ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

ASHLEY BENNETT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 39864

FILED

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APPEAL FROM JUDGEMENT OF CONVICTION
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE MICHAEL DOUGLAS, PRESIDING

APPELLANT'S OPENING BRIEF

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03-17464

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ASHLEY BENNETT, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 3986

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TABLE OF CONTENTS

Table of Authorities iii

Issues Presented for Review 4

Statement of the Case 5

Statement of Facts 6

Statement of Related Cases 5

Arguments .....

I. 18

II. 22

III. 23

IV. 25

V. 27

VI. 27

VII. 30

Conclusion 33

Certificate of Compliance 34

Certificate of Mailing 35

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TABLE OF AUTHORITIES

NEVADA SUPREME COURT CASES

Big Pond v. State, 101 Nev. 1,3, 692 P.2d 1288,1289, (1985) 30

Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000) 28

Cordova v. State, 116 Nev. ___, ___ P.3d ___ (2000) 28

Dechant v. State of Nevada, 10 P.3d 108, 116 30

Evans v. State. 117 Nev. Adv. Op. 50, 28 P.3d 498 19,20

Felder v. State. 107 Nev. 237, 241, 810 P.2d 755 (1991) 23

Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996) 31

Lay v. State, 110 Nev. 1189, 896 p.2d 448 (1994) 21,18

Meek v. State 112 Nev. 1288 20,23

Moore v. State, 96 Nev. 220, 607 P.2d 105 (1980) 27

People v. Phillips, 64 Cal.2d 574, 414 P.2d 353, 363-364 (1966) 28

Petrocelli v. State. 101 Nev. 46, 52, 692 P.2d 503 (1985) 23,20

Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997) 23

Tavares v. State, 117 Nev. Adv. Op. 61,30 P.3d 1128 (September 17, 2001) 23

Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) 19

Tinch v. State. 113 Nev. 1170, 1176, 946 P.2d 1061 (1997) 23

Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996) 20

FEDERAL CASES

Berger v. United States. 295 U.S. 78, 88, 79 L.Ed.2d 1314, 55 S.Ct. 629 (1935) 31

Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) 31

Kyles v. Whitley, 514 U.S. 419, 434, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995) 30-32

Schad v. Arizona, 501 U.S. 624, 642 (1991) 29

United States v. Agurs, 427 U.S. 97, 108, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976) 32

United States v. Baglev. 473 U.S. 667, 682, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985) 32

United States v. Hayward, 420 F.2d 142, 147 (B.C. Cir. 1969) 18

United States v. Love, 543 F.2d 87 (6th Cir. 1976) 18

United States v. Muscarella, 585 F.2d 242, 248-49 (7th Cir. 1978) 18

United States v. Peak, 498 F.2d 1337, 1339 (6th Cir. 1974) 18

United States v. Rios, 611 F.2d 1335, 1343 (10th Cir. 1979) 18

Victor v. Nebraska, 511 U.S. 1, 11, 13-14 (1994) 28

STATUTES

NRS 174.235(a) 31

NRS 200.020 24

NRS 48.045(1) 22

NRS 48.045(2) 21, 22

NRS 50.085 26

NRS 50.085(3) 26

NRS 50.090 26

NRS 50.135(2)(b) 22, 23, 24

CHRISTOPHER R. ORAM
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ISSUES PRESENTED FOR REVIEW

I. THE STATE FAILED TO PRODUCE SUBSTANTIAL, CREDIBLE EVIDENCE THAT BENNETT WAS THE SOURCE OF THE ALLEGED WITNESS INTIMIDATION IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

II. A NEW TRIAL IS WARRANTED DUE TO THE COURT'S FAILURE TO CONDUCT A PRETRIAL PETROCELLI HEARING AND TO GIVE THE PROPER LIMITING INSTRUCTION ON THE ALLEGED WITNESS INTIMIDATION IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

III. BENNETT WAS DENIED A FAIR TRIAL BY LIMITING THE TESTIMONY OF LAKIESHA REED AND REGINALD FOBBS.

IV. THE DISTRICT COURT IMPROPERLY LIMITED THE CROSS-EXAMINATION OF PURPORTED EYEWITNESS PAMELA NEAL IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION.

V. THE COURT ERRED IN GIVING INSTRUCTION NUMBERS 10 AND 11 WHICH DEFINED EXPRESS AND IMPLIED MALICE AND MALICE AFORETHOUGHT.

VI. MR. BENNETT IS ENTITLED TO A NEW TRIAL BASED UPON PREJUDICIAL CUMULATIVE ERROR.

VIII. THE STATE'S FAILURE TO PRODUCE IMPEACHMENT EVIDENCE REGARDING A KEY WITNESS WARRANTS A NEW TRIAL IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION..

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STATEMENT OF THE CASE

Joseph Williams (aka Doughboy) was shot and killed on March 3, 2001 and on May 18, 2001 a criminal complaint was filed charging Ashley Bennett, Antwant Graves, Lailoni Morrison, Anthony Gantt and Jermaine Webb with Conspiracy to Commit Murder and Murder with Use of Deadly Weapon with the Intent to promote a criminal gang (A.A. Vol. I, pp. 1-3). At the conclusion of the preliminary hearing only Bennett, Morrison and Gantt were bound over to stand trial on the murder charge. An Information was filed in District Court on June 7, 2001.

The District Court granted Motions to sever the trials of the defendants. The trial of Bennett was set first, however, on the eve of trial, co-defendant Gantt entered into a plea negotiation with the State in exchange for his testimony against Bennett and Morrison. Bennett's trial was therefore continued and commenced on January 22, 2002. The trial concluded and closing arguments were heard on Friday, February 1, 2002 and on Monday, February 4, 2002 the jury returned a verdict of First Degree Murder with Use of a Deadly Weapon. The Court conducted the sentencing and sentenced Bennett on June 18, 2002 to Life in prison without the possibility of parole.

On February 11, 2002, a Motion for New Trial was filed. On February 21, 2002,the court denied the issues in the Motion for New Trial. A subsequent Motion for New Trial was filed by newly appointed counsel, Mr. Stanley Walton.

On June 18, 2002 the court denied the Motion for New Trial. This appeal follows.

STATEMENT OF RELATED CASES

Lailoni Morrison v. State of Nevada, Supreme Court Case Number 40097.

STATEMENT OF FACTS

Throughout the various testimony individuals are referred to by both their street names and their real names. In order to make the testimony most understandable, reference herein will by the

real names. The various street names are as follow: Wayne Gantt (Wacky G); Louis Matthews (Chew, Chewy or Chew Wak); Ashley Bennett (Face); Antwon Graves (T Wak); and Joseph Williams (Doughboy).

