

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 83796

DONTE JOHNSON,
Petitioner,

Electronically Filed
May 27 2022 06:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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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196. Trial Transcript (Volume IX), <i>State v. Smith</i> , District Court, Clark County, Nevada Case No. C153624 (June 18, 1999)	02/13/2019	46	11376–11505

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197. Voluntary Statement of Luis Cabrera (August 14, 1998)	02/13/2019	46	11506–11507
198. Voluntary Statement of Jeff Bates (handwritten)_Redacted (Aug. 14, 1998)	02/13/2019	46	11508–11510
199. Voluntary Statement of Jeff Bates_Redacted (Aug. 14, 1998)	02/13/2019	46	11511–11517
200. Presentence Investigation Report, State’s Exhibit 236, <i>State v. Young</i> , District Court, Clark County, Nevada Case No. C153461_Redacted (Sep. 15, 1999)	02/13/2019	46	11518–11531
201. Presentence Investigation Report, State’s Exhibit 184, <i>State v. Smith</i> , District Court, Clark County, Nevada Case No. C153624_Redacted (Sep. 18, 1998)	02/13/2019	46	11532–11540
202. School Record of Sikia Smith, Defendant’s Exhibit J, <i>State v. Smith</i> , District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11541–11542
203. School Record of Sikia Smith, Defendant’s Exhibit K, <i>State v. Smith</i> , District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11543–11544

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204. School Record of Sikia Smith, Defendant's Exhibit L, <i>State v. Smith</i> , District Court, Clark County, Nevada (Case No. C153624)	02/13/2019	46	11545–11546
205. Competency Evaluation of Terrell Young by Greg Harder, Psy.D., Court's Exhibit 2, <i>State v. Young</i> , District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)	02/13/2019	46	11547–11550
206. Competency Evaluation of Terrell Young by C. Philip Colosimo, Ph.D., Court's Exhibit 3, <i>State v. Young</i> , District Court, Clark County, Nevada Case No. C153461 (May 3, 2006)	02/13/2019	46	11551–11555
207. Motion and Notice of Motion in Limine to Preclude Evidence of Other Guns Weapons and Ammunition Not Used in the Crime, <i>State v. Johnson</i> , District Court, Clark County, Nevada Case No. C153154 (Oct. 19, 1999)	02/13/2019	46	11556–11570
208. Declaration of Cassondrus Ragsdale (Dec. 19, 2018)	02/13/2019	46	11571–11575
209. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit A: Affidavit of Theresa Knight, <i>State v. Johnson</i> ,	02/13/2019	46	11576–11577

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District Court, Clark County, Nevada Case No. C153154, June 5, 2005			
210. Post –Evidentiary Hearing Supplemental Points and Authorities, Exhibit B: Affidavit of Wilfredo Mercado, <i>State v. Johnson</i> , District Court, Clark County, Nevada Case No. C153154, June 22, 2005	02/13/2019	46	11578–11579
211. Genogram of Johnson Family Tree	02/13/2019	46	11580–11581
212. Motion in Limine Regarding Referring to Victims as “Boys”, <i>State v. Johnson</i> , District Court, Clark County, Nevada Case No. C153154	02/13/2019	46	11582–11585
213. Declaration of Schaumetta Minor, (Dec. 18, 2018)	02/13/2019	46	11586–11589
214. Declaration of Alzora Jackson (Feb. 11, 2019)	02/13/2019	46	11590–11593
Exhibits in Support of Petitioner’s Motion for Leave to Conduct Discovery	12/13/2019	49	12197–12199
1. <i>Holloway v. Baldonado</i> , No. A498609, Plaintiff’s Opposition to Motion for Summary Judgment, District Court of Clark County, Nevada, filed Aug. 1, 2007	12/13/2019	49	12200–12227
2. Handwritten letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12228–12229

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215. <i>Holloway v. Baldonado</i> , No. A498609, Plaintiff's Opposition to Motion for Summary Judgment, District Court of Clark County, Aug. 1, 2007	12/13/2019	47–48	11840–11867
216. <i>Holloway v. Baldonado</i> , No. A498609, Opposition to Motion for Summary Judgment Filed by Defendants Stewart Bell, David Roger, and Clark County, District Court of Clark County, filed Jan. 16, 2008	12/13/2019	48–49	11868–12111
217. Letter from Charla Severs, dated Sep. 27, 1998	12/13/2019	49	12112–12113
218. Decision and Order, <i>State of Nevada v. Johnson</i> , Case No. C153154, District Court of Clark County, filed Apr. 18, 2000	12/13/2019	49	12114–12120
219. State's Motion to Disqualify the Honorable Lee Gates, <i>State of Nevada v. Johnson</i> , Case No. C153154, District Court of Clark County, filed Apr. 4, 2005	12/13/2019	49	12121–12135
220. Affidavit of the Honorable Lee A. Gates, <i>State of Nevada v. Johnson</i> , Case No. C153154, District	12/13/2019	49	12136–12138

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221. Motion for a New Trial (Request for Evidentiary Hearing), <i>State of Nevada v. Johnson</i> , Case No. C153154, District Court of Clark County, filed June 23, 2000	12/13/2019	49	12139–12163
222. Juror Questionnaire of John Young, <i>State of Nevada v. Johnson</i> , Case No. C153154, District Court of Clark County, dated May 24, 2000	12/13/2019	49	16124–12186
Findings of Fact, Conclusions of Law and Order, <i>Johnson v. Gittere, et al.</i> , Case No. A–19– 789336–W, Clark County District Court, Nevada	10/08/2021	49	12352–12357
Minute Order (denying Petitioner’s Post–Conviction Writ of Habeas Corpus, Motion for Discovery and Evidentiary Hearing), <i>Johnson v. Gittere, et al.</i> , Case No. A–19–789336–W, Clark County District Court, Nevada	05/15/2019	49	12264–12266
Minutes of Motion to Vacate Briefing Schedule and Strike Habeas Petition	07/09/2019	47	11710
Motion and Notice of Motion for Evidentiary Hearing, <i>Johnson v.</i>	12/13/2019	49	12231–12241

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Motion and Notice to Conduct Discovery, <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-W, Clark County District Court, Nevada	12/13/2019	49	12187-12196
Motion for Leave to File Under Seal and Notice of Motion	02/15/2019		11600-11602
Motion in Limine to Prohibit Any References to the First Phase as the “Guilt Phase”	11/29/1999	2	302-304
Motion to Vacate Briefing Schedule and Strike Habeas Petition, <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-W, Clark County District Court, Nevada	05/16/2019	46-47	11609-11612
Motion to Vacate Briefing Schedule and Strike Habeas Petition, <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-W, Clark County District Court, Nevada	05/23/2019	47	11621-11624
Motion to Withdraw Request to Strike Petition and to Withdraw Request for Petition to be Stricken as Not Properly Before the Court), <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-	06/26/2019	47	11708-11709

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Notice of Entry of Findings of Fact, Conclusions of Law and Order, <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-W, Clark County District Court, Nevada	10/11/2021	49-50	12358-12364
Notice of Hearing (on Discovery Motion), <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-W, Clark County District Court, Nevada	12/13/2019	49	12330
Notice of Objections to Proposed Order, <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-W, Clark County District Court, Nevada	02/02/2021	49	12267-12351
Notice of Supplemental Exhibit 223, <i>Johnson v. Gittere, et al.</i> , Case No. A-19-789336-W, Clark County District Court, Nevada	02/11/2019	49	11242-12244
223. Declaration of Dayvid J. Figler, dated Feb. 10, 2020	02/11/2019	49	12245-12247
Opposition to Defendants' Motion in Limine to Prohibit	12/02/1999	2	305-306

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Opposition to Motion to Vacate Briefing Schedule and Strike Habeas Petition, <i>Johnson v. Gittere, et al.</i> , Case No. A–19–789336–W, Clark County District Court, Nevada	05/28/2019	47	11625–11628
Petition for Writ of Habeas Corpus, <i>Johnson v. Gittere, et al.</i> , Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2019	24–25	5752–6129
Post–Evidentiary Hearing Supplemental Points and Authorities	06/22/2005	22	5472–5491
Reply to Opposition to Motion to Vacate Briefing Schedule and Strike Habeas Petition	06/20/2019	47	11705–11707
Reply to State’s Response to Petition for Writ of Habeas Corpus	12/13/2019	47	11718–11836
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Stipulation and Order to Modify Briefing Schedule, <i>Johnson v. Gittere, et al.</i> , Case No. A–19–789336–W, Clark County District Court, Nevada	11/22/2019	47	11715–11717
Transcript of All Defendant’s Pending Motions	03/02/2000	2	416–430
Transcript of Argument to Admit Evidence of Aggravating Circumstances	05/03/2004	12	2904–2958
Transcript of Argument: Petition for Writ of Habeas Corpus (All Issues Raised in the Petition and Supplement)	12/01/2011	22–23	5498–5569
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Transcript of Defendant's Motion to Reveal the Identity of Informants and Reveal Any Benefits, Deals, Promises or Inducements; Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution; Defendant's Motion to Compel the Production of Any and All Statements of Defendant; Defendant's Reply to Opposition to Motion in Limine to Preclude Evidence of Other Guns, Weapons, Ammunition; Defendant's Motion in Limine to Preclude Evidence of Witness Intimidation	11/18/1999	2	293-301
Transcript of Evidentiary Hearing	05/17/2004	12	2959-2989
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Transcript of Jury Trial – Day 1 (Volume I)	06/05/2000	2–4	431–809
Transcript of Jury Trial – Day 2 (Volume II)	06/06/2000	4–5	810–1116
Transcript of Jury Trial – Day 3 (Volume III)	06/07/2000	5–7	1117–1513
Transcript of Jury Trial – Day 4 (Volume IV)	06/08/2000	7–8	1514–1770
Transcript of Jury Trial – Day 5 (Volume V)	06/09/2000	8	1771–1179
Transcript of Jury Trial – Penalty – Day 1 (Volume I) AM	04/19/2005	12–13	2993–3018
Transcript of Jury Trial – Penalty – Day 1 (Volume I) PM	4/19/2005 ¹	13	3019–3176
Transcript of Jury Trial – Penalty – Day 10 (Volume X)	05/02/2005	20–21	4791–5065

¹ This transcript was not filed with the District Court nor is it under seal.

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Transcript of Jury Trial – Penalty – Day 2 (Volume II) PM	04/20/2005	13–14	3202–3281
Transcript of Jury Trial – Penalty – Day 3 (Volume III) PM	04/21/2005	14–15	3349–3673
Transcript of Jury Trial – Penalty – Day 3 (Volume III–A) AM	04/21/2005	14	3282–3348
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Transcript of Jury Trial – Penalty – Day 6 (Volume VI–A) PM	04/26/2005	16–17	3982–4102
Transcript of Jury Trial – Penalty – Day 7 (Volume VII– PM)	04/27/2005	18	4382–4477
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Transcript of Jury Trial – Penalty – Day 8 (Volume VIII– C)	04/28/2005	18–19	4478–4543
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Transcript of Jury Trial – Penalty Phase – Day 1 (Volume I) AM	06/13/2000	8	1780–1908
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Transcript of Material Witness Charla Severs’ Motion for Own Recognizance Release	01/18/2000	2	414–415
Transcript of Motion for a New Trial	07/13/2000	10	2471–2475
Transcript of Petition for Writ of Habeas Corpus and Setting of 1. Motion for Leave and 2. Motion for Evidentiary Hearing, <i>Johnson v. Gittere, et al.</i> , Case No. A–19–789336–W, Clark County District Court, Nevada	02/13/2020	49	12249–12263
Transcript of Preliminary Hearing	10/12/1999	2	260–273
Transcript of State’s Motion to Permit DNA Testing	09/02/1999	2	252 – 254
Transcript of State’s Motion to Videotape the Deposition of Charla Severs	10/11/1999	2	255–259
Transcript of Status Check: Filing of All Motions (Defendant’s Motion to Reveal	10/21/1999	2	274–282

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the Identity of Informants and Reveal Any Benefits, Deals, Promises or Inducements; Defendant's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution; Defendant's Motion to Compel the Production of Any and All Statements of Defendant; State's Motion to Videotape the Deposition of Charla Severs; Defendant's Motion in Limine to Preclude Evidence of Other Crimes; Defendant's Motion to Reveal the Identity of Informants and Reveal any Benefits, Deals' Defendant's Motion to Compel the Production of any and all Statements of the Defendant			
Transcript of the Grand Jury, <i>State v. Johnson</i> , Case No. 98C153154, Clark County District Court, Nevada	09/01/1998	1–2	001–251
Transcript of Three Judge Panel – Penalty Phase – Day 1 (Volume I)	07/24/2000	10–11	2476–2713
Transcript of Three Judge Panel – Penalty Phase – Day 2 and Verdict (Volume II)	07/26/2000	11–12	2714–2853

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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

Mr. Cobb is also required to show that the under representation is due to systematic exclusion. In Williams, this Court held that, "there is no evidence to indicate that the jury selection process in Clark County systematically excludes African Americans from the jury process." However, in the instant case, the questioning of the jury commissioner established that the state recognized the need to use Nevada Power to locate prospective jurors as opposed to the Department of Motor Vehicles. Clearly, this remedy is based upon the fact that Nevada Power probably will bring forth more potential jurors and a better cross-section of minorities in our community. This establishes that our system recognizes the difficulties illustrated in the instant case.

Ms. Rowland testified:

Mr. Whipple: And up to this point, have you had any complaint with regard by any individuals with regard to the list coming from the DMV with individuals.

Ms. Rowland: No complaints, no. They just think it should be a wider diversity, and that's why they have the SB 43¹ in place now (A.A. Vol 12 pp. 2488).

Mr. Cobb would contend that he is able to demonstrate along with Mr. Williams, that this is proof that the jury venire panels in Clark County are often under represented. Mr. Cobb had two African Americans in his jury venire and not one African American on his

This issue combined with the exclusion by the prosecutors of the only two African Americans resulted in a violation of Mr. Cobb's Sixth and Fourteenth Amendment rights. Mr. Cobb should not have been forced to trial with a non-African American jury. Defense counsel objected to the venire panel as a whole and Mr. Cobb is entitled to a new trial.

¹ The state contends in their answering brief that Mr. Cobb is incorrect when citing to Assembly Bill 43 and demonstrates that the correct cite is Assembly Bill 41. Although, as portrayed by the jury commissioner, Ms. Rowland, Mr. Cobb is correct in citing to Assembly Bill 43.

1 **III. MR. COBB IS ENTITLED TO A NEW TRIAL BASED UPON NRS 173.115 AND**
2 **THE LACK OF A COMMON SCHEME OR PLAN CONNECTING THE**
3 **CRIMES, THE REMOTENESS OF THE CRIMES AND THE UNFAIR**
4 **PREJUDICIAL EFFECT OF TRYING BOTH CASES TOGETHER IN FRONT**
5 **OF A SINGLE JURY.**

6 Nevada law permits joinder of counts for three reasons. First, NRS §173.115.1 permits
7 two or more offenses to be charged in the same information if the offenses are based "on the
8 same act or transaction." Second, NRS §173.115.2 permits two or more offenses to be charged
9 in the same information if the offenses are based "on two or more acts or transactions connected
10 together or constituting parts of a common scheme or plan." Third, this Court has indicated that
11 if "evidence of one charge would be cross-admissible in evidence at a separate trial on another
12 charge, then both charges may be tried together and need not be severed." Floyd v. State, 118
13 Nev. 156, 42 P.3d 249 (2002), citing, Mitchell v. State, 105 Nev. 735, 782 P.2d 1340,
14 (1989).

15 Because of the considerable length of time between November 13, 1999, and December
16 16, 1999, the counts related to acts committed on those days cannot be reasonably considered to
17 be part of "the same act or transaction." Therefore joinder under NRS §173.115.1 is not
18 justified.

19
20 When considering joinder under NRS §173.115.2, it is useful to distinguish the facts of
21 the case at hand with the facts of a case for which this Court found joinder permissible. In
22 Floyd, the defendant argued that counts related to the sexual assault of a woman at gunpoint
23 inside an apartment and the subsequent shooting of five employees at a nearby supermarket
24 should be severed. However, this Court found that "joinder was proper because the acts charged
25 were at the very least 'connected together'." Floyd v. State, 42 P.3d 249, 254 (2002).

26
27 The Court explained that a connection existed because (1) the counts relating to the
28 subsequent act began only fifteen minutes after the counts relating to the first act had ended, (2)

1 the same firearm was used at both acts, and (3) the actions and statements made at the prior act
2 were "relevant to the question of premeditation and deliberation" at the subsequent act. Id. But
3 no such connection exists in the case at hand. All of the connections established in Floyd are
4 not only absent, but are diametrically different.

5
6 The state contends that the counts were properly joined because the jury found Mr.
7 Cobb Not Guilty of Count IV, and therefore he was not prejudiced. First, this statement could
8 not be farther from the truth. In Floyd v. State, the Court reasoned,

9 "[t]he court must assess the likelihood that a jury not otherwise convinced
10 beyond a reasonable doubt of the defendant's guilt of one or more of the charged
11 offenses might permit the knowledge of the defendant's other criminal activity to
12 tip the balance and convict him. If the court finds a likelihood that this may
13 occur, severance should be granted." Floyd v. State, 118 Nev. 17, 42 P.3d 249
14 (2002), citing, People v. Bean, 46 Cal. 3d 919, 760 P.2d 996 (Cal. 1988).

15 Mr. Cobb would contend the fact that he was not guilty of Count IV to be irrelevant. No
16 connection between counts existed and it is quite probable that a jury not otherwise convinced
17 beyond a reasonable doubt that had knowledge of the defendants other criminal activity
18 (regardless of whether he was convicted) to sway the jury to convict on a separate and unrelated
19 count. Moreover, in their answering brief the state did not even mention the time that elapsed
20 between the two incidents.

21 Second, if a connection between separate acts can be argued to exist because of their
22 relative proximity in time, then it is reasonable to expect that the existence of such a connection
23 is diminished as the length of time between the acts increases. A total of thirty-three days
24 separated the events that occurred on November 13, 1999, from the events that occurred on
25 December 16, 1999. So while a connection may still remain between two acts after only fifteen
26 minutes, extending that time more than a month would seem to extinguish such a connection.

