ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

FILED

MAR 20 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

LAILONI MORRISON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 40097

APPELLANT'S OPENING BRIEF

DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

ATTORNEY FOR APPELLANT

DAVID ROGER
DISTRICT ATTORNEY
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

BRIAN SANDOVAL
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701
(702)687-3538

ATTORNEYS FOR RESPONDENT

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

RECEIVED
MAR 20 2003
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

MAILED ON
3/18/03

03-04780

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

LAILONI MORRISON, Appellant,	)	
vs.	)	
THE STATE OF NEVADA, Respondent.	)	Case No. 40097

APPELLANT'S OPENING BRIEF

DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

ATTORNEY FOR APPELLANT

DAVID ROGER
DISTRICT ATTORNEY
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

BRIAN SANDOVAL
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701
(702)687-3538

ATTORNEYS FOR RESPONDENT

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
ARGUMENT	
I. THE COURT ERRED IN DENYING MORRISON'S MOTION TO SUPPRESS HIS STATEMENT	15
II. THE DISTRICT COURT IMPROPERLY LIMITED THE CROSS-EXAMINATION OF PURPORTED EYEWITNESS PAM NEAL	27
III. IT WAS ERROR TO ADMIT THE PRIOR CONSISTENT STATEMENTS OF WAYNE GANNT	30
IV. THE COURT ERRED IN DENYING MORRISON'S MOTION FOR MISTRIAL BASED ON THE ADMISSION OF THE OTHER BAD ACT TESTIMONY	33
V. THE COURT ERRED IN GIVING INSTRUCTION NUMBERS 10 AND 11 WHICH DEFINED EXPRESS AND IMPLIED MALICE AND MALICE AFORETHOUGHT	36
CONCLUSION	40
CERTIFICATE OF COMPLIANCE	41
CERTIFICATE OF MAILING	42

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

TABLE OF AUTHORITIES

PAGE NO.

Blackburn v. Alabama,
361 U.S. 199, 80 S.Ct. 274,
4 L.Ed.2d 242 (1960) 15

Elsbury v. State,
90 Nev. 50, 518 P.2d 599 (1974) 34

Franklin v. State,
96 Nev. 417, 610 P.2d 732 (1980) 15

Henry v. Dees,
658 F.2d 406 (1981) 18

Jackson v. Denno,
378 U.S. 368, 84 S.Ct. 1774,
12 L.Ed.2d 908 (1964) 15

Martin v. People,
738 P.2d 789 (Colo. 1987) 34

Massiah v. United States,
377 U.S. 201, 84 S.Ct. 1199,
12 L.Ed.2d 246 (1964) 19

McCollin v. Wyrick,
498 F.Supp. 137 (W.D. Miss. 1980) 17

Michigan v. Jackson,
475 U.S. 625, 106 S.Ct. 1404 (1986) 19

Miller v. Fenton,
474 U.S. 104, 106 S.Ct. 445,
88 L.Ed.2d 405 (1985) 16, 17

Minnick v. Mississippi,
498 U.S. 146, 151-153, 111 S.Ct. 486 (1990) 19

Moore v. State,
96 Nev. 220, 607 P.2d 105 (1980) 29, 34

Passama v. State,
103 Nev. 212, 735 P.2d 321 (1987) 15, 16

People v. Freeman,
668 P.2d 1371 (Colo. 1983) 17

People v. Johnson,
447 NYS.2d 341 (1981) 19

Schneckloth v. Bustamonte,
412 U.S. 218, 93 S.Ct. 2041,
36 L.Ed.2d 854 (1973) 19

Spano v. New York,
360 U.S. 315, 79 S.Ct. 1202,
3 L.Ed.2d 1265 (1959) 17

State v. Castro,
756 P.2d 1033 (Haw. 1988) 34

State v. Cochran,
696 P.2d 1114 (1985) 18

State v. Hines,
633 P.2d 1384 (Ariz. 1981) 34

State v. McDaniel,
683 P.2d 231 (Wash. 1984) 31

Townsend v. Sain,
372 U.S. 293, 83 S.Ct. 745,
9 L.Ed.2d 770 (1963) 15

Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966) 35

Walker v. State,
112 Nev. Ad. Op. 107 (1996) 34

STATUTES

NRS 200.020 36

NRS 48.045 34

NRS 50.085 28

NRS 51.035 32

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

LAILONI MORRISON, Appellant,	)	
vs.	)	
THE STATE OF NEVADA, Respondent.	)	Case No. 40097

STATEMENT OF ISSUES

1. WHETHER THE COURT ERRED IN DENYING MORRISON'S MOTION TO SUPPRESS HIS STATEMENT

2. DID THE DISTRICT COURT IMPROPERLY LIMIT THE CROSS-EXAMINATION OF PURPORTED EYEWITNESS PAM NEAL

3. WAS IT ERROR TO ADMIT THE PRIOR CONSISTENT STATEMENTS OF WAYNE GANNT

4. WHETHER THE COURT ERRED IN DENYING MORRISON'S MOTION FOR MISTRIAL BASED ON THE ADMISSION OF THE OTHER BAD ACT TESTIMONY

6. DID THE COURT ERR IN GIVING INSTRUCTION NUMBERS 10 AND 11 WHICH DEFINED EXPRESS AND IMPLIED MALICE AND MALICE AFORETHOUGHT

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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 (hereinafter referred to as MORRISON), Anthony Gannt and Jermaine Webb with Conspiracy to Commit Murder and Murder with Use of Deadly Weapon with the Intent to promote a criminal gang (1 APP 1-3). At the conclusion of the preliminary hearing only Bennett, MORRISON and Gannt were bound over to stand trial on the murder charge. An Information was filed in District Court on June 7, 2001. (1 APP 4-7)

The District Court granted Motions to sever the trials of the defendants (1 APP 152; 155). The trial of Bennett was set first, however, on the eve of trial, co-defendant Gannt entered into a plea negotiation with the State in exchange for his testimony against Bennett and MORRISON (1 APP 159). Bennett's trial was therefore continued and commenced on January 22, 2002 (1 APP 164). 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 (1 APP 177-8). The Court conducted the sentencing and sentenced Bennett on June 18, 2002 to Life in prison without the possibility of parole (1 APP 184).

