A. Vol. 11, May 3, 2005, Pp.125) There was an objection by defense counsel regarding this portion of testimony. Defense counsel argued that these issues were the work product of Tina Francis. The court overruled the objection. (A.A. Vol. 11, May 3, 2005, Pp.126)

Eventually, the trial court began precluding the State from introducing any more evidence from Tina Francis' report (A.A. Vol. 11, May 3, 2005, Pp.130). Yet, the damage was done. The defense had permitted a mitigation experts information and report to be used against the defendant. It was ineffective assistance of counsel to cause the report to be prepared and for the

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State to be permitted to use evidence in the report against the defendant's expert.

The discovery statute that previously required defense counsel to turn over reports of non-testifying experts was declared unconstitutional by the Nevada Supreme Court. See Binegar v. 8th Judicial District Court, 112 Nev. 544, 551-52, 915 P.2d 889, 894 (1996).

In assessing a claim of ineffective assistance of trial counsel, the court is required to look at counsel's performance as a whole which includes commutative assessment of counsel's multiple errors and admissions during the penalty phase of trial. See eg. Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir. 2005) Citing Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) see also Harris Exrel. Ramseyer v. Wood, 94 F.3d 1432, 1438-39 (9th Cir. 1995). In the instant case, the defense should have never placed their own expert in a situation where he was cross-examined regarding facts in a mitigation experts report. Defense counsel should have reviewed the notes and discussed with Ms. Tina Francis the nature of any facts contained in the report. Appellate counsel was ineffective for not raising this issue on appeal as it was objected to during trial. It was ineffective assistance of counsel for the mitigation experts report to have been provided to the prosecution so that the State could use it against the defense's expert witness.

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

During closing argument, defense counsel argued in contradiction to each other. First, one defense attorney stated in closing arguments,

> "I also brought Mr. Esten in here for a very important reason, and that is to show you that there are no drugs in prison. We know for a fact that those individuals, that Mr. Johnson and those other individuals were simply loaded on drugs. There are no drugs in prison."(A.A. Vol. 12, May 4, 2005, Pp 47)
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> "He was loaded on drugs when these homicides occurred, and in prison, there are no drugs. You saw the way they search the inmates as they come and go, there are no drugs in prison. That's another reason that society is protected." (A.A.

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Vol. 12, May 4, 2005, Pp 47-48)

...

> "The drugs that Mr. Johnson was on, those were mind altering drugs, and those drugs are not in prison, and that is another reason why we in society are protected, and that's why I brought Mr. Esten in here to talk to you." (A.A. Vol. 12, May 4, 2005, Pp 48)

Therefore, defense counsel found it ultimately important to call an expert witness in an effort to convince the jury that Mr. Johnson would not be able to consume the same type of drugs that caused the behavior for which he was convicted. Thereafter, in a subsequent argument by the other defense attorney, counsel states,

> "There is one thing my learnered co-counsel that I beg to differ; he said there are no drugs in prison. I beg to differ. And you know how they get in prison? The guards, you know, how often do we pick up a paper and see where guards have brought drugs into prisons? Inmates can get them in their. You know, they are human beings and they make mistakes just like any body else." (A.A. Vol. 12, May 4, 2005, Pp 73)

It was ineffective assistance of counsel for both defense counsel to disagree on a theory. Mr. Whipple actually called a witness for the very "important purpose" of establishing that there are no drugs in prison. Specifically, no mind altering drugs that Mr. Johnson was on at the time of the shootings. Thereafter, co-counsel argues that Mr. Whipple is wrong and therefore implying that the defense witness was inaccurate as was the argument of Mr. Whipple. Mr. Whipple believed that the jury would be concerned with future dangerousness if they thought Donte Johnson would have access to mind altering drugs. Co-counsel argued that Donte would have access to drugs in the prison because of the nature of the guards activities.

It was ineffective assistance of trial counsel to disagree in front of the jury as to such an important point. Additionally, it was ineffective assistance of appellate counsel to fail to raise this issue on appeal.

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

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated due to defense counsel referring to the victims as "kids". U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

During closing arguments the defense attorney explains that it didn't matter whether Donte Johnson laughed about the murders or not after one of the "kids" are killed. Defense counsel further stated, "Does it make it any worse? The poor kid is dead."(A.A. Vol. 12, May 4, 2005, Pp 54) Defense counsel was ineffective for referring to the victims as kids because on appeal, appellate counsel argued prosecutorial misconduct on the basis that the prosecutor referred to the victims as "kids". The Supreme Court noted,

> "Second, Johnson contends that the prosecutor violated a pre-trial order by the District Court when he referred to the victims as "boys" or "kids" during rebuttal argument. He is correct that the prosecutor violate the order but we conclude he was not prejudiced. The meaning of the term "boys" or "kids" is relative in our society depending on the context of its use and the terms do not inappropriately describe the victims in this case. One of the four victims was seventeen year old; one was nineteen years old; and two others were twenty years old. Referring to them as "young men" may have been the most appropriate collective description. But we conclude that the State's handful of references to them as "boys" or "kids" did not prejudice Johnson." Johnson v. State, 122 Nev. 1344, 1356, (2006).

In fact, pre-trial, Johnson filed a motion in limine regarding these references, which was argued by the parties and ruled on by the district court. Id.(Footnote 23). In the instant case, it was ineffective assistance of trial counsel to refer to the victims as "kids" even after trial counsel had filed a pre-trial motion to preclude the prosecution from arguing the same. Defense counsel found it appropriate to motion the Court to preclude these type of references and then complained on

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appeal that the State violated the court order. Yet, so did defense counsel. It was ineffective assistance of counsel to raise this issue and not follow the court's order.

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

Johnson's state and federal constitutional rights to due process, equal protection, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated because the trial attorneys provided ineffective assistance of counsel for successfully motioning the court for a bifurcated penalty hearing. U.S. Cont. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In the first penalty phase, the jury was unable to reach a verdict. Prior to the third penalty phase, trial counsel successfully petitioned the court for a bifurcated penalty phase. As a result, Mr. Johnson was severely prejudiced.

Under the Nevada death penalty scheme the jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found (NRS 175.554(3)).

Support for a bifurcated penalty phase is found in a decision by the United States Supreme Court. In Buchanan v. Angelone, 522 U.S. 269, 118 S. Ct. 757, 139 L. Ed. 2d 702,(1998), the Court explained:

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. Id., at 971. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. Id., at 972.

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Mr. Johnson's attorneys were ineffective for demanding a bifurcated penalty phase and severely prejudiced Mr. Johnson in doing so. On appeal from the third penalty phase, appellate counsel argued that inmate disciplinary reports from the Clark County Detention Center were improperly admitted over defense objection in violation of Crawford v. Washington, 541 U.S. 36, 124 Sup. Ct. 1354, 158 L.Ed. 2d 177 (2004). In Summers v. State, 122 Nev. 1326, 148 P.3d 778, (2006), in the dissenting opinion, it was reasoned that capital defendants have a Sixth Amendment right to confront the declarants of testimonial hearsay statements. However, in the instant case, on appeal from the third penalty phase a concurring opinion provides,

> For the reasons stated in my concurring and dissenting opinion in Summers v. State, I believe that capital defendants have a sixth amendment right to confront the declarants of testimonial hearsay statements admitted throughout an unbifurcated capital penalty hearing. Where the hearing is bifurcated into death eligibility and selection phases, however, I believe that the right to confrontation extends only to evidence admitted in the eligibility phase. Here, because the evidence at issue in Johnson's case- - inmate disciplinary reports- - was admitted during the selection phase only, I concur in the majorities conclusion that it was not error under the confrontation clause and Crawford v. Washington to admit the reports into evidence. 122 Nev. 1344, 1360. (Internal citations omitted).

Hence, if defense counsel had not moved for a bifurcated hearing three of the seven justices would have determined that the disciplinary reports admitted were testimonial hearsay and required confrontation in violation of Crawford v. Washington.

The following are further examples of why Johnson's attorneys should not have requested a bifurcated hearing. During the settling of jury instructions for the second portion of the third penalty phase, the State and the defense stipulated that the jury would not be advised as to the definition of reasonable doubt because they were previously instructed on reasonable doubt in the first portion of the penalty phase (A.A. Vol. 12 May 4, 2005). It was ineffective assistance of trial and appellate counsel to not insure that the jury be advised of the reasonable doubt instruction at every part of a criminal case where jury instructions are provided to the jury. If the penalty phase

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had not been bifurcated, this would not have presented itself as an issue. When the jury retired to deliberate to determine the fate of Donte Johnson, they should have been instructed on the definition of reasonable doubt.

During the opening arguments in the penalty phase, the prosecutor stated, "During the second phase of this hearing, we will have the opportunity to present additional evidence about Donte Johnson's upbringing. That will be in the second phase of this proceeding. "(A.A. Vol. 5 April 25, 2005, 11:15 AM, Pp 24) Additionally, during the first portion of the penalty phase, defense counsel objects stating, "I need to object. They keep suggesting that there is something that the jury hasn't heard, and that is in violation of this Courts order, they have done it twice." (A.A. Vol. 7 April 25, 2005, Pp 80) The prosecution then states, "The jury had already been admonished in voir dire that there are two phases in the proceeding and that facts and evidence will be presented in both phases." (A.A. Vol. 7 April 25, 2005, Pp 80)

In the instant case, the State cleverly informed the jury that if they determined that a second portion of the penalty phase was necessary, they were going to hear additional bad acts and/or character evidence of the defendant. This naturally would make a jury curious as to what they have yet to hear. This is exactly the objection by trial counsel. There would be an overwhelming temptation amongst a reasonable jury to find that the mitigators do not outweigh the aggravators in order to determine what the nature of the evidence was. Appellate counsel was ineffective for failing to raise this issue on appeal. Trial counsel was ineffective for obtaining a bifurcated penalty phase.

Additionally, the bifurcated hearing provided the prosecution the opportunity to comment during the second portion of the penalty phase on mitigators that the jury had found. (See May 4, 2005, Pp 35). Lastly, the bifurcated penalty phase gave the opportunity for the State to make two

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opening arguments, two closing arguments, and two rebuttal closing arguments. Whereas, if the case was not bifurcated, the prosecution would make one opening argument, one closing argument, and a rebuttal argument. Additionally, the State would not be given an opportunity to comment and question on mitigators already found by the jury.

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

Johnson's state and federal constitutional rights to due process, equal protection, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated because the trial attorneys failed to request an appropriate mitigation instruction U.S. Cont. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In the instant case, jury instruction number three stated,

> The jury must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt. The jurors need not find mitigating circumstances unanimously (A.A. Vol. 7 April 27, 2005, P.M.,Pp 11).

In the instant case, the jury should have been advised that mitigating circumstances do not need to be found beyond a reasonable doubt which they were instructed on. However, the jury should have been told, "a mitigating circumstance is found if any one juror believes that it exist." The jury was instructed that a mitigator need not be found unanimously. However, that fails to explain to the jury that a mitigating circumstance can be found by a single juror. The jurors who read the instruction as a whole may believe that a majority of jurors necessarily were needed to find a mitigator.

Mr. Johnson acknowledges that a similar issue was considered by the Nevada Supreme Court in Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996). In Jimenez, the petitioner argued that the jury instructions would lead a reasonable juror to the belief that a mitigating circumstance must be found unanimously. 112 Nev. 610, 624.

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In a capital case, a sentencer may not be precluded from considering any relevant mitigating evidence. Mills v. Maryland, 46 U.S. 367, 374-75, 100 L.Ed.2d 384, 108 Sup. Ct. 1860 (1988). This rule is violated if the jury believes it cannot give mitigating evidence any effect unless they unanimously agree upon the mitigating circumstance. Id. at 375. In Jimenez, the Nevada Supreme Court held,

> "...there was no basis in the instruction for jurors to believe that there own individual views on the existence and nature of mitigating circumstances could not be applied by each of them in weighing the balance between aggravating circumstances and mitigating circumstances." Id. at 625.

Admittedly, the jury instructions do not state that a mitigating circumstance must be found unanimously. However, counsel for Mr. Johnson tried the instant case in 2005. The Nevada Supreme Court's decision in Jimenez v. Nevada was decided in 1996. Hence, counsel should have been aware of the Jimenez decision and insured that the jury was properly instructed that each individual juror could find the existence of a mitigator even though eleven other jurors disagreed. Appellate counsel was ineffective for failing to raise this issue on appeal. Trial counsel was ineffective for failing to offer such a jury instruction.

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

Johnson's state and federal constitutional rights to due process, equal protection, a fair penalty hearing, and a right to be free from cruel and unusual punishment were violated because appellate counsel failed to raise on appeal the prosecution improperly impeaching a defense witness. U.S. Cont. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

During the penalty phase of this matter, the prosecutor improperly elicited evidence of a misdemeanor conviction of Mr. Johnson's mitigation witness. Upon defense counsel's objection,

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the prosecutor argued that he was specifically eliciting the information regarding Mr. Zamora's prior arrest for impeachment purposes. The district court sustained the objection but provided no admonishment to the jury.

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

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

NRS 50.095 states as follows:

"Impeachment by evidence of conviction of a crime.