27
28 Third, though a connection may be argued to exist when the same firearm is used in

1 different acts, it seems that any possibility of such a connection is lost when different firearms
2 are used .The state argues that since both weapons were of a .22 caliber they must be connected.
3 However, the state fails to recognize that since two different weapons were used, a connection
4 does not exist. In the case at hand, forensics reports suggest that a Remington .22 rifle was used
5 on November 13, 1999, and a Winchester .22 rifle was used on December 16, 1999.
6

7 However, the prosecution may argue that the separate acts may still be connected by the
8 use of different weapons if a link can be established between the Defendant and both weapons.
9 Based on available evidence, that linkage would likely depend on the vague statement from one
10 of the residents of the apartment who told detectives that her sister, had told her, that the
11 Defendant had told her, that he "... had a couple of guns ..., gun on him or at his house and he
12 came over with a bag of bullets to my house and supposedly he brought the guns over to my
13 house but I didn't know about them until [the] Gang Unit came over one day and found them
14 underneath my bed." (A.A., Vol. 3, 391-425).
15

16 If it could be established that the sister's statement was acceptable evidence and not just
17 hearsay, and if it could be established that the Defendant did not supposedly bring the guns, but
18 in fact brought the guns to the apartment, then perhaps there could be a link between the
19 Defendant and the weapons. But because none of that has been established, such a link does not
20 exist. Therefore, even the remote possibility that separate acts may still be connected by the use
21 of different weapons, fails. Fourth, the prosecution has not demonstrated any link between any
22 alleged actions or statements made by the Defendant at either of the shooting incidents that
23 would be "relevant to the question of premeditation and deliberation" of the other shooting
24 incident.
25

26 There is also no evidence of a common scheme or plan linking the acts that occurred on
27 the separate dates. Though the prosecution had the opportunity to charge the Defendant with
28

1 gang-related counts, they decided not to pursue any counts related to gang activity. Absent
2 sufficient evidence to pursue such action, it would be difficult to reasonably argue that the acts
3 were linked by a common gang-related scheme or gang-related plan. There is no justification
4 for joinder under NRS §173.115.2 because the acts were not "connected together" and were not
5 part of a "common scheme or plan." Moreover, in their answering brief the state did not even
6 mention the time that elapsed between the two incidents.
7

8 Finally, this Court has stated that if "evidence of one charge would be cross-admissible
9 in evidence at a separate trial on another charge, then both charges may be tried together and
10 need not be severed." Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002), citing, Mitchell v.
11 State, 105 Nev. 735, 782 P.2d 1340, (1989). The State argues in its answering brief that "the
12 evidence of both shootings would be cross-admissible as to each case..." (State's AB pp.19).
13 Although, it would seem that the only evidence that might come close to being cross-admissible
14 would be evidence of a connection between the Defendant and the weapons. But as previously
15 discussed, the admissibility of that evidence is highly suspect. There is no other evidence for
16 the counts related to acts occurring on November 13, 1999, that would be cross-admissible in
17 evidence at a separate trial for the counts related to acts occurring on December 16, 1999.
18 Therefore, none of the reasons that would justify joinder of the counts against the Defendant
19 exist.
20
21

22 The same reasons that make joinder of the counts inappropriate, make the severance of
23 the same counts appropriate. The controlling state statute which describes relief from
24 prejudicial joinder is NRS §174.165, which states in part,
25

26 "[i]f it appears that a defendant or the State of Nevada is prejudiced by a joinder
27 of offenses or of defendants in an indictment or information, or by such joinder
28 for trial together, the court may order an election or separate trials of counts,
grant a severance of defendant's or provide whatever other relief justice
requires."

1 When counts are not related, "the court must assess the likelihood that a jury not
2 otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the
3 charged offenses might permit the knowledge of the defendant's other criminal activity to tip
4 the balance and convict him. If the court finds a likelihood that this may occur, severance
5 should be granted." Floyd v. State, 118 Nev. 17, 42 P.3d 249 (2002), citing, People v. Bean, 46
6 Cal. 3d 919, 760 P.2d 996 (Cal. 1988).

8 The counts of each event are prejudicial in their nature and will be highly inflammatory
9 to any jury. By joining the counts of each event, the State will be able to provide a circular
10 argument, wherein the likelihood that the Defendant committed the offenses at one of the
11 events is made more probable by the possibility that the Defendant committed the offenses at
12 the other event.

14 There is nothing about the counts that so intricately connects them that makes severance
15 improper. The disparity in the evidence between the counts relating to the events of November
16 13, 1999, and December 16, 1999, together with the inadmissibility of this evidence at separate
17 trials, caused extreme prejudice to the Defendant and is "... so manifestly prejudicial that it
18 outweighs the dominant concern with judicial economy." (See, United States v. Armstrong, 621
19 F.2d 951, 954 (9th Cir. 1980)). Therefore, severance of the counts is warranted.

21 There was little if any justification for joinder of the counts associated with the events of
22 November 13, 1999, with those associated with the events of December 16, 1999. For the same
23 reasons that joinder of the counts was inappropriate, severance of the same counts was crucially
24 appropriate.

26 Although the State contends the jury did not find Mr. Cobb guilty of this crime and
27 therefore it is harmless. Mr. Cobb would disagree. This information was extremely prejudicial
28 and should not have been admitted into Mr. Cobb's trial. Additionally, the lack of a common

1 scheme or plan connecting the crimes demanded severance. Based on the foregoing, Mr. Cobb
2 would respectfully request he be granted a new trial.

3 **IV. THE DISTRICT COURT ERRED IN PERMITTING EVIDENCE OF**
4 **INADMISSABLE BAD ACTS.**

5 In it's answering brief the state argues that the probative value of these acts greatly
6 outweighed their prejudicial effect. The State was permitted to introduce two prejudicial bad
7 acts against Mr. Cobb. Although Mr. Cobb plead guilty to both bad acts, they should have been
8 excluded as their probative value did not nearly outweigh their prejudicial effect.
9

10 **A. The Attempted Murder of Angel Melendez**

11 The State was permitted to introduce the following bad act information regarding this
12 incident. Mr. Cobb plead guilty to Two Counts of Attempted Murder with Use of a Deadly
13 Weapon (A.A., Vol. 3, 449-458).
14

15 On November 4, 1999, Mr. Melendez was present at 21st and Ogden (A.A. Vol 7 pp.
16 1366). Mr. Melendez noticed a black individual approach and Mr. Melendez was told to get
17 down (A.A. Vol 7 pp. 1369). Mr. Melendez heard a black man say the word "gang" and then
18 heard firecracker sounds (A.A. Vol 7 pp. 1370). Mr. Melendez described the black man as dark
19 skinned, 5'5 to 5'6, 150 lbs to 155 lbs (A.A. Vol 7 pp. 1371). Mr. Melendez heard five to eight
20 firecracker sounds (A.A. Vol 7 pp. 1371). Mr. Melendez had written a statement indicating that
21 the black male had reached towards his pants pocket and then started shooting (A.A. Vol 7 pp.
22 1372). Mr. Melendez agreed he had picked an individual out of a six-pack line up, but that he
23 "did it randomly" (A.A. Vol 7 pp. 1372-1373). Mr. Melendez indicated he was out on the
24 street with his friends but none of them were gang members (A.A. Vol 7 pp. 1375-1376). Mr.
25 Melendez also admitted he had talked with friends and based upon those discussions, he had
26 provided that information to the police (A.A. Vol 7 pp. 1376). Mr. Melendez did not observe
27
28

1 the shooter but picked someone out of a line up because he felt pressured by the police (105-
2 106). Mr. Melendez had told police approximately two times he did not remember who shot
3 but he picked someone out of a line up just to relieve the pressure from the police (A.A. Vol 7
4 pp. 1377-1378).

5
6 In November of 1999, prior to the shooting of Angel Melendez, there was an incident at
7 Mr. Cobb's school (A.A. Vol 11 pp. 2251-2252). Mr. Cobb pulled into the parking lot of
8 school with his friend Miguel (A.A. Vol pp. 2252. There was a truck parked with a bunch of
9 other guys hanging out (A.A. Vol 11 pp. 2252).. One of the people in the truck told Mr. Cobb
10 to move his vehicle believing that was their parking spot (A.A. Vol 11 pp. 2253). Mr. Cobb
11 refused to move the vehicle (A.A. Vol 11 pp. 2253). Later that day at school, at the bathroom,
12 someone lunged at Mr. Cobb (A.A. Vol 11 pp. 2254). As a result, Mr. Cobb was injured and
13 beaten up (A.A. Vol 11 pp. 2255). Several days later, Mr. Cobb and a classmate were going
14 home (A.A. Vol 11 pp. 2257) Mr. Cobb recognized the truck from the parking lot and it made
15 him angry (A.A. Vol 11 pp. 2257). Mr. Cobb drove to Angela Orozco's house and Mr. Cobb
16 obtained a rifle and got in the back of the car and drove back to where he had seen the truck
17 (A.A. Vol 11 pp. 2258). Mr. Cobb admitted to going back and shooting up the truck shooting
18 approximately 13 times (A.A. Vol 11 pp. 2258). It was with the Remington rifle (A.A. Vol 11
19 pp. 2258-2259). That incident occurred November 4, 1999.

22 **B. The Attempted Murder of Carlos Venegas**

23
24 On December 11, 1999, detectives responded to the 500 block of 28th Street with regard
25 to a gang related shooting (A.A. Vol 8 pp. 1609). An individual had been shot in the mouth by
26 perpetrators in a white van (A.A. Vol 8 pp. 1609).

27 On December 11, 1999, Mr. Cobb was involved in an incident to which he plead guilty
28 to (142-143). Mr. Cobb was at a female friend's house with about five or six other people

1 when he first observed Mr. Venegas (143). There was a knock at the door and Mr. Venegas
2 was there and Mr. Cobb confronted him (146). One of the females had complained to Mr.
3 Cobb that Mr. Venegas was an ex-boyfriend of one of the girls and he did not leave them alone.
4 Mr. Cobb confronted Mr. Venegas because of this fact (147). Later on that evening, Mr.
5 Venegas and a bunch of his friend were hanging out, on the side of the apartments (148). Mr.
6 Venegas observed Mr. Cobb walk up to the van. Mr. Cobb grabbed the rifle and shot a couple
7 of times (149). In the instant case, the State presented the above outlined bad acts against Mr.
8 Cobb. The State held the necessary hearings and the district court found the bad acts would be
9 admissible against Mr. Cobb. NRS 48.045(2) provides, "Evidence of other crimes, wrongs, or
10 acts is not admissible to prove the character of a person in order to show that the acted in
11 conformity therewith. It may, however, be admissible for other purposes, such as proof of
12 motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or
13 accident".

14
15
16
17 Once the court's ruled that evidence is probative of one of the permissible issues under
18 NRS 48.045(2), the court must decide whether the probative value of the evidence is
19 substantially outweighed by its prejudicial effect.

20 NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to
21 prove the character of a person in order to show that he acted in conformity therewith. See,
22 Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev.
23 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act
24 evidence is admissible in order to prove motive, opportunity, intent, preparation, plan,
25 knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the
26 trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v.
27 State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345,
28

1 348, 811 P.2d 67, 69 (1991). "The duty placed upon the trial court to strike a balance
2 between the prejudicial effect of such evidence on the one hand, and its probative value
3 on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course
4 the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the
5 lower court's view unless it is manifestly wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244
6 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).
7

8 In presenting these acts, the State portrayed Mr. Cobb as someone of bad character.
9 These acts were clearly prejudicial and should have been excluded as they only showed that Mr.
10 Cobb is someone of bad character. The bad acts portrayed in the instant case, have proven to be
11 more prejudicial than probative.
12

13 **V. THE DISTRICT COURT ERRED IN PERMITTED THE STATE TO PRESENT**
14 **THE PRELIMINARY HEARING OF ANGELA OROZCO.**

15 On November 27, 2006, the State filed a Motion to Admit the Preliminary Hearing
16 Testimony of Ms. Orozco(A.A., Vol. 4, pp. 663-667). At the time of trial, Angela Orozco was
17 not able to be located. Mr. Cobb would contend Ms. Orozco's preliminary hearing transcripts
18 should not have been read to the jury as Mr. Cobb was not given an opportunity to fully cross-
19 examine the witnesses against him.
20

21 Clark County District Attorney Investigator, William Faulkner testified, he had
22 attempted to find an individual named Angela Orozco (189). Mr. Faulkner came into contact
23 once with Ms. Orozco and asked her to come to a pre-trial conference. She was not
24 uncooperative but did seem hesitant (190). Mr. Faulkner testified he made several attempts to
25 contact Ms. Orozco and attempted to serve her a subpoena (192-193). Mr. Faulkner was unable
26 to locate Ms. Orozco even after attempting to show pictures around her last known residence
27 (192-193).
28

1 Mr. Cobb would contend the State's effort to locate Ms. Orozco was not sufficient. Mr.
2 Faulkner relayed she was not uncooperative but did seem hesitant. Mr. Cobb would contend it
3 was incumbent on the State to locate Ms. Orozco. In failing to locate Ms. Orozco and
4 permitting her preliminary hearing transcripts to be read to the jury denied Mr. Cobb his
5 constitutional right to confrontation. The United States Constitution guarantees a fair trial
6 through the Due Process Clauses, but it defines the basic elements of a fair trial largely through
7 the several provisions of the Sixth Amendment, including the confrontation clause:
8

9 In all criminal prosecutions, the accused shall enjoy the right to a speedy and
10 public trial, by an impartial jury of the State and District wherein the crime shall
11 have been committed, which District shall have previously ascertained by law,
12 and to be informed of the nature and cause of the accusations; to be confronted
13 with witnesses against him; to have compulsory process for obtaining witnesses
14 in favor, and to have the assistance of counsel for the defense.(United States
15 Constitution, Amendment Six).

16 In, Cruz v. New York, 107 S.Ct. 1714 (1987), at 1717; the United States Supreme Court
17 held that, "[t]he confrontation clause of the Sixth Amendment guarantees the right of a criminal
18 defendant to be confronted with the witnesses against him." The United States Supreme Court
19 further stated, "[w]e have held that guarantee, extended against the states by the Fourteenth
20 Amendment, includes the right to cross-examine witnesses." See, Pointer v. Texas, 380 U.S.
21 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). In their answering brief the state argues
22 that the investigator was unable to locate Ms. Orozco and therefore it was permissible to allow
23 the preliminary hearing transcripts to be read. In the instant case, admitting Ms. Orozco's
24 preliminary hearing transcript denied him his constitutional right to confront and cross-
25 examine the witnesses against him.

26 **VI. MR. COBB IS ENTITLED TO A NEW TRIAL BASED UPON INADMISSABLE**
27 **HEARSAY IN VIOLATION OF THE UNITED STATES CONSTITUTION.**

28 The district court erred by permitting several inadmissible hearsay statements

1 throughout Mr. Cobb's trial. The following issues of hearsay were extensively litigated in the
2 pretrial phases of Mr. Cobb's case. The following instances of hearsay were presented during
3 Mr. Cobb's trial. Mr. Cobb will address each instance below:

4
5 A) **JORGE CONTRERAS' STATEMENT TO MS. HERNANDEZ THAT HE**
6 **ALLEGEDLY WAS CONTACTED BY A PERSON IDENTIFIED AS**
7 **"SHADY".**

8 On May 16, 2005, Jorge's girlfriend Beatrice gave the following testimony.

9 Yes, I was walking to pick up my sister and I saw George talking to some guy
10 down the street, about three blocks down from me, and he walked in his car and
11 left before I met George. So I asked him, "What was that all about?" And he
12 said "Don't worry about it. That was " - he referred to him as Shady.
(Evidentiary hearing 5/16/05 p. 44, 1. 8-14).

13 During trial the district court permitted Ms. Hernandez to testify:

14 Q. And you turned the corner. How far would you say you were from
15 George when you turned the corner?

16 A. About two, three blocks down.

17 Q. Two, three blocks down? And did you immediately recognize that it was George

18 --

19 A. Yes.

20 Q. -- having this conversation? Did you recognize the other individual that
21 he was talking to?

22 A. No.

23 Q. Did you see anything associated with this other individual that he was
24 talking to?

25 A. I -- as soon as I approached George, the other individual got in the car
26 and left.

27 Q. Do you remember anything about the description from your mind as to
28 what this person looked like?

A. No.

Q. Okay. Once this person got in the car and left, did you have a
conversation with George?

A. Yes.

Q. Okay. And can you explain to the ladies and gentlemen of this jury ~~that~~
conversation began?

A. Yes. I asked George what that was all about. He said that was Shady, and
he wanted to know what gang I was from. I said nowhere. And that was
-- that was it.

Q. Okay. Let me stop for just a second. He said to you
that that was Shady?

A. Yes. (A.A. Vol. 9, pp. 47-49).

1 The district court erred as Ms. Hernandez should not have been able to testify regarding
2 "Shady".

3 NRS §51.085 (Nevada's present sense impression statute) states, "A statement
4 describing or explaining an event or condition made while the declarant was perceiving the
5 event or condition, or immediately thereafter, is not inadmissible under the hearsay rule. The
6 Court addressed the "present sense impression" exception in Browne v. Nevada, 113 Nev. 305,
7 312 (1997).
8

9 In Browne the Court held, "The policy for admitting statements under this exception is
10 that the statement is more trustworthy if made contemporaneously with the event described.
11 Narciso v. State, 446 F. Supp. 252, 285 (E.D. Mich. 1977). (emphasis added). Further this
12 Court in Bemis v. Edwards, 45 F.3d 1369, 1372, (1995), addressed the applicability of the
13 "present sense impression" exception noting "to qualify under either exception, an out-of-court
14 statement must be nearly contemporaneous with the incident described and made with little
15 chance for reflection."
16

17 Here, Jorge's alleged comments to Beatrice does not qualify as a "present sense
18 impression" under NRS §51.085. Beatrice, by her own admission states that she saw Jorge from
19 three blocks away. (emphasis added). Therefore, Beatrice must have walked up to three blocks
20 prior to any discussions with Jorge. Walking three blocks takes time.
21

22 **B) JORGE CONTRERAS' ALLEGED COMMUNICATIONS BY POINTING**
23 **TO HIS FATHER AND MS. HERNANDEZ TO TESTIFY THAT THE**
24 **PERPETRATOR WAS SHADY.**

25 In the pretrial motions, the State presented four arguments to the district court in order
26 to admit the non-verbal statements by Jorge to Beatrice and his father while in the hospital. 1)
27 Jorge's statement was non-testimonial; 2) the statement was part of an excited utterance; 3) the
28 statement was part of a dying declaration, and 4), the statement is still admissible under the

1 residual hearsay exception as the trustworthiness of a dying declaration is still present.

