ORIGINAL

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. 39864

FILED

JAN 2 6 2004

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

APPELLANT'S REPLY 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
DAVID ROGER
District Attorney
Nevada Bar No. 002781
200 S. Third Street, 7th Floor
Las Vegas, Nevada 89155
Telephone: (702) 455-4711

BRIAN SANDOVAL
Nevada Attorney General
Nevada Bar No. 0003805
100 North Carson Street
Carson City, Nevada 89701-4717

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

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CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
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DAVID ROGER
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CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

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

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

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ALL OTHER ARGUMENTS CONTAINED IN THE OPENING BRIEF ARE SUBMITTED.

STATEMENT OF THE CASE

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

STATEMENT OF FACTS

In Mr. Bennett's opening brief, he provided this Court with approximately 13 pages of facts elicited during the trial. Mr. Bennett drafted an extensive statement of facts to demonstrate to this Court that the case against Mr. Bennett was weak. Specifically, Mr. Bennett provided numerous instances where witnesses' Ms. Pam Neal and Anthony Gantt gave inconsistent testimony. More importantly, Ms. Neal and Mr. Gantt gave testimony that bordered on impossibilities. Mr. Bennett anxiously awaited the State's response and the State's rendition of a statement of facts. Unfortunately, for Mr. Bennett, the State's statement of facts appear to be approximately half a page long (answering brief, pp. 2-3).

In fact, the State informs this Court that Anthony Gantt testified that the defendant was one of the perpetrators. The State also explains that Ms. Pam Neal testified that the defendant shot the victim (answering brief, pp. 2). The State also concludes that the defense attacked the credibility of Gantt and Neal but that the jury rejected the defenses' contention. This appears to be a reasonable summary of the State's entire statement of facts. Mr. Bennett respectfully requests that this Court look carefully at the facts in this case.

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

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

ARGUMENT

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

In Mr. Bennett's opening brief, he explained that the State had made repeated an unfounded references to witnesses intimation and threats and a general reluctance of Mr. Gantt to testify. Mr. Bennett informed the Court that there no substantial or credible evidence to support the position of the State that Mr. Gantt and/or his family had been confronted by Mr. Bennett. (opening brief, pp. 18).

Curiously, the State argued the following to this Court:

> As this Court noted in Rodriguez v. State, 117 Nev. 800, 32 P.3d n773, 780 (2001), it's the Defendant's 'responsibility to prove this court with cogent argument supported by legal authority and reference to relevant parts of the record.' (answering brief, pp. 4).

The State actually placed emphasis on the following portion of that paragraph "and reference to relevant parts of the record." Mr. Bennett is surprised that the State would make this claim to this Court. It appears that the State is claiming that Mr. Bennett did not either accurately cite to the record or that he didn't cite to the record at all for this portion of his argument. Mr. Bennett is curious as to why the State would make these representations to this Court. In fact, the State cited to the record regarding Mr. Gantt's feeling of intimidations. On page 3 of the answering brief, the State cited to page 634 for the questions and answers. Yet, on page 12 of Mr. Bennett's opening brief, lines 22-27, Mr. Bennett cites to the exact same quote. Mr. Bennett provided volume page 634 as the citation to the quote. This is the same page number the State has cited. Perhaps the State did not read Mr. Bennett's statement of facts and therefore, believed that Mr. Bennett had not cited to the record for this proposition. If the State is making this claim, the State should be more careful before it accuses an appellant of not citing to the record. It is Mr. Bennett who spent approximately 13 pages of his brief citing to the record for the lengthy statement of facts. It was the State who spent less than half a page citing to the record for their rendition of the statement of

facts.

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 instant case, the State presented evidence that Mr. Gantt had been intimated by Mr. Bennett. The State claims that this issue should not be heard on appeal based upon the failure of trial counsel to properly object on the correct legal issue. (answering brief, pp. 4, lines 5-9).

First, the State is correct that the defense only objected on the basis that the question was leading.

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).

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).

Therefore, the defense objected to the first set of questioning, that the question was leading. The defense then again objected when the prosecutor asked Mr. Gantt about intimidation from people in the court

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

room. The court chose to strike the answer of the witnesses.