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

It is important to note that the prosecutor introduced the mitigation witness's prior misdemeanor arrest, in direct violation of NRS 50.095.

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

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

In the instant case, the defense attorney clearly objected to this improper impeachment evidence of an important mitigation witness. The rules and caselaw clearly demonstrate the error made by the prosecutor. Appellate counsel was ineffective for failing to raise this issue on direct appeal.

X. THE DEATH PENALTY IS UNCONSTITUTIONAL

Johnson's state and federal constitutional rights to due process, equal protection, right to be free form cruel and unusual punishment, and right to a fair penalty hearing were violated because the death penalty is unconstitutional. U.S. Const. Amend. V, VI, VII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

A. NEVADA'S DEATH PENALTY SCHEME DOES NOT NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson, 428 U.S. at 296. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6P.3d at 996; Arave, 507 U.S. at 474; Zant, 462 U.S. at 877; McConnell, 121 Nev. At 30, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually and all first-degree murderers. As a result, in 2001, Nevada had the second most persons on death row per capita in the nation. James S. Liebman, A Broken System: Error Rates

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in Capital Cases, 1973-1995 (2000); U.S. Dept. Of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 2001; U.S. Census Bureau, State population Estimates: April 2000 to July 2001, http://eire.census.gov/pspest/date/states/tables/ST-eest2002-01.php. Professor Liebman found that from 1973 through 1995, the national average of death sentences per 100,000 population, in states that have the death penalty, was 3.90. Liebman, at App. E-11.

The sates with the highest death rate for the death penalty for this period were as follows: Nevada – 10.91 death sentences per 100,000 population; Arizona - 7.82; Alabama - 7.75; Florida - 7.74; Oklahoma -7.06; Mississippi - 6.47; Wyoming -6.44; Georgia - 5.44; Texas - 4.55. Id. Nevada's death penalty rate was nearly three time the national average and nearly 40% higher than the next highest state for this 12 year period. Such a high death penalty rate in Nevada is due to the fact that neither the Nevada statues defining eligibility for the death penalty nor the case law interpreting these statues sufficiently narrows the class of persons eligible for the death penalty in this state.

Johnson recognizes that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See Leonard, 117 Nev. at 83, 17 P.3d at 416 and cases cited therein. Nonetheless, the Court has never explained the rationale for its decision on this point and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

B. THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.

Johnson's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the death penalty is cruel and unusual punishment and under the Eighth and Fourteenth Amendments. He recognizes that this

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Court has found the death penalty to be constitutional, but urges this Court to overrule its prior decisions and presents this issue to preserve it for federal review.

Under the federal constitution, the death penalty is cruel and unusual in all circumstances. *See* Gregg v. Georgia, 428 U.S. 153, 227 (Brennan, J., dissenting); id. at 231 (Marshall, J., dissenting); contra, id. at 188-195 (Opn. of Stewart, Powell and Stevens, JJ.); id. at 276 (White, J., concurring in judgment). since stare decisis is not consistently adhered to in capital cases, e.g., Payne v. Tennessee, 111 S.Ct. 2597 (1991), this court and the federal courts should reevaluate the constitutional validity of the death penalty.

The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. While the Nevada case law has ignored the difference in terminology, and had treated this provision as the equivalent of the federal constitutional prohibition against "cruel and unusual punishments, e.g. Bishop v. State, 95 Nev. 511, 517-518, 597 P.2d 273 (1979), it has been recognized that the language of the constitution affords greater protection than the federal charter: "under this provision, if the punishment is either cruel or unusual, it is prohibited. "Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death penalty may not have been considered "cruel" at the time of the adoption of the constitution in 1864, "the evolving standards of decency that make the progress of a maturing society. "Trop v. Dulles, 356 U.S. 86, 101 (1958) have led in the recognition even by the staunchest advocates of its permissibility in the abstract, that killing as a means of punishment is always cruel. *See* (Furman v. Georgia, 408 U.S. 238, 312 (White, J., concurring); *See* Walton v. Arizona, 110 S.Ct. 3047, 3066 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

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The death penalty is also unusual, both in the sense that is seldom imposed and in the sense that the particular cases in which it is imposed are not qualitatively distinguishable from those in which is it not. Further, the case law has so broadly defined the scope of the statutory aggravating circumstances that it is the rare case in which a sufficiently imaginative prosecutor could not allege an aggravating circumstance. In particular, the "random and motiveless" aggravating circumstance under NRS 200.033(9) has been interpreted to apply to "unnecessary" killings, e.g. Bennett v. State, 106 Nev. 135, 143, 787 P.2d 797 (1990), a category which includes virtually every homicide. Nor has the Court ever differentiated, in applying the felony murder aggravating factor, between homicides committed in the course of felonies and homicides in which a felony is merely incidental to the killing. CF. People v. Green, 27 Cal.3d 1, 61-62, 609 P.2d 468 (1980). Given these expansive views of the aggravating factors, they do not in fact narrow the class of murders for which the death penalty may be imposed, nor do they significantly restrict prosecutorial discretion in seeking the death penalty: in essence, the present situation is indistinguishable from the situation before the decision in Furman v. Georgia, 408 U.S. 238 (1972) when having the death penalty imposed was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 309 (Stewart, J., concurring). There is no other way to account for the fact that in a case such as Faessel v. State, 108 Nev. 413, 836 P.2d 609 (1992), the death penalty is not even sought and the defendant receives a second-degree murder sentence; in Mercado v. State, 100 Nev. 535, 688 P.2d 305 (1984), the perpetrator of an organized murder in prison receives a life sentence; and appellant, convicted of killing the woman he loved in a drug-induced frenzy, is found deserving of the ultimate penalty the state can exact.

The United States Supreme Court, unfortunately, has continued to confuse means with

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ends: while focusing exclusively upon the procedural mechanisms which are supposed to produce justice, it has neglected the question whether these procedures are in fact resulting in the death penalty being applied in a rational and even-handed manner, upon the most unredeemable offenders convicted of the most egregious offenses. The fact that this case was selected as one of the very few cases in which the death penalty should be imposed is a sufficient demonstration that these procedures do not work. Accordingly, this Court should recognize that the death penalty as currently constituted and applied results in the imposition of cruel or unusual punishment, and the sentence should therefore be vacated.

C. EXECUTIVE CLEMENCY IS UNAVAILABLE.

Johnson's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that ever of the 38 states that has the death penalty also has clemency procedures. Ohio Adult parole Authority v. Woodward, 523 U.S. 272, 282 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldrige, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2006 (December 2007 NCJ 220219).

Johnson is informed and believes and on that basis alleges that since the reinstatement of

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the death penalty, only a single death sentence in Nevada has been commuted and in that case, it was commuted only because the defendant was mentally retarded and the U.S. Supreme Court found that the mentally retarded could no longer be executed. It cannot have been the legislature's intent to create clemency proceedings in which the Board merely rubber-stamps capital sentences. The fact that Nevada's clemency procedure is not exercised on behalf of death-sentenced inmates means, in practical effect, that is does not exist. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring the vacation of Johnson's sentence.

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

In support of this claim, Mr. Johnson alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

1. Mr. Johnson hereby incorporates each and every allegation contained in this petition as if fully set forth herein.

2. The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. NRS 200.020(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguable exist in every first-degree murder case. *See* NRS 200.033. Nevada permits the imposition of the death penalty for all first-degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson,

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burglary, kidnapping, to receive money, torture, to prevent lawful arrest, and escape. *See* NRS 200.033. The scope of the Nevada death penalty statute is thus clear: The death penalty is an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all.

3. The death penalty is accordingly permitted in Nevada for all first-degree murders, and first-degree murder, in turn, are not restricted in Nevada within traditional bounds. As the result of unconstitutional form jury instructions defining reasonable doubt, express malice and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing.

4. As a result of plea bargaining practices, and imposition of sentences by juries, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Johnson stands convicted; and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to declines to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

5. Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment form the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by

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Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from he statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern. The irrationality of the Nevada capital punishment system is illustrated by State of Nevada v. Jonathan Daniels, Eighth Judicial District Court Case No.C126201. Under the undisputed facts of that case, Mr. Daniels entered a convenience store on January 20, 1995, with the intent to rob the store. Mr. Daniels then held the store clerk at gunpoint for several seconds while the clerk begged for his life; Mr. Daniels then shot the clerk in the head at point blank range, killing him. A moment later, Mr. Daniels shot the other clerk. Mr. Daniels and two friends then left the premises calmly after first filling up their car with gas. Despite these egregious facts, and despite Mr. Daniels' lengthy criminal record, he was sentenced to life in prison for these acts.

6. There is not rational basis on which to conclude that Mr. Daniels deserves to live whereas Mr. Johnson deserves to die. These facts serve to illustrate how the Nevada capital punishment system is inherently arbitrary and capricious. Other Clark County cases demonstrate this same point: In State v. Brumfield, Case No. C145043, the District Attorney accepted a plea for sentence of less than death for a double homicide; and in another double homicide case involving a total of 12 aggravating factors resulted in sentences of less than death for two defendants. State v. Duckworth and Martin, Case No. C108501. Other Nevada cases as aggravated as the one for which Mr. Johnson was sentenced to death have also resulted in lesser sentences. See Ewish v. State, 110 Nev. 221, 223-25, 871 P.2d 306 (1994); Callier v. Warden, 111 Nev. 976, 979-82, 901 P.2d 619 (1995); Stringer v. State, 108 Nev. 413, 415-17 836 P.2d 609 (1992).

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7. Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less than 20%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

8. These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . . longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . . " as the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency" (ABA Report). The ABA concludes that this morass has resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race. Like wise, the states of Illinois and Nebraska have recently enacted or called for a moratorium on imposition of the death penalty.

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9. The United Nations High Commissioner for Human Rights has recently studied the American capital punishment process, and has concluded that "guarantees and safeguards, as well as specific restrictions on Capital Punishment, are not being respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing." The High Commissioner has further concluded that "race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death." The report also described in detail the special problems created by the politicization of the death penalty, the lack of an independent and impartial state judiciary, and the racially biased system of selecting juries. The report concludes:

> The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings an lynching enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice." Yet they are not acceptable in civilized society.

10. The Nevada capital punishment system suffers from all of the problems identified in the ABA and United Nations reports - the under funding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial *per se*.

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

In support of this claim, Mr. Johnson alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power and an evidentiary hearing:

1. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to life. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 3 (1948) [hereinafter "UDHR"]; International Covenant on Civil and Political Rights, adopted December 19, 1966, Art. 6, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter "ICCPR"}. The ICCPR provides that "[n]o one shall be arbitrarily deprived of his life." ICCPR, Art. 6. Other applicable articles include, but are not limited to ICCPR, Art. 9 ("[n]o one shall be subjected to arbitrary arrest"), ICCPR, Art. 14 (right to review of conviction and sentence by a higher tribunal "according to the law"), ICCPR, Art. 18 ("right to freedom of thought"), UDHR, Art. 18 (right "freedom of thought"), UDHR, Art. 19 (right to "freedom of opinion and expression"), UDHR, Art. 5 and ICCPR, Art. & (prohibition against cruel, inhuman or degrading treatment or punishment); *See also* The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). In support of such claims, Mr. Johnson reasserts each and every claim and supporting fact contained in this petition as if fully set forth herein.

2. The United States Government and the State of Nevada are required to abide by norms of international law. The Paquet Habana, 20 S.Ct. 290 (1900)("international law is part of

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our law and must be ascertained and administered by the courts of justice of appropriate jurisdictions"). The Supremacy Clause of the United States Constitution specifically requires the State of Nevada to honor the United States' treaty obligations. U.S. Constitution, Art. VI.

3. Nevada is bound by the ICCPR because the United States has signed and ratified the treaty. In addition, under Article 4 of the ICCPR no country is allowed to derogate from Article 6. Nevada is bound by the UDCR because the document is a fundamental part of Customary International Law. Therefore, Nevada has an obligation not to take life arbitrarily.

4. A recent United Nations report on human rights in the United States lists some specific ways in which the American legal system operates to take life arbitrarily. Report of the Special Rapportuer on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/681 (Add. 3)(1998) [hereinafter "Report of Special Rapportuer"]. United Nations Special Rapportuer Bacre Waly Ndiaye found "[m]any factors other than the crime itself, appear to influence the imposition of the death sentence [in the United States]." Class, race and economic status, both of the victim and the defendant are key elements. Id., at 62. Other elements Mr. Ndiaye found to unjustly affect decisions regarding whether the convicted person should live or die include:

a. the qualifications of the capital defendant's lawyer;

b. the exclusion of people who are opposed to the death penalty from juries;

c. varying degrees of information and guidance given to the jury, including the importance of mitigating factors;

d. prosecutors given the discretion whether or not to seek the death penalty;

e. the fact that some judges must run for re-election.