2 Ms. Hernandez was permitted to testify:

3 Q. Okay. Did there come a point in time -- well, let me ask
4 you this. This conversation you had with him about who
5 shot him --

6 A. Yes.

7 Q. -- what prompted the conversation?

8 A. His friends were watching him from the glass.

9 Q. His friends were watching him from the glass?

10 A. Yes. And they wanted to come in. His father wouldn't --
11 didn't want anybody else in the room, and George waved
12 them in, and his father said I don't want anybody else in
13 this room --

14 Mr. Whipple: Judge, I'm going to object to hearsay to what the father
15 said.

16 Mr. DiGiacomo: Not offering it for the truth of the matter asserted.

17 The Court: Okay. I'm going to allow the witness' answer up until this
18 point to stand and then continue.

19 Mr. DiGiacomo: Thank you.

20 Mr. DiGiacomo:

21 Q. Did he say the reason why he didn't want anyone else in
22 this room?

23 A. I -- I didn't --

24 Q. Okay. Then what did you say?

25 A. I said Shady? Did Shady do this to you?

26 Q. And what was George's reaction to you saying that?

27 A. He pointed at me.

28 Q. He stared pointing at you?

A. Yes (A.A., Vol. 9, pp.1803).

The district court committed error. Ms. Hernandez should not have been permitted to
testify as to what Jorge told his father. This is inadmissible hearsay evidence. In admitting this
evidence, it deprived Mr. Cobb of his right to cross-examination, in violation of his right to
"actual" confrontation of the witnesses against him under the Nevada and Federal Constitution.
Mr. Cobb will outline all the State's contentions to demonstrate this inadmissible hearsay
evidence should not have been presented at trial.

1) Jorge's statement was testimonial;

First, the State argued in their pretrial motions and their answering brief that this statement is not testimonial and therefore, the Crawford v. Washington, 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004), holding would not apply. The state's argument is clearly misguided.

Mr. Cobb would contend the statement of the deceased in this case was made after an investigation was initiated and Jorge Contreras could "reasonably expect [the statement] to be used as prosecutorial." Crawford 541 U.S. 36 124 S. Ct. 1354 158 L.Ed 2d 177 (2004). Therefore, the statement is testimonial in nature, unreliable and therefore, inadmissible pursuant to Crawford. The district court erred in permitting this inadmissible hearsay.

The 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 Court reasoned that the only indicia of reliability 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. The statement Jorge made to Beatrice and her father was testimonial.

In the State's answering brief they cite Harkins v. State, 122 Nev. Adv. Rep. 84; 143 P.3d 706; (2006), and Mr. Cobb would contend the State's argument is misplaced and Jorge's

1 statement was testimonial. The opinion states in part:

2 We now take the opportunity to further refine this rule by presenting a
3 nonexhaustive list of factors for courts to consider in determining whether a
4 statement is testimonial: (1) to whom the statement was made, a government
5 agent or an acquaintance; (2) whether the statement was spontaneous, or made in
6 response to a question (e.g., whether the statement was the product of a police
7 interrogation); (3) whether the inquiry eliciting the statement was for the purpose
8 of gathering evidence for possible use at a later trial, or whether it was to
9 provide assistance in an emergency; and (4) whether the statement was made
10 while an emergency was ongoing, or whether it was a recount of past events
11 made in a more formal setting sometime after the exigency had ended. No one
12 factor is necessarily dispositive, and no one factor carries more weight than
13 another. These factors will assist courts in ascertaining the relevant facts
14 surrounding the circumstances of a hearsay statement in order to determine its
15 testimonial nature. Harkins v. State, 122 Nev. Adv. Rep. 84; 143 P.3d 706;
16 (2006).

17 In Harkins the victim had been shot, went to a neighbor to have them call police,
18 offering statement of who shot him without inquiry, and was in an emergency because 911 was
19 called and he was bleeding to death. Harkins v. State, 122 Nev. Adv. Rep. 84; 143 P.3d 706;
20 (2006). The situation in Harkins is quite different from what is now before the Court. Here,
21 the facts continue to favor the Defendant's position that the statement was testimonial. The first
22 factor, to whom the statement was made, is neutral. Though Beatrice is an acquaintance of
23 Jorge, she acted as an agent of the government when she immediately called the homicide
24 detectives to inform them that "Shady" shot Jorge. As this Court is well aware, the police
25 regularly ask witnesses, and friends to contact them if they learn anything, in short to act as
26 their agents. The second factor, the statement being spontaneous or in response to a question,
27 sides completely with the defendant. Beatrice's father asked Jorge, "So who did this to you?"
28 followed by Beatrice asking, "Shady? Was it Shady that did this?" Jorge clearly made this
statement in response to these questions.

The third factor, the purpose of the statement, was not for the purpose of providing
assistance in an emergency, it was in response to a question intending to gather evidence. The

1 shooting happened more than two weeks prior, and Jorge was safely in the hospital.
2 Additionally, Beatrice's actions confirm her intent of the question to gather evidence because
3 she immediately called the police to tell them "Shady" shot Jorge. This factor also sides with
4 the Defendant.

5
6 The fourth factor, whether the statement was during an emergency, or in a more formal
7 setting, sides with the Defendant. The emergency was long since over. The setting in the
8 hospital was as formal as could be expected for a hospitalized patient. The police even had a
9 formal meeting with Jorge earlier that morning in the hospital. None of these factors are
10 dispositive, and no one factor carries more weight than the other. Harkins v. State, 122 Nev.
11 Adv. Rep. 84; 143 P.3d 706; (2006). Therefore, because one of the factors is neutral, and the
12 other three weigh in favor of the Defendant, the statements must be considered testimonial, and
13 therefore inadmissible in order to protect Defendant Cobb's constitutional rights of
14 Confrontation and cross-examination.

15
16 2) The Statement was part of an excited utterance;

17 Addressing the question as to whether Jorge's statement was an excited utterance, the
18 State claimed that Jorge had no time to reflect and fabricate his response.

19
20 Hearing the name "Shady" is not excitable in the least. Additionally, because homicide
21 detectives had been there previously, Jorge had plenty of time to reflect and fabricate a
22 response. The identification came nearly two weeks after the shooting, not a matter of minutes
23 or hours.

24
25 3) The Statement was a dying declaration;

26 A communication made almost a month after being injured can not be a dying
27 declaration. The State cites to Bishop v. State, 92 Nev. 510, 554 P.2d 266; (1976), to support
28 their proposition of a dying declaration exception. In Bishop, the dying declaration was made

1 two (2) days after injury. In the instant case, almost a month had passed. The State was unable
2 to cite any case law to support their position that a person can believe that death is imminent a
3 "month" after an injury. The dying declaration exception is found at NRS §51.335, where it
4 states "statements made by a declarant while believing that his death was imminent . ."
5
6 (emphasis added).

7 Jorge must have felt that his death was imminent for a full month after his injury. In
8 Bishop, 92 Nev. 510, 554 P.2d 266; (1976), this Court clarified NRS §51.335 stating, "the
9 declarant subjectively senses impending death without any hope of recovery, then there is
10 present the vibrant requisite which the law demands. ." Id at 518. Here, the State's explanation
11 of the dying declaration exception can not be accepted. Here, testimony of Beatrice Hernandez
12 showed that the victim seemed to be aware only of the shot to his leg and was "not" aware of
13 the fact that he had been shot in the head. Lastly, any of the alleged statements of impending
14 death by the declarant are simply not supported by the record and they should not have been
15 admitted.
16

17 The State assumes in its answering brief that because noone had told Jorge that he was
18 going to live and the evidence pointed towards death so that Jorge believed his death was
19 imminent. However, on January 3, 2000, Jorge awoke from a comma. No one had told him
20 they thought he was not going to recover. Further, a few days later, Jorge was moved to
21 rehabilitation, dead and dying people do not need rehabilitation. Additionally, the state argues
22 that Jorge tells Beatrice he did not expect to live (State's AB pp. 30) This is belied by the
23 record. Both Jorge and Beatrice thought Jorge was going to make it (A.A, Vol. 9, pp. 1804-
24 1805). Most importantly, while Jorge was speaking to Beatrice and his father, nothing gave
25 Jorge the impression his death was imminent. The State carries the burden of proving Jorge was
26 in fear of his imminent death for the statement to be admissible, and the State has failed to do
27
28

1 so. It appears Jorge was getting better, not dying. This was not a dying declaration and should
2 not have been admitted.

- 3 4) The Statement is admissible under the residual hearsay exception as the
4 trustworthiness of a dying declaration.

5 The State contention that the statements may be admitted under NRS §51.315 must also
6 fail. As NRS 51.315 is outlined by this Court in Maresca v. Nevada, 103 Nev. 669, 748 P.2d 3,
7 (1987), held:
8

9 We have previously held that a statement could be admitted under NRS 51.315
10 where the person making the statement had no involvement with the police, the
11 defendant, or the victims; where neither the declarants nor the police had any
12 apparent motive to lie; where the declarants were unavailable for trial; and
13 where the statement, in its nature, was of a relatively simple kind which could be
14 recorded with little prospect of later misinterpretation.

15 The state attempts to hide how clearly Beatrice's statement does not fit under NRS
16 51.315. Even by the state's own admission "the statement does not completely fit under the
17 traditional sense of a dying declaration or an excited utterance" (State's AB pp. 30). Here, the
18 facts violate the parameters of NRS §51.315. First, the declarant had an involvement with the
19 defendant. The State has already acknowledged the fact that Jorge and Shady met at least five to
20 six months prior to December 1999. This involvement violates the first prong of NRS 51.315.
21 Second, the alleged communication between the declarant and the witnesses was "not" of a
22 relatively simple kind. Here, Jorge was "not" in his normal state of mind. Dr. Ozobia testified
23 that Jorge was heavily medicated and under stress and trauma (A.A., Vol. 3, pp. 510).
24 Additionally, no matter how close Jorge was to his girlfriend and his father, they could not read
25 his mind. Jorge did not communicate by talking to Beatrice or his father. Rather, there was
26 alleged pointing and subjective interpretations by a third party. This third party interpretation is
27 not the "simple kind of recorded" communication that is identified by the Court. Maresca v.
28 Nevada, 103 Nev. 669, 748 P.2d 3, (1987).

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1 Mr. Cobb's position is that any alleged statements made to Beatrice from Jorge do not
2 qualify because Jorge knew Shady and also due to the medical condition of Jorge and the
3 inherent bias of Beatrice. Beatrice testified for the first time, on May 16, 2005, that during the
4 time Jorge was in rehabilitation, Jorge had told her who had shot him. Clearly, to now allow
5 this questionable evidence to "now" come before the finder of fact would be improper. This
6 speculative, questionable evidence does not fit within the parameters of NRS § 51.315 and
7 should be denied as questionable hearsay testimony.
8


9 The district court erred in permitting the above outlined instances of hearsay.
10 Permitting these hearsay statements denied Mr. Cobb his right to confrontation with the
11 witnesses against him.
12

13 CONCLUSION

14 Therefore, based upon the arguments herein, Mr. Cobb would respectfully request that
15 this Court grant him a new trial, based upon the fact that defendant did not receive a fair trial as
16 afforded by the United States Constitution's Amendments.
17

18 DATED this 14 day of September, 2009.

19 Respectfully submitted by:

20
21 
22 _____
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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 appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14 day of September, 2009.

Respectfully submitted by,



CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Appellant

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 14 day of September, 2009, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF**, addressed to:

David Roger
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

Catherine Cortez-Masto
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717


An employee of Christopher R. Oram, Esq.

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

EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

DELBERT CHARLES COBB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50346

FILED

JUL 06 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit a crime, first-degree murder with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

The district court sentenced appellant Delbert Charles Cobb to life in prison without the possibility of parole for first-degree murder, plus an equal and consecutive term for the deadly weapon enhancement; 20 years with the possibility of parole after 8 years for attempted murder with the use of a deadly weapon, plus an equal and consecutive term for the deadly weapon enhancement; and one year for conspiracy to commit a crime, all counts to run concurrently. Cobb appeals his convictions on multiple grounds: (1) the district court's error in overruling his Batson objections to two of the State's peremptory challenges, (2) violation of his constitutional right to a venire selected from a fair cross section of the community, (3) the district court's refusal to sever the charges against him, (4) admission of evidence of prior bad acts, (5) admission of the preliminary hearing testimony of an unavailable witness, and (6) admission of hearsay evidence. We conclude that any error in this case does not warrant relief, and we affirm the judgment of conviction.

10-17444

The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Batson claims

Cobb contends that the district court erred in overruling his objections pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), because the State exhibited discriminatory motive in using peremptory challenges to remove two African-American prospective jurors from the jury pool. In evaluating a Batson challenge, whether the State exhibited discriminatory intent is a determination of fact for the district court that this court "accord[s] great deference." Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (quoting Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (internal quotation marks omitted)). We will not reverse the district court's decision "unless clearly erroneous." Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

The district court denied Cobb's Batson challenges after determining that he failed to demonstrate purposeful discrimination by the State. Nothing in the record indicates that the State's reasons for excusing the two contested jurors were motivated by racial discrimination. Both potential jurors provided inconsistent answers in their juror questionnaires and during voir dire, and the son of one of the potential jurors had been prosecuted twice by the State. Such factors would be cause for concern from the State's perspective. Accordingly, we conclude that the district court's decision was not clearly erroneous in this instance, and reversal is not warranted on this issue.

Jury venire

Cobb also argues that his constitutional rights were violated because his jury venire did not adequately represent a cross section of the community with regard to African Americans. The Sixth Amendment of

the United States Constitution "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."" Williams v. State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005) (quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996) (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975))). To show that his right to a fair cross section has been violated, a defendant must demonstrate:

"(1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

Id. at 940, 125 P.3d at 631 (quoting Evans, 112 Nev. at 1186, 926 P.2d at 275) (internal quotation marks omitted) (emphases omitted)).

Assuming arguendo that Cobb satisfied the first and second steps, we evaluate whether African Americans are systematically excluded from the Clark County jury selection process. At trial, Cobb examined the Clark County jury commissioner about the jury selection process. The jury commissioner testified that jurors are currently selected from a list provided by the Department of Motor Vehicles but that a senate bill was pending at that time that would expand the pool of potential jurors to include those who are customers of Nevada Power.¹ This attempt to expand the juror list is Cobb's sole argument that minorities are

¹There is no evidence in the record indicating whether the bill passed.

systematically excluded from the juror pool. We conclude that Cobb's argument falls short of demonstrating systematic exclusion and, thus, Cobb has failed to show that his right to a venire selected from a fair cross section of the community was violated.

District court's refusal to sever the charges

Cobb contends that the charges he faced for shootings that occurred on November 13 and December 16, 1999, should have been severed because they could not reasonably be considered as connected to one another, and, thus, a new trial should be granted. The district court has discretion to join or sever charges. Weber v. State, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005). NRS 173.115(2) specifies that joinder of charges is permissible if the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Cobb argues, and our review of the record indicates, that the only evidence introduced at trial exhibiting a commonality between the November 13 and December 16 shootings was that the shootings occurred near each other in an area where Cobb's gang had a known presence and that the two rifles used in each incident were found together at a fellow gang member's home. This connection is tenuous at best. As such, we conclude that the district court abused its discretion by not severing the charges. However, we deem the error to be harmless as it did not "ha[ve] a substantial and injurious effect on the jury's verdict." Weber, 121 Nev. at 570-71, 119 P.3d at 119. Cobb was acquitted of the charges resulting from the December 16 shooting, thus indicating that the jury carefully considered the evidence relating to each charge and did not infer from the joinder of charges that Cobb had a criminal disposition.

Evidence of prior bad acts

Cobb next argues that the district court erred by admitting evidence of two attempted murder convictions that occurred on November 4 and December 11, 1999. "The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). Under NRS 48.045(2), such evidence "is not admissible to prove the character of a person," but may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the district court held a hearing outside the presence of the jury and determined that evidence of Cobb's prior bad acts was relevant, the acts were "established by clear and convincing evidence," and "the probative value [was] not substantially outweighed by the danger of unfair prejudice." See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (instructing that the district court must conduct a hearing outside the presence of the jury to determine the admissibility of prior bad act evidence). Cobb only challenges the district court's determination that the probative value of the prior bad act evidence was not substantially outweighed by the danger of unfair prejudice. See id.

The State presented evidence at trial to show that on December 11, Cobb was a passenger in a white Astro van and was involved in an attempted murder and that the shooter in the November 13 incident was also a passenger in a white Astro van. Additionally, the prior bad acts that occurred on November 4 and December 11 and the charged crimes that occurred on November 13 and December 16 all occurred within approximately four blocks of each other in an area that is occupied by

Cobb's gang. The evidence further indicated that the same rifle was used in both the November 4 prior bad act shooting and November 13 shooting. In addition, a second rifle used in the December 16 shooting was recovered at the same time and from the same location as the aforementioned rifle.

Thus, we determine that the probative value of evidence of Cobb's prior bad acts was not substantially outweighed by the danger of unfair prejudice, especially with regard to proving the identity of the shooter in and the motive behind the charged crimes. As a result, we conclude that it was not manifest error for the district court to admit evidence of Cobb's prior bad acts.

Preliminary hearing testimony of unavailable witness

Cobb next contends that the district court erred in admitting the preliminary hearing testimony of Angela Orozco, who the State claimed was unavailable for trial, because "the State's effort to locate Ms. Orozco was not sufficient." A district court's decision to admit prior testimony of a witness whom the State is unable to locate presents a mixed question of law and fact. Hernandez v. State, 124 Nev. 639, 646-47, 188 P.3d 1126, 1131-32 (2008). This court "give[s] deference to the district court's findings of fact but will independently review whether those facts satisfy the legal standard of reasonable diligence." Id. at 647, 188 P.3d at 1132.

Prior testimony is admissible at trial "if three preconditions exist: first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970); see also NRS 171.198, NRS 51.325. "[A] witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his

presence at trial.” Barber v. Page, 390 U.S. 719, 724-25 (1968); accord Drummond, 86 Nev. at 7-8, 462 P.2d at 1014.

A review of the record demonstrates that Cobb was represented by counsel at the preliminary hearing and that he effectively cross-examined Orozco. At trial, the State’s investigator testified that in attempting to locate and subpoena Orozco, he visited her alleged place of employment and went to every residence to which he knew she had been linked. In addition, the investigator testified that he questioned Orozco’s aunt about her whereabouts and was informed that she was transient. We conclude that the State’s efforts to locate Orozco constituted good faith and reasonable diligence. See Quillen v. State, 112 Nev. 1369, 1374-76, 929 P.2d 893, 897-98 (1996). Thus, we conclude that the district court did not err in determining that Orozco was unavailable and admitting her preliminary hearing testimony.

Hearsay evidence

Lastly, Cobb argues that the district court erred in admitting two separate hearsay statements. Both instances involve communications between Jorge Contreras, the victim in the December 16 shooting who later died from his wounds, and his girlfriend Beatriz Hernandez. Prior to trial, Cobb moved to exclude Hernandez’s testimony regarding both hearsay communications, and the district court ultimately concluded that they were admissible. A district court’s decision to admit hearsay evidence will not be disturbed on appeal absent an abuse of discretion. Fields v. State, 125 Nev. ___, ___, 220 P.3d 709, 716 (2009). “Hearsay is inadmissible” absent a statutory exception to the hearsay rule. NRS 51.065.

Statement prior to the December 16 shooting

Cobb first challenges the district court's admission of a hearsay statement relating to an incident that occurred months before the December 16 shooting. Hernandez testified at trial that she was walking to meet Contreras when she observed him a few blocks away from her talking to a man. As she approached, the man with whom Contreras was speaking drove off in a car. Hernandez asked Contreras who he was talking to and he responded "that was Shady," a moniker by which Cobb was also known.