An Amended Information was filed on May 28, 2002 against MORRISON. (1 APP 79-82) MORRISON'S trial started on May 29, 2002 and concluded with closing arguments on June 6, 2002 (1

APP 148). On June 7, 2002 the jury returned a verdict of second degree murder with use of a deadly weapon (1 APP 149). MORRISON was sentenced on August 1, 2002 to consecutive life sentences of life in prison with eligibility for parole after ten years (1 APP 131-132).

The Notice of Appeal was timely filed on August 15, 2002 (1 APP 133-134).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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 Gannt (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 (3 APP 48). 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 (3 APP 50). 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 (3 APP 50-51). 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 (3 APP 53). She stayed at the hospital until she learned that Williams had passed (3 APP 53).

Hunt also knew MORRISON and his girlfriend, Stephanie Riedel who was her best friend in high school (3 APP 56-57). It was common knowledge that Williams was her boyfriend (3 APP 57).

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 (2 APP 105-107). 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 (2 APP 107-110). Not seeing anything he went back to the golf cart and saw a number of people running through a park area (2 APP 110). A individual he knew as Wayne appeared to making gestures with his hand like he was trying to put something in his pants (2 APP 113-115). Subsequently, Golden picked Gannt out of a photo lineup as the person he saw running (2 APP 116).

Immediately after the gunshots Golden called his dispatch, and then went to the area of the gunshots and found one subject laying partially face down on the ground and then called for medical assistance (2 APP 118). 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 (2 APP 123). Three individuals approached and attempted to move Willims into a car to take him to the hospital, but Golden stopped them (2 APP 118-119).

Golden knew and recognized MORRISON and did not see him present at any time on March 3, 2001 (2 APP 127-128).

Anthony Gannt was 15 years old on March 3, 2001 (2 APP 21). On that afternoon, he along with MORRISON, Bennett, Matthews, Graves and others had gathered at the house of Mark Doyle who had been killed the day before (2 APP 24). Gannt

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

arrived at around 10:00 AM and left around 1:30 PM with MORRISON, Matthews, Graves and Bennett to go to the Hunt's house to shoot it up (2 APP 25-26). It was Bennett's idea because the Gerson Park Kingsmen were feuding with the Rolling 60's and the Hunt's house was Rolling 60's (2 APP 26).

On the way they ran into security and turned back around at which time they observed Joseph Williams coming out of an apartment (2 APP 30). Based on the fact that Williams was a Rolling 60 they started shooting him (2 APP 30). According to Gannt, Graves was the first one to shoot and was shooting a nine-millimeter as were Bennett and Matthews (2 APP 33). Gannt had a .32 and MORRISON a .38 Super (2 APP 33-34). After everyone had emptied their clips they split up, with Gannt leaving with his friend, Henry (2 APP 35). The last one to shoot was Matthews, who walked up to the body and started shooting (2 APP 47-48). Henry had been there the entire time, but Gannt was not sure if he was shooting or, but he did hear bullets flying past his head from where Henry was located (2 APP 36).

Gannt and Henry ran to the home of two girls and Henry reloaded his .357 revolver and they waited for the police to leave (2 APP 38-41). Gannt denied that he had walked over to Williams and fired his .32 pistol into the body (2 APP 95). While they were waiting an individual known as R Wak came to the apartment and took the .32 back, because Gannt had borrowed the gun from him at the Doyle's house (2 APP 41-42). Gannt had

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

specifically borrowed the gun for the purpose of going and shooting up the Hunt's house (2 APP 70).

With respect to Pam Neal, Gannt denied that she was present at the time of the shooting or standing on her balcony (2 APP 96-97; 99). He was sure because he looked up there and she wasn't there (2 APP 101). Gannt was aware that Pam Neal blamed MORRISON for the death of her cousin Eric Bass (2 APP 101).

Gannt claimed that he had known MORRISON for five years when the incident occurred (2 APP 50; 52). Gannt was of the opinion that MORRISON was a member of the GPK because he used to hang around the Carey Arms and say he was a member and because he had crown tattoes on his chest and arm (2 APP 53-56). In Court, MORRISON showed his arms and chest to Gannt, and Gannt did not see any tattoos of a crown (2 APP 57). Gannt claimed that all of the other individuals were members of the GPK, but that he was not a member, but rather just hung out with them (2 APP 64). Gannt also claimed that MORRISON was firing a shiny chrome .38 Super that belonged to Henry and MORRISON just had it for that one day (2 APP 88-90).

On March 21, 2001, Gannt was contacted by the police and he told them that he was not involved in the shooting (2 APP45). He was again contacted on May 7th and at first minimized his involvement and later told them the truth (2 APP 45). Gannt reached his agreement with the State on November 26, 2001 and prior thereto had given another statement on

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

November 21st describing his involvement (2 APP 46-47).