5. The reasons why Mr. Johnson's conviction and sentence are arbitrary and, therefore, violate International Law are described throughout this petition; Mr. Johnson

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incorporates each and every and supporting facts as if fully set forth herein. However, to assist the court, Mr. Johnson provides the following examples of how his conviction and sentence are arbitrary in nature (they specifically correspond to the arbitrary factors listed above from the Report of Special Rapportuer):

a. People who were opposed to the death penalty were excluded from Mr. Johnson's jury;

b. A single aggravating action (burglary) was allowed to be used against Mr. Johnson in multiple ways in order to justify the imposition of the death penalty, while mitigating factors were not fully considered;

c. The prosecutor had discretion in whether or not to seek the death penalty;

d. The judge presiding over Mr. Johnson's trial was elected;

e. The Nevada Supreme Court which reviewed the case is elected;

f. Finally, an additional factor not listed in the Report of the Special Rapporteur but clearly an indication of the arbitrary nature of the imposition of the death sentence in Nevada, members of the judiciary admit that they do not read briefs regarding the death penalty cases before them.

6. These violations of international law were prejudicial *per se*. In the alternative, the State cannot show beyond a reasonable doubt that these violations did not affect Mr. Johnson's conviction and sentence and thus relief is required.

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

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

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Art. IV, Sec. 21.

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

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

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

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of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

Based on the foregoing, Mr. Johnson would respectfully request that this Court reverse his conviction based upon cumulative errors of counsel.

XIV. MR. JOHNSON IS ENTITLED TO AN EVIDENTIARY HEARING

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

In the instant case, an evidentiary hearing is necessary to question trial counsel and appellate counsel. Mr. Johnson's counsel fell below a standard of reasonableness. More importantly, based on the failures of trial and appellate counsel, Mr. Johnson was severely prejudiced, pursuant to Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984).

Under the facts presented here, an evidentiary hearing is mandated to determine whether the performance of trial counsel and appellate counsel were effective, to determine the prejudicial impact of the errors and omissions noted in the petition, and to ascertain the truth in this case.

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CONCLUSION

Based on the foregoing, Mr. Johnson's writ in the instant matter must be granted based upon violations of the United States Constitution Amendments Five, Six, Eight, and Fourteen.

DATED this 12 day of October, 2009.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
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Las Vegas, Nevada 89101
Attorneys for the Petitioner
DONTE JOHNSON

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
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AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

CHRISTOPHER R. ORAM, being first duly sworn, deposes and says:

I am an attorney duly licensed to practice law in the State of Nevada. I am counsel for the Defendant in the above-entitled matter. I have personal knowledge of all matters contained herein and am competent to testify thereto. As post-conviction counsel in the instant case the undersigned made contact with Mr. David Figler. Mr. Figler was trial counsel at the first trial and at the second penalty hearing before the three judge panel for Mr. Donte Johnson. Mr. Figler informed the undersigned that the first jury filled out a mitigation form finding more than thirty (30) mitigators including one indicating the defendant's role in the instant case.

After discussing the matter with Mr. Figler, the undersigned has made attempts to obtain the penalty phase verdict forms form the first jury trial. Unfortunately, the requested verdict forms provided by the court clerk were the guilt verdict forms from the first trial. Further efforts to obtain the mitigation form have yet to result in the location of the verdict form. However, once an investigator is appointed, the investigator can go through the entire court file in order to locate the mitigation form which the court clerks have not been able to locate.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on: October 12, 2009

Christopher R. Oram, Esq.
Attorney for Defendant,
Donte Johnson

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Attorney for Defendant
DONTE JOHNSON

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

RECEIPT OF COPY

RECEIPT OF A COPY of the attached **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS** is hereby acknowledged this 12 day of October, 2009.

DAVID ROGER, DISTRICT ATTORNEY
By Rasondra Gilbert
DEPUTY DISTRICT ATTORNEY
200 Lewis Avenue

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

EXHIBIT 29

EXHIBIT 29

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SUPP
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Attorney for Defendant
DONTE JOHNSON

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS WRIT OF HABEAS CORPUS.

COMES NOW, Defendant, DONTE JOHNSON, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., and hereby submits this Second Supplemental Brief in support of Defendant's Writ of Habeas Corpus.

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This supplement is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 14th day of July, 2010.

Respectfully submitted by:

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STATEMENT OF THE CASE

On September 2, 1998 an indictment was returned charging Donte Johnson with one count of burglary while in possession of a firearm, four counts of murder with use of a deadly weapon, four counts of robbery with use of a deadly weapon, four counts of kidnapping with use of a deadly weapon [1].

On September 15, 1998, notice of intent to seek the death penalty was filed (ROA 2 pp. 271). On February 26, 1999, a supplemental notice of intent to seek death penalty was filed. The notice indicated the murder was committed by (1), a person who knowingly created great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person; (2), the murder was committed while the person was engaged alone or with others, in the commission of or an intent to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home, or kidnapping in the first degree and that the person charged (A), killed or attempted to kill the person murdered or (B), knew or had reason to know that life would be taken or lethal force used; (3), the murder was committed to avoid or prevent a lawful arrest or to affect an escape from custody; and (4), the defendant has, in the immediate proceedings, been convicted of more than one offense of murder in the first or second degree (ROA 2 pp. 388)

On September 16, 1998, a superceding indictment was filed adding an additional charge of conspiracy to commit robbery and/or kidnapping and/or murder (ROA 2 pp. 278). On February 10, 1999, Mr. Johnson filed a pro per motion to withdraw the special public defender's office based upon a conflict of interest (ROA 2 pp. 380) The State filed an opposition to the pro per motion to withdraw counsel on February 19, 1999 (ROA 2 pp. 385). Mr. Johnson filed a second motion to dismiss counsel on April 17, 1999 (ROA2 pp.403). On April 15, 1999 the District Court considered the defendants motion to dismiss counsel (ROA 2 pp. 410). At the conclusion of the hearing, the Court denied the defendant's pro per motion to dismiss counsel (ROA 2 pp. 417).

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[1]The State admitted that Todd Armstrong was a fourth suspect in the case (ROA 8 1835, DAY 2, pp. 12). On direct examination, Todd Armstrong was asked whether he was promised anything regarding whether he would be prosecuted for this crime. He states that he was not promised anything by the District Attorney's office (JT Day 2 pp. 212; ROA 8 pp. 2035).

On May 17, 1999, the defendant filed a motion to proceed pro per with co-counsel and an investigator (429). The defendant requested permission to represent himself pursuant to Faretta v. California, 422 U.S. 806 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). On June 28, 1999, the defendant filed a pro per motion entitled memorandum to the court, complaining of ineffective assistance of counsel (ROA 2 499-504).

On December 6, 1999, the Court considered the defendant's motion to compel disclosure of existence of substance of expectations or actual receipt of benefits or preferential treatment for cooperation with the prosecution. The Court granted the motion to the extent that the State had a continuing duty to give information to the defense (ROA 6 pp. 1348).

On December 22, 1999, the defendant, again, filed a memorandum with the Court insisting that defense counsel file a motion to preclude the testimony of Sharla Severs (ROA 6 pp. 1457). On December 29, 1999, the defendant filed a memorandum with the Court requesting that his attorneys file numerous motions which had not been filed (ROA 6 pp. 1492).

STATEMENT OF THE FACTS

Mr. Johnson hereby adopts the statement of the facts as enunciated in the first supplemental brief.

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the

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proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington ,466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. In Nevada, the Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the U.S. Supreme Court in Strickland v. Washington, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 Nev. 1996).

In meeting the prejudice requirement of ineffective assistance of counsel claim, Mr. Johnson must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine confidence in the outcome. Kirksey v. State, 112 Nev. at 980. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,783 P.2d 430 Nev. 1989); Olausen v. State, 105 Nev. 110,771 P.2d 583 Nev. 1989).

The Nevada Supreme Court has held a defendant has a right to effective assistance of

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appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See Jones v. Barnes, 463 U.S. 745, 751-54, 77 L.Ed. 2d 987, 103 S. Ct. 3308 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); Leaks v. United States, 841 F. Supp. 536, 541 (S.D.N.Y. 1994), aff'd, 47 F.3d 1157 (2d Cir.). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. Heath, 941 F. 2d at 1132.

In the instant case, Mr. Johnson's proceedings were fundamentally unfair. The defendant received ineffective assistance of counsel. Based upon the following arguments:

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

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

A. MR. JOHNSON RECEIVED AN UNCONSTITUTIONAL JURY VENIRE

At the conclusion of voir dire, trial counsel argued that the jury pool did not reflect a cross-section of Clark County, Nevada (ROA 8 pp. 1833, JT Day 2 pp. 10). Specifically, trial counsel stated that the jury pool consisted of over eighty (80) potential jurors and only three (3) were potential minority jurors (ROA 8 pp. 1833).

In Williams v. State, 121 Nev. 934; 125 P. 3d 627 (2005), the Nevada Supreme Court

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considered a defendant's Sixth Amendment right to a fair cross section of the community in a venire panel. The Nevada Supreme Court expressed,

> Williams is entitled to a venire selected from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution. The Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community. Instead, the Sixth Amendment only requires that "'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Thus, as long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible. Williams 121 Nev. 934, 939, 940 (see also Evans v. State, 112 Nev. 1172, 1186, 926 P. 2d 265, 274 (1996), Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)).

In Williams, the defense moved to dismiss the first venire because it contained only one African American out of forty venire members. In Williams, this Court explained,

> The first venire included only one African American person out of forty venire members. Clark County, Nevada, contains 9.1% Black or African American people. Id. at 938. (citing the United States Census Bureau, profile of general demographic characteristics (2000).

In fact, in Williams, the Court found that "the district court stated that, on average, three (7.5%) to four (10%) African Americans are present in a forty-person venire. This reflects the percentage of African Americans in Clark County (9.1%)." Williams,121 Nev. 934, 941. In the instant case, Mr. Johnson did not receive between 3-4 African Americans per every forty (40) potential jurors. Additionally, like Mr. Williams, Mr. Johnson had less African Americans in his venire panel by percentage, only three (3) minority jurors in a pool of over eighty (80) potential jurors (ROA 8 pp. 1833).

Mr. Johnson should have been provided a new jury venire. In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986), the United States Supreme Court recognized that the remedy for Batson violations would vary from jury system to jury system and allow the courts to fashion their own remedy. 476 U.S. at 99. The United States Supreme Court reasoned that one of the remedies would be to discharge the venire and empanel an entirely new one. Id.

Mr. Johnson was entitled to that remedy. Mr. Johnson's venire panel insufficiently represented a cross section of the community according to statistics provided by the United States Census. Mr. Johnson's venire panel had a less percentage of African Americans than a relevant

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cross section of the community.

On direct appeal, appellate counsel failed to raise this issue. If appellate counsel had raised this issue based upon the United States Constitution, the result of the appeal would have been different and Mr. Johnson would have been granted a new trial.

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

In the instant case, Mr. Johnson did not receive between six and nine (6-9) African Americans in his venire of approximately eighty (80). Additionally, this was compounded as the State dismissed a African American juror. There was a contemporaneous Batson Challenge on Juror number seven (7) (JT Day 2 pp. 6, ROA 8 pp. 1833).

The defense complained the State had excluded the juror in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986).

> In State of Arizona v. Holder, 155 Ariz. 83 , 745 P.2d 141(1987), the court stated: A criminal defendant can use the facts and circumstances of his individual case to make a prima facie showing that the state is violating his equal protection rights by using peremptory challenges systematically to exclude members of the defendant's race from the jury.

The Holder court also held,

> In Batson, the United States Supreme Court indicated that to establish a prima facie case the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of race. 155 Ariz. 83 , 745 P.2d 141(1987).

Mr. Johnson would contend he is a member of a cognizable racial group and the prosecutor did use a peremptory challenge to remove a member of Mr. Johnson's race.

Juror number seven (7) was only one of three potential minority jurors in the jury pool. The State preempted this juror[2] (ROA 8, 1829, JT 2 pp. 6). Hence, only one potential minority

[2] Additionally, one of the only other three potential minority jurors who was in the jury panel never made it to the questioning process (ROA 8 1832).

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juror was available for selection[3]. Trial counsel objected to the fact that there were only three potential minority jurors in a pool of over eighty (80) (JT Day 2 pp. 10, ROA 8 1829).

In response to the Batson Challenge, the State claimed that the juror had a stepson who had been in jail (ROA 8 pp. 1830). The prosecutor also explained that she had crossed her arms when questioned (ROA 8 BS 1830) Ms. Fuller informed the prosecutor that she could be fair (ROA 12 BS 2821). Ms. Fuller indicated that sitting in judgment of Donte Johnson did not cause her concern. (12 BS 2821). Ms. Fuller indicated to the prosecutor that there was nothing in her social or religious background that would cause her a problem with sitting in judgment (12 BS 2821, JT Day 1 pp. 219). Ms. Fuller stated that she could pass judgment fairly (12 BS 2821). Ms. Fuller also explained without hesitation, she could consider all four forms of punishment. (VOL a. pp. 221 BS 2823). Ms. Fuller again affirmed that she could follow the law and consider all four forms of punishment (2823).

Ms. Fuller was asked whether she could consider the death penalty and she indicated she could (2823). In fact, Ms. Fuller went further, stating that she could check the block on the form if she believed the death penalty was the appropriate punishment (BS 2824). The last question by the prosecutor was, "Can you promise me this: That the verdict you pick will be a just and fair verdict, no matter how difficult the choice? Juror Fuller stated, "definitely fair, yes". The Court then stated, "Pass for cause" and the prosecutor stated yes. (JT Day 1 pp. 223).