Monique Hunt had an on and off boyfriend relationship with Joseph Williams (A.A. Vol. II, pp. 350). He had a key to her apartment on Morton Street and if he needed a place to take a shower, change clothes or rest he had permission to use her apartment (A.A. Vol. II, pp. 353-354). She left her home on March 3, 2001 at around 10:00 AM and when she returned about 3:00 in the afternoon there was no where to park because of the paramedics and crowds of people so she parked across Martin Luther King at her grandmother's house (A.A. Vol. II, pp. 353-354). Shortly thereafter her aunt came running up and told her that Williams had been shot so she took off and followed the ambulance to the hospital (A.A. Vol. II, pp. 358). She stayed at the hospital until she learned that Williams had passed (A.A. Vol. II, pp. 358-359).

Hunt also knew Morrison and his girlfriend, Stephanie Riedel who was her best friend in high school. It was common knowledge that Williams was her boyfriend.

Security Officer James Golden was traveling through Carey Arms in a golf cart with maintenance worker Don Stewart on March 3, 2001 when he heard about 20 gunshots (A.A. Vol. II, pp. 303-305). He posted up behind a tree and when the shooting stopped ran toward Morton Street to see if he could see anyone leaving the area in a vehicle (A.A. Vol. II, pp. 307-308). Not seeing anything he went back to the golf cart and saw a number of people running through a park area (A.A. Vol. II, pp. 314-315). A individual he knew as Wayne appeared to making gestures with his hand like he was trying to put something in his pants (A.A. Vol. II, pp. 314-316). Subsequently, Golden picked Gantt out of a photo lineup as the person he saw running (A.A. Vol. II, pp. 3320).

Immediately after the gunshots Golden called his dispatch, and then went to the area of the

CHRISTOPHER R. ORAM
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gunshots and found one subject laying partially face down on the ground and then called for medical assistance (A.A. Vol. II, pp. 321-322). Before approaching the body, Golden checked to be sure that the area was clear and did not see anyone on any of the surrounding balconies (A.A. Vol. II, pp. 323-324). Three individuals approached and attempted to move Williams into a car to take him to the hospital, but Golden stopped them (A.A. Vol. II, pp. 325-326).

Golden knew and recognized Morrison and did not see him present at any time on March 3, 2001 (A.A. Vol. II, pp. 350).

Dr. Gary Telgenhoff testified that he was employed at the Clark County Coroner's Office. (A.A. Vol. IV, pp. 680). On March 4, 2001, Dr. Telgenhoff performed an autopsy on the body of Joseph J. Williams. (A.A. Vol. IV, pp. 682) There were fourteen bullet entry wounds in the body. (A.A. Vol. IV, pp. 682) Dr. Telgenhoff concluded that Mr. Williams died as a result of multiple gunshot wounds as a result of homicide. (A.A. Vol. IV, pp. 703).

Anthony Gantt testified for the prosecution after entering a plea with an agreement to testify against Mr. Bennett. (A.A. Vol. III, pp. 534). Originally, Mr. Gantt was charged with the Murder of Joseph Williams that had occurred on March 3, 2001. (A.A. Vol. III, pp. 534). On November 26, 2001, Mr. Gantt entered into an agreement with the State wherein he would agree to testify against his co-defendant's. (A.A. Vol. III, pp. 534). As part of the plea agreement, Mr. Gantt would receive a sentence of life with the possibility of parole after ten (10) years for Second Degree Murder. Additionally, the State would retain the right to argue as to whether his sentence on conspiracy to commit murder was to run concurrent or consecutive to the Second Degree Murder. (A.A. Vol. III, pp. 537).

Mr. Gantt entered the courtroom at Mr. Bennett's trial to testify and was sworn in and then stated "I ain't testifying." (A.A. Vol. III, pp. 528). At that point, the court room was cleared and

CHRISTOPHER R. ORAM
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permitted Mr. Gantt to confer with his attorney, Ms. Christina Wildeveld. (A.A. Vol. III, pp. 528-530). During the brief recess, the prosecutor indicated that there were spectators in the court room who were allegedly affiliated with the person Gerson Park Kingsmen, and this was the reason Mr. Gantt was reluctant to testify. (A.A. Vol. III, pp. 530). Thereafter, Mr. Gantt agreed to testify after a conference with his attorney. Mr. Gantt testified that Ashley Bennett had a moniker of "Face". (A.A. Vol. III, pp. 535).

On March 3, 2001, Mr. Gantt was fifteen years old and was present at a gathering at "L-Wack's house. (A.A. Vol. III, pp. 538). The purpose of this gathering at "L-Wack's" residence was because "L-Wack's" little brother, Mark Doyle, had been killed. (A.A. Vol. III, pp. 538). Mr. Gantt was present along with Ashley Bennett, "T-Wack", "Chew-Wack", Lailoni Morrison and Henry at the gathering. (A.A. Vol. III, pp. 539).

At approximately 11:00 a.m. in the morning this gathering occurred. Thereafter, Mr. Gantt testified that Ashley Bennett suggested that they go up to the "hunt house" to shoot up the house. (A.A. Vol. III, pp. 539). The purpose of going to the "hunt house" to shoot it up was because the "hunt house" was a meeting place for the Rolling Sixties. (A.A. Vol. III, pp. 541). Mr. Gantt explained that the Rolling Sixties and the Gerson Park Kingsmen were "beefing". (A.A. Vol. III, pp. 541). Mr. Gantt included himself as an associate of the Gerson Park Kingsmen.(A.A. Vol. III, pp. 541).

As the group walked toward the "hunt house", Mr. Gantt noticed that security walked past so the group turned around. (A.A. Vol. III, pp. 542). Thereafter, they observed the victim, Mr. Williams also known as "dough boy",wherein Mr. Bennett alleged stated, "there goes a sixty niggar" and the shooting began. (A.A. Vol. III, pp. 546). Mr. Gantt testified that himself, Lailoni Morrison, Louis Matthews and Antwon Graves, and Ashley Bennett all shot into the body of the victim, Mr. Williams.

CHRISTOPHER R. ORAM
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Mr. Gantt testified that Mr. Bennett used a 9millimeter hand gun during the shooting. (A.A. Vol. III, pp. 549). Mr. Gantt estimated that there were approximately 20 shots fired. (A.A. Vol. III, pp. 550). Mr. Gantt was positive that "Chew-Wack" known as Louis Matthews was the last person who shot into the body of the victim. This fact was directly contradicted by the State's witness Ms. Pam Neal. Although Mr. Gantt associates with the Gerson Park Kingsmen, he denied being a member of their gang. (A.A. Vol. III, pp. 553). During direct examination, the prosecutor questioned Mr. Gantt as to whether anyone was present with him as he ran across the field after the shooting. Mr. Gantt indicated that he was present with Henry. (A.A. Vol. III, pp. 556). The prosecutor then stated,

Q: Henry. You didn't mention Henry before when you gave the list of people here that were involved in the shooting. Why is that?
A: Cause Henry wasn't involved in the shooting.
Q: Where was Henry in that he could run with you?
A: He was on the sidewalk of 2529.
Q: Can you take that black marker and just put an H where Henry is? Do you know if Henry had a gun?
A: Yes.
Q: What kind of a gun did he have?
A: a .357. (A.A. Vol. III, pp. 556).