Gannt as a result of negotiations with the State pled guilty to second degree murder and conspiracy to commit murder, with the agreed sentence being ten to life on the murder and the State retaining the right to argue on the conspiracy to commit murder (2 APP 23). Pursuant to the agreement Gannt agreed to testify against Bennett and MORRISON (2 APP 23). He decided to take the deal so he wouldn't face life in prison without the possibility of parole (2 APP 60). Gannt was aware that if he did not testify the way the State wanted him to, that the prosecutors could argue for the Court to sentence him to a consecutive ten years on the conspiracy to commit murder charge (2 APP 63-64).

On March 3, 2001 Pam Neal lived at 2529 Morton, Apartment D, which was an upstairs apartment (2 APP 128-129). At around 3:30 to 3:40 in the afternoon she was preparing to take her downstairs neighbor, Michelle Wilson to work (2 APP 129-130). After Neal locked her door, she turned and was standing on her balcony when shooting started (2 APP 130-131). As she was turning she observed Williams coming on the side of the building and he appeared to be talking with several guys when they pulled out guns and started shooting (2 APP 132). She knew that Williams was associated with the Rolling 60's (2 APP 133). There were five or six shooters and she recognized three of them, MORRISON, Gannt and Bennett (2 APP 133-135). Contrary to the description given by Gannt, Neal described the gun used

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

by MORRISON as being a black gun and that MORRISON shot first (2 APP 137; 147). Contrary to the physical evidence she testified that MORRISON went up to within 3 feet of Williams and was firing shots (3 APP 20). She further testified that Gannt was the last one to shoot Williams contrary to his testimony (2 APP 147). She stood on the balcony in the same spot of for 15 or 16 minutes (3 APP 10). She stayed there until her daughter opened the door and told her that Eric was on the phone and then Neal went down the stairs (3 APP 14).

When the police arrived at the crime scene she did not tell them what had happened because it was none of her business (2 APP 146). Neal was downstairs when the police came and one of them came up and asked her questions but she told them that she didn't know anything (3 APP 16). She changed her mind and went to the police after her cousin Eric Bass was killed and nobody would talk to the police (2 APP 146). On April 15th her cousin was killed she was arrested and charged with conspiracy to commit murder, burglary with a deadly weapon, battery with a deadly weapon with substantial bodily harm, discharging a firearm into a structure, and coercion with a deadly weapon (2 APP 149; 150-151). Charges against her were dismissed by the District Attorney on the day of the preliminary hearing in the case at bar (2 APP 149). She was not promised anything in exchange for her testimony (2 APP 150). While she was on the stand at the preliminary hearing she was given immunity by the District Attorney while she was on the stand (2 APP 157).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Her charges arose out of an incident where she was trying to find out who had killed Bass (2 APP 158). She thought that MORRISON was involved in Bass' death (2 APP 161).

North Las Vegas police officer Jason Arnona was dispatched to the call of shots fired at 3:09 PM (3 APP 61). He arrived at the scene within 15 seconds and observed a black male lying face down with obvious gunshot injuries (3 APP 62-63). After medical and assistance arrived Arnona started going door to door trying to find out what had happened by talking to witnesses (3 APP 68). Of all the doors he knocked on only four people answered the door and none of those four had seen anything (3 APP 69-71). Later he impounded Williams' vehicle and found a wallet and paperwork belonging to Williams (3 APP 72).

Officer Robert Aker also responded to the scene of the shooting and when he arrived there was a crowd of 25 to 30 people and he started putting up crime scene tape (3 APP 80). He attempted to interview the persons that were present and only got responses from two persons that could not identify the shooters (3 APP 83-84). Officer Eric Garcia also canvassed the area and knocked on doors looking for witnesses with negative results (3 APP 91).

Crime scene analyst Sandra Nielson-Hanes assisted Sergeant Anthony Dimauro and analyst Gerald Heredia in processing the scene of the shooting (3 APP 95-96). She marked and photographed items of evidence as well prepared a rough sketch

diagram of the crime scene (3 APP 100-101). In total she collected 39 pieces of different evidence including blood samples, projectiles, casings, and bloody clothing (3 APP 105). There were four different types or brands of casings collected (3 APP 108).

The autopsy of Williams was performed by Dr. Gary Telgenhoff on March 4, 2001 (4 APP 7). There were obvious multiple gunshot wounds to the body (4 APP 10). There were 14 bullet entrance wounds and no gunpowder residue meaning that all shots were fired from more than two feet away (4 APP 29-30). At least six of the wounds were to the backside (4 APP 37). One projectile was recovered from the body at the hospital (4 APP 43) and five at the autopsy (4 APP 49). The cause of death was determined to be multiple gunshot wounds and the manner to be homicide (4 APP 31).

On April 15, 2001 LVMPD Officer Patricia Spencer came into contact a male juvenile that was observed throwing something to the ground (4 APP 56). The individual was identified as Orlando Walker and a Colt .38 firearm found on the ground was impounded along with a magazine from Walker's pocket (4 APP 57; 59).

Detectives Preito and Morgan were present when arrested MORRISON on May 18, 2001 at 2895 East Charleston Boulevard (4 APP 63). Preito assisted in the search of the apartment and recovered a .32 seven shot revolver from a box in the master bedroom (4 APP 66). MORRISON when asked about the gun

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

explained that he had just purchased it a week earlier from a guy at the Lucky 7 Market (4 APP 67).

Detective Michael Bodnar was the lead detective on the Williams homicide (4 APP 71). Based on information he had received he interviewed Wayne Gannt on March 7, 2001, and Ashley Bennett on March 24, 2001 (4 APP 75-76). On May 1, 2001 he interviewed Pam Neal and she gave him information about the case (4 APP 77). Bodnar made her no promises in exchange for her information and offered her no leniency with respect to her pending case (4 APP 78). It was after speaking with Neal that Bodnar went back and again conducted an interview with Gannt (4 APP 79). When MORRISON was arrested he was taken to the NLV Police department and interviewed (4 APP 88). His statement was the subject of the Motion to Suppress which is discussed below (4 APP 88).