A review of Ms. Fuller's questioning by the prosecutor establishes that she could be fair to the State of Nevada and would have considered the death penalty. There was nothing in the transcript to reflect that she would be unfair to the State of Nevada. In fact, defense counsel accused the State of using pretextual reasons for excusing Ms. Fuller[4]. (JT Day 2 pp. 8).

A review of Ms. Fuller's testimony demonstrates the State had no race neutral reason to

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[3] It appears the third, and final minority juror, was a black female who was seated in the number three position. It is difficult to ascertain from the record whether she actually was sworn as a juror.

[4]After the prosecutor provided the race neutral reasons, defense counsel stated, "Now which of those reasons are you determining to be race neutral and which do you determine to be pretextual so I can respond to them" (ROA 8 pp. 1831, JT Day 2 pp. 8).

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preempt this particular juror. Ms. Fuller's testimony demonstrates that she should not have been systematically excluded. (See Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d. 69, (1986)).

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

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

Additionally, the United States Department of Justice concluded that in 1997, nine percent (9%)of the African American population in the United States was under some form of correctional supervision compared to two percent (2%) of the Caucasian population[5]. Statistics from the United States Department of Justice show that at midyear 2008, there were 4,777 black male inmates per 100,000 black males held in state and federal prisons and local jails, compared to 1,760 Hispanic male inmates per 100,000 Hispanic males and 727 white male inmates per 100,000 white males[6]. Under the state's argument, virtually, every African-American as a prospective juror would be ineligible under the state's theory of racial neutrality because the statistics show they will know someone who has been arrested.

According to the Bureau of Justice Statistics presented by the Department of Justice African American's were almost three (3) times more likely than Hispanics, and five times more likely than Caucasians to be in jail[7]. Additionally, midyear 2006, African American men

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

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

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

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comprised forty-one (41%) percent of the more than two million men in custody. Overall, in 2006 African American men were incarcerated at a rate of six and a half percent (6.5%) times the rate of Caucasian Men[8].

In the instant case, the State used a reason to excuse juror Fuller that can be used against almost any single African American in Clark County. The statistics cited above illustrate that almost every African American will have had a family member or someone closely associated with him or her who has been arrested in their lifetime. Now, prosecutors are free to argue, that the potential jurors being excused because they know someone who has been arrested and their body languages (twitching of facial muscles, crossing of the arms, crossing of the legs) all establish a race neutral reason to excuse the juror.

This factor combined with the failure to ensure a cross section of the community in Mr. Johnson's jury venire established a discriminatory and unconstitutional jury selection. Appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

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

In the instant case, not only did Mr. Johnson received an inadequate jury venire and had member of his race systematically excluded, the State used peremptory challenges to remove life affirming jurors.

The defense complained that they were life affirming jurors who were not essentially opposed to considering the death penalty. The court denied the objection (ROA 8 pp. 1825; Day 2 pp. 2). The State used one of their peremptory challenge on Mr. Calbert (ROA 12, 2860; JT Day 1 pp. 258). The State used their second peremptory challenge to excuse Mr. Morine. (ROA 12, 2819).

Mr. Calbert indicated that he was opposed to the death penalty (JT Day 1 pp. 236; ROA 12 2838). Although Mr. Calbert indicated he was opposed to the death penalty he stated he would

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

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consider it (ROA 12 2839; JT Day 1 pp. 237). Mr. Calbert stated, "I mean, it would really be a situation where I just felt that the person was just so cold hearted, and that would be definitely the only answer to the problem, you know, I could consider it" (JT Day 1 pp. 237; ROA 12 pp. 2839). Mr. Calbert was challenged for cause by the State however, Mr. Calbert was again asked whether he could consider the death penalty and he answered, "Yes, I could" (ROA 12 2842; JT Day 1 pp. 240). Mr. Calbert again affirmed that he could follow the law and consider all four forms of punishment at sentencing (JT Day 1 pp. 244; ROA 12 pp. 2846).

During voir dire, the prosecution questioned prospective juror Mr. Morine (JT Day 1 pp. 68; 11 ROA 2670). Mr. Morine agreed that all four forms of punishment could be appropriate in a murder case (JT Day 1 pp. 65; 11 ROA 2668). Mr. Morine agreed that the worst possible crimes deserve the worst possible punishment (JT Day 1 pp. 66; ROA 11 pp. 2668). Mr. Morine indicated that he could impose a death sentence although he stated... "I think it would take an awful lot of compelling argument for and an awful lot of soul searching before I could ever come to that conclusion" (JT Day 1 pp. 68; 11 ROA 2670).

Interestingly enough, the district court had no difficulty excusing any juror who demonstrated reservation on the death penalty.

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

Compounded with the discriminatory and unconstitutional method in which Mr. Johnson's trial jury was selected, was the District Court's failure to recognize the standard of law in the defense's challenges for cause.

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See Jones v. Barnes, 463 U.S. 745, 751-54, 77 L.Ed. 2d 987, 103 S. Ct. 3308 (1983).

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The defense challenged three jurors for cause based upon the same legal rational. All three potential jurors indicated that having found an individual guilty of murder of the first degree they could not consider all four forms of punishment (the possibility of parole).

1. POTENTIAL JUROR FINK

Mr. Fink indicated that his favorable beliefs regarding the death penalty were "deeply held" (ROA 11 2738; JT Day 1 pp. 136). Mr. Fink was asked the following question, "So you would agree that you would always vote for the death penalty when you have premeditated intentional murders," and Juror Fink stated he would (ROA 11 2739;J T Day 1 pp. 137). The defense attempted to ask the juror if he found an individual guilty of premeditated intentional multiple murders would he automatically vote for the death penalty and an objection was sustained (ROA 11 2739; JT Day 1 pp. 137). The defense then attempted to ask the juror whether every person convicted of intentional premeditated deliberate murder should receive the same sentence, Mr. Fink indicated, yes. Mr. Fink was then asked, "Do you think the only appropriate penalty should be the death penalty to which the State successfully objected and the Court sustained the objection[9] (ROA 11 2740; JT Day 1 pp. 138).

Mr. Fink indicated that he would not take the defendant's youth into account in terms of mitigation. (ROA 11 2741; JT Day 1 pp. 139). Mr. Fink explained that if the defendant had a bad childhood, he would think that was just something used in today's society, as an excuse[10]. (ROA 11 2742; JT Day 1 pp. 140). Mr. Fink further stated that was the type of mitigation he would not consider in a penalty phase. (ROA 11 2742; JT Day 1 pp. 140).

Mr. Fink obviously believed that the only appropriate punishment for an individual convicted of premeditated deliberate first degree murder was the death penalty. A review of the transcript reflects his obvious opinions. Mr. Fink would not even consider appropriate mitigation. More importantly, the District Court erroneously precluded the defense from verifying those facts.

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[9]The question was not objectionable, but was valid questioning of a potential juror. The defense had every right to determine whether or not the juror would automatically vote for the death penalty. Which apparently, was his indication.

[10]Even the three judge panel found the mitigator that the defendant had a very bad childhood. Something Mr. Fink indicated he would not be willing to consider.

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The defense challenged Mr. Fink for cause (BS 2802 of ROA 12, JT Day 1 pp. 200). Trial counsel indicated that Mr. Fink would automatically vote for the death penalty if he convicted Mr. Johnson. The Court denied the challenge for cause (BS 2804). Therefore, the defense was forced to use of one their eight peremptory challenges to remove Mr. Fink (BS 2913). Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the trial attorney's objections to the district court's improper and unconstitutional denials of the defenses challenge for cause in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

2. POTENTIAL JUROR BAKER

Mr. Baker (just like Mr. Fink) indicated that he was a strong supporter of the death penalty (JT Day 1 pp. 152; ROA 11 2754). Mr. Baker affirmed that an individual who is found guilty of intentional and premeditated murder should receive the death penalty (JT Day 1 pp.152-153; ROA 11 2754). The defense then asked, "so you're saying that there is - - if I'm hearing you right, there is no circumstances where someone who you already convicted of a premeditated deliberate and intentional murder should get life with the possibility of parole". Juror Baker replied, "A possibility, but not parole" (JT Day 1 pp. 153; ROA 11 2754). Prospective juror Baker indicated that it would be highly unlikely that he could vote for a period or a term of years (JT Day 1 pp. 153; ROA 11 2754). Mr. Baker was further asked the following, "Let me ask you, do you feel that's appropriate for every case in which a person has been found guilty and the aggravators are there as well, do you think that person should get the death penalty every time?" Juror Baker replied, "I believe so, yes (JT Day 1 pp. 153; ROA 11 2754).

Mr. Baker did not believe he should consider the youth of the defendant in the penalty phase (JT Day 1 pp. 154; ROA 11 2755). Mr. Baker did not think that the defendant's childhood would be important to consider during the penalty phase (JT Day 1 pp. 154-155; ROA 11 2756-2757). Mr. Baker was also asked, "But once your positive that the person did the offense, it would be hard for you to come up with a scenario where you wouldn't vote for the death penalty, is that fair to say". Mr. Baker stated, "Yes, that's fair" (JT Day 1 pp. 156; ROA 11 2758).

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Trial counsel challenged Mr. Baker for cause (ROA 12 2802). Trial counsel challenged on the basis that Mr. Baker would automatically vote for the death penalty and he could not consider all four forms of punishment (ROA 12 2802). The District Court denied the challenge for cause (ROA 12 2804). Therefore, the defense was forced to use another peremptory challenge to excuse prospective juror, Mr. Baker (ROA 12 pp. 2878; JT Day 1, pp. 276).

Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the trial attorney's objections to the improper and unconstitutional denials of the defenses challenge for cause.

3. POTENTIAL JUROR SHINK

Mr. Shink indicated that he would impose a death sentence if there was overwhelming evidence of guilt (BS 2792). Mr. Shink was asked the following question, "So if he's the individual that pulled the trigger, that's when you would say the person deserves the death penalty?" Mr. Shink stated, "Yes" (JT Day 1 pp. 191; 12 ROA pp. 2793).

Mr. Shink was so bizarre in his answers that he actually indicated that prisoners should be given numbers, and a number should be picked out of the barrel for their execution. Mr. Shink affirmed that they should use a "Logan's Run" theory on punishment[11] (JT Day 1 pp. 191-192; ROA 12 pp. 2793). Mr. Shink was asked the following question, "You mentioned earlier, probably the best thing to do is just get a random drawing and go into the prisons and run around and pull out the numbers?" Juror Shink replied, "Yeah". Mr. Shink was then asked, "So you're saying that people who are in prison from anywhere from car theft to murder, they're eligible for Logan's Runs numbers?" Mr. Shink stated, "Yes, unless they got less than a year, they would be exempt (JT Day 1 pp. 192; 12 ROA 2793). Defense counsel then asked Mr. Shink, "How long have you had this view of kill em' all let God sort em out?" Mr. Shink replied, "I don't know a long time" (JT Day 1 pp. 192; 12 ROA 2793). Mr. Shink was further questioned as to his "Logan's Run" theory. Defense counsel stated, "How ingrained is it in your beliefs that it's easier to kill or it's best to put them in a drum, pull out the numbers and get rid of them?" Mr. Shink

[11] Logan's run refers to a Hollywood Film where people are randomly considered for death. (JT Day 1 pp. 191-192; 12 ROA 2793)

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stated, "because they had a choice. There was nobody twisting their arms to do what they did. They made a decision. Nobody else did" (ROA 12 2794-2795; JT Day 1 pp. 193-194).

Trial counsel challenged Mr. Shink for cause based on his "Logan Run Theory" of pulling out numbers for execution, on car thieves to murderers (12 ROA 2802-2803 JT Day 1 pp. 201). Unbelievably, the District Court denied the challenge for cause (JT Day 1 pp. 204; 12 ROA 2805). Hence, the defense was forced to use another peremptory challenge to excuse a prospective juror. Mr. Henry Shink who believed in a "Logan's Run" theory of execution was acceptable to the judge (12 ROA 2847).

Mr. Johnson received ineffective assistance of appellate counsel for failure to raise the trial attorney's objections to the improper and unconstitutional denials of the defenses challenge for cause in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

For instance, prospective juror Davis, initially indicated that he did not believe in the death penalty (JT Day 1 pp. 295, ROA 12 pp. 2897). However, under further questioning, Mr. Davis was asked, "Now if the judge was to instruct you on the law and say that you have to consider everything in a particular case, can you follow the law to consider things?" Juror Davis stated, "I can consider stuff ya" (12 ROA 2900; JT Day 1 pp. 295). However, the transcript reflects that Mr. Davis was significantly opposed to the death penalty. Therefore, the State's challenge for cause was granted. Therefore, the district court determined that a prospective juror who opposed the death penalty was not appropriate to sit on the jury. However, someone who believed that a car thief should have a number thrown into a barrel until it was his time for execution was properly seated.

This violates the equal protection clause of the United States Constitution. The Court treated Donte Johnson very differently than the State of Nevada. Mr. Johnson was not entitled to have jurors seated that could consider life as punishment. However, the State of Nevada was entitled to have "Logan's Run jurors". This is a blatant violation of the fourteenth, fifth and eighth amendments to the United States Constitution.