Mr. Gantt was questioned as to whether he observed Ms. Pam Neal at any time during, before or after the shooting to which Mr. Gantt denied seeing Ms. Neal. (A.A. Vol. III, pp. 564). Mr. Gantt indicated that he knew who Ms. Pam Neal was but that he did not observe her. Mr. Gantt was asked,

Q: If Pam Neal had indicated that Lailoni Morrison fired the first shot, would that be incorrect?
A: Yes.

Mr. Gantt stated that Mr. Morrison did not fire the first shot because Antwon Graves was the person who fired the first shot. (A.A. Vol. III, pp. 565). Mr. Gantt was also asked the following question,

Q: Pamela Neal indicated that it was you that fired the last shot into dough boy as he was on the ground? Would that be a lie?
A: Yes. (A.A. Vol. III, pp. 565).

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Mr. Gantt was asked the following question,

Q: If Mr. Golden had indicated that he saw you with two other juveniles running from the scene, would that be a lie?

A: Yes.

According to Mr. Gantt, he only fired into "dough boy" because he felt his life was in jeopardy. (A.A. Vol. III, pp. 567).

Mr. Gantt indicated that Pamela Neal was lying when she testified that Mr. Gantt was the person who fired the last shot into "dough boy". (A.A. Vol. III, pp. 568-569). Mr. Gantt claimed that Pamela Neal lied about Mr. Gantt shooting into "dough boy" last because she was attempting to get her case dropped. (A.A. Vol. III, pp. 570). Mr. Gantt specifically testified that he knew that Pam Neal was not present to witness the shooting because he knew no one was out there at the time of the shooting. (A.A. Vol. III, pp. 570). Mr. Gantt agreed that he was facing the possibility of life without parole had he proceeded to trial and been convicted. (A.A. Vol. III, pp. 573). After the entry of Mr. Gantt's plea, he sent Mr. Bennett a letter stating that he was not going to testify. Mr. Gantt made mention in the letter that he had been pressured into negotiating the case to testify against Mr. Bennett. (A.A. Vol. III, pp. 584). As part of Mr. Gantt's case, he admitted that his attorney had conducted a psychological evaluation to determine Mr. Gantt's competency. (A.A. Vol. III, pp. 534).

Prior to March 3,2001, Mr. Gantt had never socialized with Mr. Bennett, did not know Mr. Bennett's true name and did not even know where Mr. Bennett lived. (A.A. Vol. III, pp. 587).

Mr. Gantt admitted that the shooting had nothing to do with "dough boy " being one of the Rolling Sixties or the other co-conspirators being part of the Gerson Park Kingsmen. (A.A. Vol. III, pp. 595). In fact, Mr. Gantt testified that the reason he shot "dough boy" was to protect himself. (A.A. Vol. III, pp. 595).

On March 21, 2001, Mr. Gantt gave a statement tot he police at juvenile hall, wherein he told the police that he did not know anything about the shooting of Mr. Williams. (A.A. Vol. III, pp. 596).

CHRISTOPHER R. ORAM
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On May 7, 2001, Mr. Gantt was interviewed again by police officers at juvenile detention. (A.A. Vol. III, pp. 597). Mr. Gantt admitted at trial that his statement to the police on May 7, 2001, was not freely and voluntarily given. (A.A. Vol. III, pp. 598). Mr. Gantt testified that he was pressured in this statement by the police telling him that he could receive the death penalty if he didn't' cooperate. (A.A. Vol. III, pp. 598). In his May 7, 2001, statement Mr. Gantt told police that co-defendant, Lailoni Morrison had come back and changed his clothes, however, at trial he indicated that Lailoni Morrison had never come back to change his clothes. (A.A. Vol. III, pp. 600). Mr. Gantt also freely admitted that when he told the police officer that he had been at the basketball courts prior to the shooting was a lie. (A.A. Vol. III, pp. 601). The reason that he lied to them regarding him being at the basketball courts was because the police were exerting pressure on him. (A.A. Vol. III, pp. 601.

During cross- examination, Mr. Gantt finally admitted he had to duck because Henry was behind him shooting. (A.A. Vol. III, pp. 603). This testimony was directly contradicted by Mr. Gantt's earlier testimony, wherein he indicated that Henry was not part of the shooting. Mr. Gantt explained that he told the police that he had shot into the leg because the police had suggested the answer to him. (A.A. Vol. III, pp. 605).

Mr. Gantt admitted it was not Mr. Graves who stated, "I'm going to smoke this dude". It was in fact Mr. Bennett and when he told the police it was Mr. Graves, that was a lie. (A.A. Vol. III, pp. 609). Mr. Gantt was questioned as to his statement to the police wherein he stated that it was no one's idea to go over to the "hunt house" to shoot it up. He remembered making that statement. (A.A. Vol. III, pp. 612). However, at trial, he maintained it was Mr. Bennett's idea.

In his November 21, 2001, statement to the police, Mr. Gantt indicated that Henry was not in possession of a gun. At trial he admitted that he was just attempting to protect Henry. (A.A. Vol. III, pp. 616). Mr. Gantt testified that the reason he made this statement is because he felt pressure form

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the police. (A.A. Vol. III, pp. 617). Mr. Gantt admitted that in his November 21, 2001, statement, not only were the police present but Deputy District Attorney Melissa De La Garza was also present. (A.A. Vol. III, pp. 621-2). Mr. Gantt admitted in his November 21, 2001, statement that he was lying to the police when he told the police that Lailoni Morrison had obtained the gun from Henry and that was a lie.(A.A. Vol. III, pp. 621-2). In Mr. Gantt's November 21, 2001, statement to the police he indicated that Jermaine Webb had obtained a .357 at the time of the shooting. However, at trial, he testified that Jermaine Webb was not there and not involved in the shooting. (A.A. Vol. III, pp. 623). When asked why he had lied to the police about Jermaine Webb, Mr. Gantt testified that he told them that Jermaine Webb had the gun and had given it to Henry. (A.A. Vol. III, pp. 623). However, at trial, Mr. Gantt was adamant that Jermaine Webb was not involved. (A.A. Vol. III, pp. 623).

Mr. Gantt was adamant that Mr. Bennett was in possession of a black nine millimeter hand gun during the shooting. (A.A. Vol. III, pp. 625-626). This is in direct contradiction to Ms. Neal's testimony, wherein she stated that Mr. Bennett was in possession of a silver western style gun. Mr. Gantt agreed that the only reason he testified against Mr. Bennett "to save his own skin". (A.A. Vol. III, pp. 633).

On redirect examination, the prosecutor asked the following question,

Q: He was in the Gerson Park Kingsmen that you associated with? Correct? (referring to Ashley Bennett)
A: Yes. (A.A. Vol. III, pp. 634).

Farther down the page the following question and answer occurred,

Q: And in fact, Mr. Gantt was there a point in which this defendant basically threatened you with your own family.
A: Yes.
Q: Didn't he basically tell you, I am going to bring your family in here to watch you testify?
(A.A. Vol. III, pp. 634).