Orlando Walker knew MORRISON only by his first name Lailoni (4 APP 122-123). Walker testified that he found the Colt .38 and clip in the little slot by the garbage cans about two weeks after Williams was shot (4 APP 124). When he was interviewed by the police about the gun on May 25, 2001 he told them he got the gun from MORRISON (4 APP 125-126). The reason that he said he got the gun from MORRISON was because of what the police had already told him (4 APP 127). He also told the police that he had gotten the gun for protection because his little niece had been shot (4 APP 128). On cross-examination, Walker was adamant that he did not get the gun from MORRISON

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

and did not have any conversation with MORRISON concerning the gun (4 APP 131).

Firearms and tool mark examiner James Krylo examined the cases, projectiles and firearm that was recovered and reached a number of opinions. Several bullet jackets and a core recovered at the scene were consistent with being fired from the Colt .38 Super semi-automatic pistol recovered from Walker (5 APP 15-17; 29-30). Nine cartridge cases at the scene matched the Colt .38 super (5 APP 31). Eight casings recovered had been fired from the same 9mm pistol that was not recovered (5 APP 22-23). One recovered bullet jacket had been fired from a Colt .32 semiautomatic pistol that had been recovered in a different case (5 APP 24-25). Seven cartridge cases recovered from the scene had been fired from the .32 (5 APP 29). Three projectiles recovered from the body were consistent with having been fired from a 9mm Luger (5 APP 25-27). Four cartridge cases had been fired from an unidentified 9mm firearm (5 APP 32). A minimum of four different firearms were identified from the recovered evidence (5 APP 36). The .38 super was chrome and the only part that was black was the grips (5 APP 47).

Private investigator Jim Thomas had examined the body of MORRISON in preparation for trial and informed the jury that he only had one tattoo, of a heart on his right shoulder (5 APP 66). There was no indication that any tattoos had been removed (5 APP 67). Thomas had also gone to the balcony where Pam Neal claimed to have observed MORRISON shooting and photographed a

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

large pine tree that would have obstructed her view of the location (5 APP 68-71). He stationed his secretary at the location and was unable to see her from the Neal balcony (5 APP 73).

Michelle Wilson lived downstairs from the apartment of Pam Neal on March 3rd (6 APP 8). On that date she first saw Neal at about 11:00 AM and Neal was getting high, smoking marijuana (6 APP 10). Neal was also drinking a four pack of Smirnoff Vodka (6 APP 11). At about 2:30 in the afternoon Wilson went into her apartment and started getting ready for work as she was supposed to be at work at 4:30 PM and she would usually leave for work at about 3:45 PM (6 APP 12). Wilson would pay Neal $5 per day to take her to work (6 APP 13). Wilson was inside her apartment curling her hair when she heard gunshots (6 APP 15). She started to run to close the door, but instead ran and hid in her storage closet (6 APP 15). When Wilson came out of the closet, Neal was standing there and asked her if she had seen anything (6 APP 16). Shortly thereafter Eric Bass came into the apartment and stated that Avian had been killed and at no point did Neal correct him and state that Williams was the victim of the shooting (6 APP 16-17). When the police arrived, both Wilson and Neal went outside and told them that they had not seen anything (6 APP 18). Pam Neal was married to Wilson's cousin, David Neal and Wilson had know her for about 15 years (6 APP 19). In Wilson's opinion Neal was a very untruthful person (6 APP 20).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

ARGUMENT

I.

THE COURT ERRED IN DENYING MORRISON'S MOTION TO SUPPRESS HIS STATEMENT

Prior to trial MORRISON filed a Motion to Suppress the statement he gave to the police on the day he was arrested. (1 APP 8-22) The statement taken from MORRISON was involuntary and coerced and taken in violation of his rights under the Fourth and Fifth Amendment to be not subjected to unreasonable search and seizure and right to remain silent. The District Court after hearing the Motion and watching the videotape of the statement suppressed any statements made after the 1:47:07 time on the tape. (1 APP 137) This constituted only the last few pages of the statement and did not address the numerous other improprieties that occurred during the statement.

A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Franklin v. State, 96 Nev. 417, 610 P.2d 732 (1980). In order to be voluntary, a confession must be the product of a rational intellect and a free will. Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987).

A confession is involuntary where it is coerced by physical intimidation or psychological pressure. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963);

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Passama, supra.

In 1987, the Nevada Supreme Court reversed a conviction based on a confession which was gained through coercion and trickery. Passama v. State, supra. In that case, the defendant's will was overborne by the police officer's intimidation that he would go to the District Attorney and make sure the defendant was imprisoned if he was not entirely truthful. In short, the Nevada Supreme Court found the defendant's confession to be involuntary. Passama, supra at 324. Throughout the Passama opinion, the Nevada Supreme Court cited and quoted the United States Supreme Court case of Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). The following portion of the Miller opinion was quoted within Passama:

> "The admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with the system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."

Miller, 106 S.Ct. at 453, as quoted within Passama, supra, at 323.

In Miller, the United States Supreme Court indicated that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the due process clause of the Fourteenth Amendment. Although the Miller Court did not

finally rule on the question of voluntariness of the confession, it indicated it's grave concern with police interrogation techniques when presented with a case where certain misrepresentations were made by police officers to a suspect. In Miller, the defendant was fed false information about the victim being able to identify the suspect, and also that there were other witnesses and blood stains which would be used to convict the defendant. Miller, 474 U.S. at 106. Promises of leniency also render confessions involuntary. State v. Gard, 358 N.W.2d 463 (Minn. 1984); McCollin v. Wyrick, 498 F.Supp. 137 (W.D. Miss. 1980).

In Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959), the United States Supreme Court also found a confession to be involuntary where police officers coerced a confession from a suspect by having a friend of the suspect, who was a police officer, play the part of a sympathetic friend and trick the suspect into confessing. Spano, 360 U.S. at 323. The Spano court also indicated that where there is an undeviating intent on the part of the police officers to extract a confession from a suspect, the resulting confession must be examined with the most careful scrutiny. Spano, 360 U.S. at 324.

Other courts that have taken the opportunity to examine this issue have rules confessions involuntary on less egregious facts than presented in the instant case. In People v. Freeman, 668 P.2d 1371 (Colo. 1983), the Supreme Court of

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

Colorado ruled that a confession was involuntary where certain psychological pressures were placed upon the defendant in order to induce his confession. The Freeman court stated as follows:

> "The officers' false representations regarding the extent of their knowledge and evidence of the defendant's participation in the murders, coupled with their assertions of the defendant's obvious guilt, added to the coercive nature of the interrogation." Id at 1380.

In State v. Cochran, 696 P.2d 1114 (1985), the Oregon Court of Appeals found that the use of trickery and deception was a relevant circumstance to be considered in the voluntariness of a confession. In that case, the police told the suspect that the orange glow on his hands when placed under a black light indicated the remnants of the victim's blood. Id at 1123. Obviously, this was a misrepresentation by the police officers which contributed to the court's finding of the involuntariness of the confession.

In Henry v. Dees, 658 F.2d 406 (1981), the Fifth Circuit Court of Appeals ruled the defendant's confession involuntary where the suspect was told after completing a polygraph that he had failed it, and that he was lying. Id at 409. The Fifth Circuit Court of Appeals stated:

> "Oregon v. Matheson, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), suggests that false police statements do not necessarily render an interrogation environment coercive, but the Supreme Court considered the fact relevant." Id at 410.

According to the New York Supreme Court, police deception is not only relevant but is a serious circumstance to be

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

considered where the defendant's will has been overborne. People v. Johnson, 447 NYS.2d 341 (1981). In Johnson, the Court stated:

> "Generally, deception by the police is not enough to render a defendant's confession involuntary, unless it is accompanied by threats or promises." Id at 346-47.

While the Court is to examine the totality of the circumstances in deciding the admissibility of a statement, no single test of voluntariness is determinative. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). However, police deception weighs against a finding of voluntariness. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

He had therefore, de facto, invoked his Sixth amendment right to counsel and no questioning could occur outside of the presence of the attorney. See, Minnick v. Mississippi, 498 U.S. 146, 151-153, 111 S.Ct. 486 (1990) and Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404 (1986).

In the case at bar, MORRISON was arrested and taken to the police station and placed in a small room while handcuffed. The videotape of the interview begins with MORRISON laying on the floor of the interview room trying to become comfortable while tightly handcuffed. After several minutes Detectives Bodnar and Rodrigues are seen to enter the room and the following conversation occurs:

> "DETECTIVE BODNAR: What's up, dude. Try and get up. Have a seat. You all right? You need some

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

help? You didn't fall did you?

LAILONI MORRISON: I couldn't sit in this chair like that.

DETECTIVE BODNAR: How do those feel? Are they all right?

LAILONI MORRISON: They're so tight.

DETECTIVE BODNAR: Here stand up. Let's loosen them a little bit." (1 APP 35)

After the cuffs are moved to in front of MORRISON and small talk about an unrelated injury to MORRISON'S legs, he expresses that he expected not to give a statement but rather to go to jail, but BODNAR simply ignored him:

"LAILONI MORRISON: Why'd you put me here. How come I didn't go to jail.

BY DETECTIVE BODNAR: Okay. Listen up. You know how to read?

A Yeah." (1 APP 35)

After MORRISON incorrectly read his rights card and BODNAR read the card to him, BODNAR refused to tell MORRISON what he was arrested for until he signed the card. MORRISON signed the card and BODNAR told him that he had a warrant for his arrest for the murder of Doughboy. At no point did either BODNAR or RODRIGUES ask if MORRISON wanted to give a statement but rather began immediately asking him questions after telling him what the charges were. (1 APP 35-36)

On page 10 of the transcribed interview, MORRISON complains again about the tightness of the cuffs, stating "Oh, my God. These things hurt". (1 APP 37)

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

MORRISON continues to insist during the first portion of the interview that he was in the area and heard shots but was not involved in the shooting. The detectives continue to insist that they have a number of witnesses that told them that MORRISON was a shooter. The detectives then tell MORRISON that they have information that he was involved in a number of shootings and has gotten away with it.

When MORRISON continued to deny involvement with the shooting and indicated that he was focused on his child and the one on the way, BODNAR threatened that he would never see his kids again:

> "Q Okay. You want to see them kids again?
>
> A Yeah.
>
> Q Well, you need to be able to help yourself on this because the information we're getting and you sitting here blowing smoke up our ass ain't helping you any." (1 APP 39)

RODRIGUES then lies again to MORRISON telling him that there are people that don't even know him that picked him and the other guys out of a photo lineup and drew diagrams showing were everybody was located. (1 APP 40)

The detectives then begin to suggest other scenarios to MORRISON, such as he was there but fired into the air or at a pole ten feet away or that he was there and aimed the gun and didn't get a chance to shoot, then Doughboy fell down before MORRISON got a chance to pull the trigger (1 APP 41-42). Specifically BODNAR told him:

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

"Q Because people saw you and they saw you with a gun in your hand and they saw you aiming it over there. So if that's the case and you pointed the gun at him and he fell before you got a chance to shoot and you spooked and you ran, then we need to know that. Okay? 'Cause that makes a real difference" (1 APP 42)

Based on these inducements MORRISON changes from just hearing the shots to being in the area and hearing the shots and seeing the man fall and his own gun falling down his pants legs, picking the gun up and then running (1 APP 42).