The challenge for cause against Mr. Davis was granted over the defense's request to

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continue to question Mr. Davis (12 ROA 2903, JT Day 1 pp. 301).

Similarly, prospective juror Grecco was challenged for cause by the State and the judge granted the State's challenge (12 ROA 2945-2947; JT Day 1 pp. 343). Mr. Greko had demonstrated reservation on the death penalty (Even though Mr. Grecco had answered in his questionnaire (question number 45) that he would not always vote for a life sentence). Mr. Grecco answered "no" in his questionnaire when asked if he would always vote for life and never consider the death penalty (JT Day 1 pp. 345; ROA 12 pp. 2947). The challenge for cause was sustained (JT Day 1 pp. 345; ROA 12 pp. 2947). Mr. Grecco was asked whether he would legally consider all four forms of punishment. Mr. Grecco said, "legally I would consider all four, yes". (ROA 12 pp. 2931; JT Day 1 pp. 329). For a second time, juror Grecco stated "legally I would have to consider it" regarding the death penalty (ROA 12 pp. 2944; JT Day 1 pp. 333).

Hence, any prospective juror with reservations regarding the death penalty was successfully challenged by the State. Whereas, people who would only consider the death penalty and could not consider a life sentence, including a prospective juror with a "Logan's Run" theory, could not be successfully challenged for cause by the defense in violation of the Fourteenth, Fifth, Sixth, and Eighth amendments to the United States Constitution.

In Wainwright v. Witt, 469 U.S. 412, 105 Sup. Ct. 844, 83 L.Ed. 2d 841, the United States Supreme Court clarified the proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment. The Standard is whether the jurors view would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath" 496 U.S. 412, 424. See also Witherspoon v. Illinois, 391 U.S. 510, 88 Sup. Ct. 1770, 20 L.Ed. 2d 776 (1968). See, Adams v. Texas, 448 U.S. 38 (1980). The United States Supreme Court concluded in Dennis v. United States, 339 U.S. 162, 168 (1950) that trial courts have a serious duty to determine the question of actual bias, and a broad discretion in it's ruling on challenges. Therefore... "in exercising it's discretion, a trial court must be zealous to protect the rights of the accused".

In Marshall v. Loneerger, 459 U.S. 422, 103 Sup. Ct. 843, 74 L.Ed. 2d. 646 (1983) "the question is not whether a reviewing court might disagree with the trial court's findings, but

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whether those findings are fairly supported by the record" 459 U.S. at 432. In United States v. Martinez-Salazar, 528 U.S. 304, 120 Sup. Ct. 774, 145 L.Ed. 2d. 1792 (2000), the United States Supreme Court held, "although the peremptory challenge plays an important role in reenforcing a defendant's constitutional right to trial by an impartial jury, this court has long recognized that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not a federal constitutional dimension, See Ross v. Oklahoma, 487 U.S. 81, 88, 108 Sup. Ct. 2273, 101 L. Ed.2d 80 and Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L. Ed.2d 759 (1965).

In the United States v. Martinez-Salazar, the defendant challenged a single juror for cause, but when the trial judge swore the jury. Whereas, in the instant case, the defendant was forced to use three peremptory challenges after the trial judge erroneously failed to grant three challenges for cause even after the jury was announced. In the instant case, the defense clearly complained about the juries makeup and their failure to represent a cross-section of the community. In Ross, the United States Supreme Court held that a loss of a single peremptory challenge does not constitute a violation of the constitutional right to an impartial jury Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273,101 L. Ed. 2d 80 1988). So long as the jury which sits is impartial Id. The Majority in the United States Supreme Court decision in Ross determined that the single loss of the state law right to a single peremptory challenge did not violate his right to a fair trial under the federal constitution 47 U.S. at 90-91.

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

In the instant case, that is exactly what occurred. The trial judge clearly should have granted the defense's three challenges for cause. Remembering, at least one prospective juror apparently had a vision that car thieves should even have a number placed in the barrel so that their time could come up for execution. The judge refused to grant the defense's challenge for cause. Therefore, this decision forced the defendant into using almost forty percent of his

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peremptory challenges in order to remedy the trial court's errors.

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

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

The dissent explained, "The Court today ignores the clear dictates of these and other similar cases by condoning a scheme in which a defendant must surrender procedural parity with the prosecution in order to preserve his Sixth Amendment right to an impartial jury". 487 U.S. 81, 96.

In Morgan v. Illinois, 504 U.S. 716, 112 Sup. Ct. 2222, 119 L.Ed. 2d 492 (1992), the United States Supreme Court held trial court's refusal to inquire into whether potential jurors would automatically vote to impose the death penalty if the defendant were convicted violated the due process clause of the federal constitution's fourteenth amendment, and that the defendant's sentence therefore could not stand, because (1) a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances, and (2) determine whether the latter is sufficient to preclude imposition of the death penalty, as required by state statute and by the court's instructions; and neither general fairness and "follow the law" questions, nor the jurors' oath, were sufficient to satisfy the defendant's right to make inquiry. Id.

In Morgan, the United States Supreme Court noted that Illinois conducts capital cases in two phases (Nevada conducts the trial and penalty phase as well). In Morgan, the United States Supreme Court noted that the trial court questioned every member of the venire whether they possessed moral or religious difficulties that would prevent them from imposing the death penalty regardless of the facts. However, the trial court refused a defense request to ask perspective jurors whether they would automatically vote to impose the death penalty if they found the defendant guilty Id. The trial court found that it had properly questioned the jury because all of the jurors were asked whether they could follow the law and whether they could be fair and impartial. In the

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panel, all the jurors swore to render a verdict in accordance with the law. Id. The supreme court of Illinois held that 1) there is no rule requiring a trial court to life qualify a jury to exclude all jurors who believe that the death penalty should be imposed in every case. Id.

In Morgan, the United States Supreme Court reversed the lower court's ruling, and held that the trial court's refusal to inquire into whether potential jurors would automatically vote to impose the death penalty if the defendant were convicted violated the due process clause of the fourteenth amendment. The United States Supreme Court noted that the Illinois Supreme Court had affirmed the conviction and death sentence relying upon Ross v. Oklahoma, Supra.

The United States Supreme Court determined that any juror who would automatically vote for death is entitled to have a defendant challenge for cause that perspective juror. 505 U.S. 719, 729. "...Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. Dennis v. United States, 339 U.S. 152, 171-172 , 70 Sup. Ct. 519, 94 L.Ed. 734 (1950). "Voir dire plays a critical function in assuring a criminal defendant that his constitutional right to an impartial jury will be honored. Without an adequate voir dire the trial judges responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled" Rosales-Lopez v. United States, 451 U.S. 182, 101 Sup. Ct. 1629, 188, 68 L.Ed. 2d. 22 (1981). The United States Supreme Court ultimately reversed the lower court's decision, "because the inadequacy of voir dire leads us to doubt that the petitioner was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment, his sentence cannot stand" 504 U.S. 719, 739.

In the instant case, Mr. Johnson's voir dire was unconstitutional for a number of reasons. First, the judge systematically precluded the granting of defense counsel's challenges for cause in a blatant violation of Morgan v. Illinois. Defense counsel actually cited the district court to Morgan v. Illinois at the time of their objections (8 ROA 1826; JT Day 2 pp. 371). The district court ignored the defenses challenges. In addition, over the defense objection, jurors were excused because of their concerns regarding the death penalty (juror Davis and juror Grecco). Juror Lewis, indicated in voir dire that she could not consider the death penalty (8 ROA 1826; JT Day 1 pp. 370). However, the court noted that this answer was different than what she had answered in her

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questionnaire (8 ROA 1827; JT Day 1 pp. 371). E.

E. CUMULATIVE ERROR

Pursuant to the rulings of the United States Supreme Court, Mr. Johnson is entitled to a new trial for multiple reasons connected with the unconstitutional nature in which his voir dire was conducted. First, a black juror was removed pretextually. Second, his jury venire did not represent a cross section of the community. Third, the defense was forced to use peremptory challenges where the district court erred in denying the challenge for cause. Fourth, the State was permitted to challenge for cause, at least one juror who said he could apply the law but was generally opposed to the death penalty. Fifth, the State used two peremptory challenges on perspective jurors who had reservations about the death penalty but indicated that they would consider it. This resulted in cumulative error.

Therefore, Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise these issues on direct appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. Had appellate counsel raised these issues on appeal the result of the appeal would have been different, and Mr. Johnson would have been granted a new trial.

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

The instant case involved a contemporaneous robbery, therefore, the kidnapping charges should have been dismissed as a separate crime. In the instant case, trial counsel failed to file a pre-trial motion dismissing the kidnapping charge and appellate counsel failed to raise on appeal. (The insufficiency of the evidence to convict Mr. Johnson of Kidnapping).

Recently, the Nevada Supreme Court provided in Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006),

> We hold that to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion. 122 Nev. at 274.

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In Wright v. State of Nevada, 94 Nev. 415, 581 P.2d442 (1978), the Supreme Court reversed the kidnaping convictions where the defendants had also been convicted for robbery with use of a deadly weapon. The Nevada Supreme Court held that:

> (1) if movement of victim is incidental to robbery and does not substantially increase risk of harm over and above that necessarily present in crime of robbery itself, it would be unreasonable to believe that Legislature intended a double punishment . . .and
>
> (2) convictions of kidnaping were subject to being set aside where, with respect to movement and detention of victim, movement appeared to have been incidental to robbery and without an increase in danger to victims and detention was only for short period of time necessary to consummate robbery.

The defendants in the Wright case entered into the lobby of the Ambassador Motel on February 11, 1977. Defendant Wright, pulled a gun on the night clerk while his co-defendant pulled a gun on the night auditor. The cash registered was then emptied, and the victims were instructed to walk to a back office. Subsequently, the night auditor was taken to open the safe located in the motel lobby. The defendants then returned the night auditor to the back office where they commanded the victims to lie face down on the floor. The victims were then taped at their hands and feet and threatened. Id.

The appellant argued that the kidnaping was contemporaneous to the robbery and should not be considered a separate crime. The Nevada Supreme Court agreed, stating that the movement of the victims appeared to have been incidental to the robbery. There appeared to be no increased danger to the victims. Additionally, the victims were only detained for a short time period which was necessary for the commission of the robbery. The Nevada Supreme Court further held that "[i]n these circumstances, the convictions for kidnaping **must** be set aside. " Citing People v. Ross, 81 Cal. Rptr. 296 (Cal. App. 1969). (Emphasis added).

Likewise, in Hampton v. Sheriff, 95 Nev. 213,591 P.2d 1146 (1979), the Nevada Supreme Court reversed the decision of the district court wherein the appellant's Petition for Writ of Habeas Corpus had been denied. Again, the Nevada Supreme Court held that a separate charge of kidnaping would not lie against the appellants, as the movement of the victim had occurred incidentally to the commission of a robbery.

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The Nevada Supreme Court has held that this factual scenario demonstrates that the kidnaping was clearly incidental to the robbery and therefore, the kidnaping charge should have been dismissed. Mr. Johnson received ineffective assistance of trial counsel for failure to object and file a motion to dismiss the kidnapping counts. Additionally, appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

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

Trial counsel for Mr. Johnson filed a motion for change of venue prior to voir dire. The State filed their opposition (ROA 6 pp.1421). In the motion, the State argues that the defense filed a motion for change of venue pursuant to NRS 174.455 which provides, "an application for removal of a criminal action shall not be granted by the Court until after the voir dire examination has been conducted...". Defense counsel renewed his request for a change of venue after jury selection (JT Day 4 pp. 166; ROA 13 at 3147).

In the instant case, several members of the jury had heard about this case through the media. Juror Juarez had heard about the case. (ROA 11 2682; JT Day 1 pp. 80). Juror Baker had some knowledge of the case (ROA 11 pp. 2687; JT Day 1 pp. 85). Juror Garceau had heard about the case on Channel 8 news (ROA 11 pp. 2769; JT Day 1 pp. 167). Juror Garceau stated that it inflamed his emotions, the description of the crime it made him angry (ROA 11 2770; JT Day 1 pp. 170). Juror Garceau stated this in front of the entire jury panel. Prospective juror Sandoval stated that when she read the summary on the questionnaire it "rang a bell" regarding the facts (ROA 12 2927; JT DAY 1 pp. 325).

In Ford v. State of Nevada, 102 Nev. 126, 717 P.2d 27 (1986), this Court explained,

> The preeminent issue in a motion seeking a transfer of trial site is whether the ambiance of the place of the forum has been so thoroughly perverted that the constitutional imperative of a fair and impartial panel of jurors has been unattainable. See, Kaplan v. State, 96 Nev. 798, 618 P.2d 354 (1980). The net concern of a criminal defendant is whether the community hosting the trial will yield a jury qualified to deliberate impartially and upon competent trial evidence, the guilt or innocence of the accused 102 Nev. 126 at 129.

The Nevada Supreme Court further stated, [t]his, of course, implicates the jury selection

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process and explains why a motion for a change of venue must be presented to the court after voir dire of the venire". (See, NRS 174.45) Mr. Johnson's conviction was in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise this issue on direct appeal.