In denying Cobb's pretrial motion to exclude this hearsay statement, the district court determined that the statement was admissible under the present sense impression exception. See NRS 51.085 (providing that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" may be admissible). We conclude from our review of the trial record that the district court did not abuse its discretion in admitting this hearsay statement under the present sense impression exception because Contreras's statement was made contemporaneously with the event as perceived by Hernandez. See *Browne v. State*, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997) (noting that the policy underlying the present sense impression "exception is that the statement is more trustworthy if made contemporaneously with the event described").

Statement after the December 16 shooting

The second communication that Cobb argues was improperly admitted hearsay evidence relates to an incident that occurred while Contreras was in the hospital before he passed away. The district court permitted Hernandez to testify that Contreras was in the hospital for approximately one month and that she visited him almost daily during

that time. On one of her visits, she asked Contreras “[d]id Shady do this to you,” and, although he was unable to speak, Contreras “pointed at [her].” Hernandez testified that she immediately left Contreras’s room to call the police. Cobb argues that the district court erred in admitting this hearsay communication in violation of his constitutional right to confrontation. We agree but conclude that the error was harmless beyond a reasonable doubt, see Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 476-77 (2006) (stating that harmless-error analysis applies to Confrontation Clause errors and that the error must be harmless beyond a reasonable doubt), thus reversal of Cobb’s convictions is not warranted.

A defendant’s Sixth Amendment right to confront witnesses against him is not violated by the admission of statements that are not testimonial in nature. Harkins v. State, 122 Nev. 974, 979, 143 P.3d 706, 709 (2006).² Testimonial hearsay statements are only admissible under the Sixth Amendment if the declarant is unavailable and the defendant had an opportunity to cross-examine him. Crawford v. Washington, 541 U.S. 36, 68 (2004). This court has enumerated several factors to be utilized in evaluating whether a statement is testimonial, including

²The State argues, among other things, that Hernandez’s testimony is admissible under the dying declaration hearsay exception. See NRS 51.335. Statements admitted under the dying declaration hearsay exception do not violate a defendant’s Sixth Amendment confrontation right. Harkins, 122 Nev. at 979, 143 P.3d at 709. We conclude that Contreras’s communication with Hernandez was not admissible as a dying declaration because there is no evidence in the record to indicate that he believed he was going to die soon. See NRS 51.335 (providing that a dying declaration is “[a] statement made by a declarant while believing that his . . . death was imminent”).

(1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question . . . ; (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events.

Harkins, 122 Nev. at 987, 143 P.3d at 714.

Here, Contreras's communication to Hernandez was not spontaneous but was instead prompted by her specific question. Additionally, there is no evidence in the record demonstrating that Hernandez's question and Contreras's response occurred in an emergent situation. At that time, Contreras had been in the hospital for over one week and his condition was improving. In addition, immediately after Contreras communicated his response to Hernandez, she left his hospital room to call the police, which appears to indicate that she was merely attempting to discover the identity of the shooter.

Therefore, we conclude that Contreras's communication to Hernandez was testimonial in nature, rendering it inadmissible under Crawford because Cobb was not afforded the opportunity to cross-examine Contreras. Thus, we conclude that the district court abused its discretion in admitting this hearsay communication. However, we conclude that the error was harmless beyond a reasonable doubt as the jury acquitted Cobb on the charges stemming from the December 16 shooting of Contreras. See Medina, 122 Nev. at 355, 143 P.3d at 477 (concluding that erroneously admitted testimony was harmless because it did not contribute to the jury's verdict).

Having considered Cobb's contentions and concluded that they
do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

1 Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Jennifer Togliatti, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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4 520 S. Fourth Street, 2nd Floor
5 Las Vegas, Nevada 89101
6 (702) 384-5563
7
8 Attorney for Petitioner
9 DONTÉ JOHNSON

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,

CASE NO. C153154
DEPT. NO. VI

Plaintiff,

vs.

DONTÉ JOHNSON,

Defendant.

RECEIPT OF COPY

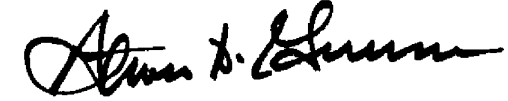
RECEIPT OF A COPY of the attached **REPLY BRIEF ON MR. JOHNSON'S INITIAL**
TRIAL ISSUES is hereby acknowledged this ____ day of August, 2011.

DAVID ROGER, DISTRICT ATTORNEY

By _____
DEPUTY DISTRICT ATTORNEY
200 Lewis Avenue

EXHIBIT 33

EXHIBIT 33



CLERK OF THE COURT

1 **FFCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 STEVEN S. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #004352
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 DONTE JOHNSON,
13 #1586283

14 Defendant.

CASE NO: 98C153154

DEPT NO: VI

15 **FINDINGS OF FACT, CONCLUSIONS OF
16 LAW AND ORDER**

17 DATE OF HEARING: 6/21/13
18 TIME OF HEARING: 8:30 AM

19 THIS CAUSE having come on for hearing before the Honorable ELISSA F. CADISH,
20 District Judge, on the 21st day of June, 2013, the Petitioner being present, represented by
21 CHRISTOPHER R. ORAM, ESQ., the Respondent being represented by STEVEN B.
22 WOLFSON, Clark County District Attorney, by and through STEVEN S. OWENS, Chief
23 Deputy District Attorney, and the Court having considered the matter, including briefs,
24 transcripts, testimony, arguments of counsel, and documents on file herein, now makes the
25 following findings of fact and conclusions of law:

26 Before the Court is Defendant's Petition for Writ of Habeas Corpus, Supplemental Brief
27 in Support of Defendants Writ of Habeas Corpus, Second Supplemental Brief in Support of
28 Defendants Writ of Habeas Corpus, State's Response, Defendant's Reply to the State's
Response, and Defendant's Reply Brief on Mr. Johnson's Initial Trial Issues. The Court heard

1 argument followed by an evidentiary hearing at which Mr. Johnson's trial attorneys from his
2 2000 and 2005 trials testified. After review of the briefs, exhibits, and evidence presented to
3 the Court, the Court hereby denies Defendant's Petition for Writ of Habeas Corpus.

4 In 2000, Mr. Johnson was found guilty by the jury, but the jury was unable to reach a
5 unanimous verdict on the appropriate penalty in the penalty phase. Thereafter, a three-judge
6 panel held a penalty hearing and imposed the death penalty on Mr. Johnson for all four
7 murders. On appeal, the Nevada Supreme Court noted the overwhelming evidence of Mr.
8 Johnson's guilt and affirmed his convictions by the jury. However, under the United States
9 Supreme Court's decision in Ring v. Arizona, the Court reversed the imposition of death by
10 the three-judge panel and remanded the case for a new penalty phase before a new jury. In
11 2005, the jury imposed a sentence of death for all four murders. This sentence was affirmed
12 on appeal to the Nevada Supreme Court. Mr. Johnson asserts ineffective assistance of counsel
13 at his trials and on his appeals. Under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052
14 (1984), to establish ineffective assistance, Defendant must show first that his counsel's
15 representation fell below an objective standard of reasonableness, and second, that but for
16 counsel's errors, there is a reasonable probability that the result of the proceedings would have
17 been different.

18 Here, Mr. Johnson asserts that his first appeal should have challenged various issues
19 relating to the jury selection process. Given that the jury did not reach a verdict on the penalty
20 and the Nevada Supreme Court reversed the death penalty imposed by the three-judge panel,
21 the alleged appeal deficiencies could only be prejudicial if they would have resulted in a
22 reversal of the convictions herein. With respect to the alleged underrepresentation of African
23 Americans in the jury venire, there is no evidence presented that this was a systematic
24 underrepresentation and the issue, if raised on appeal, would not have been successful.
25 Additionally, the State is permitted to use its peremptory challenges to strike life-affirming
26 jurors, and no authority is provided indicating this is in any way improper. This issue would
27 not be likely to succeed on the direct appeal. Mr. Johnson also argues that appellate counsel
28 should have raised the trial court's denial of cause challenges for jurors who would have

1 automatically voted for death or otherwise should have been stricken for cause, but the trial
2 court had denied those challenges. At trial, defense counsel used its peremptory challenges to
3 strike these jurors. Thus, the jurors in question did not sit on the jury that made decisions about
4 Mr. Johnson's case. There is no indication that the actual jurors had improper biases, and no
5 authority that the forced use of peremptory challenges violated Mr. Johnson's rights other than
6 a dissenting opinion in a United States Supreme Court case. Thus, this issue would likely have
7 been rejected if raised on appeal, and it is not below an objective standard of reasonableness
8 to fail to make this argument. Mr. Johnson also argues that his counsel should have moved to
9 dismiss the kidnapping charges as incidental to the robbery charges. However, under
10 applicable case law, the movement and restraints used in this case would likely have been
11 found to have substantially increased the risk of harm to the victims and the motion would not
12 have been successful. Accordingly, no prejudice has been shown. The Court has also reviewed
13 each of the other arguments about alleged ineffective assistance at the 2000 trial and appeal
14 therefrom and finds that neither prong of Strickland is met as to those matters.

15 With respect to the 2005 penalty phase, the Court similarly finds that Mr. Johnson's
16 counsel neither fell below an objective standard of reasonableness, nor has prejudice been
17 shown. Specifically, the failure to list on the verdict form the mitigators listed by the jury at
18 the first penalty phase is not ineffective given that those matters were argued in any event and
19 the jurors could consider them in evaluating the penalty. Additionally, there is no showing of
20 prejudice from this failure. The failure to obtain and present a PET scan was not unreasonable
21 given that Mr. Johnson was noted to be bright, the conflicting testimony about whether his
22 mother had been drinking during her pregnancy with him, and the fact it was not general
23 practice to do one at the time. Additionally, there is no showing that a PET scan would have
24 assisted Mr. Johnson in presenting mitigation evidence to the jury. The decisions not to present
25 evidence of the co-defendants' sentences or to attempt to present Mr. Johnson's father as a
26 witness were strategic decisions that do not rise to the level of ineffective assistance, and were
27 not shown to be prejudicial. Similarly, all other matters raised regarding the 2005 penalty
28 phase and the appeal therefrom are also rejected as failing under both prongs of Strickland.

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ACCORDINGLY, the Petition for Writ of Habeas Corpus is denied.

DATED this 14 day of March, 2014.


DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

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CHRISTOPHER R. ORAM, ESQ.
crorambusiness@aol.com

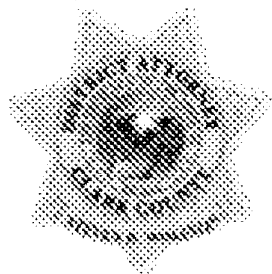
Eden Davis
Employee,
Clark County District Attorney's Office

5

Eileen Davis

From: Eileen Davis
Sent: Wednesday, March 12, 2014 9:38 AM
To: 'crorambusiness@aol.com'
Cc: Steven Owens
Subject: Donte Johnson, 98C153154, Findings submitted to Judge for signature.
Attachments: Johnson, Donte, 98C153154, Findings, 2014.pdf

Eileen Davis
Paralegal
Criminal Appeals
Clark County District Attorney
eileen.davis@cccdanv.com
(702) 671-2750



Eileen Davis

From: Eileen Davis
Sent: Tuesday, March 04, 2014 9:17 AM
To: 'crambusiness@aol.com'
Cc: Steven Owens
Subject: Donte Johnson, 98C153154, Findings.
Attachments: Johnson, Donte, 98C153154, FOFCL&O.pdf

Attorney Oram:

The attached Findings will be submitted to the Judge on March 12, 2014.

Sincerely,

Steven S. Owens

EXHIBIT 34

EXHIBIT 34

98C153154

Case No. C153154Dept. No. VI

FILED

OCT 08 2014

Clerk of Court
CLERK OF COURT

8th
IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

98C153154
PWHC
Petition for Writ of Habeas Corpus
4329881



Donte Johnson
Petitioner,

v.

State of Nevada,
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

* Death Penalty *

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

CLERK OF THE COURT

OCT 08 2014

RECEIVED

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

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, Ely, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court

3. Date of judgment of conviction: on or about October 3rd 2000

4. Case number: 45456

5. (a) Length of sentence: Death

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

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

If "yes", list crime, case number and sentence being served at this time: Attempt murder, Nolo plea for 4 to 10 years case no 98F06789 X

7. Nature of offense involved in conviction being challenged: Homicide

8. What was your plea? (check one):

(a) Not guilty ☒ (b) Guilty ☐ (c) Nolo contendere ☐

9. If you entered a plea of guilty 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 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 judgment 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: Affirmed conviction retried penalty phase; result Death

(d) Date of result: N/A
(Attach copy of order or decision, if available.)

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

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

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

(a)(1) Name of court: Eighth Judicial District court
(2) Nature of proceeding: Habeas corpus

(3) Grounds raised: IAC - related

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result: currently pending

(6) Date of result: N/A

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

N/A

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

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result: N/A

(6) Date of result: N/A

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

(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: N/A

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

Citation or date of decision: N/A

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

Citation or date of decision: N/A

(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 1/2 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 postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: NONE

(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

18. If any of the grounds listed in No. 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 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

Ground one was not presented, because it is newly discovered evidence.

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, 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 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

(See Attached "Paragraph 19")

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

If yes, state what court and case number: CASE NO 65168

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: ALZERA B. JACKSON, DAVID FIGLER, JOSEPH

SAISENTO, and BRETT WHIPPLE. Current Counsel, CHRISTOPHER R. DRAM. 520 S. FOURTH STREET L.V., NEV.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ☒ No ☐

If yes, specify where and when it is to be served, if you know: 4 to 10 years in the Nevada Department of Corrections

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.

See Ground one (Attached)

PARAGRAPH 19

-4A-

Paragraph 19

* Paragraph 19 *

19. This petition is being filed in excess of one year following judgement of conviction in case number 45456, in light of newly discovered evidence which forms its basis (see attached Declaration of Sikia L. Smith at page 46).

It would constitute a fundamental miscarriage of justice for the court not to excuse any procedural default as petitioner is actually innocent. And the new evidence could not, even with due diligence, have been discovered at an earlier date, Schulp-v-DeLo, 513 U.S., 298, 854 (1995) moreover, it is more likely than not, that no reasonable juror would have found petitioner guilty beyond a reasonable doubt had they been provided this newly discovered evidence. And further, this newly discovered evidence could have been presented to the elected jury had trial counsel simply interviewed petitioners co-dependants.

* GROUND ONE *

-4C-

Ground one

* Ground One *

1. The investigation that led to petitioners conviction and sentence were obtained in violation of His Substantial Rights.

A) Petitioners co defendant Dikia L. Smiths newly discovered declaration (see page 4G), establishes that his inculpatory statements were not true, and did help guide an investigation by authorities which played a part in petitioners conviction and sentence.

B) Mr. Smiths declaration indicates that he has been trying to come forward with new evidence in the form of his declaration "for years". At this point it is unknown if Mr. Smiths attempts to come forward [over the years] include efforts to contact the prosecutor or other authorities, and or, what he was told by them after those efforts. One such effort was made in his recent contact to ^{see page - 4F - letter to Oram} petitioners attorney of record (Mr. Christopher Oram). Petitioner is simply not with the ability or resources to develop any of the information that may exist as a result of any of Mr. Smiths prior efforts.

i) Given that this is a death penalty case, the court, in the interest of justice, should appoint counsel and allow an amendment of this claim.

C) This newly discovered evidence could not have been discovered earlier, even with the exercise of due diligence:

i) no reasonable juror would have found petitioner guilty beyond a reasonable doubt had they known Mr. Smith's statement were false in the rule of authorities investigation;

ii) Petitioner is actually innocent, and it would constitute a fundamental miscarriage of justice for the court not to hear the underlying claim. *Schlup - V - Delo*, 513 U.S. 298, 854 (1995).

D) Petitioner's conviction is infected with materially false and misleading evidence (attached hereto page 46: Declaration of Sikia L. Smith) in violation of his substantial rights and should be vacated.

E) Petitioner incorporates all of the foregoing paragraphs as if stated fully herein, and requests the court construe them liberally pursuant to *Haines - V - Kemer*, 404 U.S. 519 (1972)

D. Johnson

(EXHIBIT)

DEAR MR. ORAM

10/29/14

MY NAME IS SIKIA SMITH. I AM CO-DEFENDANT WITH DONTÉ JOHNSON. I AM WRITING YOU BECAUSE, I WISH TO RECALL MY STATEMENT I MADE AGAINST MR. JOHNSON WHAT DO I DO, HOW DO I DO IT. THE STATEMENTS WERE FALSE AND I WANT TO MAKE IT RIGHT. PLEASE WRITE BACK SO WE CAN TAKE CARE OF THIS THE RIGHT WAY.

THANK YOU

SIKIA L SMITH

-4F-

AA06804

(Exhibit)

Declaration OF Sikia L. Smith

I, Sikia Lafayette Smith, declare:

on or about 9/8/98 I gave authorities a recorded voluntary statement inculpat~~ing~~ my co-defendant Donte Johnson in a homicide.

For years I've been trying to recant my statements to police, as they are not an accurate account of the events that took place which resulted in Donte Johnson ultimately being convicted of his charged crimes.

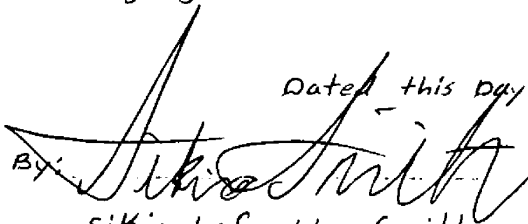
Donte Johnson was not, in any way, involved in the murders and related robberies, kidnappings or home invasion for which he was convicted.

I have my reasons as to why I gave authorities the false statements implicating Donte Johnson, I just need a chance to explain them.

At this point in time, this Declaration is the only avenue available to me, to make the court aware that my statements to police inculpat~~ing~~ Donte Johnson were not true.

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

Dated this Day of June 10th 2014

By: 

Sikia Lafayette Smith
P.O. Box 1484
Ely, Nevada 89301

Co Eighth Judicial Dist. Court
Steve Wolfgan, Clark County D.A.

-46-

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 5th day of the month of October of the year 2014.