MORRISON continues to talk about a variety of different incidents and then complains again about the conditions of the interview:

"A I feel like they beat the shit out of me, man.

DETECTIVE RODRIGUES: You want something to drink? You want the air -- it's cold in here.

DETECTIVE BODNAR: It's fine. Leave that air alone.

LAILONI MORRISON: Come on, buddy. You got slacks on. I've got some shorts on, no socks.

DETECTIVE BODNAR: Listen. We just -- we just -- you can turn it down." (1 APP 44)

After considerable more discussion and continued denials from MORRISON the detectives suggest to him that he was just a lousy shot and that all his shots missed and that they needed to know if all of his shots missed so they could present it to the District Attorney, suggesting that his liability would be mitigated (1 APP 51-2). MORRISON eventually goes along with the suggested story and tells them that he fired three shots

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

and that all of the shots missed (1 APP 52).

The detectives would not let up despite MORRISON continuing to deny that he killed anyone and denying that he knew who did the shooting. Finally they once again played the family issue which prompted MORRISON to ask for a lawyer, a request that was effectively ignored by both BODNAR and RODRIGUES:

"BY DETECTIVE BODNAR:

Q. Listen. You need to be able to help yourself and help us help you because all you're saying is yep, I was here and I shot three rounds. You ain't -- why you protecting these people? These people going to raise your family? They going to help your kids? They going to help your girl?

A Hell, no.

Q Okay. Did they --did they do something? Did they do something --

A How come I can't have a lawyer in here while I'm sitting in here talking to y'all, man?

Q If you want a lawyer, that's up to you.

DETECTIVE RODRIGUES You can have a lawyer. It's up to you.

BY DETECTIVE BODNAR:

Q That's why we read you your rights.

A I want a paid lawyer.

Q Do you want a lawyer?

A Yep.

Q Okay.

DETECTIVE RODRIGUES: We're done talking.

DETECTIVE BODNAR: Sit tight and we'll be back.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

You want some water or something? You thirsty?

(Detective Bodnar leaves interview room)

LAILONI MORRISON: Can I make a phone call?

DETECTIVE RODRIGUES: Not right now.

SPEAKER 3[MORRISON]: That's fucked up, man." (1 APP 54)

Not deterred by MORRISON'S request for termination of the interview, request for counsel and request for a phone call, RODRIGUES remains in the interview room and proceeds to immediately initiate and prompt further conversation from MORRISON:

> "DETECTIVE RODRIGUES: You want a lawyer and you won't talk -- if you want to talk to me, I'll talk to you, but I can't initiate it. You have to initiate it." (1 APP 54)

MORRISON then makes the mistake of not remaining absolutely quiet while the Detective remains in the room and solicits conversation and MORRISON asks how he could be convicted of something he didn't do, and RODRIGUES proceeds back to the same coercive routine of lying to MORRISON about the information they claim to have that implicates MORRISON. No further mention is made by the Detective of the request for counsel and he launches again into full scale questioning of MORRISON. (1 APP 54)

As RODRIGUES continues the questioning, BODNAR returns to the interview room and proceeds to show MORRISON a notice of reservation to seek the death penalty and tells him that the state is going after the death penalty (1 APP 55). As the

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

threats continue MORRISON provides names of individuals that were present, specifically naming Chew, T-wak, Detwan and Face (1 APP 56).

At one point MORRISON is left alone for a number of minutes in the interview room and mumbles to himself that it isn't right, that he had not killed anybody, and then Detective RODRIGUES re-enters the interview room and MORRISON pleads with him "Man, can y'all just take me to the station, man", clearly evidencing his continued desire to end the interview (1 APP 57). It is at this point that the District Court suppressed any further use of the statement. One page later in the transcript, MORRISON renews his request to end the interview:

> "A That's cold, man. But I ain't going to go down for this shit, man. I ain't going to go down for something I didn't do. I already told you the mother fuckers who were there. Now could you take me to the station?" (1 APP 57)

The detectives again leave MORRISON sitting alone in the cold interview room and return and again threaten that he is going to receive the death penalty. After coercing six more pages of information out of MORRISON, he again asks to go to the station, and RODRIGUES finally agrees to take him right away. (1 APP 59). Instead he is left alone in the cold interview room for an extended period of time, during which he complains to the camera of the way he was treated:

> "LAILONI MORRISON: Hello? I should never have came to this mother fucking hole. They should have taken me straight to the jail house, homey." (1 APP 59).

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

The record thus demonstrates that MORRISON was never asked if he wanted to give a statement, but rather expressed surprise at being held in an interview room, repeatedly asked to be taken to jail, asked for an attorney during the course of the interview, was threatened with the death penalty, threatened with never seeing his children, lied to about the statements of alleged other witnesses, intentionally kept in an ice cold room without adequate clothing, as well as uncomfortably handcuffed. The totality of the circumstances and constitutional violations must weigh in favor of the suppression of the entire statement.