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

Mr. Armstrong, a key witness for the state against Mr. Johnson, had previously testified in Henderson Justice Court against Michael Celis. Mr. Celis was bound over for trial based upon Mr. Armstrong's testimony

During the cross-examination of Todd Armstrong, the defense questioned Mr. Armstrong regarding whether he had been a witness in another murder case. Mr. Armstrong agreed that he had also testified as a witness for the State in another murder case. The State requested permission to approach and a recess was held. The State argued to the district court that this information had no relevance. The Court noted that District Attorney, had questioned Mr. Armstrong regarding the fact that he was receiving no benefit in this case. The State indicated that he was receiving no benefit in Mr. Johnson's case nor did he receive any benefit in Mr. Celis' case.

The district court then precluded Mr. Johnson's defense attorneys from questioning Mr. Armstrong based on the highly relevant fact that Mr. Armstrong was a witness in two murder cases, yet claimed to receive no benefit. This information went to his prejudice and bias. The State requested the Court strike the cross-examination (ROA 8 pp. 2067; JT Day 2 pp. 136)

Mr. Armstrong admitted that he had identified the defendant in the other murder case, but the question was stricken based upon an objection by the State (ROA 8 pp. 2071; JT Day 2 pp. 140). Mr. Armstrong denied receiving any benefit from the State (ROA 8 pp. 2070; JT Day 2 pp. 139). The defense was denied the opportunity to go into the facts of the other case[12].

[12] The State admitted that Todd Armstrong was a fourth suspect in the case (DAY 2, pp. 12). On direct examination, Todd Armstrong was asked whether he was promised anything regarding whether he would be prosecuted for this crime. He states that he was not promised anything by the District Attorney's office (JT Day 2 pp. 212).

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District Court's have wide discretion to control cross-examination that attacks a witnesses general credibility. However, a trial court's discretion is narrowed when bias or motive is a subject to be shown and the cross-examiner must be permitted to elicit the facts which impeach a witnesses testimony, Busnell v. State, 95 Nev. 570, 572, 599 P.2d 1038, 1040 (1979);See Also Ransey v. State, 100 Nev. 277, 279, 680 P.2d 596, 597 (1984). The Nevada Supreme Court has held, "[a]nd extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50. 085(3)" Lobato v. Nevada, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004).

Proof of a witnesses bias, interests, corruption or prejudice is exempt from the collateral fact rule. 1 John W. Strong McCormick on Evidence Sec. 49 (5th ed. 1999). Therefore, impeachment by extrinsic evidence on the basis of bias, corruption, or prejudice is never collateral and is admissible.

In Lobato v. Nevada, 120 Nev. 512, 96 P.3d 765 (2004), the Nevada Supreme Court explained,

> Having held that there was error in the record, we must consider whether that error was harmless. NRS 178.598 directs that any error that does not affect a defendant's substantial rights shall be disregarded. The "exclusion of a witness' testimony is prejudicial if there is a reasonable probability that the witness' testimony would have affected the outcome of the trial.

The instant case is very similar to Lobato. In both Lobato and the instant case, the introduction of the evidence in question was directed towards one of the State's star witness. Mr. Armstrong had testified for the State in two murder cases. Yet, Mr. Armstrong claimed he was receiving no benefit. This evidence would have affected the outcome of the trial.

Defense counsel should have been permitted to examine for bias and prejudice. Defense counsel was completely precluded from doing that. Therefore, Mr. Johnson received ineffective assistance of appellate counsel for the failure to raise this issue on direct appeal.

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

During the voir dire, the prosecutor asked the jury during voir dire, "do you believe that you have the intestinal fortitude, for lack of a better word, to impose the death penalty if you truly

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believe that it fits this crime? (JT Day 1 pp. 38; ROA 11 pp. 2640). During voir dire, the prosecutor also speculated that Donte Johnson has future dangerousness and could kill a prison guard or a maintenance worker. (JT Day 1 pp. 70; ROA 11 pp. 2672).

During voir dire, the prosecutor questioned a juror stating, "you would agree that it's possible someone in that situation might harm somebody in prison?" The prospective juror replied stating that it is entirely possible. The prosecutor then stated, "you would agree that there aren't just prisoners in prison, there are prison guards, correct". The prosecutor further states, "medical staff in prison"? The prospective juror replied, yes. The prosecutor further asked, "maintenance workers at a prison correct:? The juror replied yes. The prosecutor then states, "certainly you would concede that it's possible for somebody who was convicted of a crime to harm those individuals within the confines of the prison". During this point in voir dire, the defense objects to the prosecution speculating that Mr. Johnson will kill a prison guard or other staff member (ROA 11 2672; JT Day 1 pp. 70).

The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995)(internal quotations omitted).

In Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), the Nevada Supreme Court stated,

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

The Nevada Supreme Court found the prosecutors argument in Castillo, to be improper. Likewise, the above questioning of the potential juror by the prosecutor regarding intestinal

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fortitude was also improper. It was clearly improper for the prosecutor to attempt to tell the jury venire that a prison guard or maintenance worker would be Donte Johnson's next victim. It was ineffective for appellate counsel to fail to raise this issue on appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution. Had appellate counsel for Mr. Johnson raised this issue on appeal, the result of the appeal would have been different.

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

In the instant case, the district court permitted inadmissable hearsay during the direct examination of Todd Armstong. During his testimony, Todd Armstrong was questioned regarding a conversation he overheard between Bryan Johnson and the police (ROA 8 pp. 2022; JT DAY 2 pp. 184). Hence, Mr. Armstrong was permitted to state that Bryan Johnson tells the police that "we knew who did it" (ROA 8 2022; JT Day 2 pp. 184).

The United States Supreme Court held that an out of court statement may not be admitted against a criminal defendant unless the Declarant is unavailable and the defendant had prior opportunity to cross-examine the Declarant. The United States Supreme Court reasoned that the only indicia of reliablity sufficient to satisfy the U.S. Constitution's Confrontation Clause was "actual confrontation." Crawford 541 U.S. 36 124 S. Ct. 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 non-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 unavailable, the statement was previously subjected to cross-examination. Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004). The Crawford Court expressly declined to address what constitutes a testimonial statement

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The United States Supreme Court has held that "confrontation means more than being allowed to confront the witnesses physically. Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination" Davis v. Alaska, 415 U.S. 308, 315, 39 L.Ed.2d. 347, 94 Sup. Ct. 1105 (1974)(Quoting, Douglas v. Alabama, 380 U.S. 415, 418, 13 L.Ed. 2d. 934, 85 Sup. Ct. 1074 (1965). If a statement does not fall within a firmly rooted hearsay exception, the statement is presumptively unreliable and inadmissible for confrontation clause purposes. Idaho v. Wright, 497 U.S. 805, 818, 111 L.Ed.2d. 638, 110 Sup. Ct. 3139 (1989)(Quoting, Lee v. Illinois, 476 U.S. 530, 543, 90 L.Ed.2d. 514, 106 Sup.Ct. 2056 (1996).

Mr. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal.

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

In the instant case, two witnesses testified for the State against Mr. Johnson.

A. TODD ARMSTRONG

Mr. Armstrong testified for the State (ROA 8 2062-2065; JT Day 2 pp. 239). The State should have introduced that evidence on direct examination and introduced the fact that he had testified for the State instead of having Mr. Armstrong testify that he had received no benefit in the instant case without even mentioning the prior murder.

B. LASHAWNYA WRIGHT

Lashawnya Wright testified as a witness for the State. Ms. Wright says she is receiving no special treatment on her other cases (ROA 8 2141; JT Day 2 pp. 210). Ms. Wright does admit that the prosecutor helped her get released on a misdemeanor (ROA 8 pp. 2120; JT Day 2 pp. 231).

Ms. Wright testified that she was receiving no benefit, even though she has a probation hold (ROA 8 2081-2114; JT Day 2 pp. 258-291).

In criminal cases, the prosecution has a duty to disclose all material evidence that is favorable to the accused. Brady v. Maryland, 373 U.S. 83, 87, 10 Led 2d 215, 83 S.Ct. 1194 (1963). This duty extends not only to exculpatory evidence but also to evidence that the defense might have used to impeach the government's witness by showing bias or interest. United States v. Bagley, 473 U.S. 667, 676, 87 L.Ed 2d 481, 105 S.Ct. 3375 (1985). A finding that non disclosed evidence tending to undermine the reliability of a key witness testimony was material was error. Kyles v. Whitley, 514 U.S. 419, 444, 131 L.Ed. 2d 490, 115 S.Ct. 1555 (1995). In Giglio v. United States, 405 U.S. 150, 154-155, 31 L.Ed 2d 104, 92 S.Ct. 763 (1972), the United States Supreme Court held that finding that undisclosed deal with key prosecution was a material non-disclosure and should result in the reversal of a conviction. The Ninth Circuit Court of Appeals recently considered the issue of whether the government must disclose to the defense all benefits conferred upon a "star witness". In Horton v. Mayle, No. 03-56618 U.S. Appeal, Lexis 8121 (2005). The Ninth Circuit held,

> In sum, we hold that the prosecution's failure to disclose the deal between McLaurin and the police violated Brady. The rule in this situation is clear and specific: the prosecution must disclose material evidence favorable to the defense. Brady, 373 U.S. at 87. By implicitly finding that the suppression of McLaurin's leniency deal was immaterial, the state court unreasonably applied Supreme Court-established federal law set down in Napue, Brady, Giglio, and Kyles. The recurrent theme of these cases is that HN13where the prosecution fails to disclose evidence such as the existence of a leniency deal or promise that would be valuable in impeaching a witness whose testimony is central to the prosecution's case, it violates the due process rights of the accused and undermines confidence in the outcome of the trial. Napue, 360 U.S. at 270; Giglio, 405 U.S. at 154; Kyles, 514 U.S. at 444. Here, the prosecution failed to disclose a promise of immunity given to McLaurin, its "star witness," in exchange for his testimony, testimony that provided the only evidence of a motive and the opportunity to kill the victim and that included a confession by Horton himself. The state court was not only wrong in its application of these cases, it was objectively unreasonable. See 28 U.S.C. § 2254(d)(1); Lockyer v. Andrade, 538 U.S. 63, 75-76, 155 L. Ed. 2d 144, 123 S. Ct.

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1166 (2003); see also Gantt, 389 F.3d at 916 (holding that the state court's conclusion that the suppression of evidence did not violate Brady was an unreasonable application of clearly established federal law).

In essence, it has long been established in federal law that the failure of the prosecution to disclose evidence such as the existence of a leniency deal or promise that would be invaluable in impeaching a witnesses will result in a violation of the due process clause of the United States Constitution.

Mr. Johnson received ineffective assistance of counsel for failure to raise this issue on direct appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution. Had appellate counsel raised this issue on appeal, the result of the appeal would have been different.

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

On November 29, 1999 Mr. Johnson filed a motion in limine to prohibit any reference to the first phase of trial as the guilt phase. In the instant case, the prosecutor repeatedly referred to the trial phase of Mr. Johnson's trial, as the "guilt phase".

During voir dire the prosecutor refers to the trial as the "guilt phase" (ROA 12 pp. 2811; JT Day 1 pp. 209). Again, in voir dire, the prosecutor refers to the trial phase as the "guilt phase" (JT Day 1 pp. 338; ROA 12 2940). The State continues to refer to the trial phase as the "guilt phase". Trial counsel for Mr. Johnson does not object (ROA 11 pp. 2656, 2671; JT Day 1 pp. 54, 69). The prosecutor tells the jury that the first part of the trial is called the Guilt Phase of the trial (ROA 12 pp. 2851; JT Day 1 pp. 249).

Article I, Section 8, of the Nevada Constitution, as well as the Fifth, Sixth and

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Fourteenth Amendments to the United States Constitution, guarantee every criminal defendant the right to a fair trial. This right requires the court to conduct trial in a manner which does not appear to indicate that a particular outcome of the trial is expected or likely.

Although participants, including some defense counsel, have lapsed into referring to the verdict-determination process as the "guilt phase" of a capital proceeding (apparently to distinguish it from the "mitigation" or "punishment" phase), the "guilt" label creates an unfair inference that the very purpose of the evidentiary phase is to find a defendant guilty. The terms "evidentiary stage," "trial stage," or "fact-finding stage" would more appropriately designate that phase of the matter without unfairly predisposing the jury toward assuming Defendant's guilt. Present use of the phrase "guilt phase" makes no more sense than referring to the trial as the "innocence phase".

Mr. Johnson received ineffective assistance of trial counsel for the failure of counsel to object to the State's repeated reference to the first phase of the trial as the guilt phase. Additionally, Mr. Johnson received ineffective assistance of appellate counsel for failing to raise this issue on direct appeal.

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

In the instant case, the State brought out several instances of inadmissable bad acts against Mr. Johnson.