Dante Johnson
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

Signature of Attorney (if any)

Christopher R. Oram
Attorney for petitioner
520 South Fourth Street Second Floor
Las Vegas, Nevada 89101
Address

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
Petitioner

Attorney for petitioner

Donte Johnson #66858

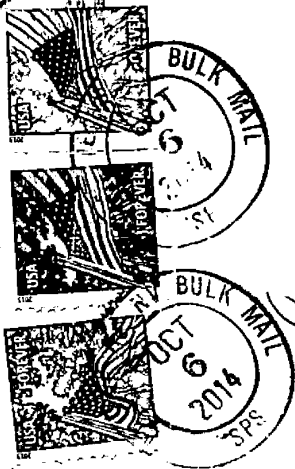
Ely State Prison

P.O. Box 1984

Ely, Nevada

89301

(Legal Mail)



(Legal Mail)
10-5-2014

Office Of THE Clerk

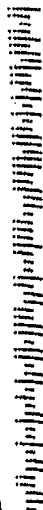
Eighth Judicial District Court

200 Lewis Avenue, Third Floor

Las Vegas, Nevada

89155

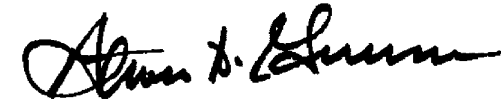
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ELY STATE PRISON
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10-5-14

EXHIBIT 35

EXHIBIT 35



CLERK OF THE COURT

1 RSPN
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 STEVEN S. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #004352
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: 98C153154

12 DONTE JOHNSON,
13 #1586283

DEPT NO: VI

14 Defendant.

15 STATE'S RESPONSE TO SECOND PETITION FOR WRIT
16 OF HABEAS CORPUS (POST-CONVICTION)

17 DATE OF HEARING: 1/14/15
18 TIME OF HEARING: 8:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District
20 Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the
21 attached Points and Authorities in Response to Defendant's Second Petition For Writ Of Habeas
22 Corpus (Post-Conviction).

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

26 //

27 //

28 //

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Johnson timely filed a first post-conviction petition for writ of habeas corpus on February 13, 2008, and counsel, Chris Oram, was appointed. After extensive briefing and evidentiary hearings, the petition was denied with Findings of Fact and Conclusions of Law filed on March 17, 2014. The appeal from the denial of that petition is presently pending before the Nevada Supreme Court in Case # SC 65168.

21 The problem with Johnson's claim is that Johnson was tried separately from his co-
22 defendants and no statements by Sikia Smith were ever used against him:

23

24

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1 against Johnson and admission of Smith's statement would have violated Johnson's constitutional
2 right to confrontation.

3 The current petition is in violation of the one-year time bar of NRS 34.726, the successive
4 petition bar of NRS 34.810, and the statutory laches bar of NRS 34.800 which the State now
5 affirmatively pleads because it has been more than five years since Johnson's trial. Even if Sikia
6 Smith's recantation constitutes newly discovered evidence, it does not establish good cause and
7 prejudice to overcome these procedural bars because Smith's original statement was never used
8 against Johnson and the outcome of Johnson's case would not have been any different.

9 Actual innocence is an extraordinary claim in which the defendant has presented new
10 evidence "that constitutional error has caused the conviction of an innocent person." Schlup v. Delo,
11 513 U.S. 298, 324, 115 S. Ct. 851, 865 (1995). To demonstrate actual innocence a petitioner must
12 demonstrate in light of all the evidence, it is more likely than not that no reasonable juror would
13 have convicted petitioner absent a constitutional violation. See Pellegrini v. State, 117 Nev. 860,
14 887, 34 P.3d 519, 537 (2001). A recantation of another defendant's incriminating statement never
15 presented to the jury, is not evidence of actual innocence or of an affirmative exoneration.
16 Furthermore, Johnson's claim of innocence is not cognizable as a freestanding claim where it is
17 unconnected to any procedurally barred constitutional claim of error. Herrera v. Collins, 506 U.S.
18 390, 113 S.Ct. 853 (1993) (Claims of actual innocence based on newly discovered evidence have
19 never been held to state a ground for federal habeas relief absent an independent constitutional
20 violation). Instead, actual innocence may be raised only as a procedural gateway or "fundamental
21 miscarriage of justice" to review of otherwise procedurally barred and independent constitutional
22 claims of ineffective assistance of counsel. Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995).
23 Johnson raises no such independent constitutional claim.

24 Appointment of counsel in a capital case is only required for an initial habeas petition, not
25 for a successive habeas petition. NRS 34.820; NRS 34.750. Johnson was represented by Counsel
26 Oram in his first habeas petition and continues to be represented by that same counsel in the pending
27 habeas appeal. The narrow issue of a codefendant's recantation is not a difficult or complex issue
28

1 warranting the appointment of counsel in a successive habeas petition that is clearly procedurally
2 barred.

3 WHEREFORE, the State respectfully requests that the petition and motion be denied.

4 DATED this 5th day of December, 2014.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY 

10 STEVEN S. OWENS
11 Chief Deputy District Attorney
12 Nevada Bar #004352
13 Office of the Clark County District Attorney
14 Regional Justice Center
15 200 Lewis Avenue
16 P.O. Box 552212
17 Las Vegas, Nevada 89155-2212
18 (702) 671-2750
19
20
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28

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 16th day of
December, 2014, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

CHRISTOPHER R. ORAM, ESQ.
520 South Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

DONTE JOHNSON, #66858
Ely State Prison
P.O. Box 1989
4569 North State Rt.
Ely, Nevada 89301

BY



Employee for the District Attorney's Office

SSO/ed

EXHIBIT 36

EXHIBIT 36



PLEASE FILE
LEFT SIDE

**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3RD FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

98C153154
LSF
Left Side Filing
4423414



Steven D. Grierson
Clerk of the Court

Brandi J. Wendel
Court Division Administrator

January 02, 2015

Attorney: Christopher R. Oram
520 S Fourth St 2nd Floor
Las Vegas NV 89101

Case Number: 98C153154
Department: Department 6

Defendant: Donte Johnson

Attached are pleadings received by the Office of the District Court Clerk which are being forwarded to your office pursuant to Rule 3.70.

Pleadings: **Reply to States Response to Second Petition for Habeas Corpus (Post Conviction Death Penalty)**

Rule 3.70. Papers which May Not be Filed

Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to the attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to Rule 7.40(b)(2)(ii).

Cordially yours,
DC Criminal Desk # 35
Deputy Clerk of the Court

AA06816

District Court
Clark County, Nevada

Donte Johnson
#66858 Petitioner

Case NO: 98C153154

~VS~

Dept. NO: VI

State of Nevada
Respondent

- Reply to States Response To
- Second Petition For Habeas Corpus (Post conviction)
Death Penalty

Points And Authorities

I. Reply

The State requests that the court not appoint counsel;
not grant leave to amend, and dismiss on procedural grounds.
It would constitute a manifest injustice for the court to grant
any such relief to the State.

CLERK OF THE COURT

JAN 02 2015

RECEIVED

A. Experienced counsel should be appointed, and leave to amend granted, given the obvious existence of substantial constitutional claims in the Pro Se Petition.

Petitioner is a death row inmate.¹⁾ There are no persons trained in the Nevada law within the prison available to assist him. The extent of law library access is restricted to a "cite specific paging system," accessed only through the prison guards.

Under these circumstances, and given this is a death penalty case, it would constitute a manifest injustice for the court not to appoint counsel to investigate and develop his constitutional claims.

In the Pro Se Petition, Petitioner specifically requested the appointment of counsel and leave to amend because he is not a lawyer, and recognized that his legal claims and theories would need further investigation and adjustment by someone who's trained in Nevada law, which, as stated above, he is simply not equipped to do.

That Mr. Sikia was convicted of the crimes (as petitioners co-defendant and prior to petitioner being convicted), yet no lawyer representing petitioner - at any stage of proceedings in the entitled case - has ever so much as made an effort to interview Mr. Sikia Smith; itself speaks to at least ineffective representation given his contemporary statements could have been used to

1. Petitioner has no legal training in filing petitions or experience in complex procedural arguments.

attack the states witnesses credibility at trial and/or in collateral proceedings.

- That the petitioner may have confused or misunderstood the procedural and legal theories in the current petition doesn't negate the fact that Mr. Sikia Smiths newly presented statements as to him: "[f]or years"... trying to recant [his] statements to police, necessarily evince a total failure by counsel - at all stages of proceedings - to have conducted a basic investigation of the case, discovered this information, and to have impeached the states witnesses credibility and/or evidence with it.⁽²⁾ This failure violated petitioners substantial rights.

Justice itself requires the court to appoint counsel and grant leave to amend to correct any deficiencies that exist in the current petition.

Executed under penalty of perjury.

Dated this 22nd day Dec. 2014

Attorney For Petitioner

Christopher R. Oram

520 South Fourth Street
Second Floor

LAS Vegas, Nevada
89101

Dante Johnson #66858

Ely State Prison

P.O. Box 1989

Ely, Nevada

89301

Dante Johnson

2. As the petition states, it is unknown at what point the prosecutors office was notified by Mr. Smiths as to his wanting to recant. Jurors were never made aware of this. Basic fairness requires the court to appoint counsel so that this claim can be properly and effectively delivered.

Dante Johnson #66858

E.S.P. Rm. 3-A-22

P.O. Box 1984

Ely, Nevada

89301

LAS VEGAS NV 8900

30 DEC 2014 PM 4 L



Legal Mail

Legal Mail

Mr. Steven D. Grierson

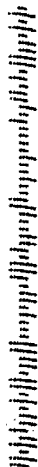
Clerk of The Court

200 Lewis Avenue, 3rd Floor

Las Vegas, Nevada

89155-1160

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AA06820

12/29/14
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12/29/14

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ELY STATE PRISON

DEC 29 2014

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EXHIBIT 37

EXHIBIT 37

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

Electronically Filed
Jan 09 2015 11:29 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING**

~~~~~  
**APPELLANT'S OPENING BRIEF**  
~~~~~

ATTORNEY FOR APPELLANT

CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

**ATTORNEY FOR
RESPONDENT**

STEVE WOLFSON, ESQ.
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
(702) 671-2500

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- I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.**
- II. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ON DIRECT APPEAL THE UNCONSTITUTIONALITY OF JOHNSON'S JURY SELECTION PROCESS.**
- 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.**
- IV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE THE ISSUE OF CHANGE OF VENUE 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.**
- VI. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PROSECUTORIAL MISCONDUCT REGARDING INTESTINAL FORTITUDE ON DIRECT APPEAL.**
- 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.**
- 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.**

- 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.
- X. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON INADMISSABLE EVIDENCE BEING PRESENTED PURSUANT TO.
- 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.
- XII. MR. JOHNSON IS ENTITLED TO REVERSAL OF HIS CONVICTIONS BASED UPON THE STATE'S INTRODUCTION OF OVERLY GRUESOME AUTOPSY PHOTOS.
- XIII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR TRIAL COUNSEL'S FAILURE TO OBJECT AND STATE ON THE RECORD WHAT TOOK PLACE DURING THE UNRECORDED BENCH CONFERENCES.
- 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.

- 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.
- 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.
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XXVI. THE DEATH PENALTY IS UNCONSTITUTIONAL

XXVII. 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.

XXVIII. 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.

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

JURISDICTIONAL STATEMENT

The Notice of Entry of Findings of Fact, Conclusions of Law and Order denying Mr. Johnson's Petition was filed on March 21, 2014 (A.A. Vol. 42 pp. 8184). Mr. Johnson filed a timely Notice of Appeal on March 6, 2014 (A.A. Vol. 42 pp. 8203-8204).

STATEMENT OF THE CASE

On September 2, 1998, the Grand Jury returned a true bill indicting the defendant (A.A. Vol. 1 pp. 1-10). On September 16, 1998, a superceding indictment was filed (A.A. Vol. 2 pp. 278). 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 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 (A.A. Vol. 6 pp. 1347).

On June 5, 2000, trial commenced (A.A. Vol. 11 pp. 2603). On June 9, 2000, the jury 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 (A.A. Vol. 14 pp. 3239-3247).

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 (A.A. Vol. 17 pp. 3928-4018).

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, this Court filed its Order of Affirmance in part, vacated in part, and remanded. This affirmed Mr. Johnson's convictions and his sentences other than his death sentences. This Court vacated his death sentences and remanded for a new penalty hearing. This Court overruled Mr. Johnson's death sentences based upon 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 (A.A. Vol. 20 pp. 4654-4679).

On April 27, 2005, the jury heard closing arguments regarding the first portion of the bifurcated penalty phase (A.A. Vol. 25 pp. 5854-5949). 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 the 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 (A.A. Vol. 26 pp. 6181-6246).

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 (A.A. Vol. 30 pp. 7113-7124). On December 28, 2006 this Court affirmed Mr. Johnson's appeal. 122 Nev. 1344, 148 P.3d 767, (Dec. 2006). The remittitur issued on January 28, 2008.

Mr. Johnson filed a timely Petition for Writ of Habeas Corpus on February 13, 2008 (A.A. Vol. 43 pp. 8346). Numerous supplemental briefs were filed (A.A. Vol. 32 pp. 7308; A.A. Vol. 33 pp. 7343). The Notice of Entry of Findings of Fact, Conclusions of Law and Order denying Mr. Johnson's Petition was filed on March 21, 2014 (A.A. Vol. 42 pp. 8184). Mr. Johnson filed a timely Notice of Appeal on March 6, 2014 (A.A. Vol. 42 pp. 8203-8204).

STATEMENT OF 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 Gorringer, and Jeff Biddle. (A.A. Vol. 23 pp.5490-5492)

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

The friends were playing video games and lounging around. (A.A. Vol. 23 pp. 5492) There was a VCR, playstation and television in the entertainment center. (A.A. Vol. 23 pp. 5493) Before Mr. Perkins left, he was offered some muscle relaxers, which he refused. (A.A. Vol 23 pp. 5494) At approximately 9 p.m. Mr. Perkins left. (A.A. Vol 23 pp. 5494) Remaining at the house was Matt Mowen, Jeff Biddle, and Tracey Gorringer. (A.A. Vol 23 pp. 5494)

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 Gorringer and Jeff Biddle laying face down with duct tape binding their wrists and ankles. (A.A. Vol 23 pp. 5497). Mr. Perkins went to a neighbors home where he requested assistance in contacting authorities. (A.A. Vol 23 pp. 5499) Mr. Perkins was informed by a police officer that a fourth victim was also inside. (A.A. Vol 23 pp. 5501)

Officer David West and Sargent Randy Sutton were the first responding officers to the crime scene. (A.A. Vol 23 pp. 5514-5516) The officers had to concern themselves with sweeping the home for possible suspects and any other victims. (A.A. Vol 23 pp. 5516) There was no sign of forced entry. (A.A. Vol 23 pp. 5524)

Four deceased victims were located inside the Terra Linda residence. (A.A.

Vol 23 pp. 5516)The four victims were identified as Jeffrey Biddle, Tracey Gorringer, Matthew Mowen, and Peter Talamentez. (A.A. Vol 23 pp. 5591) At the feet of Tracey Gorringer, was a box of black and mild cigars. (A.A. Vol 23 pp. 5594) The cigar box was processed for fingerprints.(A.A. Vol 23 pp. 5594) Donte Johnson's fingerprint was located on the black and mild box located in the Terra Linda residence. (A.A. Vol 23 pp. 5597)

According to detective Thomas Thowsen, the perpetrators had been motivated in looking for narcotics and money. (A.A. Vol 23 pp. 5526) The home had been thoroughly ransacked. (A.A. Vol 23 pp. 5526) No paper currency was located in the entire home. (A.A. Vol 23 pp. 5527) 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".(A.A. Vol 23 pp. 5510) The Terra Linda home and Everman home were approximately eight-tenths of a mile apart. (A.A. Vol 23 pp. 5510)

On August 18, detectives made contact with three young males of interest, Mr. Todd Armstrong, Bryan Johnson and Ace Hart. (A.A. Vol 23 pp. 5532-5533)

Mr. Armstrong lived at 4815 Everman.² The legal owner of that address was his mother.(A.A. Vol 23 pp. 5535) 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.(A.A. Vol 23 pp. 5536) Consent to search the Everman residence was provided by Todd Armstrong. (A.A. Vol 23 pp. 5536)

Donte Johnson and his girlfriend occupied the master bedroom.(A.A. Vol 23 pp. 5539) Todd Armstrong allegedly occupied a different bedroom because there was a water bed there.(A.A. Vol 23 pp. 5539) Ace Hart stayed in a bedroom and Terell Young stayed in the living room.(A.A. Vol 23 pp. 5539) 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. (A.A. Vol 23 pp. 5540) Mr. Armstrong observed these weapons in a black and green duffle bag. (A.A. Vol 23 pp. 5540) The duffle bag was located during the search of the Everman home. (A.A. Vol 23 pp. 5540)

Also located during the search of the Everman home was a VCR and Playstation. (A.A. Vol 23 pp. 5541) Detectives believed the VCR and Playstation

² During the penalty phase detective Thowsen was permitted to summarize the testimony of Mr. Armstrong and several other witnesses.

located at the Everman home, originated from Terra Linda and were taken during the robbery. (A.A. Vol 23 pp. 5541-5542)

At first, Donte Johnson was only going to stay at Everman two or three days but stayed longer. (A.A. Vol 23 pp. 5545) Todd Armstrong claimed Donte Johnson was not told to leave because he was scared of him. (A.A. Vol 23 pp. 5545) Mr. Armstrong had the only key to the residence. (A.A. Vol 23 pp. 5547-5548) He claimed that the defendant could climb through a broken bathroom window to get into the home. (A.A. Vol 23 pp. 5548)

Somewhere between the seventh and tenth of August, Matt Mowen came to the Everman home. (A.A. Vol 23 pp. 5548) When Matt Mowen arrived, Mr. Armstrong, the defendant and Terell Young were present. (A.A. Vol 23 pp. 5548) Matt Mowen made a comment that he had been following a musical group, called Fish Tour and had made a lot of money selling acid. (A.A. Vol 23 pp. 5549)

Mr. Johnson apparently looked around as if he had formed an idea when he heard Matt Mowen's comment. (A.A. Vol 23 pp. 5549) Over the next several days, Mr. Johnson asked Todd Armstrong where Mowen lived. (A.A. Vol 23 pp. 5550) Mr. Johnson and Mr. Armstrong were in a vehicle accompanied by Ace Hart, when Mr. Hart pointed out where Mr. Mowen lived. (A.A. Vol 23 pp. 5551) Ace Hart pointed out the Terra Linda home, between the tenth and twelfth of August. (A.A.

Vol 23 pp. 5552)

During the search of the Everman home, duct tape was located in the master bedroom. (A.A. Vol 23 pp. 5554) Also located during the search was a .22 caliber rifle and black jeans. (A.A. Vol 23 pp. 5555) Police also noted freshly dug portion of dirt which caused them to located a blue pager and two motel keys. (A.A. Vol 23 pp. 5557-5558) The pager was later identified as belonging to Peter Talamentez. (A.A. Vol 23 pp. 5557-5558)

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. (A.A. Vol 23 pp. 5559-5560)

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. (A.A. Vol 23 pp. 5563)

Mr. Armstrong claimed that Donte Johnson admitted to killing one of the men because he was "mouthing off". (A.A. Vol 23 pp. 5561-5562)

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". (A.A. Vol 23 pp. 5566-5567) Donte Johnson was laughing according to Mr. Armstrong.