During the trial, defense counsel stated:

> As there - - there were allegations of intimidation by Mr. Bennett to his family and there was information that the letters came to Mr. Gantt from Ashley Bennett. There was nothing establishing that those letters from Mr. Bennett to Mr. Gantt that they were actually from Mr. Bennett; they requested the handwriting exemplar. Secondly, the intimidation of this family, there was no basis for that allegation. (A.A., Vol. 4 pp. 675).

Clearly, defense counsel was objecting to the Court that there was absolutely no basis for the questions from the prosecutor regarding alleged intimidation by Mr. Bennett. In fact, the State had been given an opportunity to do a handwriting exemplar on a letter supposedly containing intimidation. The State never presented any such evidence. More importantly, the State doesn't even seem to respond to the court after the defense made this objection regarding the handwriting exemplars. There was no evidence presented that Mr. Bennett had made any form of threat or attempted to intimidate anyone. Yet, the prosecutor was permitted to present and elicit evidence involving alleged threats without any compliance with established federal law that there must be substantial, and credible evidence produced by the government that the defendant is the source of the intimidation.

Mr. Bennett cited to federal authority for the proposition that witness intimidation by a defendant may result in reversible error if there is not substantial and credible evidence that the defendant was the source of the intimidation. In response, the State claims that the federal cases cited by Mr. Bennett are irrelevant because there was no evidence to substantiate the witnesses intimidation in the cases cited by Mr. Bennett.

The State's argument is without merit. There was no real evidence that Mr. Bennett had made any type of threat or attempted intimidation against the witnesses nor any real evidence that Mr. Bennett had written the letter in question. During trial, the prosecutor stated:

> The prosecutor: Your Honor at this time State would request that all spectators be excluded from the courtroom. In speaking with Mr. Gantt's attorney, specifically Ms. Kristina Wildeveld, she noted that not only is a co-defendant in herein, there is one of his cousins, and there's some other people that we're concerned might be affiliated with the

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520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

> Gerson Park Kings, and it's at this point intimidating this witness, and basically the State is viewing it as a veiled threat by having him here. I know that there were some letters sent earlier by Mr. Bennett to Mr. Gantt, saying that he was going to try to have a lot of people in here, in the courtroom, to see what Mr. Gantt was going to say, and basically, against a veiled threat to Mr. Gantt about his testimony. So it would be the State's request that the spectators be excluded form the courtroom at this time. (A. A. Volume 3, pp. 530).

The prosecutor's statement is made outside of the jury's presence, just after Mr. Gantt has refused to testify. Mr. Gantt had refused to testify and the prosecutor had already determined that the reason that Mr. Gantt had refused to testify is because of witnesses intimidation. Yet, the court held no hearing to determine whether there was any validity to witness intimidation. The State never presented any evidence that Mr. Bennett had actually written any type of letter to Mr. Gantt. The State argued that this had occurred. Based upon this argument and others made later in the trial, the court permitted the State to introduce evidence of witness intimidation.

In United States of America v. Peak, 498 F.2d 1337 (6th Cir. 1974), the United States Court of Appeals for the 6th Circuit reversed the conviction of Mr. Peak based partly on the prosecutors unsupported and unfounded references to threats to the police and prosecutors by the defendant. Id at 1339.

In the instant case, the State does not provide any substantial or credible proof that Mr. Bennett either wrote an intimidating letter or had been involved with the threatening or intimidating of Mr. Gantt.

In the State's answering brief, the State simply concludes that unlike the federal cases cited by the State, there is evidence of witnesses intimidation and threats. Where does the State produce such evidence. The State was given an opportunity to conduct a handwriting exemplar of a letter supposedly written by Mr. Bennett but did not present any such evidence.

In United States. v. Rios, 611 F.2d 1335 (10th Cir. 1979), the Court of Appeals held that "generally references to threats or danger to prosecution witnesses are improper unless admissible testimony is offered connecting the defendant with threats or danger." See, eg. United States v. Mitchell, 556 F.2d 371, 379- 80

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

(6the cir.) cert. denied, 434 U.S. 925, 98 S. Ct. 406, 54 L.Ed. 2d 284; United States v. Davis, 487 F.2d 112, 125-126 (5th Cir.), cert denied, 415 U.S. 981, 94 S. Ct. 39 L.Ed 2d 878.