At that point the defense objected to the question being leading and the witness answered

CHRISTOPHER R. ORAM
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yes. (A.A. Vol. III, pp. 635).

The prosecutor further questioned Mr. Gantt stating,

Q: You were asked about changing your mind. Isn't it true today that you changed your mind about testifying because you were concerned about the people in the courtroom?
A: Yes.
Objection by the defense.
The Court will strike - - will strike - - strike the question, strike the answer.(A.A. Vol. III, pp. 645).

Pamela Neal was living at 2529 Morton Avenue, Apartment D on March 3 ,2001. (A.A. Vol. II, pp. 191). At approximately 3:30 p.m., 2001, Ms. Neal was getting ready to go downstairs to take the downstairs neighbor to work. (A.A. Vol. II pp. 193-194). As she came out her door, she observed people surrounding Joseph William ("dough boy") and firing approximately 20 shots. (A.A. Vol. II, pp. 196-197). Ms. Neal indicated that there were approximately 5 or 6 people that surrounded "dough boy" and that he put his hands up in the air just prior to the shooting. (A.A. Vol. II, pp. 201). Ms. Neal identified the people that surrounded "dough boy" as Wayne Gantt, Lailoni Morrison, and Ashley Bennett. (A.A. Vol. II, pp. 202). However, in her initial statement to the police she indicated that she did not have any information for the police. (A.A. Vol. II, pp. 216). She testified that the reason she didn't tell the police any information because "it wasn't none of my business at the time". (A.A. Vol. II, pp. 216). More importantly, at a subsequent date, Mr. Neal told the police she could identify the shooters. She initially identified Louis Matthews as a shooter. (A.A. Vol. II, pp. 266-267).

On May 8, 2001, Ms. Neal specifically picked Louis Matthews out of a photo line up as on of the shooters. (A.A. Vol. II, pp. 268). In fact, she identified both "Chew" and "Wing" from line-ups. (A.A. Vol. II, pp. 220). However, a preliminary hearing was held in North Las Vegas on June 5 ,2001, wherein Ms. Neal now recanted her identification of "Chew" also known as Louis Matthews

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Las Vegas, Nevada 89101

and the case was subsequently dismissed. (A.A. Vol. II, pp. 228-229). Ms. Neal explained that she recanted her testimony regarding Louis Matthews because she didn't see him with a weapon and that concerned her. (A.A. Vol. II, pp. 229).

During the preliminary hearing, she also recanted her testimony regarding "Wing" Jermaine Webb as one of the possible shoots. (A.A. Vol. II, pp. 230). Ms. Neal indicated that she had identified Jermaine Webb as one of the shooters but later changed her mind because she was unsure. (A.A. Vol. II, pp. 270-271). Ms. Neal also indicated that all the individuals she identified as shooters were supposedly associated with the Gerson Park Kingsmen except for Morrison and Webb. (A.A. Vol. II, pp. 271). Ms. Neal denied that it was a coincidence that she had changed her story about Morrison and Webb based upon the fact that they were the only two not associated with the Gerson Park Kingsmen. (A.A. Vol. II, pp. 271). It is important to remember that Ms. Neal had been upset and blamed the Gerson Park Kingsmen of taking the life of her cousin Eric Bass. (A.A. Vol. II, pp. 276). Ms. Neal believed the Gerson Park Kingsmen were responsible. (A.A. Vol. II, pp. 278).

Ms. Neal testified that the last person to shoot into the body of "dough boy" was "Wacky- G" also known as Wayne Gantt. (A.A. Vol. II, pp. 236). This was in direct contradiction to Mr. Gantt who testified that it was Lailoni Morrison who was the last person to shoot into "dough boy".

On the day of the preliminary hearing, Ms. Neal had a pending case against her which was subsequently dismissed in the middle of the proceedings. (A.A. Vol. II, pp. 237). Ms. Neal also received $325.00 from the District Attorneys Office in order to move out of the area. (A.A. Vol. II, pp. 238). Ms. Neal's case that was dismissed was based upon an incident that occurred on April 15, 2001. In that case, Ms. Neal was charged with multiple counts including conspiracy to commit murder, burglary while in possession of a deadly weapon, battery with substantial bodily harm with use of a deadly weapon, and discharging a firearm into a structure and coercion with use of a deadly

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

weapon. (A.A. Vol. II, pp. 279). Ms. Neal was adamant that her case was not dismissed for her testimony but because the case against her was insufficient to prosecute her. Ms. Neal did admit that she received immunity on the case that was dismissed. (A.A. Vol. II, pp. 281).

During Ms. Neal's testimony, the court heard the arguments of counsel regarding how much information the defense could question Ms. Neal about regarding her dismissed case. (A.A. Vol. III, pp. 534). Defense counsel informed the court that Ms. Neal had volunteered the case was dismissed for "lack of evidence". (A.A. Vol. II, pp. 243). The defense told the court that this was not true and that,

> There was plenty of evidence, she barged into a place with two other unidentified black males and a six year old, young black girl of Antonio Luney was shot in the chin and had to be hospitalized, taken it. They barged in. She rushed in confronted Antonio and demanded to know if was involved with the killing of her beloved relative, Eric Bass. There was a scuffle and that man came close to being killed on that particular day. This is not a case of insufficient evidence that she has mischaracterized it to the jury. I believe that clearly opens the door that I have a right now to get into more specific allegations of what occurred and should have an opportunity to cross-examine her further then the court indicted that I would be allowed to when we had a previous hearing on this. (A.A. Vol. II, pp. 243).

The prosecutor objected to the State being able to question Ms. Neal regarding the specifics of the dismissed case. (A.A. Vol. III, pp. 534). The defense countered that she received a grant of immunity and there were plenty of eyewitnesses who identified her. (A.A. Vol. II, pp. 246). Additionally, it seems coincidental that her serious case was dismissed and she was granted immunity on the day of the defendant's preliminary hearing.

Thereafter, the court determined that it was not going to deviate from its prior ruling and would preclude the defense about questioning Ms. Neal regarding the facts and circumstances of the dismissed case. (A.A. Vol. II, pp. 248).

On cross-examination, Ms. Neal was questioned as to her statement to the police wherein she indicated that the incident too place at 3:40 p.m. This is contradicted by al of the State's witnesses

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

from the North Las Vegas Police Department who indicated that they arrived at the scene prior to 3:10 p.m. Some twenty five to thirty minutes before Ms. Neal testified she observed the event. Ms. Neal testified that she knew the time the incident occurred because she had just picked up her son from school at approximately 3:20 and had to return to her residence to take her neighbor to work. (A.A. Vol. II, pp. 251). Unfortunately, defense counsel then reminded her that March 3, 2001 was a Saturday and she would not have had to pick up her child from elementary school. (A.A. Vol. II, pp. 252). Ms. Neal admitted that she had been ingesting marijuana and had some wine coolers on the day of the incident. (A.A. Vol. II, pp. 254).

At trial, Ms. Neal remembered that Lailoni Morrison was wearing black pants. However, she was questioned as to why she had previously stated that she could not identify any of the clothing that the shooters were wearing. (A.A. Vol. II, pp. 265).