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Once the court's ruled that evidence is probative of one of the permissible issues under NRS

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48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991). "The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

A. MR. JOHNSON SOLD NARCOTICS

During the direct examination of Ms. Sharla Severs, the prosecutor elicited that Mr. Johnson would sell crack cocaine to several individuals (ROA 9 pp. 2147; JT Day 3 pp. 16). The prosecutor asked Ms. Severs whether she had actually personally witnessed Mr. Johnson selling drugs, to which she replied, "yes" (JT. DAY 3 pp. 17). Again, the prosecutor elicits from witness Bryan Johnson that Donte Johnson had sold him crack cocaine in the past (ROA 9 pp. 2302). The prosecutor asked if Mr. Johnson would put the cocaine in a black and mild cigar box and Bryan

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Johnson stated, he never remembered Donte Johnson selling narcotics to him in that fashion (JT. DAY 3 pp. 171, ROA 9 pp. 2302).

Therefore, introducing Mr. Johnson's alleged narcotics transactions had no relevance to the case other than to demonstrate that he was a person of poor character. The prosecutor specifically asked whether the black and mild box had any relevance and Bryan Johnson indicated that Donte Johnson had not sold it to him in that manner.

The above noted bad acts were more prejudicial than they were probative. In presenting these acts, the State portrayed Mr. Johnson as someone of bad character. None of the bad acts were proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution.

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

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

A. IMPROPER WITNESS VOUCHING

During closing argument the following exchange took place,

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

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

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

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

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Wright is lying." (JT Day 4 pp. 215; 13 ROA 3196).

In the instant case, the prosecutor was essentially vouching for the credibility of the witness indicating that there was no evidence that these individuals were lying and therefore they were telling the truth. In United States v. Williams, 112 Fed. Appx 581, 204 U.S. Ap. Lexis 22077 (2004), the Ninth Circuit Court of appeals held that a defendant was entitled to a new trial when the prosecutor improperly vouched for the veracity of a government key witness. Id. In Williams, the prosecutor explained that the government agent came to court and told the truth. That the government agent had told the truth about what had occurred. It was improper for the prosecutor to place the prestige of the government behind a witness through assurances of the witnesses veracity. See United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993).

In Williams, the Ninth Circuit also considered the prosecutor informing the jury that the witness could be penalized if he lied. 112 Fed. Appx. 581, 582. See United States v. Combs, 379 F.3d 564,575 (9th Cir. 2004)(holding that it was improper vouching when a prosecutor implied she knew an agent would be fired for committing perjury).

In the instant case, during opening argument, the prosecutor informed the Court that Sharla Severs had given numerous inconsistent statements throughout the investigation of the case. The prosecutor then stated, 'You will learn that she had been told again and again what perjury is and that she must tell the truth when she comes to this courtroom" (JT Day 2 pp. 50; 8 ROA 1873). At which time, the district court overruled the defenses objection.

Thus, in the instant case, the prosecutor vouched for the credibility of the witnesses and also informed the jury that one of the witnesses was well aware of the penalties for perjury.

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

A prosecutor may not make remarks putting jurors in the victims shoes. A prosecutor

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should also not make remarks requesting that jurors consider the victims plight. Normally, such comments violate the rule against referring to facts not in evidence since the evidence of the victims reaction before death is not before the jury. In Rhodes v. State, 547 So.2d 1201, 1205-06 (Florida 1989), the court remanded for a new sentencing hearing where a prosecutor improperly asked the jurors to place themselves at the crime scene, Cert. Denied 513 U.S. 1046 (1994). Bertolotti v. State, 476 So.2d 130, 133 (Florida, 1985) (condemning prosecutors suggestion that jurors put themselves in the victims position and imagine the final pain, terror, and defenselessness of the victims. Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991) (Holding it is improper for a prosecutor to place the jury in victims shoes). Howard v. State, 106 Nev. 713, 718, 800 P.2d 175, 178 (1991)(the Court has held that arguments asking the jury to place themselves in the shoes of a party of the victim(the golden rule argument) are improper. Williams v. State, 103 Nev. 106, 109, 734 P.2d 700, 702-03 (1987) (Explaining that the prosecutor improperly placed the jury in the position of the victim by stating the following, "can you imagine what she must have felt when she saw that it was the defendant and he had a gun?"

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

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

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

> There should be no doubt in anyones mind that these three boys had fear in their minds as they laid face down, duct taped, and defenseless, waiting for the bullet that would send each of them into eternity. I'm certain that they were in fear as Donte placed the barrel of the gun two inches from the skull at each boy" (JT Day 4 pp. 200-201; 13 ROA 3181-3182).

These improper remarks by the prosecutor were objected to by defense counsel (JT Day 4

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pp. 200-201; 13 ROA 3181-3182). Therefore, Mr. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal.

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

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

During closing argument the prosecutor stated, "Did Donte Johnson allow the victim to take one last drag of the cigarette before he put a bullet in the back of his head? Is that why there is two sources of DNA on the cigarette? We know Donte Johnson smoked the cigarette, we know Donte Johnson was at the crime scene" (JT Day 4 pp. 212). The prosecutor further stated, "Did Donte Johnson allow the victim to take on last drag before he put a bullet in the back of his - -" (JT Day 4 pp. 212). Defense counsel objected to these statements, as speculation (JT Day 4 pp. 212).

Agard v. Portuondo, 117 F.3d 696, 711 (2nd Cir. 1997) (Holding that alluding to facts that are not in evidence is prejudicial and not at all probative) cert. granted on other grounds, 119 Sup. Ct. 1248 (1999). In the instant case, the prosecutor asked the jury to completely speculate as to the minor component of the DNA. Defense counsel objected to these statements by the prosecutor as to speculation and appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution. These comments taken as a whole mandate a new trial for Mr. Johnson.

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

The defense filed a motion to exclude autopsy photos (ROA 5 pp. 1098-1101). During the

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testimony of the medical examiner, Dr. Bucklin, the defense continued to object to the photographs. The Court noted that there was a continuing objection (JT Day 3 pp. 274; ROA 10 pp. 2406). The autopsy photos and exhibit numbers that were objected to by defense counsel were exhibits 74, 76, 135-148 151 113 114 116 120, 125, 127, 130 134 (JT Day 4 pp. 166, ROA 13 3147). In Byford v. State of Nevada, 116 Nev. 215 pp4 P.2d 700 (2000), the Nevada Supreme Court held:

> Admission of evidence is within the trial court's sound discretion; this court will respect the trial court's determination as long as it is not manifestly wrong." Colon v. State, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997). Gruesome photos are admissible if they aid in ascertaining the truth. Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). "Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime or when utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction." Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976) (citations omitted), overruled on other grounds by Alford v. State, 111 Nev. 1409, 1415 n.4, 906 P.2d 714, 717 n.4 (1995).

Although, the Nevada Supreme Court noted the admission of evidence is within the trial court's sound discretion, Mr. Johnson would argue this evidence should not have been permitted. It was admitted to inflame the jury. Appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on direct appeal.

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

In the instant case, numerous bench conferences were held during trial. None of the bench conferences were recorded. In Daniels v. State of Nevada, 119 Nev. 498, 78 P.3d 890 (2003), the Nevada Supreme Court expressed that rarely should a proceeding in a capital case not be recorded and failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations.

On direct appeal, Johnson argued that there were 59 bench conferences off the record. Johnson

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claimed this violated Nevada Supreme Court rule 205 (5) (a) and his right to meaningful appellate review. The Nevada Supreme Court explained, "Johnson's trial attorney did not object to these off the records conferences or try to make them part of the records. Thus Johnson did not preserve the issue for appeal, and he fails to show that any plain error occurred" (Nevada Supreme Court decision pp. 28-29).

Nev. Sup. Ct. R. 250, Procedure at trial and post-conviction proceedings states,

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

In Daniels v. State of Nevada 119 Nev. 498, 78 P.3d 890 (2003), the Nevada Supreme Court reasoned,

> Moreover, meaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal. Failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations. A capital defendant therefore has a right to have proceedings reported and transcribed 119 Nev. at 508.

In the instant case, it is uncertain as to what was discussed during the numerous bench conferences held during Mr. Johnson's trial, as they were unrecorded. Mr. Johnson was denied meaningful appellate review because the trial court conducted numerous conferences without having them reported, or recorded, and transcribed in violation of Nevada Supreme Court Rule 250 (5)(a). Trial counsel was ineffective for failing to object to the bench conferences being unrecorded and failing to place on record what was stated during said unrecorded bench conferences in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

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

During Mr. Johnson's third and final penalty phase, the jury found seven mitigating circumstances. Seven mitigating circumstances were found: Johnson's youth at the time of the murders, (he was eighteen years old); he was taken as a child from his mother due to her neglect and placed in foster care; he had no positive or meaningful contact with either parent; he had no positive male role models; he grew up in a violent neighborhood; he witnessed many violent attacks as a child; while a teenager he attended schools where violence was common. Johnson v. State of Nevada, 122 Nev. 1344, at 1350.

However, the jury in Mr. Johnson's first penalty phase found a number of mitigating circumstances that were not argued or found by the final jury. The following list of mitigators were checked or hand written onto the special verdict form in Mr. Johnson's first penalty phase, dated June 15, 2000 (signed by the foreperson). The jury found:

1. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
2. The youth of the Defendant at the time of the crime.
3. Witness to father's emotional abuse of mother.
4. Witness to drug abuse by parents and close relatives.
5. Abandonment by parents.
6. Poor living conditions while at great grandmothers.
7. Turned into police by great grandmother.
8. Crowded living conditions while at grandmothers house.
9. Very violent neighborhood.
10. Witness to various acts of violence in neighborhood.

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11. Had to live a guarded life
12. Grandmothers second house was even more crowded.
13. No way to avoid gangs at second house
14. Gang intimidation
15. Could not comply with parole conditions - other gang territories
16. Indicators he may have wanted to return to parole school
17. Lack of positive male role model
18. Lifestyle of victims
19. No eyewitness to identify of shooter
20. Killings happened in a relatively shore period of time, more isolated incidence than a pattern
21. No indication of any violence while in jail
22. Appears to excel in structured environment of jail
23. Joined gang to protect family (Special Verdict Form, attached as Exhibit A).

In the instant case, defense counsel failed to argue to the jury that Mr. Johnson had all of these mitigators found by his first jury. Mr. Johnson's twenty-three (23) mitigators found by the first jury was much more extensive than from the second jury's seven (7) mitigators that ultimately resulted in a sentence of death. Obviously, the first jury could not reach a resolution as to Mr. Johnson's sentence given the effort they made in locating mitigating circumstances.

Additionally, trial counsel was ineffective for not filing a pretrial motion to have the Court consider whether a jury had already determined that these mitigators exist. Defense counsel was ineffective for failing to obtain a pretrial order instructing the jury that the mitigators existed. Additionally, the first jury noted that the evidence was not clear who was responsible for the actual shooting given the handwritten mitigator by the jury stating, "no eyewitness to identity of shooter".

This mitigator should have been argued pretrial in order for defense counsel to argue to the jury that there was a question as to who the actual shooter was. The State was able to enforce the

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finding that Mr. Johnson had already been determined to be the physical killer and defense counsel failed to enlighten the court that the first jury did not agree with that conclusion.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,

2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

Counsel for Mr. Johnson fell below a standard of reasonableness by not obtaining the special verdict form and listing each and everyone of these mitigators to the jury. But for the failure of counsel to argue these mitigators pretrial and/or to the jury, the result of the trial would have been different (ie. the first jury did not sentence Mr. Johnson to death). Mr. Johnson received ineffective assistance of counsel in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

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

These issues are presented here because the Nevada Supreme Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

A. THE "PREMEDITATION AND DELIBERATION" INSTRUCTION

INSTRUCTION NO. 36 AND 37

The jury was given the following instruction on premeditation and deliberation:

> Premeditation is a design, a determination to kill distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constitution the killing has been preceded by and has been the result of premeditation, no matter how rapidly t he act follows the premeditation, it is premeditated (10 ROA 2577-2578).

By approving the concept of "instantaneous" premeditation and deliberation, the giving of this instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis for distinguishing its verdict from one of second degree murder, and without proof beyond a reasonable doubt of "premeditation and deliberation," which are statutory elements of first degree murder. The instruction violates the constitutional guarantees to due process and equal protection and results in death sentences that violate the constitutional guarantees to due process and equal protection and results in death sentences that violate the constitution's guarantee of a reliable sentence.

The vague "premeditation and deliberation" instruction given during Johnson's trial, which does not require and sort of premeditation at all, violated the constitutional guarantee of

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due process of law because it was so bereft of meaning as to the definition of two elements of the statutory offence of first degree murder as to allow virtually unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess culpability and made defense against the charges virtually impossible, due to the inability to discern what the State needs to prove to establish the elements of the charged offense.

By relieving the State of it's burden of proof as to an essential element of the charged offense, this unconstitutional "premeditation and deliberation" instruction was per se prejudicial, and no showing of specific prejudice is required. Nevertheless, substantial prejudice occurred as a result of the giving of this instruction. The unconstitutional "premeditation and deliberation" instruction substantially and injuriously affected the process to such an extent as to render Johnson's conviction fundamentally unfair and unconstitutional. The State cannot show, beyond a reasonable doubt, that this instruction did not affect the conviction. Appellate counsel was ineffective for failing to raise this issue on appeal in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

B. THE REASONABLE DOUBT INSTRUCTION

INSTRUCTION NO. 5

The trial court's reasonable doubt instruction given improperly minimized the State's burden of proof. The jury was given the following instruction on reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation (10 ROA 2543).