The State does not seem to argue that they can present evidence of witness intimidation without credible evidence. However, the State does not provide any credible evidence to the district court or to this Court that there was any proof that Mr. Bennett was responsible for any perceived intimidation. There was no evidence presented that Mr. Bennett had people come to the court in order to intimidate Mr. Gantt. There was no evidence presented that Mr. Bennett wrote an alleged letter referred to by the prosecutor. There was no evidence of any type of witness intimidation. In fact, the prosecutor concluded almost directly after Mr. Gantt refused to testify and Mr. Bennett is responsible for the intimidation. The court permitted witnesses intimidation to be presented to the jury without holding any type of hearing to determine whether the prosecutor could produce any substantial or credible evidence that Mr. Bennett was the source of intimidation.

Based upon the failure of the State to produce any evidence of witness intimidation by Mr. Bennett, Mr. Bennett would respectfully request that his conviction be reversed based upon violations of the Fifth, Sixth 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.

Mr. Bennett was entitled to have the court make a finding that there was substantial credible evidence that Mr. Bennett was the source of the intimidation. The court permitted this type of evidence into the trial without any type of hearing in compliance with established federal law that there must be substantial evidence that the defendant is the source of the threat. In the State's answering brief, they claim that there was no need for a hearing based upon there being no bad act evidence introduced. The State claims that the intimidation was introduced in response to attacks of credibility of witness Gantt. (State's answering brief, pp. 8, lines 24-27).

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

Apparently, the State believes that if one of their witnesses is cross-examined, they are entitled to bring out evidence of witness intimidation without providing any credible source of substantial evidence that the defendant is the source of the intimidation. The State claims that there was no need for a hearing. The State's arguments are in complete contradiction to established federal law which provides that there must be substantial evidence of the intimidation. The State provided no such evidence of intimidation. The State didn't even bother to produce the letter or results of the tests of the letter that were supposedly written by Mr. Bennett. The State made no effort to present evidence that Mr. Bennett had brought people in the courtroom to intimidate Mr. Gantt. The State presented no evidence that Mr. Bennett wrote a letter to Mr. Gantt indicating that Mr. Bennett would use Mr. Gantt's family against him. The State was permitted to present instances of intimidation without providing any proof. Surely, the court should have held a hearing to determine whether there was substantial credible evidence of intimidation. Apparently, the court relied upon the argument of the prosecutor, wherein she stated that basically the State viewed people in the courtroom as a "veiled threat" by Mr. Bennett. (A. A. Volume 3, pp. 530). That may have been the State's personal belief, but that was not the evidence that was presented. That argument by the prosecutor is very similar to Peak wherein the prosecutor argued about perceived threats by the defendant to the police and the prosecution without substantial evidence to support the contention. This is exactly what occurred in the instant case.

Next, the State continues to refer to the witness intimidation evidence being presented after the defense had opened the door. First, that is not the standard that the federal courts have presented to prosecutors. If the defense asks a witness why he had refused to initially testify, this should not permit prosecutors to then argue that they can present evidence of witness intimidation without substantial evidence that the intimidation occurred and that the defendant is the source of the intimidation. Apparently, that's what the State believed.

Second, Mr. Bennett is concerned about the State's contention that the defense opened the door without quoting to a portion of the record on appeal wherein the defense asks questions opening the door. Assuming arguendo, that the defense did open the door by questioning Mr. Gantt regarding his refusal to initially testify

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

and his bias' in this case, it still did not excuse the requirement that the State present substantial evidence of the intimidation. The State is argues that a hearing should not have been conducted whether the defendant was the source of intimidation. The State merely concludes that there was just no need for one. In fact, the federal courts have repeatedly held that there is a need to establish that the defendant is the source of the intimidation. The State made absolutely no attempt other than arguments by the prosecutor, that in her belief Mr. Bennett was the source of intimidation. This is insufficient. The State may have obtained an order permitting this evidence into trial. However, the defense did not brief this issue and had the court had an opportunity to review the standards presented by the federal courts, the court most certainly would have had not choice but to have some type of hearing to establish that there was substantial and credible evidence that Mr. Bennett was the source of any threat or intimidation. Mr. Bennett's trial should be reversed based on the failure of the court to hold any type of hearing to determine whether there was substantially and credible evidence that Mr. Bennett threatened or intimidated anyone associated with this case in violation of the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution.