(A.A. Vol 23 pp. 5567)

Bryan Johnson was a friend of Ace Hart and Todd Armstrong³. (A.A. Vol 23 pp. 5568) Mr. Johnson lived at the Everman home for a brief period. (A.A. Vol 23 pp. 5571) According to Mr. Bryan Johnson, he observed Donte Johnson smoke black and mild cigars. (A.A. Vol 23 pp. 5574) 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. (A.A. Vol 23 pp. 5574-5578) He then shot the other individuals. Mr. Bryan Johnson said that Donte Johnson explained that the blood squirted up like it was Niagra Falls. (A.A. Vol 23 pp. 5579) Donte mentioned the fact that he had some of the blood on his pants. (A.A. Vol 23 pp. 5580)

Ms. Lashawnya Wright is the girlfriend of co-defendant, Sikia Smith(also known as tiny bug). (A.A. Vol 23 pp. 5580) Ms. Wright previously testified, she did not testify in the penalty phase.⁴ (A.A. Vol 23 pp. 5580) On August 13, Ms. Wright entertained Terell Young and Donte Johnson at her apartment. (A.A. Vol

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.

23 pp. 5581-5582) When Donte and Terell Young left, Donte was carrying a duffle bag with duct tape and gloves. (A.A. Vol 23 pp. 5582) Prior to leaving the apartment, the two were discussing a “lick,” a slang word for robbery. (A.A. Vol 23 pp. 5583) When they returned fourteen hours later Sikia Smith appeared to be scared. (A.A. Vol 23 pp. 5584) Ms. Wright explained that Sikia Smith sold .380 caliber handgun on approximately August fifteenth or sixteenth of 1999. A.A. Vol 23 pp. 5587()

Allegedly, when Mr. Johnson saw the Review Journal newspaper he stated, “we made the front page.” (A.A. Vol 23 pp. 5588) He appeared excited. (A.A. Vol 23 pp. 5589) Four empty bullet casings were located at the Terra Linda address. (A.A. Vol 23 pp. 5592) Mr. Richard Goode tested all four shell casings and determined that they were all fired by the same weapon. (A.A. Vol 23 pp. 5592)

On August 17, 1998, at approximately 10:40 Trooper Robert Honea conducted a traffic stop on a vehicle. (A.A. Vol 23 pp. 5600) 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 23 pp. 5600) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of both defendants. (A.A. Vol 23 pp. 5600-5601).

During the search of 4825 Terra Linda, police noted that Peter Talamentez had a loaded handgun on his person. (A.A. Vol 25 pp. 5956) Police also located white baggies with methamphetamine at Terra Linda. (A.A. Vol 25 pp. 5960-5961)

Although police had indications that Mr. Armstrong was involved he was never arrested or charged with the instant offenses. (A.A. Vol 25 pp. 5972-5973) There was evidence that he told the defendant there was money and illegal mushrooms inside the residence. (A.A. Vol 25 pp. 5974) When officers arrived at the Everman residence on August 18th, they located Charla Severs, Donte Johnson and Duane Anderson (A.K.A Scale). (A.A. Vol 25 pp. 5951) The defendant denied living at the residence. (A.A. Vol 25 pp. 5952)

The previous testimony of Charla Severs was read to the jury. (A.A. Vol 25 pp. 5978-5979) Ms. Severs had a moniker "Lala". (A.A. Vol 25 pp. 5979) In 1998, Ms. Severs and Donte Johnson were involved in a dating relationship. (A.A. Vol 25 pp. 5980-5981) Ms. Severs noted that none of the defendants had jobs in the month of July. (A.A. Vol 25 pp. 5990) Donte Johnson smoked black and mild cigars according to Ms. Severs. (A.A. Vol 25 pp. 5990) 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". (A.A. Vol 25 pp. 5995)

Ms. Severs had seen the defendant with a duffle bag that had guns in it.

(A.A. Vol 25 pp. 6000-6001) 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. (A.A. Vol 25 pp. 6010-6013) 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. (A.A. Vol 25 pp. 6014)

On the day of the murders, Donte was wearing a black pair of jeans. (A.A. Vol 25 pp. 6016-6017) “Red” is carrying the duffle bag with guns inside when they left. (A.A. Vol 25 pp. 6019-6020) 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”. (A.A. Vol 25 pp. 6023) Ms. Severs said that Donte Johnson confessed that he killed the Mexican because he was talking “mess”. (A.A. Vol 25 pp. 6026-6027) Mr. Johnson also said that he kicked the Mexican before shooting him in the back of the head. Mr. Johnson allegedly stated the victims made noises when they were shot and blood squirted out of their heads. (A.A. Vol 25 pp. 6026-6027) Mr. Johnson had been concerned people would hear the gunshots, so he turned the music up very loud. (A.A. Vol 25 pp. 6029)

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. (A.A. Vol 25

pp. 6030-6033) 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. (A.A. Vol 25 pp. 6035)

Ms. Severs admitted that she originally lied to the police to help Donte. (A.A. Vol 25 pp. 6042) Ms. Severs also lied to the grand jury to help Donte. (A.A. Vol 25 pp. 6044) Ms. Severs had previously stated that Todd Armstrong had gone to the murder scene with the other defendants. (A.A. Vol 25 pp. 6053) She claimed that Todd Armstrong had set everything up. (A.A. Vol 25 pp. 6053) However, she later claimed that Mr. Armstrong did not go to the murder scene and she did it just to get him in trouble. (A.A. Vol 25 pp. 6054)

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. (A.A. Vol 25 pp. 6056) 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. (A.A. Vol 25 pp. 6062)

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. (A.A. Vol 25 pp. 6068) Ms. Severs admits she has approximately five

aliases. (A.A. Vol 24 pp. 5685)

When Ms. Severs was arrested and placed in the Clark County Detention Center she hoped her testimony would gain her release. (A.A. Vol 24 pp. 5656) 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. (A.A. Vol 24 pp. 5676) Ms. Severs was never charged with perjury for her lies to the Grand Jury. (A.A. Vol 24 pp. 5677)

Todd Armstrong smoked crack cocaine on a daily basis. (A.A. Vol 24 pp. 5666)

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. (A.A. Vol 24 pp. 5680-5681) In fact, Mr. Armstrong said where is my cocaine. (A.A. Vol 24 pp. 5681)

Mr. Berch Henry works for the DNA laboratory with the Las Vegas Metropolitan Police Department. (A.A. Vol 24 pp. 5706) Mr. Henry had analyzed the work conducted by Mr. Thomas Wahl. (A.A. Vol 24 pp. 5707) A cigarette butt located at the Terra Linda residence had the DNA of Donte Johnson identified on it. (A.A. Vol 24 pp. 5718-5719) There is no way to tell when the DNA was left on the cigarette butt. (A.A. Vol 24 pp. 5719) A pair of black Calvin Klein jeans was

tested and the DNA was determined to originate from Tracey Gorringer. (A.A. Vol 24 pp. 5720-5721)

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. (A.A. Vol 24 pp. 5738) All four victims died as a result of a single gunshot wound. (A.A. Vol 24 pp. 5740-5752)

Mr. Talamentez also had a laceration behind his left ear and an abrasion to his nose. (A.A. Vol. 24 pp. 6529) These injuries were caused by blunt force trauma. The toxicology report of all victims demonstrated the presence of methamphetamine, amphetamine, and cocaine. (A.A. Vol. 24 pp. 6536-6537) Mr. Matthew Mowen also had alcohol in his system. (A.A. Vol. 24 pp. 6537) 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 Donte Johnson's sister, Johnnisha Zamora. (A.A. Vol. 24 pp. 5766) Mr. Zamora knew Donte Johnson by his real name, John White. (A.A. Vol. 24 pp. 5766) Mr. Zamora is half Hispanic and explained that the defendant did not treat him any differently because of his background. (A.A. Vol. 24 pp. 5768-5770) Mr. Zamora felt that Donte accepted him like a brother. (A.A. Vol. 24 pp. 5770) Mr. Zamora briefly

lived with Donte Johnson and described him like a family member who he loved.

(A.A. Vol. 24 pp. 5771-5772)

Donte Johnson has a child named Allen. Allen's communication with his father while he has been incarcerated, was very important to him. (A.A. Vol. 24 pp. 5775)

The defense called Arthur Cain, Mr. Johnson's uncle. (A.A. Vol. 24 pp. 5780) Mr. Cain described Donte's mother, Eunice as "slow" and she attended special ed classes in school. (A.A. Vol. 24 pp. 5787) People often teased Donte Johnson's mother because she was "slow". (A.A. Vol. 24 pp. 5787) They referred to her as "retarded or stupid". (A.A. Vol. 24 pp. 5787) Eunice eventually married John White (the defendant's father). (A.A. Vol. 24 pp. 5788) Mr. Cain became aware that Eunice had begun to use alcohol and drugs. (A.A. Vol. 24 pp. 5790) He was also aware that there was physical violence between Mr. White and Eunice. (A.A. Vol. 24 pp. 5790) Eventually, Donte Johnson was taken from his mother and went to live with his grandmother, "big momma". (A.A. Vol. 24 pp. 5793)

Eunice and Cain testified for the defense. (A.A. Vol. 24 pp. 5799) Eunice described Donte Johnson as her oldest child. (A.A. Vol. 24 pp. 5800) Eunice stated that she drank alcohol when she was pregnant with Donte. (A.A. Vol. 24 pp. 5800) Eunice described her husband as violent and that her children would see her being

beaten by him. (A.A. Vol. 24 pp. 5804) Donte would try to defend his mother but he was too little. John White actually knocked Eunice's teeth out. (A.A. Vol. 24 pp. 5804) John White also attempted to throw her out of a window at the Frontier and Donte ran for help, which she believed saved her. (A.A. Vol. 24 pp. 5805)

Eunice explained that she was having a problem taking care of her children because she was smoking PCP at the time. (A.A. Vol. 24 pp. 5809) She would get high when her kids were present. (A.A. Vol. 24 pp. 5810) Her children were taken from her and sent to foster care but eventually ended up living with her mother. (A.A. Vol. 24 pp. 5811)

Johnnisha Zamora is the younger sister of Mr. Johnson. (A.A. Vol. 24 pp. 5814) Johnnisha remembers her mother would smoke drugs in front of the children and her father would beat her mother in front of the children. (A.A. Vol. 24 pp. 58216) 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. (A.A. Vol. 24 pp. 5817) At one point, the children were forced to live in a shed. (A.A. Vol. 24 pp. 5818) There were approximately five or six of them living in a shed with no toilet, running water, or furniture. (A.A. Vol. 24 pp. 5819-5821) Johnnisha observed John White beating Donte Johnson and Donte not understanding why he was being beaten. (A.A. Vol. 24 pp. 5825)

When the Donte went to live with his grandmother, his grandfather did not spend time with Donte. (A.A. Vol. 24 pp. 5828) Johnnisha and Donte observed a lady who was found dead with a “pole shoved up her private.” (A.A. Vol. 24 pp. 5830) Donte and Johnnisha observed a police shootout where a man was killed upstairs. (A.A. Vol. 24 pp. 5831)

When the children would walk to school they would be chased almost everyday by bullies. (A.A. Vol. 24 pp. 5832) They observed a lot of street violence. (A.A. Vol. 24 pp. 5832) The bullies would throw rocks and beat them up. (A.A. Vol. 24 pp. 5833) Johnnisha testified that she loved her brother. (A.A. Vol. 24 pp. 5840)

The defendant’s other sister, Eunisha White testified for the defense. (A.A. Vol. 26 pp. 6073) Ms. White observed her mother being abused by her father. (A.A. Vol. 26 pp. 6075) 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. (A.A. Vol. 26 pp. 6076) Ms. White remembered having to live in the shack with lots of other people. (A.A. Vol. 26 pp. 6079) Eventually, the children went to live with their grandmother, but even then, sometimes they went without food. (A.A. Vol. 26 pp. 6083-6084)

Ms. Keonna Atkins was the cousin of Donte Johnson. (A.A. Vol. 26 pp.

6088) Ms. Atkins remembers how they would be chased by bullies. (A.A. Vol. 26 pp. 6120-6121) On one occasion, there was a burglary and a perpetrator came through the window and groped Ms. Atkins. (A.A. Vol. 26 pp. 6122) The perpetrator confronted the children which upset Donte (he was seven or eight years old). (A.A. Vol. 26 pp. 6121-6122)

Donte's grandmother, Jane Edwards testified that she attempted to take care of approximately ten children in her home, including Donte. (A.A. Vol. 26 pp. 6132)

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. (A.A. Vol. 26 pp. 6143-6145)

On April 27, 2005 the jury heard closing arguments regarding the first portion of the penalty phase.(A.A. Vol. 25 pp. 5871-5932) The jury found that there was at least one aggravating circumstance as to all four victims. 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.

(A.A. Vol. 26 pp. 6218-6220) 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.

(A.A. Vol. 26 pp. 6221-6222) During the bank robbery one of the robbers stood near the door with a sawed off shotgun. (A.A. Vol. 26 pp. 6223) Ms. Sandra Gatlin worked for Sen Fed Bank on June 8, 1993, as assistant bank manager. (A.A. Vol. 26 pp. 6239-6240) She remembered how she felt fear and described that some of the robbers jumped the counters where the tellers were working. (A.A. Vol. 26 pp. 6241-6242)

Donte Johnson received a total of four years commitment to the California youth authority for the bank robbery. (A.A. Vol. 26 pp. 6216) Once Donte Johnson was released from custody, he was on parole. (A.A. Vol. 26 pp. 6218) However, Donte Johnson became an absconder and his parole was suspended and a warrant issued. (A.A. Vol. 26 pp. 6218)

On May 4, 1998, Officer Charles Burgess responded to a shooting call at the 2100 block of east Fremont. (A.A. Vol. 26 pp. 6268) When Officer Burgess arrived he noticed Derrick Simpson lying motionless on the road. (A.A. Vol. 26 pp. 6269) He had suffered from gunshot wounds. (A.A. Vol. 26 pp. 6270) Officer Burgess asked the victim what had occurred and he stated “that a black male named Deko shot him”. (A.A. Vol. 26 pp. 6271) 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. (A.A. Vol. 26 pp. 6276)

On February 24, 2001, Officer Alexander Gonzales was working in the Clark County Detention Center in the disciplinary housing unit. (A.A. Vol. 26 pp. 6295-6296) Officer Gonzales claimed that he witnessed a fight wherein Mr. Reginald Johnson and Donte Johnson threw Oscar Irias over the second story tier. (A.A. Vol. 26 pp. 6300-6301) Officer Gonzales claimed that he could observe the fight through a window. (A.A. Vol. 26 pp. 6303)

Oscar Irias had disciplinary problems including being written up for masturbating on a toilet and attacking his roommate for no apparent reason. (A.A. Vol. 26 pp. 6313) It was also noted that Oscar was a psych patient with a violent temper. (A.A. Vol. 26 pp. 6319) After being thrown over the tier, Oscar went into his cell and was shaken up but had no other significant injuries. (A.A. Vol. 27 pp. 6323-6324)

Prisoner George Cotton observed Oscar Irias fall from the second tier on February 24, 2001. (A.A. Vol. 27 pp. 6504-6507) Mr. Cotton heard someone yell help, help, and then saw Oscar fall and then jump up and run in his cell. (A.A. Vol. 27 pp. 6511-6512) Mr. Cotton indicated that Donte Johnson was not involved in the incident. (A.A. Vol. 27 pp. 6514) Mr. Cotton has two convictions for robbery

with use of a deadly weapon. (A.A. Vol. 27 pp. 6515)

Prisoner Permaine Lytle also heard Oscar yell for help. (A.A. Vol. 27 pp. 6526) He explained that the Officers were unable to see what had occurred from their vantage point. (A.A. Vol. 27 pp. 6530) Mr. Lytle is currently serving life without parole consecutive to life without parole for first degree murder with use of a deadly weapon. (A.A. Vol. 27 pp. 6531)

Mr. Reginald Johnson told the jury that he was solely responsible for the attack on Oscar Irias.(A.A. Vol. 27 pp. 6540-6544) Mr. Reginald Johnson explained, “I assaulted him and heped him over the tier.” (A.A. Vol. 27 pp. 6544) Mr. Reginald Johnson pled guilty for his role in the assault. (A.A. Vol. 27 pp. 6544) Reginald Johnson told the jury he attacked Oscar because he did not like child molesters. (A.A. Vol. 27 pp. 6545) Mr. Reginald Johnson denied that Donte Johnson had any involvement in the crime. (A.A. Vol. 27 pp. 6546-6556) Subsequently, Reginald Johnson and Oscar Irias were again placed together in a holding cell and Reginald Johnson beat him up for a second time. (A.A. Vol. 27 pp. 6556) During Reginald Johnson’s cross-examination, he became so heated the Court called a recess. (A.A. Vol. 27 pp. 6559-6560)

Reginald Johnson’s attorney, Ms. Gloria Navarro testified that she is employed with the Clark County District Attorney’s Office. (A.A. Vol. 28 pp.

6581) Mr. Reginald Johnson informed her that Donte Johnson was not involved with the crime. (A.A. Vol. 28 pp. 6582-6583) Pursuant to an independent investigation, Ms. Navarro concluded that Officer Gonzales was unable to see the fight, as he had claimed. (A.A. Vol. 28 pp. 6591) Ms. Navarro testified Reginald Johnson entered a plea of guilty because she guaranteed him that the charges against Donte would be dismissed with prejudice. (A.A. Vol. 28 pp. 6608)

The State called several witnesses to provide victim impact statements. (A.A. Vol. 28 pp. 6596) Juanita Aguilar provided victim impact regarding her son, Peter Talamentez. (A.A. Vol. 28 pp. 6598-6600) Marie Biddle provided an impact statement regarding her son Jeff. (A.A. Vol. 28 pp. 6602-6609) Sandy Viau provided victim impact regarding her son Tracey Corrinage. (A.A. Vol. 28 pp. 6610-6617) Jennifer Mowen provided victim impact regarding her brother, Matthew. (A.A. Vol. 28 pp. 6618-6621) Lastly, Mr. David Mowen provided victim impact regarding his son, Matthew. (A.A. Vol. 28 pp. 6621-6629)

The State then rested their case in the second part of the penalty phase. (A.A. Vol. 28 pp. 6631).