The prejudice from admitting the unconstitutional statement was established by the fact that the jury requested a readback of the testimony of Detective Bodnar of portions of the statement given my MORRISON (7 APP 3). The District Court only partially cured the unconstitutional conduct by suppressing the very end of the statement. The entire statement should have been suppressed.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

II.

THE DISTRICT COURT IMPROPERLY LIMITED THE CROSS-EXAMINATION OF PURPORTED EYEWITNESS PAM NEAL

Prior to trial MORRISON 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 MORRISON was as follows:

> "That date [April 15, 2001], obviously, is a month and a half after the shooting that we're here for. But it also is the same day that Eric Bass, her cousin, was killed. And when she testified at Mr. Bennett's trial during her cross-examination, she admitted that she blamed Lailoni Morrison for that death; that at one point in time she blamed him for that death.
>
> When she went and committed these or allegedly committed these five felonies, the five felonies that she was charged with, she was going to the house of an Antonio Looney, also known as T Loo or T Lo, because she believed he was involved in the death of her cousin Eric Bass. When she went there, there were three individuals that were identified as going into the house. At least one of them had a gun because a gun was discharged into the front door of the house, passing through the doorknob, and striking a six-year-old girl in the face. The bullet actually lodged in her face. . . .
>
> Pam is identified as one of the people that went into the house. They went upstairs. They confronted Antonio Doyle (sic) and a struggle occurred. They left. The police had been called. Pam was identified by her size and her first name. They did not have a last name. But from the description the police recognized Pam Neal as someone they had talked to. And they went and she was still wearing the same clothes that fit the description of the person that came into the house. And they arrested her and booked her into the North Las Vegas Jail. That was April 15th. She then bails out, and on May 1st goes down and gives her statement that implicates Mr. Morrison." (2 APP 5-7).

The specifics of the activity of Neal that lead to her

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

arrest should have been admitted by the trial court to show the extent of her motive to implicate MORRISON 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 additional factor that makes the factual background of the charges against Neal relevant was that the .38 Super that Orlando Walker possessed was for protection against the very assault that Neal had perpetrated. The little girl that was shot through the door by Neal, or her cronies, was the niece of Orlando Walker. This additional connection was an additional basis for admission of the evidence, or at the very least allowing MORRISON to inquire on cross-examination.

The State in opposing the Motion of MORRISON argued to the Court that the evidence was not admissible under NRS 50.085 as extrinsic evidence. This is not entirely accurate as MORRISON 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

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

> 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., MORRISON should have been allowed to ask specific questions of Neal concerning the incident for which she was arrested. If Neal had denied the facts MORRISON would have been precluded from offering extrinsic evidence.

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

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

III.

IT WAS ERROR TO ADMIT THE PRIOR CONSISTENT STATEMENTS OF WAYNE GANNT

During the testimony of Detective Bodnar the State sought to introduce the contents of the statement Gannt had given to the police on May 7, 2001 (4 APP 79). This was prior to the filing of charges and thus obviously prior to Gannt entering into his plea negotiation with the District Attorney's office. When the State attempted to elicit the out of court prior consistent statements from Bodnar MORRISON interjected a contemporaneous objection that the prior consistent statement was inadmissible. The Court overruled the objection based on the State's argument as follows:

> "MS. DELAGARZA: Your Honor, I believe at this time that the State would be allowed to go into the statements made by Anthony Gannt. At this time the State has introduced into evidence a guilty plea memorandum that was entered into between the State and Mr. Anthony Gannt. And based on that, the State is allowed to go into, pursuant to NRS, prior consistent statements made before that guilty plea memorandum was entered into.
>
> THE COURT: Mr. Schieck, do you still have an objection based upon Ms. DeLaGarza's?
>
> MR. SCHIECK: Yes, I do, your Honor. And I would still submit that it's a prior consistent statement that is inadmissible under the statute.
>
> THE COURT: Court's going to allow the testimony" (4 APP 79).

The detective then proceeded to explain in great detail the prior consistent statements made by Gannt in the May 7th statement (4 APP 80-81).

The Supreme Court of the State of Washington had the occasion to consider such testimony of prior consistent statements in State v. McDaniel, 683 P.2d 231 (Wash. 1984). In McDaniel the court reversed a statutory rape and indecent liberties conviction on the basis that the trial court had improperly admitted prior consistent statements of the victim to a case-worker, physician and aunt, stating:

> "Prior out-of-court statements consistent with the victim's testimony are not admissible to reinforce or bolster the testimony of the victim. Thomas v. French, 99 Wash.2d 95, 103, 659 P.2d 1097 (Wash. 1983). Repetition generally is not a valid test of veracity. State v. Harper, 35 Wash. App 855, 670 P.2d 296 (1983) . . . There was no showing that the victim's consistent statements were made at a time when the motive to falsify was not present. Evidence which merely showed that the victim made similar statements to the case worker and aunt was of little probative value and should not have been admitted as prior consistent statements."

State v. McDaniel, 683 P.2d at 233. The court specifically went on to find that the error was not harmless as the victim's veracity was severely challenged, the questions to the victim were somewhat leading, and her specificity as to the offense was not as clear or succinct as stated by the caseworker.

This Court considered this issue in Daly v. State, 99 Nev. 565, 665 P.2d 798 (1983) and determined admission of prior consistent statements of the victim-prosecutrix in a sexual assault case constituted reversible error. In Daly, supra, there was no hearsay objection yet the Court found reversible error and noted that "[t]he prosecution elicited testimony from several witnesses referring to Cami's statements to her friend,

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

and emphasized the 'corroborative' nature of the testimony in closing argument." Daly, 99 Nev. at 569.

In Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981) the court considered the admissibility of prior consistent statements of a victim-prosecutrix in a sexual assault case. After careful analysis the court stated in reversing the conviction:

> "We find it difficult to view this inadmissible testimony as other than prejudicial in this case...The prosecution's case rested solely on the credibility of the victim-prosecutrix.
>
> The inadmissible testimony of the police matrons highlighted by the prosecutor in closing argument, resulted in an improper and unfair advantage to the state in this case. We therefore reverse the judgment of conviction."

Gibbons, 97 Nev. at 302. In the case at bar, it was improper and prejudicial to allow the State to bolster the testimony of Gannt with his out-of-court prior consistent statements. The relevant statute NRS 51.035(2)(a) only allows the admission of prior consistent statements to "rebut an express or implied charge against him of recent fabrication." Thus if the prior statement is made when the declarant has a motive to fabricate it is not admissible.

Gannt's previous statements were made at a time when he had a motive to fabricate and were inadmissible. The Court erred to MORRISON'S prejudice by allowing the State to bolster Gannt's testimony with the out-of-court hearsay statements.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

IV.

THE COURT ERRED IN DENYING MORRISON'S MOTION FOR MISTRIAL BASED ON THE ADMISSION OF THE OTHER BAD ACT TESTIMONY

During the testimony of Detective Bodnar wherein he was summarizing the interview with MORRISON, the detective stated as follows:

> "Later on in the interview, he started to say how he was in the area; that he was walking through the back of the apartments; that he had a gun on him; that he heard the shots. He went to run, choked on a blunt, as he put it.
>
> MR. SCHIECK: Objection, your Honor. Could we approach?
>
> THE COURT: Yes." (4 APP 89-90)

At the conference at the bench, MORRISON asked the court for a mistrial, and at the next break the Court allowed MORRISON to make a record, as follows:

> "MR. SCHIECK: For the record, your Honor, blunt is common phraseology that I've come to learn over many years for smoking controlled substances, specifically marijuana. It's another bad act. The detective knew better, saw fit to tell the jury that Mr. Morrison had admitted to committing a felony or another crime. It's not a felony anymore. And to preserve the record, we did object, approach, and move for a mistrial." (4 APP 120).

The Court denied the motion, stating inter alia:

> "But having said that, Mr. Schieck's point is well taken that it's not suppose to be done. The Court deemed it a harmless error at this time. But one thing I will say in terms of we have made a record, and at the conclusion of the trial I will also allow Mr. Schieck to poll the jury to whether or not the term of art meant anything to any of them to fully protect the record" (4 APP 120-121)

NRS 48.045(2) provides that:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."
>
> "Evidence of other crimes committed by a defendant must be determined to be admissible pursuant to NRS 48.045(2). While such evidence usually does not come in the form of statements or confessions made by the defendant, we see no reason to make an exception to this statutory requirement for prior bad act evidence disclosed in a defendant's confession."

Walker v. State, 112 Nev. Ad. Op. 107 (1996).

It is hornbook law that evidence of other criminal conduct is not admissible to show that a defendant is a bad person or has a propensity for committing crimes. State v. Hines, 633 P.2d 1384 (Ariz. 1981); Martin v. People, 738 P.2d 789 (Colo. 1987); State v. Castro, 756 P.2d 1033 (Haw. 1988); Moore v. State, 96 Nev. 220, 602 P.2d 105 (1980). Although it may be admissible under the exceptions cited in NRS 48.045(2), the determination whether to admit or exclude evidence of separate and independent criminal acts rests within the sound discretion of the trial court, and it is the duty of that court to strike a balance between the probative value of the evidence and its prejudicial dangers. Elsbury v. State, 90 Nev. 50, 518 P.2d 599 (1974).

The prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

probability that the accused committed the charged crime because of a trait of character. Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966). Even where relevancy under an exception to the general rule may be found, evidence of other criminal acts may not be admitted if its probative value is outweighed by its prejudicial effect. Williams v. State, 95 Nev. 830, 603 P.2d 694 (1979).

The test for determining whether a reference to criminal history is error is whether "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) citing Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972). In a majority of jurisdiction improper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court must therefore determine whether the error was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

The Court cannot condone allowing veteran police officers to intentionally discuss other criminal conduct of defendants. The only remedy which should be considered to cure the prejudice to the defendant and deter future conduct is to reverse the conviction of MORRISON

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

V.

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

At the settling of jury instructions MORRISON objected to instruction numbers 10 and 11 (6 APP 27-28) which defined express and implied malice and malice aforethought as follows:

"INSTRUCTION NO. 10

> 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. (1 APP 92)

INSTRUCTION NO. 11

> 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." (1 APP 93).

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

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

result. The fact that no other state, as far as MORRISON 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 MORRISON 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.

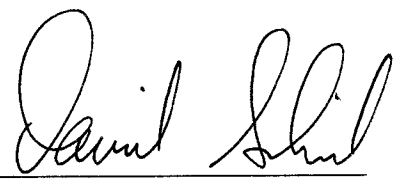
David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CONCLUSION

Based on the authorities herein contained and in the pleadings heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of LAILONI MORRISON.

Dated this 18 day of March, 2003.

RESPECTFULLY SUBMITTED:



DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, Ste. 600
Las Vegas NV 89101
702-382-1844
Attorney for Appellant

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

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: March 18, 2003

BY _____
DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
The Law Office of David M. Schieck
302 East Carson, Suite 600
Las Vegas, Nevada 89101
702-382-1844

CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 18 day of March, 2003, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

District Attorney's Office
200 S. Third Street
Las Vegas NV 89101

Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

KATHLEEN FITZGERALD, an employee
of David M. Schieck

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844