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 proffered testimony would have been admissible. Thus, a new trial is warranted.

In the State's answering brief, they claim that the defense limitation on their cross-examination of Reed and Fobbs is not supported by any clear citation to the record. (answering brief, pp. 9). Again, the State is inaccurate. Specifically Mr. Bennett extensively cited to the record on page 24 and 25 of his opening brief regarding the limitation of defense counsel on cross-examination of Fobbs and Reed. Citations were included to the record. The State's contention that it is not supported by a clear citation is misplaced.

The State further contends that the testimony of both Reed and Fobbs should be considered hearsay.

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

(answering brief, pp. 9). First and foremost, suspiciously absent from the State's argument is any citation to legal authority. In fact, the State presented their entire argument as to number III, without a single citation to a case. The State failed to cite state law, federal law or any other type of statues or legal authority. The State's argument and answer is highly improper. The State can not simply rely upon the trial court's order and argue their own personal belief as to what the law should be. It is incumbent upon the State to provide this Court with some authority for their proposition. They have utterly failed in their responsibility to properly argue argument number III. Perhaps the State has failed to present any binding or persuasive authority because the law is squarely against them.

During Ms. Neal's testimony, defense counsel asked the following questions and Ms. Neal gave the following answers:

Q: Who is Reginald Fobbs?
A: My brother.
Q: Are you close with him?
A: Kind of.
Q: Do you recall having conversations with Mr. Fobbs within the last six- month period about what you saw on that date.
A: No.
Q: Do you recall telling him that you did not really see the shooting that day?
A: No, never.
Q: Do you recall being - - Do you know a Lakeisha Reed?
A: No.
Q: Do you recall being - -
Q: You don't know Lakiesha Reed?
A: No. (A.A. Vol. 2, pp. 284).
Q: Do you recall being - - Do you know an individual by the name of HK?
A: Yes.
Q: Were you at his home within the last six months in which you had occasion to talk with a Lakiesha Reed on the phone?
A: No. I wasn't at his home. I was outside his house at my nephew's house next door.
Q: Do you recall, since the shooting, telling any family, friends or acquaintances that you had not really seen the shooting?
A: No. (A.A. Vol. 2, pp. 285).

Defense counsel made an offer of proof regarding the testimony of Reed. Reed would have testified that she received a call from Bennett regarding Neal. Reed was standing in the doorway of her neighbor's

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

house when she over heard a conversation between Bennett and Neal. During the conversation Neal indicated that a man named Tyro was the person responsible for the shooting death of the victim in this case. (A.A. Vol. 5, pp. 924). The court excluded Reed's testimony on the grounds of hearsay. (A.A. Vol. 5, pp. 924).

The defense called Reginald Fobbs. (A.A. Vol. 5, pp. 900). Mr. Fobbs testified that Pamela Neal was his sister. (A.A. Vol. 5, pp. 901). Mr. Fobbs considered his relationship with his sister, Pam Neal, very close. (A.A. Vol. 5, pp. 901). The following questions and answers occurred during Mr. Fobbs direct examination by defense counsel:

Q: When did you have this conversation with Pam Neal?
A: That involved Ashley Bennett?
Q: Yes.
A: I had that conversation with my sister every day, and it was right after my cousin go killed by sister was told - -
The Court: Stop. Stop right there. (A.A. Vol. 5, pp. 902-903).

At that point, the defense was completely stifled from proceeding with Mr. Fobbs regarding the conversation he had with star witness, and his very close sister, Ms. Neal. The State and the court considered both Mr. Fobbs and Ms. Reed's potential testimony as hearsay. Nonsense. It is not hearsay. That is why the State failed to provide any legal authority to this Court that these questions could not have been elicited by defense counsel. Ms. Reed was prepared to testify that she heard Ms. Neal indicate that a man named Tyro was responsible for the shooting. It appeared that Mr. Fobbs whose testimony on direct examination lasted only four pages, was prepared to impeach his own sister with prior inconsistent statements. Ms. Neal had testified that she had witnessesed Mr. Bennett commit the shooting. The defense attempted to call two people closely related to Ms. Neal to establish that she had made prior inconsistent statements. Apparently, the State thinks this was hearsay. The court thought this was hearsay.