Penalty Mitigation in the second portion of the penalty phase

Keonna Atkins testified again, for the defense. (A.A. Vol. 28 pp. 6632) Ms. Atkins explained that during their youth, there were Blood and Crip gangs that

were very violent in the area. (A.A. Vol. 28 pp. 6634) There were shoot outs and gang members often harassed them. (A.A. Vol. 28 pp. 6635) Donte Johnson became the protector of the family. (A.A. Vol. 28 pp. 6638) Ms. Atkins learned that Donte had become a gang member because of a threat to rape her by Baby Sonny. (A.A. Vol. 28 pp. 6640) Donte had become a member or “jumped in” to the six deuce brims. (A.A. Vol. 28 pp. 6641) Ms. Atkins felt that Donte’s participation in the gang had provided protection for her. (A.A. Vol. 28 pp. 6643) Donte’s sister also confirmed that he joined a gang to protect the family. (A.A. Vol. 28 pp. 6655) Donte’s sister also reported that Donte took care of her growing up and made sure others did not harm her. (A.A. Vol. 28 pp. 6660-6661)

The defense recalled Moises Zamora who told the jury that he was a crip and Donte was a blood. (A.A. Vol. 28 pp. 6669) Mr. Zamora explained he had similar experiences to Donte growing up in South Central, LA. (A.A. Vol. 28 pp. 6670)

The defense called Martin Jankowski, a professor of sociology at the University California, Berkley and an expert in gangs. (A.A. Vol. 28 pp. 6690-6691) Professor Jankowski lived and worked with gangs for ten years. (A.A. Vol. 28 pp. 6694) He also authored a book on gang culture entitled, “Islands in the Street”. (A.A. Vol. 28 pp. 6695) Professor Jankowski indicated that violence is in an integral part of the gang environment. (A.A. Vol. 28 pp. 6702) 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. (A.A. Vol. 28 pp. 6733) Her fear level improved after Donte joined the gang. (A.A. Vol. 28 pp. 6734)

The defense recalled Donte's grandmother, Jane Edwards. (A.A. Vol. 28 pp. 6736) The defense also recalled the defendant's son Allen White. (A.A. Vol. 28 pp. 6740) Allen told the jury that he loved his father. (A.A. Vol. 28 pp. 6741)

The defense called parole agent, Mr. Craig Clark from the California youth authority. (A.A. Vol. 28 pp. 6650) 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. (A.A. Vol. 28 pp. 6665) Officer Clark indicated that there were several gangs in the area that Mr. Donte Johnson was raised. A.A. Vol. 28 pp. 6666() Donte Johnson was always polite, cordial, and respectful to other members of the parole staff. (A.A. Vol. 28 pp. 6676) In fact, Officer Clark like Donte Johnson. (A.A. Vol. 28 pp. 6676)

Ms. Nancy Hunterton administered a program at the Clark County Detention Center that was attended by Donte Johnson. (A.A. Vol. 28 pp. 6691-6692) The class was called life skills, and Donte participated in the class in approximately

2000. (A.A. Vol. 28 pp. 6692) Mr. James Esten was retired from the California department of corrections. (A.A. Vol. 28 pp. 6713) Mr. Esten personally reviewed the records of Donte Johnson and toured Ely State penitentiary. (A.A. Vol. 28 pp. 6718) 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. (A.A. Vol. 28 pp. 6751)

Dr. Thomas Kinsora, a psychologist in clinical neuropsychology, testified on behalf of Mr. Donte Johnson. (A.A. Vol. 29 pp. 6789) 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. (A.A. Vol. 29 pp. 6813) 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. (A.A. Vol. 29 pp. 6821) Dr. Kinsora noted that Donte Johnson's mother would regularly smoke crack cocaine in front of the children. (A.A. Vol. 29 pp. 6822) Social services talked with Donte who complained that he was frequently beaten but didn't know why. (A.A. Vol. 29 pp. 6823)

Dr. Kinsora also noted that Donte was a very small child and he had no father figure or male role model at home. (A.A. Vol. 29 pp. 6841-6842) Therefore, Donte felt responsible for protecting the women at home and this was difficult

based upon his stature. (A.A. Vol. 29 pp. 6842) At thirteen years old, Donte Johnson witnessed a friend stabbed to death with a screwdriver by a rival gang member. (A.A. Vol. 29 pp. 6844) At age fifteen, he had a friend shoot himself in the head in front of Donte because he felt that he had disappointed the gang. (A.A. Vol. 29 pp. 6844) In 1992, Donte witnessed a girl in his neighborhood shot in the face by a Crip gang member as she exited a bus. (A.A. Vol. 29 pp. 6845)

Dr. Kinsora compared South Central to a war zone, equivalent of something you would see in a third world country . (A.A. Vol. 29 pp. 6851) 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. (A.A. Vol. 29 pp. 6853)

Dr. Kinsora stated “I don’t think there is any brain damage in talking to him and reading some of his writings.” (A.A. Vol. 29 pp. 6861). The doctor concluded that there is no organic brain disorder. (A.A. Vol. 29 pp. 6876)

Dr. Kinsora admitted that he relied upon a report prepared by Tina Francis, a defense mitigation expert. (A.A. Vol. 29 pp. 6887) 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. (A.A. Vol. 29 pp. 6900) There was an objection by the defense throughout this testimony

(A.A. Vol. 29 pp. 6901) The Court permitted the prosecutor to cross-examine Dr. Kinsora on Tina Francis' report because he claimed he had relied upon it. (A.A. Vol. 29 pp. 6904) Eventually, the court precluded the state from introducing any more evidence from Tina Francis' report. (A.A. Vol. 29 pp. 6905) At the conclusion of Dr. Kinsora's testimony, the defense rested their mitigation case.

The State called a rebuttal witness, Ms. Cheryl Foster. (A.A. Vol. 29 pp. 6908) Ms. Foster is the warden of Southern Desert Correction Center. (A.A. Vol. 29 pp. 6909) Ms. Foster testified extensively regarding the inner workings of the Nevada Penitentiaries.

The defendant informed the Court he did not want to provide allocution. (A.A. Vol. 29 pp. 6971) Thereafter, the jury was once again instructed on the law and closing arguments were heard.

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).

This 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).

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

TRIAL PHASE 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 (A.A. Vol. 8 pp. 1833).

Specifically, trial counsel stated that the jury pool consisted of over eighty (80) potential jurors and only three (3) were potential minority jurors (A.A. Vol. 8 pp. 1833).

In Williams v. State, 121 Nev. 934; 125 P. 3d 627 (2005), this Court considered a defendant's Sixth Amendment right to a fair cross section of the community in a venire panel. This 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 (A.A. Vol. 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 cross section of the community.

On direct appeal, appellate counsel failed to raise this issue. At an evidentiary hearing in the district court, trial counsel emphasized that he objected to this issue because it was an important issue in the case and should have been raised on appeal (A.A. Vol. 40 pp. 7987-7989). Counsel indicated if he were appellate counsel, he would have raised the issue on appeal (A.A. Vol. 40 pp. 7990). 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) (A.A. Vol. 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 juror⁵ (A.A. Vol. 8 pp. 1829). Hence, only one potential minority juror was available for selection⁶. Trial counsel objected to the fact that there were only three potential minority jurors in a pool of over eighty (80) (A.A. Vol. 8 pp. 1829).

In response to the Batson Challenge, the State claimed that the juror had a stepson who had been in jail (A.A. Vol. 8 pp. 1830). The prosecutor also explained that she had crossed her arms when questioned (A.A. Vol. 8 pp. 1830) Ms. Fuller informed the prosecutor that she could be fair (A.A. Vol. 33 pp 7381). Ms. Fuller indicated that sitting in judgment of Donte Johnson did not cause her concern. (A.A. Vol. 33 pp 7381). 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 (A.A. Vol. 33 pp 7381). Ms. Fuller stated that she could pass judgment fairly (A.A. Vol. 33 pp 7381). Ms. Fuller also explained without

⁵ Additionally, one of the only other three potential minority jurors who was in the jury panel never made it to the questioning process (A.A. Vol. 8 pp. 1832).

⁶ 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.

hesitation, she could consider all four forms of punishment. A.A. Vol. 33 pp 7381). Ms. Fuller again affirmed that she could follow the law and consider all four forms of punishment (A.A. Vol. 33 pp 7381).

Ms. Fuller was asked whether she could consider the death penalty and she indicated she could (A.A. Vol. 33 pp 7381). 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 (A.A. Vol. 33 pp 7381). 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. (A.A. Vol. 33 pp 7381).

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. Fuller⁷. (A.A. Vol. 8 pp. 1831).

⁷After 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” (A.A. Vol. 8 pp. 1831).

A review of Ms. Fuller's testimony demonstrates the State had no race neutral reason to 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 population⁸. Statistics from the United States Department of Justice show that at midyear 2008, there were 4,777 black male inmates per 100,000 black

⁸U.S. Department of Justice, *Bureau of Justice Statistics*, (1997) available at <http://www.ojp.usdog.gov/bjs/glance/cpracept.htm>

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 males⁹. 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 jail¹⁰. Additionally, midyear 2006, African American men 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 Men¹¹.

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

⁹U.S. Department of Justice, *Bureau of Justice Statistics*, (2008), available at <http://www.ojp.usdoj.gov/bjs/glance/jailair.htm>

¹⁰U.S. Department of Justice, *Bureau of Justice Statistics*, (2008), available at <http://www.ojp.usdoj.gov/bjs/prisons.htm>

¹¹U. 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>

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 receive 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 (A.A. Vol. 8 pp. 1825). The State used one of their peremptory challenge on Ms. Calvert (A.A. Vol. 11 pp. 2741). The State used their second peremptory

challenge to excuse Ms. Ashmore. (A.A. Vol. 11 pp. 2819).

Mr. Calvert indicated that he was opposed to the death penalty (A.A. Vol. 33 pp. 7383). Although Mr. Calvert indicated he was opposed to the death penalty he stated he would consider it (A.A. Vol. 33 pp. 7383). Mr. Calvert 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” (A.A. Vol. 33 pp. 7383). Mr. Calvert was challenged for cause by the State however, Mr. Calvert was again asked whether he could consider the death penalty and he answered, “Yes, I could” (A.A. Vol. 33 pp. 7384). Mr. Calvert again affirmed that he could follow the law and consider all four forms of punishment at sentencing (A.A. Vol. 33 pp. 7384).

During voir dire, the prosecution questioned prospective juror Mr. Morine (A.A. Vol. 11 ROA 2670). Mr. Morine agreed that all four forms of punishment could be appropriate in a murder case (A.A. Vol. 11 pp. 2668). Mr. Morine agreed that the worst possible crimes deserve the worst possible punishment (A.A. Vol. 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” (A.A. Vol. 11 pp. 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 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" (A.A. Vol. 11 pp. 2738). 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 (A.A. Vol. 11 pp. 2739). 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 (A.A. Vol. 11 pp. 2739). 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 objection¹² (A.A. Vol. 11 pp. 2740).

Mr. Fink indicated that he would not take the defendant’s youth into account in terms of mitigation (A.A. 11 pp. 2741). 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 excuse¹³ (A.A. Vol. 11 pp. 2742). Mr. Fink further stated that was the type of mitigation he would not consider in a penalty phase. (A.A. Vol. 11 pp. 2742).

Mr. Fink obviously believed that the only appropriate punishment for an individual convicted of premeditated deliberate first degree murder was the death

¹²The 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.

¹³Even 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.

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. The defense challenged Mr. Fink for cause (A.A. Vol. 33 pp. 7386). 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 (A.A. Vol. 33 pp. 7386). Therefore, the defense was forced to use of one their eight peremptory challenges to remove Mr. Fink (A.A. Vol. 33 pp. 7386). 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 (A.A. Vol. 11 pp. 2754). Mr. Baker affirmed that an individual who is found guilty of intentional and premeditated murder should receive the death penalty (A.A. Vol. 11 pp. 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” (A.A. Vol. 11 pp. 2754). Prospective juror Baker indicated that it would be highly unlikely that he could vote for a period or a term of years (A.A. Vol. 11 pp. 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 (A.A. Vol. 11 pp. 2754).

Mr. Baker did not believe he should consider the youth of the defendant in the penalty phase (A.A. Vol. 11 pp. 2755). Mr. Baker did not think that the defendant’s childhood would be important to consider during the penalty phase (A.A. Vol. 11 pp. 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” (A.A. Vol. 11 pp. 2758).

Trial counsel challenged Mr. Baker for cause. 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. The District Court denied the challenge for cause. Therefore, the defense was forced to use another peremptory challenge to excuse prospective juror, Mr. Baker (A.A. Vol. 11 pp. 2759).

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 (A.A. Vol. 33 pp. 7387). 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" (A.A. Vol. 33 pp. 7387).

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 punishment¹⁴ (A.A. Vol. 33 pp. 7387). 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,

¹⁴ Logan's run refers to a Hollywood Film where people are randomly considered for death. (A.A. Vol. 33 pp. 7387).

they're eligible for Logan's Run numbers?" Mr. Shink stated, "Yes, unless they got less than a year, they would be exempt (A.A. Vol. 33 pp. 7387). 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" A.A. Vol. 33 pp. 7387). 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 stated, "because they had a choice. There was nobody twisting their arms to do what they did. They made a decision. Nobody else did" (A.A. Vol. 33 pp. 7388).

Trial counsel challenged Mr. Shink for cause based on his "Logan Run Theory" of pulling out numbers for execution, on car thieves to murderers (A.A. Vol. 33 pp. 7388). Unbelievably, the District Court denied the challenge for cause (A.A. Vol. 33 pp. 7388). 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 (A.A. Vol. 33 pp. 7388).

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 (A.A. Vol. 11 pp. 2778). 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” (A.A. Vol. 11 pp. 2781). 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 continue to question Mr. Davis (A.A. Vol. 11 pp. 2784).

Similarly, prospective juror Grecco was challenged for cause by the State and the judge granted the State's challenge (A.A. Vol. 11 pp. 2826). Mr. Grecco 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 (A.A. Vol. 11 pp. 2828). The challenge for cause was sustained (A.A. Vol. 11 pp. 2828). Mr. Grecco was asked whether he would legally consider all four forms of punishment. Mr. Grecco said, "legally I would consider all four, yes". For a second time, juror Grecco stated "legally I would have to consider it" regarding the death penalty.

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. During a post-conviction evidentiary hearing, trial counsel explained he was extremely concerned with the lack of a fair jury selection process (A.A. Vol. 40 pp. 7993).

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 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 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 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, a blatant violation of Morgan v. Illinois. Defense counsel actually cited the district court to Morgan v. Illinois at the time of their objections (A.A. Vol. 8 pp. 1826). 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 (A.A. Vol. 8 pp. 1826). However, the court noted that this answer was different than what she had answered in her questionnaire (A.A. Vol. 8 pp. 1827).

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).

This 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.

In Wright v. State of Nevada, 94 Nev. 415, 581 P.2d 442 (1978), the Supreme Court reversed the kidnapping convictions where the defendants had also been convicted for robbery with use of a deadly weapon. This 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 kidnapping 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. This 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. This 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), this

Court reversed the decision of the district court wherein the appellant's Petition for Writ of Habeas Corpus had been denied. Again, this 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.

This 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 (A.A. Vol. 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

(A.A. Vol. 13 pp. 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. (A.A. Vol. 11 pp. 2682). Juror Baker had some knowledge of the case (A.A. Vol. 11 pp. 2687). Juror Garceau had heard about the case on Channel 8 news (A.A. Vol. 11 pp. 2769). Juror Garceau stated that it inflamed his emotions, the description of the crime it made him angry (A.A. 11 pp. 2770). 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 (A.A. Vol. 12 pp. 2927).

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.

This Court further stated, [t]his, of course, implicates the jury selection 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 (A.A. Vol. 8 pp. 2067)

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 (A.A. Vol. 8 pp. 2071). Mr. Armstrong denied receiving any benefit from the State (A.A. Vol. 8 pp. 2070). The defense was denied the opportunity to go into the facts of the other case ¹⁵.

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). This Court has held, "[a]nd extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias,

¹⁵ The State admitted that Todd Armstrong was a fourth suspect in the case (A.A. Vol. 8 pp. 2035). 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 (A.A. Vol. 8 pp. 2035).

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), this 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 believe that it fits this crime? (A.A. Vol. 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. (A.A. Vol. 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 (A.A. Vol. 11 pp. 2672).

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), this 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.

This Court found the prosecutors argument in Castillo, to be improper.

Likewise, the above questioning of the potential juror by the prosecutor regarding

intestinal 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 inadmissible hearsay during the direct examination of Todd Armstrong. During his testimony, Todd Armstrong was questioned regarding a conversation he overheard between Bryan Johnson and the police (A.A. Vol. 8 pp. 2022). Mr. Armstrong was permitted to state that Bryan Johnson tells the police that "we knew who did it" (A.A. Vol. 8 pp. 2022).

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 reliability 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

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 (A.A. Vol. 8 pp. 2062). 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 (A.A. Vol. 8 pp. 2018). Ms. Wright says she is receiving no special treatment on her other cases (A.A. Vol. 8 pp. 2110-2113). Ms. Wright does admit that the prosecutor helped her get released on a misdemeanor (A.A Vol. 8 pp. 2120). Ms. Wright testified that she was receiving no benefit, even though she has a probation hold (A.A. Vol. 8 pp. 2113).

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 L.ed 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 HN13 where 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. 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.

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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". Again, in voir dire, the prosecutor refers to the trial phase as the "guilt phase" (A.A. Vol. 11 pp. 2821). The State continues to refer to the trial phase as the "guilt phase". Trial counsel for Mr. Johnson does not object (A.A. Vol. 11 pp. 2656). The prosecutor tells the jury that the first part of the trial is called the Guilt Phase of the trial.

Article I, Section 8, of the Nevada Constitution, as well as the Fifth, Sixth and 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 inadmissible 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 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 (A.A. Vol. 9 pp. 2147). The prosecutor asked Ms. Severs whether she had actually personally witnessed Mr. Johnson selling drugs, to which she replied, “yes” (A.A. Vol. 9 pp. 2148). Again, the prosecutor elicits from witness Bryan Johnson that Donte Johnson had sold him crack cocaine in the past (A.A. Vol. 9 pp. 2302). The prosecutor asked if Mr. Johnson would put the cocaine in a black and mild cigar box and Bryan Johnson stated, he never remembered Donte Johnson selling narcotics to him in that fashion (A.A. Vol. 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 Wright is lying.” (A.A. Vol. 13 pp. 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 (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” (A.A. Vol. 8 pp. 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 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 taped 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 (A.A. Vol. 13 pp. 3181-3182). Therefore, Mr. Johnson received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal.

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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 (A.A. Vol. 13 pp. 3086-3193).

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" (A.A. Vol. 13 pp. 3193). 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 - -" (A.A. Vol. 13 pp. 3193). Defense counsel objected to these statements, as speculation (A.A. Vol. 13 pp. 3193).

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 (A.A. Vol. 5 pp. 1098). During the testimony of the medical examiner, Dr. Bucklin, the defense continued to object to the photographs. The Court noted that there was a continuing objection (A.A. Vol. 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 (A.A. Vol. 13 pp. 3147). In Byford v. State of Nevada, 116 Nev. 215 pp4 P.2d 700 (2000), this 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, this 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 COUNSEL'S 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), this 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. This Court reiterated this position recently in Preciado v. State, 130 Nev. Adv. Op. 6 (February 13, 2014). In Preciado, this Court extended its holding in Daniels to non-capital cases. This Court explained bench conferences should be memorialized either contemporaneously or by allowing counsel to make a record afterward (pp. 1-2).