The instruction given to the jury minimized the State's burden of proof by including terms

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"It is not mere possible doubt, but is such a doubt *as would govern or control a person in the more weighty affairs of life*" and "Doubt, to be reasonable, must be *actual*, not mere possibility or speculation." This instruction inflates the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. See Victor v. Nebraska, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); Cage v. Louisiana, 498 U.S.39, 41 (1990); Estelle v. McGuire, 502 U.S. 62, 72 (1991). Johnson recognizes that the Nevada Supreme Court has found this instruction to be permissible. See e.g. Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998); Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). This issue is presented here because the Nevada Supreme Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

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

INSTRUCTION NO. 12:

> Where two or more individuals join together in a common design to commit any unlawful act, each is criminally responsible for the acts of his confederates committed in furtherance of the common design. In contemplation of law, the act of one is the act of all. Every conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even if it was not indented as part of the original plan and even if he was not present at the time of the commission of such act.

Over the objection of defense counsel, the district court gave the jury instruction number twelve (JT Day 4 pp. 167; 13 ROA 3148).

Jury Instruction 12 fails to inform the jury that Mr. Johnson would have been required to have the intent that the crime charged was to be committed. In fact, the instruction fails to provide the fundamental elements of intent. The instruction given to the jury fails to dictate that a

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defendant cannot be convicted under conspiracy to specific intent crimes unless the defendant had the specific intent to commit those crimes. Yet, Mr. Johnson is convicted of the kidnappings which were all specific intent crimes. Additionally, the prosecutor highlighted the faulty instruction during closing argument (JT Day 4 pp. 198; (13 ROA 3177).

In Sharma v. Nevada, 118 Nev. 648; 56 P. 3d 868; (2002)[13], the Nevada Supreme Court held:

> In order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime. Id. at 655,56 P. 3d at 872.

Sharma, overturned Mitchell v. State, 114 Nev. 1471, 971 P. 2d 813 (1998), and Garner v. State, 116 Nev. 770; 6 P. 3d 1013 (2000), to the extent that those other cases permitted a defendant to be convicted for a specific intent crime under an aiding or abetting theory without proof that the aider or abettor specifically intended the commission of the crime charged. 118 Nev. at 652-655, 56 P.3d at 872. See also, Bolden v. State, 124 P. 3d 191; 121 Nev. Ad. Rept. 86 (2005).

Trial counsel objected to this instruction (JT Day 4 pp. 167; 13 ROA 3148). Therefore, appellate counsel for Mr. Johnson was ineffective for failing to raise this issue on appeal in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution.

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

In the instant case, the jury was not properly instructed as to the elements of murder in the first and second degree based on the failure of the court to define malice for the jury. Trial counsel for Mr. Johnson should have offered the following instructions to the jury in order to properly

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define malice.

Express malice is that deliberate intention unlawfully to take away the life of a human, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Trial counsel for Mr. Johnson was ineffective for failing to offer a instruction that would define malice for the jury. Additionally, appellate counsel was ineffective for failing to raise this issue on direct appeal in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution.

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

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

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

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

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

Based on the foregoing, Mr. Johnson would respectfully request that this Court reverse his conviction based upon cumulative errors of counsel.

XIX. THE UNDERSIGNED ENDORSES ALL ARGUMENTS RAISED ON BOTH DIRECT APPEALS TO THE NEVADA SUPREME COURT(TRIAL AND FINAL PENALTY PHASE).

The undersigned acknowledges that the district court cannot over rule the Nevada Supreme Court's determination on the issues already previously argued in both direct appeals from the trial and the penalty phase. However, the undersigned endorses those issues and would note that with regard to the search warrant issue, (of Mr. Johnson's objection to the belongings located in the bedroom), appellate counsel should have cited to Minnesota v. Olson, 494 U.S. 91, 110 Sup. Ct. 1684, 109 L.Ed. 2d. 85 (1990).

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XX. MR. JOHNSON IS ENTITLED TO AN EVIDENTIARY HEARING

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

In the instant case, an evidentiary hearing is necessary to question trial counsel and appellate counsel. Mr. Johnson's counsel fell below a standard of reasonableness. More importantly, based on the failures of trial and appellate counsel, Mr. Johnson was severely prejudiced, pursuant to Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984). At the evidentiary hearing, Mr. Johnson wishes to call the jury commissioner to establish the aforementioned statistics regarding the jury venire.

Under the facts presented here, an evidentiary hearing is mandated to determine whether the performance of trial counsel and appellate counsel were effective, to determine the prejudicial impact of the errors and omissions noted in the petition, and to ascertain the truth in this case.

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CONCLUSION

Based on the foregoing, Mr. Johnson's writ in the instant matter must be granted based upon violations of the United States Constitution Amendments Five, Six, Eight, and Fourteen.

DATED this 14th day of July, 2010.

Respectfully submitted by:

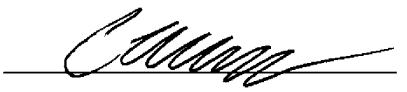

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EXHIBIT A

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

Case No. C153154
Dept. No. V
Docket H

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the Defendant, DONTE JOHNSON, Guilty of COUNT XIII- MURDER OF THE FIRST DEGREE, designate that one or more jurors have found that the mitigating circumstance or circumstances checked and/or written below have been established.

✓ The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

___ The Defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

___ The Defendant acted under duress or under the dominion of another person.

✓ The youth of the Defendant at the time of the crime.

✓ Any other mitigating circumstances witness to father's physical & emotional abuse of mother witness to drug abuse of parents and close relatives abandonment by parents

DATED at Las Vegas, Nevada, this 15 day of June, 2000.

John C. Young
FOREPERSON

EXHIBIT "A"

- poor living conditions while at great grandmother's
- turned in to police by great grandmother
- crowded living conditions while at grandmothers house

- very violent neighborhood
  - witness to various acts of violence in neighborhood
  - had to live a guarded life
  - grandmothers second house even more crowded
  - no way to avoid gangs at second house
  - gang intimidation
  - could not comply with parole conditions - other gang territories
  - indications he may have wanted to return to parole school
  - lack of positive male role model
  - lifestyle of victims
  - no eyewitness to identity of Shooter
  - Killings happened in a relatively short period of time. more isolated incident than pattern
  - no indication of any violence while in jail
  - appears to excell in structured environment of jail
  - joined gang to protect family

ROC
CHRISTOPHER R. ORAM, ESQ.
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(702) 384-5563
Attorney for Defendant
DONTE JOHNSON

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

RECEIPT OF COPY

RECEIPT OF A COPY of the attached **SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS** is hereby acknowledged this 14 day of July, 2010.

DAVID ROGER, DISTRICT ATTORNEY
By _____
DEPUTY DISTRICT ATTORNEY
200 Lewis Avenue

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

EXHIBIT 30

EXHIBIT 30

ORIGINAL

FILED

JAN 28 11 24 AM '11

CLERK OF THE COURT

RSPN
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Clark County District Attorney
Nevada Bar #002781
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DONTE JOHNSON,
#01586283

Defendant.

CASE NO: 98C153154

DEPT NO: VI

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND DEFENDANT'S SUPPLEMENTAL BRIEF AND SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 4/13/11
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus and Defendant's Supplemental Brief and Second Supplemental Brief in Support of Defendant's Writ of Habeas Corpus (Post-Conviction).

This reponse is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

INTRODUCTION

Donte Johnson (hereinafter "Defendant") filed a Petition for Writ of Habeas Corpus (Post-Conviction) on February 13, 2008. Defendant initiated this post-conviction proceeding after the Nevada Supreme Court affirmed his four death sentences following a previous remand for re-sentencing. The only issues properly before this court concern allegations of ineffective assistance of counsel during the most recent penalty hearing in 2005.

STATEMENT OF THE CASE

On December 18, 2002, the Nevada Supreme Court affirmed Defendant's convictions, pursuant to a jury verdict, of four counts each of First Degree Murder with Use of a Deadly Weapon, Robbery with Use of a Deadly Weapon, And First Degree Kidnapping with Use of a Deadly Weapon, And One Count of Burglary with Use of a Deadly Weapon. However, the Court reversed the death sentences because they were imposed by a three-judge panel of district court judges and not a jury. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002). Remittitur issued on January 14, 2003.

On August 8, 2003, Defendant filed a Motion for the Automatic Imposition of Life without the Possibility of Parole, or, in the Alternative, Motion for Exercise of Judicial Discretion. The district court denied Defendant's Motion on September 3, 2003.

On April 27, 2004, Defendant filed a Motion to Allow the Defense to Argue Last at The Penalty Phase. Also, on April 27, 2004, Defendant filed a Motion to Bifurcate Penalty Phase. On April 28, 2004, Defendant filed a Motion in Limine Regarding Referring to Victims as "Boys." On May 3, 2004, the court granted Defendant's Motion in Limine Regarding Referring to Victims as "Boys," but denied Defendant's Motions to Allow the Defense to Argue Last and to Bifurcate the Penalty Phase.

On April 12, 2005, Defendant filed a Motion to Reconsider Request to Bifurcate Penalty Phase. On April 18, 2005, the district court granted Defendant's motion to bifurcate the penalty phase of the penalty hearing: death-eligibility and selection, and the district court

granted Defendant's Motion to Suppress Evidence Regarding Darnell Johnson[1].

Defendant's jury trial commenced on April 19, 2005. On April 28, 2005, the jury returned with the special verdict that the aggravating circumstance outweighs any mitigating circumstance or circumstances in all four (4) Murder counts. The one aggravating circumstance was that the defendant has, in the immediate proceeding, been convicted of more than one offense of Murder in the First or Second Degree.

Thereafter, on April 28, 2005, the second portion of Defendant's penalty phase, the selection phase, began. On May 5, 2005, the jury returned a verdict of death on all four (4) counts of Murder of the First Degree with Use of a Deadly Weapon counts.

On June 6, 2005, Defendant was sentenced to death on each of the four (4) counts of First Degree Murder with Use of a Deadly Weapon – XI, XII, XIII, XIV. The Warrant and Order of Execution were signed and filed in open court as was the Order to Stay Execution. The Judgment of Conviction was filed on June 6, 2005. Defendant filed a timely Notice of Appeal on June 30, 2005.

On December 28, 2006, the Nevada Supreme Court affirmed Defendant's death sentences. Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006). Remittitur issued on January 28, 2008.

On February 13, 2008, Defendant initiated the present post-conviction proceedings by filing a proper person Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel. Christopher Oram was appointed as counsel for Defendant.

Defendant's counsel filed a Supplemental Brief in Support of Defendant's Writ of Habeas Corpus on October 12, 2009. Additionally, Defendant's counsel filed a Second Supplemental Brief in Support of Defendant's Writ of Habeas Corpus on July 14, 2010. The State's Response to Defendant's Petition, his Supplemental Brief, and his Second Supplemental Brief follows.

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[1] The evidence regarding Darnell Johnson concerned Defendant's involvement in the homicide of Darnell Johnson. The evidence and testimony provided would have indicated that Defendant strangled Darnell Johnson and then buried his body in the desert. This evidence was admitted in Defendant's 2000 penalty hearing; however, defense counsel was successful in excluding the evidence in Defendant's 2005 penalty hearing.

STATEMENT OF FACTS

The following facts are adapted from the Nevada Supreme Court's decisions in Johnson v. State, 118 Nev. 787, 791-793, 59 P.3d 450, 453 - 454 (2002) and Johnson v. State, 122 Nev. 1344, 1347-1352, 148 P.3d 767, 770 - 773 (2006).

Sometime during the late evening of August 13 or early morning of August 14, 1998, four men were shot to death in a home located at 4825 Terra Linda in Las Vegas. No eyewitnesses to the crimes testified, but the State's witnesses testified that Johnson admitted that he, Sikia Smith, and Terrell Young were responsible. Smith and Young were tried separately, were convicted of Murder and other felonies, and received multiple sentences of life without the possibility of parole. Johnson was convicted of Murder and other felonies and sentenced to death.

At Johnson's trial, Tod Armstrong testified for the State to the following. Many people used his house ("the Everman home") as a place to buy, sell, and use drugs. For approximately two weeks prior to the killings, Johnson and Young spent a substantial amount of time at the Everman home. They kept clothes in the master bedroom and often slept there. Johnson and Young possessed four guns: a .38 caliber handgun, a revolver, a firearm that looked like a sawed-off shotgun, and a .22 caliber rifle. The guns were usually kept in a duffel bag. Several days before the killings, Matt Mowen went to the Everman house to buy rock cocaine, at which time Johnson, Young, Armstrong, and several others were present. Mowen told everyone that he had just returned from touring with a band and selling acid. Later, Johnson asked where Mowen lived, and Ace Hart, Armstrong's friend, eventually took Johnson to Mowen's house. A few days later, Mowen and three others were killed at Mowen's residence.

Armstrong testified that Young and Johnson left the Everman home that night and returned with the duffel bag containing the guns early the next morning, also with a "PlayStation" and a video cassette recorder (VCR). Johnson advised Armstrong as follows: that he, Young, and Smith went to Mowen's house for the purpose of robbing Mowen, but Mowen and Tracey Gorringe did not have cash or drugs. Johnson ordered them to call some