As NRS 51.035 defines hearsay as a "statement offered into evidence to prove the truth of the matter asserted unless: 2) the declarant testifies at trial or hearing and is subject to cross examination concerning the statement and the statement is a inconsistent with his testimony; . ." The simple answer to this legal issue is

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

found within NRS 51.035. The simple legal proposition is that if a witness testifies to something and is subjected to cross-examination,, the defense can then present evidence to show what the witness has given a statement that was inconsistent. The defense is always permitted to demonstrate that a witnesses has given a prior inconsistent statement.

Ms. Reed's testimony is obviously admissible to impeach the credibility of Ms. Neal with a prior inconsistent statement. NRS 51.035 establishes that this was admissible. The State failed to distinguish the instant argument from the evidence code. The State did not even address the evidence code nor provide any legal authority for their proposition. It is difficult to argue against the State's position given the fact that they have no position founded on any type of legal authority. It the State's position and their personal belief that the district court judge was right in determining that this was hearsay. This is directly contrary to the Rules of Evidence.

Interestingly enough, the first question opposed by the prosecutor to Mr. Fobbs is as follows:

Q: Mr. Fobbs isn't true you are a member of the GPK?
A: Ma'am, I wouldn't actually say that. I am 34 years old, I'm cripple, and I've just lived in the neighbor hood. But at one time I was affiliated.
Prosecutor: No further questions. (A.A. Vol. 5, pp. 904).

The prosecutor's only question to Mr. Fobbs, was whether he was a Gerson Parks Kingsmen. The question was inadmissible. The district court did nothing about. Unfortunately, the defense did not object. However, the defense was precluded from putting on the admissible evidence that would have been exculpatory to Mr. Bennett. Ms. Neal's own brother had come into court and was prepared to testify against his "very close sister". It is remarkable that the district court stopped the defense from questioning Mr. Fobbs about the conversation he had with his sister about Ashley Bennett. The court's exclusion of his potential devastating evidence (to the State's case) was excluded for a reason that does not appear to be founded upon any legal authority. The defense had every right to call any witness who could establish a prior inconsistent statement.

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520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Hypothetically, if a witness came to court and said that the defendant had confessed to murder, would the defense be precluded from putting on the witnesses mother and father who would testified that they had talked to their daughter extensively about the defendant and she had always maintained that the defendant said that he was innocent. Would this Court preclude the mother and father from providing the prior inconsistent statement. Apparently, only the State gets to present their evidence and Mr. Bennett was not permitted the same opportunity. Mr. Neal's own brother was prepared to testify against her and the court susaponte stopped it. Ms. Reed was prepared to testify against Ms. Neal, and the court stopped it. What kind of a fair trial was that. More importantly, what law was the trial court relying upon. Moreover, what was the State relying upon when they wrote this answering brief and failed to cite to any legal authority for the proposition that these two witness should have been precluded from providing impeachment evidence against the State's star witness. Mr. Bennett would respectfully request that his conviction be reversed based upon the limiting of the defense to present exculpatory evidence in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

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.

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

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

> 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. 244).

Mr. Bennett was more than entitled to elicit the facts and charges that Ms. Neal faced by way of inquiry on cross-examination.

In the State's answering brief, the State concludes:

> The trial court properly exercised it's discretion in controlling the trial proceedings and preventing a time-consuming, confusing, irrelevant and speculative cross-examination of witness Neal on specifics of a dismissed case that had no bearing on her credibility or bias towards the defendant. (answering brief, pp. 11).

The State has not relied upon sound legal authority for this proposition. In fact, in Davis v. Alaska, 415, 308; 94 S. Ct. 1105; 39 L.E2d 347 (1974), the United States Supreme Court considered an issues closely associated with the instant case. In Davis, the petitioner was not permitted to cross-examine a juvenile witnesses regarding his delinquency. The State contended that the had an important interest in maintaining the anonymity of juvenile offenders. The United States Supreme Court held that the Sixth and Fourteenth Amendments conferred the right to cross-examine the prosecution witnesses about his delinquency adjudication for burglary and his status as a probationer. Id. The United States Supreme Court reasoned that:

> A more particular attack on the witness credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to explanation at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionality protected right of cross-examination. Citations omitted. Id. at 316.