On direct appeal, Johnson argued that there were 59 bench conferences off the record. Johnson claimed this violated this Court rule 205 (5) (a) and his right to meaningful appellate review. This 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” (This Court’s 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), this 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 NSC 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.

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.
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 short 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

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.¹⁶

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 finding that Mr. Johnson had already been determined

¹⁶ Mr. Johnson relies on the legal authority articulated in the argument pertaining to the failure to investigate.

to be the physical killer and defense counsel failed to enlighten the court that the first jury did not agree with that conclusion.

During a post-conviction evidentiary hearing, penalty phase counsel was concerned that she had not seen the document containing the list of mitigators and did not know why they were not presented to the jury (A.A. Vol. 42 pp. 8224-8225). 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.

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 this 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 constituted the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated (A.A. Vol. 10 pp. 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 any sort of premeditation at all, violated the constitutional guarantee of due process of law because it was so bereft of meaning as to the definition of two elements of the statutory offense 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 its 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 (A.A. Vol. 10 pp. 2543).

The instruction given to the jury minimized the State's burden of proof by including terms "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 this 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 this 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.

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 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 (A.A. Vol. 13 pp. 3177).

In Sharma v. Nevada, 118 Nev. 648; 56 P. 3d 868; (2002)¹⁷, this 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 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.

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PENALTY PHASE ARGUMENTS

XVIII. 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), this 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. 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. 24 pp. 5800). 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.

Counsel failed to obtain or conduct testing on Donte Johnson to determine whether he suffered from Fetal Alcohol disorder. Donte Johnson's mother 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.

During a post-conviction evidentiary hearing, penalty phase counsel admitted presentation of fetal alcohol syndrome would have been beneficial to Mr. Johnson (A.A. Vol. 40 pp. 8217-8218). Penalty phase counsel further explained that the physiological symptoms of Fetal Alcohol Syndrome were glaring in Mr. Johnson (A.A. Vol. 42 pp. 8218). 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 caused 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. Counsel never attempted to obtain an analysis of Mr. Johnson’s brain. Mr. Johnson was denied funding to conduct this testing, during the post-conviction proceedings.

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 objected and defense counsel argued, “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. 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.

When questioned about calling the co-defendant's attorneys to introduce this vital information, penalty phase counsel explained, "...I made a mistake. I thought that evidence was in. I neglected to even introduce the JOCs, which would have been admissible. It just was I made a mistake". (A.A. Vol. 42 pp. 8224). 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.

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. 25 pp. 5867). 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.

Additionally, there is no evidence in the file that counsel in the third penalty phase made an effort or actually interviewed the hold out juror(s) from 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 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).

XIX. 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. 23 pp. 5600). 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. 23 pp. 5600) The Trooper observed the co-defendant with a gun in his hand and then a foot pursuit occurred of both defendants (A.A. Vol. 23 pp. 5600-5601). Defense counsel objected 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. 23 pp. 5600).

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. 23 pp. 5602).

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 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. 23 pp. 5602-5603). The court did taken notice that it was not the murder weapon and Ms. Severs never identified the gun (A.A. Vol. 23 pp. 5604). 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. 23 pp. 5605). 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.

XX. 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 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. 29 pp. 6887). Dr. Kinsora was impeached with Tina Francis' 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. 29 pp. 6888). 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. 29 pp. 6896).

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. 29 pp. 6897-6898). 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. 29 pp. 6900). 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. 29pp. 6901).

Eventually, the trial court began precluding the State from introducing any more evidence from Tina Francis' report (A.A. Vol. 29 pp. 6905). 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 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 this 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.

XXI. 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. 29 pp. 7020-7021).

...

“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. Vol. 29 pp. 7020-7021)

...

“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. 29 pp. 7021)

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 learned 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. 30pp. 7047)

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.

XXII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL REFERRED 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. 30 pp. 7028) 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 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.

XXIII. 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. Const. 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.

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. 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 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. 24 pp. 5630) 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. 25 pp. 5933)

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. 25 pp. 5933).

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. Lastly, the bifurcated penalty phase gave the opportunity for the State to make two 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.

XXIV. 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. Const. 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. 25 pp. 5863-5864).

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 this 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.

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, this 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. This 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.

XXV. 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. Const. 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, 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 Mr. 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. 27 pp. 6437).

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 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 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.

XXVI. THE DEATH PENALTY IS UNCONSTITUTIONAL

Johnson's state and federal constitutional rights to due process, equal protection, right to be free from 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 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 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 states 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 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.

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 it is 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 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 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 it 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.

XXVII. 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.

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

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, 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.

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.

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 untrammelled 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.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment from 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 this 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 the 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.

There is no 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).

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.

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.

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 and 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.

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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XXVIII. 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.

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.

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 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.

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.

**XXIX. 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).

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), this 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 error 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.

CONCLUSION

Based on the foregoing, Mr. Johnson respectfully requests this Court order reversal of his convictions.

DATED this 9th day of January, 2015.

Respectfully submitted:

s/s Christopher R. Oram, Esq.
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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b), this appellate brief complies because excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 37,000 words, to wit 31,878 words.

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

DATED this 9th day of January, 2015.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9th day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Chief Deputy District Attorney

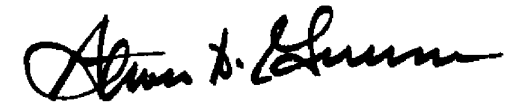
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BY:

/s/ Jessie Vargas
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EXHIBIT 38

EXHIBIT 38



CLERK OF THE COURT

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7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

CASE NO: 98C153154

12 DONTÉ JOHNSON,
13 #1586283

DEPT NO: VI

14 Defendant.

15 **FINDINGS OF FACT, CONCLUSIONS OF
16 LAW AND ORDER**

17 DATE OF HEARING: 01/14/15
18 TIME OF HEARING: 8:30 AM

19 THIS CAUSE having come on for hearing before the Honorable ELISSA F.
20 CADISH, District Judge, on the 14th day of January, 2015, the Petitioner not being present,
21 PROCEEDING IN FORMA PAUPERUS, the Respondent being represented by STEVEN B.
22 WOLFSON, Clark County District Attorney, by and through STEVEN S. OWENS, Chief
23 Deputy District Attorney, and the Court having considered the matter, including briefs,
24 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court
25 makes the following findings of fact and conclusions of law:

26 **FINDINGS OF FACT**

27 In 2000, Mr. Johnson was found guilty by the jury, but the jury was unable to reach a
28 unanimous verdict on the appropriate penalty in the penalty phase. Thereafter, a three-judge
panel held a penalty hearing and imposed the death penalty on Mr. Johnson for all four

1 murders. On appeal, the Nevada Supreme Court noted the overwhelming evidence of Mr.
2 Johnson's guilt and affirmed his convictions by the jury. However, under the United States
3 Supreme Court's decision in Ring v. Arizona, the Court reversed the imposition of death by
4 the three-judge panel and remanded the case for a new penalty phase before a new jury. In
5 2005, the jury imposed a sentence of death for all four murders. . On appeal, the Nevada
6 Supreme Court affirmed the death sentences and Remittitur issued on January 28, 2008.
7 Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006).

8 Thereafter, Johnson timely filed a first post-conviction petition for writ of habeas
9 corpus on February 13, 2008, and counsel, Chris Oram, was appointed. After extensive
10 briefing and evidentiary hearings, the petition was denied with findings of fact and
11 conclusions of law filed on March 17, 2014. The appeal from the denial of that petition is
12 pending before the Nevada Supreme Court in Case # SC 65168.

13 Meanwhile, presently before the Court is Johnson's proper person Petition for Writ of
14 Habeas Corpus filed on October 8, 2014, State's Response, and Defendant's Reply. The
15 Court hereby denies Defendant's Petition for Writ of Habeas Corpus with its request for
16 appointment of counsel.

17 The petition Mr. Johnson has filed is based on a purported declaration by Sikia Smith
18 who was a co-Defendant in this case reporting to recant statement that Smith had made to the
19 police back during the police investigation. However, Mr. Smith did not testify against the
20 Defendant in his trial. His statements were not used in Mr. Johnson's trial. The petition is
21 untimely and successive and no good cause has been shown for those procedural defaults.
22 NRS 34.726; NRS 34.810. The declaration from Smith does not provide good cause in light
23 of the lack of relationship of Smith's purported statements to Mr. Johnson's trial.

24 Additionally, the State has asserted laches as a defense pursuant to NRS 34.800,
25 which has not been rebutted by Mr. Johnson. He attempts to assert a claim of actual
26 innocence. However, the Smith declaration does not show actual innocence of Mr. Johnson
27 in this case, particularly given that that evidence was not used to convict Mr. Johnson. And
28

1 there is no independent underlying constitutional claim shown by Mr. Johnson were there to
2 be an excuse of the procedural default.

3 **ORDER**

4 WHEREFORE, the petition and the request for appointment of counsel are denied.

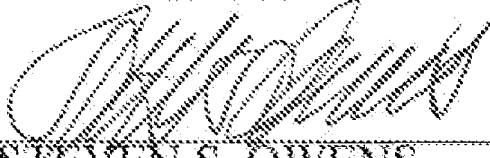
5 DATED this 7 day of January, 2015.

6
7 
DISTRICT JUDGE

MEV

8
9 STEVEN B. WOLFSON
10 Clark County District Attorney
Nevada Bar #001565

11 BY

12 
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13 Chief Deputy District Attorney
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CERTIFICATE OF SERVICE

I certify that on January 15, 2015, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

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January 15, 2015

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RE: Findings of Fact, Conclusions of Law and Order

Mr. Johnson:

The enclosed Findings will be submitted to the Judge on January 26, 2015.

Sincerely,

Steven S. Owens
Chief Deputy District Attorney

EXHIBIT 40

EXHIBIT 40

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

Electronically Filed
Nov 18 2015 11:43 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING**

~~~~~  
**APPELLANT'S REPLY BRIEF**  
~~~~~

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ISSUES PRESENTED FOR REVIEW

- I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.**
- II. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ON DIRECT APPEAL THE UNCONSTITUTIONALITY OF JOHNSON'S JURY SELECTION PROCESS.**
- 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.**
- IV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE THE ISSUE OF CHANGE OF VENUE 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.**
- VI. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PROSECUTORIAL MISCONDUCT REGARDING INSTANTIAL FORTITUDE ON DIRECT APPEAL.**
- 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.**
- 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.**

- 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.
- X. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON INADMISSABLE EVIDENCE BEING PRESENTED PURSUANT TO.
- 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.
- XII. MR. JOHNSON IS ENTITLED TO REVERSAL OF HIS CONVICTIONS BASED UPON THE STATE'S INTRODUCTION OF OVERLY GRUESOME AUTOPSY PHOTOS.
- 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.
- 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.

- 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.
- 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.
- XVII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE OF TRIAL COUNSEL TO OFFER A JURY INSTRUCTION REGARDING MALICE.
- XVIII. 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.
- XIX. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO PRECLUDE THE STATE FROM INTRODUCING AN INADMISSIBLE BAD ACT.
- XX. TRIAL COUNSEL WAS INEFFECTIVE FOR PROVIDING THE STATE A MITIGATION REPORT FROM TINA FRANCIS WHICH WAS USED TO IMPEACH A DEFENSE EXPERT.
- XXI. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSEL TO DISAGREE AMONG THEMSELVES IN FRONT OF THE JURY.
- XXII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL REFFERED TO THE VICTIMS AS KID/KIDS.

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

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

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

XXVI. THE DEATH PENALTY IS UNCONSTITUTIONAL

XXVII. 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.

XXVIII. 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.

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

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This argument stands as submitted in the Opening Brief.

II. JOHNSON'S CLAIMS REGARDING INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL DURING THE 2000 JURY TRIAL AND DIRECT APPEAL ARE NOT PROCEDURALLY BARRED.

The district court carefully considered the State's time bar argument below.

After significant briefing and oral argument, the district court denied the State's contention that Mr. Johnson's trial issues were time barred. The State repeats the same arguments in this Court as they previously made in the district court. A careful consideration of Mr. Johnson's arguments mandate the merits of his writ be heard.

A. MR. JOHNSON'S ISSUES REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL FROM TRIAL AND ON APPEAL FROM THE JUDGMENTS OF CONVICTIONS SHOULD BE HEARD ON THE MERITS.

In the instant case, Mr. Johnson can demonstrate good cause that an impediment external to the defense prevented him from complying with the State procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); citing, Pellegrini v. State, 117 Nev. 860, 886-887, 34 P.3d 519, 537 (2001);

Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). To find good cause there must be a “substantial reason: 1) that affords a legal excuse” Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

Mr. Johnson can demonstrate good cause for the failure to file the writ pursuant to NRS 34.726(1). First, the State cites no authority for the proposition that Mr. Johnson should not have concluded his third penalty phase and appeal before filing a post-conviction writ. The filing of the post-conviction writ after the remittitur was issued from direct appeal would have resulted in the withdrawal of his attorney’s based upon the conflict of interest. Lastly, the State provides no case law for the proposition that Mr. Johnson is required to file his writ of habeas corpus prior to the third penalty phase.

The State claims that the defendant cannot contend that a sentencing rehearing prevented him from filing a timely petition. In support, the State cites to Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). The State argues that Mr. Johnson’s post-conviction petition for a writ of habeas corpus should be limited to issues concerning the penalty phase of his trial because issues concerning the guilt phase should have been brought within one year of the date that this Court affirmed his convictions and reversed his sentence of death. There is no support for the

State's argument. Nevada does not provide for a bifurcated post-conviction proceeding. Mr. Johnson's judgment of conviction was not final until his final sentence was rendered by the district court. His post-conviction petition for a writ of habeas corpus was not due until one year after this Court's decision on direct appeal from his final penalty phase. Accordingly, Mr. Johnson's post-conviction petition was timely filed in this case and all issues, those concerning the guilt phase as well as those concerning the penalty phase, were properly before the district Court.

1. NRS CHAPTER 34 CONTEMPLATES THE FILING OF A SINGLE PETITION

The main premises underlying the provisions of NRS 34.720 et. seq., setting forth the procedures to be followed in post-conviction proceedings, is to insure that all of petitioner's claims are consolidated so as to avoid the inefficiency which would result from filing separate post-conviction petitions for each claim the petitioner may have (NRS 34.820(4)). An interpretation of NRS 34.726(1) which would permit bifurcated post-conviction proceedings such as that suggested by the State would place a greater burden on the system, the defendant, and the State.

A post-conviction petition filed before the final judgment of conviction is entered is a nullity as prematurely filed. NRS 34.724 permits a post-conviction

petition for a writ of habeas corpus to be filed by "[a]ny person convicted of a crime and under sentence of death or imprisonment[.]" Here, there was no valid judgment of conviction until the third penalty hearing was complete. The two prior judgments of conviction were invalid for the purpose of filing post-conviction proceedings because they lacked the essential requirement of a sentence once the sentence was vacated on appeal. See NRS 176.105 ("If a defendant is found guilty and is sentenced as provided by law, the judgment of conviction must set forth: (a) The plea; (b) The verdict or finding; (c) The adjudication and sentence, including the date of the sentence, any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment, a reference to the statute under which the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute; and (d) The exact amount of credit grated for time spent in confinement before conviction, if any." See also Ex Parte Dela, 25 Nev. 346, 250, 60 P. 217, 218 (1900) (there are two essentials to a judgment of conviction – "the statement defining the punishment, and the statement of the offense for which the punishment is inflicted"); Ex Parte Roberts, 9 Nev. 44 (1873) (judgment was void because it did not state a valid sentence); Ex Parte Salge, 1 Nev. 449, 453 (1865) (a valid judgment of conviction must list the reciting court and cause, the sentence defining the punishment, and a statement of the offense for

which the punishment is inflicted). A judgment of conviction is not final until a written judgment setting forth the plea; the verdict or finding; and the adjudication and sentence, including the date of sentence and a reference to the statute under which the defendant is sentenced. Bradley v. State, 109 Nev. 1090, 1094, 864 P.2d 1272, 1275 (1993) (citing NRS 176.035(1)). See also Johnson v. State, 118 Nev. 787, 59 P.3d 450, 460 n. 31 (2002) (a conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987); Doyle v. State, 116 Nev. 148, 157, 995 P.2d 465, 471 (2000) (same); Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed.2d 204, 204 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798, 109 S.Ct. 1494, 1498, 103 L.Ed.2d 879, 887 (1989) (same)).

The judgment of conviction is filed not merely after completion of the guilt phase of a capital trial, but only after the penalty has been determined. The judgment of conviction in this case, as required by NRS 176.105, sets forth both the fact of the conviction and the imposition of the death sentence. Where the Supreme Court affirms the conviction but reverses the death sentence and remands

for a new penalty hearing, the original judgment of conviction is void. Following retrial of the penalty phase, a new judgment of conviction is filed.

There is no statute providing for the filing of a post-conviction petition prior to entry of the final judgment of conviction, thus the petition was a nullity. See. Kinsey v. Sheriff, Clark County, 94 Nev. 596, 596, 584 P.2d 158, 159 (1978) (vacating order denying a pretrial petition for a writ of habeas corpus because there was no statute permitting a pretrial challenge to an order denying a motion for discovery and no statute providing for interlocutory appellate review of such orders); Sheriff v. Toston, 93 Nev. 394, 395, 566 P.2d 411, 411 (1977) (remanding case with instructions to dismiss a petition that did not meet the requirements imposed by the legislature). See also Allgood v. State, 78 Nev. 326, 372 P.2d 466 (1962) (finding it impermissible to file a notice of appeal prior to entry of judgment).

Further, NRS 34.724(1) provides in pertinent part that "[a]ny person convicted of a crime and under sentence of death or imprisonment . . . may, without paying a filing fee, file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence" Emphasis added. This statute requires that the petitioner be convicted of a crime and be under a sentence of death or imprisonment. Here, the petitioner's sentence was reversed, and the petitioner is

under neither sentence of death nor sentence of imprisonment and, under this statute, is not permitted to file for post-conviction relief.

Chapter 34 clearly contemplates that a single post-conviction petition will be filed which challenges both the underlying conviction and sentence. NRS 34.820(4) states in pertinent part that "all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and . . . any matter not included in the petition will not be considered in a subsequent proceeding." If this Court were to interpret Chapter 34 in the manner suggested by the State, Mr. Johnson would be unable to properly complete the petition. NRS 34.735 sets forth the form of the Petition for Post-Conviction Relief. In pertinent part, the instructions state that "(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence." Emphasis added. The instructions further state that "(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted." The statute also sets forth the form of the Petition, in pertinent part question 5: (a) Length of sentence; and (b) If sentence is death, state any date upon which execution is scheduled. This question can clearly not be answered by a petitioner