In Ms. Neal's May 1, 2001, statement, she indicated that Mr. Bennett used a old time gun or revolver "like a western gun, silver in color". (A.A. Vol. II, pp. 273). However, at the preliminary hearing, she testified that she never saw Mr. Bennett's gun. (A.A. Vol. II, pp. 272). At trial she testified that her statement at the preliminary hearing that she did not see Mr. Bennett's gun was incorrect. She testified at trial that she observed his gun to be a silver gun. This fact was in direct contradiction to Mr. Gantt's testimony that Mr. Bennett used a black nine millimeter hand gun at the time of the shooting. Ms. Neal freely admitted that she had never socialized, "hung out", or went any place with Mr. Bennett. (A.A. Vol. II, pp. 285). In fact, she agreed that she only really only knew Mr. Bennett from what she had heard from others. (A.A. Vol. II, pp. 285). Ms. Neal's testimony was further contradicted by the testimony of the downstairs neighbor Ms. Michele Wilson.

Ms. Michelle Wilson, lived at 2529 Morton, apartment B, on March 3, 2001. (A.A. Vol. II, pp. 271). Ms. Wilson testified that she had known Ms. Neal for approximately for fifteen years. (A.A.

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

Vol. II, pp. 271). During direct examination, the defense attempted to ask the following set of questions,

> Q: So have you've know Pamela Neal long enough and well enough to form your own opinion as to her being truthful and untruthful.
>
> Ms. Delagarsa: Objection.
> A: Yes I have.
>
> The Court: I'll let the question stand.
>
> Q: And in your opinion.
> Ms. Delagarsa: Objection.
>
> The Court: I'll sustain the objection as to the form of the question.
> Q: And what is your opinion of Pamela Neal.
> Ms. Delagarsa: Objection, Your Honor.
>
> The Court: Sustained.
> Q: Do you have an opinion as to her - -
> Ms. Delagarsa: Objection, Your Honor.
> The Court: Objection sustained. (A.A. Vol. II, pp. 271-272).

Ms. Wilson testified that she had to arrive at work at approximately 4:30 on the day in question. (A.A. Vol. II, pp. 274). According to Ms. Wilson she unusually leaves for work around 3:45 p.m.(A.A. Vol. II, pp. 275). Ms. Wilson indicated that she did observed Ms. Neal on March 3, 2001, "getting high what she always do." (A.A. Vol. II, pp. 276). According to Ms. Wilson, after the shooting, Ms. Wilson came out of her hiding place in the closet and Ms. Neal was standing directly in front of her in Ms. Wilson's hallway. Ms. Wilson, Ms. Neal and a man named Eric then walked out to she what had occurred. (A.A. Vol. II, pp. 278). According to Ms. Wilson, Ms. Neal's cousin entered the residence and stated that someone named Evian had been killed. (A.A. Vol. II, pp. 278). However, when the three walked out to investigate they realized that Evian had not been shot. (A.A. Vol. II, pp. 278). Ms. Wilson testified that Ms. Neal never told her that she had seen the shooting and that she did not know even who had been shot. (A.A. Vol. II, pp. 280).

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

On cross-examination, the prosecutor asked only a limited amount of questions from Ms. Wilson. Ms. Wilson was asked is she had a child named "Tricky C" . (A.A. Vol. II, pp. 282-283). The prosecutor then asked isn't it true that "Tricky C" is a member of the Gerson Park Kingsmen and Ms. Wilson admitted that he was. Ms. Wilson's testimony seemed to completely refute the testimony of Ms. Neal. Ms Wilson's testimony demonstrated that Ms. Neal had not seen the shooting and that Ms. Neal's cousin had reported to both Ms. Wilson and Ms. Neal that Evian had been killed. This obviously contradicts the testimony of Ms. Neal who testified that she observed the whole killing at approximately 3:30 -3:40 some thirty minutes after the incident had occurred.

I. THE STATE FAILED TO PRODUCE SUBSTANTIAL, CREDIBLE EVIDENCE THAT BENNETT WAS THE SOURCE OF THE ALLEGED WITNESS INTIMIDATION IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

The State's repeated and unfounded references to witness intimidation and threats and to the general reluctance of Gantt to testify requires a new trial. There was a no substantial, credible evidence to support the proposition that Gantt and/or his family were afraid of or had been confronted by Bennett.

Federal courts have consistently held that the prosecution's reference to, or implications of, witness intimidation by a defendant are reversible error unless the prosecutor also produces substantial, credible evidence that the defendant was the source of the intimidation. See, e.g.. United States v. Rios, 611 F.2d 1335, 1343 (10th Cir. 1979); United States v. Peak, 498 F.2d 1337, 1339 (6th Cir. 1974); United States v. Hayward, 420 F.2d 142, 147 (B.C. Cir. 1969). Federal courts have also reversed convictions where prosecutors have implied the existence of threats that "in the context of the whole record" specifically "hint[ed] of violence." United States v. Muscarella, 585 F.2d 242, 248-49 (7th Cir. 1978), citing. United States v. Love, 543 F.2d 87 (6th Cir. 1976).

In the case at bar, there was direct implication that Gantt was intimidated by Bennett. There

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

was also the implication that Gantt was reluctant to testify because he thought Bennett himself might retaliate against him. More specifically, Gantt testified that Bennett threatened him and his family, (A.A. Vol. III, pp. 635). Gantt also said that Bennett would bring Gantt's family into court to watch Gantt testify, (A.A. Vol. III, pp. 635-6).

The prosecutor attempted to put gangs on trial instead of Bennett. The clear import of the alleged threats and/or intimidation was an improper objective sought to distract and influence the jury. These references were not relevant to the issues in the case as Gantt was ultimately not afraid to testify in open court.

In addition, the reluctance and fright were not relevant based on the cross-examination of Gantt. Fright or general concern for Gantt's safety would not explain the numerous inconsistencies in his statements.

There is a total lack of proof of the threats. Gantt is a convicted co-defendant with a lot to loose. His testimony was inconsistent in many regards. Furthermore, there is no other evidence beyond Gantt's testimony to prove the allegations. Thus, Gantt's claims of threats and/or intimidation do not meet the standard of substantial, credible evidence. Evans v. State. 117 Nev. Adv. Op. 50, 28 P.3d 498 0uly 24, 2001). Bennett should, therefore, receive a new trial without this prejudicial information coming before the jury.

In Lay v. State, 110 Nev. 1189, 896 p.2d 448 (1994), this Court indicated that, "Federal courts have consistently held that the prosecution's references to, or implications of, witness intimidation by a defendant are reversible error unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation." Id. 110 Nev. At 1193. (Citations omitted). In Lay, this Court differentiated between eliciting testimony of a general reluctance to testify and testimony regarding specific threats from a defendant,

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

> We first note that although many of these references were not relevant to any issue in the case, neither were they direct references to witness intimidation by Lay. Nor was there any implication that the witnesses were reluctant to testify because they thought Lay himself might retaliate against them or that Lay had threatened them. Most of the references appear, rather, to have been attempts to show the witnesses; reluctance to testify because of the presence in the witnesses; neighborhoods of Lay's fellow gang members who might retaliate against them for testifying. Although these references may have been irrelevant to the examination of most oF the witnesses, we have been irrelevant to the examination of most of the witnesses, we conclude that the references are not misconduct requiring reversal. Id. 110 Nev. at 1193-94.