The United States Supreme Court has ordered that proper examination of a witness may be had to explore bias and prejudices. Defense counsel for Mr. Bennett specially requested that the court permit him to question Ms. Neal as to the charges and facts regarding the case she received immunity on. As was highlighted above, there was plenty of evidence against Ms. Neal. Ms. Neal's case was dismissed in the identical court and

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520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

on the identical day that she testified at the preliminary hearing against Mr. Bennett. Ms. Neal was permitted by the court to testify that she was innocent of the charge and that there was no evidence against her. Yet, Ms. Neal had barged into a place where there were several witnesses' and shot a young African American girl in the chin which required hospitalization. Ms. Neal confronted witnesses in the residence. Obviously, this was not a case of insufficient evidence. The State permitted Ms. Neal to receive a dismissal upon that case in order to obtain her favorable testimony for the State.

The United States Supreme Court considered these issues in Davis v. Alaska, a review of the United States Supreme Court rationale in Davis v. Alaska demonstrates that defense counsel was absolutely entitled to question Ms. Neal regarding the facts and circumstances and charges that she was alleged to have committed. Obviously, as the United States Supreme Court provided in Davis, "the State's policy interest in protecting the confidentiality of a juvenile offender's record can not require yielding of so vital of a constitutional right as the effective cross-examination or bias of an adverse witness." Id. at 320.

In Sheriff v. Acuna, 107 Nev. 664; 819 P.2d 197, (1991), this Court held that:

> In accordance with the foregoing, we now embrace the rule generally prevailing in both sate and federal courts, and hold that any consideration promised by the State in exchange for a witnesses's testimony affects only the weight accorded the testimony, and not its admissibility. Second, we also hold that he State may not bargain for testimony so particularized that it amounts to following script, or require that he testimony produce a specific result. Finally, the terms of the quid pro quo mus be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross- examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction. Id. at 669

This Court has held that a defense attorney is entitled to fully cross-examine a witness concerning the terms of an agreement and the jury must be given a cautionary instruction. This Court has held that an instruction must be given as well. See also Giglio vs. United States, 405 U.S. 150 (1972).

In the State's answering brief, they provide case law for the proposition that a judge may exclude cross-examination regarding things such as prejudice, harassment, irrelevant and confusing matters. Obviously, the State's arguments are misplaced. Defense counsel wanted to cross-examine Ms. Neal to demonstrate to the

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

jury her motive for lying. Obviously, Ms. Neal did not want to be charged with a shooting where a young child had been injured. There were plenty of witnesses against Ms. Neal on the case. The State made some type of agreement wherein the matter was dismissed in the same court and on the same day as Mr. Bennett's preliminary hearing. The court permitted Ms. Neal to testify that she was innocent of the charges. The court then precluded defense counsel from inquiring of the facts of the case against Ms. Neal. This has nothing to do with confusing issues before a jury and everything to do with bias and motive. Additionally, it appears a violation of Giglio vs. United States, 405 U.S. 150 (1972). wherein defense counsel is permitted to impeach and cross-examine a witness regarding inducements and favorable treatment they have received by the State. Apparently, the State was able to preclude the defense from this constitutional confrontation that is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Mr. Bennett has demonstrated that both this Court and the United States Supreme Court have specifically held that this type of cross-examination must be permitted to a defendant. The State's argument in response is inadequate. Mr. Bennett was entitled to cross-examine Ms. Neal's testimony in order to show bias and motive to fabricate.

ALL OTHER ARGUMENTS CONTAINED IN THE OPENING BRIEF ARE SUBMITTED.

CONCLUSION

Based on the foregoing Mr. Bennett would respectfully request that this Court reverse his convictions based on violations of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

DATED this ____ day of January, 2004.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

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

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 ____ day of January, 2004.

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
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 22 day of January, 2004, 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 S. Third Street, 7th Floor
Las Vegas, Nevada 89155

Brian Sandoval
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Sunshine Miyasato

An employee of Christopher R. Oram, Esq.

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