This Court has repeatedly held to this distinction between general threats to the witness and those attributed to the defendant. See Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996) (no implication that the defendant threatened the witness); Meek v. State 112 Nev. 1288, 930 P,2d 1104 (1996), (implication that defendant's relatives or friends were responsible for intimidation was improper); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997), (involving general questions of witness intimidation not directly related to the defendant); Evans v. State, 117 Nev. Adv. Op. 50, 28 P.3d 498 (2001) (no error in admitting testimony of direct threats by the defendant himself when supported by substantial credible evidence).

In the instant matter, Anthony Gantt initially took the stand and refused to testify. After a short recess, Gantt agreed to testify. Sometime during this turn of events the State moved to close the courtroom due to witness intimidation. The defense objected based upon the Defendant's Sixth Amendment right to a public trial. The court refused the State's request.

Anthony Gantt thereafter testified and upon cross examination, indicated that he was reluctant to testify due to the presence of Louis Matthews in the back of the courtroom. During re-direct examination, the State elicited from Gantt that the Defendant had also sent him threatening letters and had made threats to his family.

The defense subsequently moved for a mistrial based upon the Lay decision. The district

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

court refused to grant the mistrial due to the fact that defense counsel "opened the door" by asking Gantt about why he was reluctant to testify. In addition, the district court placed on the record the fact that Louis Matthews was observed making threatening gestures to Gantt during his testimony.

As indicated previously, this Court has repeatedly differentiated between threats to witnesses that came directly from a defendant and threats to witnesses from other areas. If the State elicits testimony or implies that a defendant is the source of the threats without substantial credible evidence, this is reversible error. Evidence of threats from other areas, not involving the defendant is not reversible error. See Lay v. State, 110 Nev. 1189, 896 p.2d 448 (1994).

Here, defense counsel did not open the door to evidence of threats from the Defendant himself. Defense counsel elicited testimony regarding Gantt's reluctance to testify due to the presence of other individuals in the courtroom. Gantt never indicated during cross- examination that he or his family was threatened by the Defendant Ashley Bennett. Because of the difference between threats from others and threats from the Defendant, counsel's elicitation of testimony regarding threats from others did not open the door for the state to elicit testimony regarding perceived threats from the Defendant.

Accordingly, in order for the State to elicit this testimony, there had to be substantial credible evidence of threats from Mr. Bennett. Gantt testified about two instances of threats, one to his family and letters to himself allegedly from Mr. Bennett. Initially, there was absolutely no evidence of any kind of threats to Mr. Gantt's family. As to the letters Gantt allegedly received from the Defendant, there was absolutely no evidence that such letters were written by Mr. Bennett.

Prior to trial, the State moved the district court for an order directing the Defendant to provide a handwriting sample for comparison with the two letters Gantt had received. Although,

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

the district court granted the Motion, the State never obtained the handwriting sample. Accordingly there was no evidence establishing that Mr. Bennett was the source of the letters.

Without substantial credible evidence of threats to Gantt or his family from the Defendant, the testimony regarding these "threats" was improper and constituted reversible error. Defense counsel, in eliciting testimony of intimidation by other individuals, did not open the door for the State to inquire about unsubstantiated threats by the Defendant. This Court has recognized a difference between threats by others and threats by the Defendant. Proof one is not proof of the other. Here the State elicited testimony of threats by Mr. Bennett and such evidence was not supported by substantial credible evidence. Accordingly, the Defendant herein respectfully request that Court order a new trial based on the Fifth and Fourteenth Amendments to the United States Constitution.

II. A NEW TRIAL IS WARRANTED DUE TO THE COURT'S FAILURE TO CONDUCT A PRETRIAL PETROCELLI HEARING AND TO GIVE THE PROPER LIMITING INSTRUCTION ON THE ALLEGED WITNESS INTIMIDATION IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

No pretrial hearing was conducted to determine whether Gantt's allegations of threats and/or intimidation were sufficient. In addition, the jury was never told of the limited evidentiary value of the uncharged evidence. Thus, a new trial must be conducted.

Under Nevada's rules of criminal evidence, evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question. NRS 48.045(1). However, evidence of other wrongs may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. NRS 48.045(2). Prior to admission of such evidence, the trial court must conduct a hearing on the record and determine: (1)

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

that the evidence is relevant to the crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that he probative value of the other act is not substantially outweighed by the danger of unfair prejudice. Tinch v. State. 113 Nev. 1170, 1176, 946 P.2d 1061 (1997); Petrocelli v. State. 101 Nev. 46, 52, 692 P.2d 503 (1985).

Where the trial court admits evidence under NRS 48.045(2) without first conducting an on-the-record hearing, the Nevada Supreme Court may be deprived of the opportunity for meaningful review of this Court's admissibility determination. See. Meek v. State. 112 Nev. 1288, 1292-93, 930 P.2d 1104 (1996). The administration of justice depends on the trial court's conscientious adherence to the dictates of on-the-record hearings. See. Felder v. State. 107 Nev. 237, 241, 810 P.2d 755 (1991). [1] Therefore, the failure to hold the proper hearing on the record coupled with a lack of a limiting instruction requires a new trial.

III. BENNETT WAS DENIED A FAIR TRIAL BY LIMITING THE TESTIMONY OF LAKIESHA REED AND REGINALD FOBBS.

Two of Bennett's witnesses were limited in their testimony. The district court concluded that both witnesses were not allowed to get into certain conversations. Based on the following, it will be clear that the hearsay rule does not apply to these conversations. Thus, a new trial is warranted at which Mr. Bennett can properly defense himself.

NRS 51.035 defines Hearsay as a statement offered in to evidence to prove the truth of the matter asserted unless:

2. The declarant testifies at the trial or hearing and is subject

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[1] Bennett assumes that the bad act s evidence was offered to prove motive. See Tinch 113 Nev. at 1176, 946 P.2d at 1065(gang-affiliation evidence may be relevant and not substantially outweighed by unfair prejudice when it tends to prove motive). In addition, this Court should have *sua sponte* given a limiting instruction on the use of the other bad acts evidence prior to Gantt's testimony and again injury instructions. Tavares v. State, 117 Nev. Adv. Op. 61,30 P.3d 1128 (September 17, 2001).

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

to cross-examination concerning the statement, and the statement is:

(a) Inconsistent with his testimony;

3. The statement is offered against a party and is:

(a) His own statement, in either his individual or a representative capacity;

NRS 50.135(2)(b) states:

2. Extrinsic evidence of a prior contradictory statement by a witness is inadmissible unless:

(b) The witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon.

This statue differs from NRS 51.035(2)(a) in the requirement that the witness be confronted with the prior inconsistent statement during direct or cross-examination[2]

In the instant case, Don Fobb's testified that key State's witness, Pamela Neal is his sister. (A.A. Vol. V, pp. 901). Fobb's repeatedly discussed this case with Neal. (A.A. Vol. V, pp. 903). Fobb's had a conversation with Neal regarding some statements that Neal heard from homicide

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[2] NRS 51.035(2)(a) is very similar to NRS 50.135(2)(b). NRS 51.035(2)(a) prohibits the admission of hearsay evidence unless "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony."

NRS 51.035(2(a) embodies the traditional approach to the admission of prior inconsistent statements. It addresses the situation where the witness is confronted with the statement at the time of his examination thereby giving him an opportunity to admit or deny making the prior inconsistent statement at that very moment.

Also note that NRS 50.135(2(b) is the Nevada counterpart to Federal Rule of Evidence 613(b). See also, 2 Stephen A. Salzburg, et al., Federal Rules of Evidence Manual, 985-1002 (6th ed. 1994).

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

detectives, (A.A. Vol. V, pp. 903). Defense counsel was not allowed to go further.

Lakiesha Reed testified that she knows Bennett vary well. (A.A. Vol. V, pp. 903). She received a call from Bennett regarding Pamela Neal (A.A. Vol. V, pp. 905-906). However, Reed was also not allowed to go any further with her testimony.

Later in the trial, defense counsel made a proffer regarding the testimony of Reed. Reed would have testified that she received a call Bennett regarding Neal. Reed was standing in the doorway of her neighbor's house when she overheard a conversation between Bennett and Neal. During that conversation Neal indicated that a man by the name of Tyro was the person responsible for the shooting death of the victim in this case. (A.A. Vol. V, pp. 924). The court excluded both portions of Reed and Fobb's testimony on the grounds of hearsay, (A.A. Vol. V, pp. 924).

It is axiomatic that a homicide detective is a representative of the state. The statements that Neal received from homicide detectives are, therefore, not hearsay under the Nevada evidence code. NRS 51.035(3)(a). The statements were offered against a party, i.e., the State of Nevada, and were made by homicide detectives in their representative capacity. Thus, Fobb should have been allowed to testify concerning the statements ultimately made by homicide detectives relating to this case. On the other hand, Reed is testifying regarding a prior inconsistent statement of Neal. It is irrelevant whether Neal was asked specifically if she ever told anyone that Tyro was the actual killer. Neal was available as a witness and subject to examination under oath. Neal would have been afforded the opportunity to be recalled and explain her prior inconsistent statement. Thus, this proffered testimony was not hearsay and was admissible for impeachment purposes as a prior inconsistent statement under NRS 50.135(2)(b). Bennett is entitled to a new trial at which Reed and Fobb's can testify fully as to the aforementioned relevant evidence.

IV. THE DISTRICT COURT IMPROPERLY LIMITED THE CROSS-EXAMINATION OF PURPORTED EYEWITNESS PAMELA NEAL IN VIOLATION OF THE

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

FIFTH AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION.

During trial Mr. Bennett requested to be allowed to examine Pam Neal concerning the specifics of her actions on the night of the death of her cousin Eric Bass. The offer of proof from Bennett was a follows:

> Your Honor, when queried by the State, she acknowledged that she was told by the district attorney before court that the case would be dismissed and she volunteered that the case was being dismissed because of "lack of evidence". This is not true, your Honor. I have a thick sheet of discovery in reference to her particular case which was 01FN0625. It was on calendar that very morning of the preliminary hearing, June 5, 2001. Had she not testified that day she would have been held to answer charges on that and a preliminary hearing would have been set for her in that matter. Basically she's told the jury, hey this case went away because there wasn't any evidence. I am innocent of that charge and that's why it went away. That's clearly not what happened. There was plenty of evidence, she barged into a place with two other unidentified black males and a six year old, young black girl of Antonio Luney was shot in the chin and had to be hospitalized, taken it. They barged in. She rushed in confronted Antonio and demanded to know if was involved with the killing of her beloved relative, Eric Bass. There was a scuffle and that man came close to being killed on that particular day. This is not a case of insufficient evidence that she has mischaraterized it to the jury. I believe that clearly opens the door that I have a right now to get into more specific allegations of what occurred and should have an opportunity to cross-examine her further then the court indicted that I would be allowed to when we had a previous hearing on this. (A.A. Vol. II, pp. 244).

The specifics of the activity of Neal that lead to her arrest should have been admitted by the trial court to show the extent of her motive to implicate Mr. Bennett in the Williams shooting to get even for his involvement (in her mind) in the death of her cousin. If a person is willing to unlawfully and wantonly take a gun and fire through a closed door in order to gain entry into a residence to interrogate the occupants concerning the death of her cousin, doesn't it follow that the same person would be willing to wrongfully implicate the person she believed was somehow responsible for the death of the same cousin?

The State in opposing the Motion of Mr. Bennett argued to the Court that the evidence was

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

not admissible under NRS 50.085 as extrinsic evidence. This is not entirely accurate as Mr. Bennett was seeking only to be able to inquire into the specific conduct on cross-examination of Neal.

NRS 50.085(3) provides that:

> "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provision of NRS 50.090."

The standard that the Court should have followed is described in Moore v. State, 96 Nev. 220, 607 P.2d 105 (1980), i.e., Mr. Bennett should have been allowed to ask specific questions of Neal concerning the incident for which she was arrested. If Neal had denied the facts Mr. Bennett would have been precluded from offering extrinsic evidence.

Neal was a crucial State's witness and the Court's ruling limited Mr. Bennett'sS ability to show bias and motive to fabricate. The erroneous ruling requires that this conviction be reversed.

V. THE COURT ERRED IN GIVING INSTRUCTION NUMBERS 10 AND 11 WHICH DEFINED EXPRESS AND IMPLIED MALICE AND MALICE AFORETHOUGHT IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION..

INSTRUCTION NO. 8

> Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may also result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes rather an unlawful purpose and design in contradistinction to accident and mischance. (A.A. Vol. I, pp. 36).

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

INSTRUCTION NO. 9

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, 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." (A.A. Vol. I, pp. 37).

The Court has approved the use of "may be implied" instead of "shall be implied" as required by NRS 200.020. See Cordova v. State, 116 Nev. ___, ___ P.3d ___ (2000). Despite this correction of an improper mandatory presumption language the instruction remains unconstitutionally vague. The terms "abandoned or malignant heart" do not convey anything in modern language. See Victor v. Nebraska, 511 U.S. 1, 11, 13-14 (1994) (term "moral evidence" not "mainstay or the modern lexicon"); id. at 23 (Kennedy, J., concurring) ("what once might have made sense to jurors has long since become archaic"). The words "abandoned or malignant heart" are devoid of rational content and are merely pejorative, and they allow the jurors to find malice simply on the ground that they believe the defendant is a "bad man." In People v. Phillips, 64 Cal.2d 574, 414 P.2d 353, 363-364 (1966), the California Supreme Court analyzed the element of implied malice, and concluded that an instruction would adequately define implied malice if it made clear that "the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." 414 P.2d at 363: Nevada law is basically consistent with this definition. See Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000) (Rehearing pending):

> "Nevada statutes and this court have apparently never employed the phrase 'depraved heart,' but that phrase and 'abandoned and malignant heart' both refer to the same 'essential concept ... one of extreme recklessness regarding homicidal risk.' Model Penal Code § 210.2 cmt. 1 at 15; see also Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) (malice as applied to murder includes 'general

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

malignant recklessness of others' lives and safety or disregard of social duty')."

The California Supreme Court disapproved the use of the language referring to an "abandoned or malignant heart" as superfluous and misleading:

> Such an instruction renders unnecessary and undesirable an instruction in terms of 'abandoned and malignant heart.' The instruction phrased in the latter terms adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation.
>
> The charge in the terms of the 'abandoned and malignant heart' could lead the jury to equate the malignant heart with an evil disposition or a despicable character; the jury, then, in a close case, may convict because it believes the defendant a 'bad man.' We should not turn the focus of the jury's task from close analysis of the facts to loose evaluation of defendant's character. The presence of the metaphysical language in the statute does not compel its incorporation in instructions if to do so would create superfluity and possible confusion.
>
> The instruction in terms of 'abandoned and malignant heart' contains a further vice. It may encourage the jury to apply an objective rather than subjective standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter.

414 at 363-364 (footnotes omitted). Although the court did not find the use of the language to be error (as it reversed the conviction on other grounds), the passage of time since Phillips has certainly not increased the likelihood that the term "abandoned or malignant heart" conveys anything rational to a juror. No reasonable juror today would understand that phrase as requiring that the defendant commit the homicidal act with conscious disregard of the likelihood that death would result. The fact that no other state, as far as Mr. Bennett can determine, uses this language in a jury instruction also militates in favor of finding that it does not satisfy due process standards. See Schad v. Arizona, 501 U.S. 624, 642 (1991).

Wherefore it is respectfully requested that this Court find that the "abandoned and malignant heart" implied malice is unconstitutionally vague and ambiguous and denied Mr. Bennett

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

of due process of law and based thereon reverse his conviction. Likewise the catch phrase of "heart fatally bent on mischief" has no meaning in the definition of malice aforethought. This Court should strike down both of these instructions and craft language that has meaning and is understandable to the average person.

VI. MR. BENNETT IS ENTITLED TO A NEW TRIAL BASED UPON PREJUDICIAL CUMULATIVE ERROR IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

This Court has provided that if the cumulative effect of errors committed in trial denies the appellant the right to a fair trial, this Court will reverse the conviction. See Dechant v. State of Nevada, 10 P.3d 108, 116 Nev. Op. 100 (2000). In Dechant, this Court determined that the relevant factors to consider in deciding where error is harmless or prejudicial include whether the issue of innocence of guilt is close, the quantity and character of the error, and the gravity of the crime charged." Id. at 17 citing Big Pond v. State, 101 Nev. 1,3, 692 P.2d 1288,1289, (1985). Mr. Bennett received an unfair trial based upon several assignments of error.

VII. THE STATE'S FAILURE TO PRODUCE IMPEACHMENT EVIDENCE REGARDING A KEY WITNESS WARRANTS A NEW TRIAL IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

Due process requires that evidence must be disclosed if it provides grounds for the defense to attack the credibility of the state's witnesses or to bolster the defense case against prosecutorial attacks. Gantt, a convicted co-defendant, was a key witness against Bennett. Gantt was questioned concerning his plea. However, no mention was ever made of Gantt's pre-sentence report nor his statement to the court at the time he entered his plea.

Discovery laws provide that these documents be provided and used to impeach Gantt. Defense counsel's failure to have and use these important documents requires a new trial as a matter of law.

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Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), and its progeny require a prosecutor to disclose evidence favorable to the defense if the evidence is material either to guilt or punishment. See, Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996). Failure to do so violates due process regardless of the prosecutor's motive. Id. at 619.

Materiality "does not require demonstration by a preponderance" that disclosure of the evidence would have resulted in acquittal. Kyles v. Whitley, 514 U.S. 419, 434, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995). Nor is it a sufficiency of the evidence test; a defendant need not show that "after discounting the inculpatory evidence in light of the undisclosed evidence, there would have been enough left to convict." Id, 514 U.S. at 434-35.

"The character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." See [United States v. Agurs, 427 U.S. 97, 108, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976).] ("The prudent prosecutor will resolve doubtful questions in favor of disclosure."). [3] This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative. . . of a sovereignty . . . whose interest. . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88, 79 L.Ed.2d 1314, 55 S.Ct. 629 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. Kyles, 514 U.S. at 439-40.

Due process does not require simply the disclosure of "exculpatory" evidence. Evidence also must be disclosed if it provides grounds for the defense to attack the credibility of a State's

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[3] NRS 174.235(a) requires the prosecuting attorney provide defendant with any written or recorded statements made by a witness.

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witness. See. 514 U.S. at 442, n.13, 445-51.

The Supreme Court further concluded that a defendant's due process rights could be violated even where the defendant did not request such evidence. United States v. Baglev. 473 U.S. 667, 682, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985). Once a reviewing court has identified constitutional error pursuant to Baglev. a new trial is warranted without additional harmless error analysis. Kyles, supra.

In the case at bar, co-defendant, Gantt said that he was present when Bennett allegedly shot the victim, (A.A. Vol. III, pp. 545-547). Gantt is facing a potential life sentence, (A.A. Vol. III, pp. 573). Gantt plead guilty to second degree murder without the use of a deadly weapon and conspiracy to commit murder, (A.A. Vol. III, pp. 575). The District Attorney has stipulated to a sentence of ten (10) years to life, the State retaining the right to argue for consecutive time for the conspiracy conviction. (A.A. Vol. III, pp. 575-576).

No mention was ever made of Gantt's pre-sentence report nor his statement to the court at the time Gantt entered his plea. The pre-sentence report and Gantt's entry of plea will both contain his statements concerning his involvement in this case. Neither of these documents were available to defense counsel at the time of Gantt's testimony.

Based upon Gantt's inconsistent testimony, it is reasonably probable that Gantt undermined his involvement in this case. These documents would provide substantial impeachment evidence and are material to Bennett's defense. The State's failure to produce the pre-sentence report and transcript of Gantt's plea substantially undermined Bennett's ability to defend himself. Thus, a new trial is warranted after the disclosure of the noted impeachment evidence. Kyles, supra.

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CONCLUSION

Mr. Bennett is entitled to an new trial based on the numerous Constitutional errors.

DATED this 17 day of October, 2003.

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CERTIFICATE OF COMPLIANCE

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

DATED this 17 day of October, 2003.

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 20 day of October, 2003, 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 OPENING BRIEF**, addressed to:

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