ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 44984

FILED

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APPELLANT'S REPLY BRIEF

Appeal from Judgment of Conviction (Jury Trial)
Eighth Judicial District Court, Clark County, Nevada
Honorable Donald M. Mosley

CARMINE J. COLUCCI, ESQ.
Carmine J. Colucci, Chtd.
Nevada Bar No. 000881
629 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-1274

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar No. 002781
Clark County Court House
200 Lewis Avenue, 3rd Floor
Post Office Box 552212
Las Vegas, Nevada 89155-2211
(702) 455-4711

George J. Chanos
Nevada Attorney General
Nevada Bar No. 005248
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

06-03685

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100 North Carson Street
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(775) 684-1265

Counsel for Respondent

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I.

STATEMENT OF THE ISSUES

A. Whether Appellant is entitled to a new trial because of juror misconduct which occurred when the juror concealed her prior felony conviction and then misrepresented that her civil rights had been restored when they had not been.

B. Whether Appellant is entitled to a new trial because of juror misconduct which occurred when a juror performed his own firearm testing experiment during the trial.

C. Whether Appellant is entitled to a new trial because of juror misconduct which occurred when a juror wore a tee-shirt during closing arguments that read, "DO YOU KNOW WHAT A MURDERER LOOKS LIKE?"

D. Whether Appellant is entitled to a new trial because of juror misconduct

as two jurors slept during the trial of this case.

E. Whether the prosecutors' continuous use of the terms "murder" and "victim" in their questions during trial constituted prosecutorial misconduct and/or violated Appellant's rights to a fair trial and to due process as guaranteed under the Constitution of the United States and under state law.

F. Whether the admission of various hearsay statements violated the Confrontation Clause and denied Appellant his rights to a fair trial and to due process of law as guaranteed under the Constitution of the United States.

G. Whether it was reversible error for the district court not to grant Appellant's motion to exclude evidence and dismiss charges against Appellant.

H. Whether the cumulative effect of the previously cited errors denied Appellant his rights to a fair trial and due process of law as guaranteed under the Constitution of the United States and under state law.

ARGUMENT

A. APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR MISCONDUCT AS A JUROR CONCEALED HER PRIOR FELONY CONVICTION AND THEN MISREPRESENTED THAT HER CIVIL RIGHTS HAD BEEN RESTORED WHEN THEY HAD NOT BEEN.

In Respondent's Answering Brief, the State now reverses the position it took in its opposition to the Defendant's Motion for a New Trial. Their original position, which they asserted as fact in writing and orally is set forth below.

> . . . . Her [juror Karen Barrs]civil rights had been restored and she was allowed to retain her right to vote as well as her nursing license. Most importantly however, Ms. Barrs told the Jury Commissioner on more than one occasion about the felony conviction. She did not intentionally conceal the conviction. **In fact, the Jury Commissioner told her to appear for jury service and she did so.** (Emphasis added) (AA Vol. 8, p. 116)

The State now concedes that Karen Barrs was not qualified to serve as a juror in this case. The State also concedes that NRS 176.515 and the relevant case law, including *Meyer v. State*, 119 Nevada 554, 80 P.3d 447 (2003) **do** authorize the use of a motion for new trial as the proper way for a defendant to seek relief, where it is clear that an unqualified person was seated as a juror in his case (Respondent's Answering Brief, p. 8, ll. 1-9).

> The State concedes that it appears Barrs was unqualified to serve on the jury by virtue of her being a felon without the reinstatement of her civil rights. Based on the requirements of NRS 6.010 (cited in Appellant's Opening Brief), which states in pertinent part that '[a] person who has been convicted of a felony is not a qualified juror of the county in which he resides until his civil right to serve as a juror has been restored,' and the fact that Barrs' civil rights have not been restored in Florida, Barrs was apparently statutorily ineligible to serve as a juror in the trial. NRS 6.010; (AA Vol. 8: 154). Nevertheless, Barrs made it through the juror selection process and sat on a jury that rendered a verdict. There is, however, very little controlling authority (and no Nevada case law) that governs such a situation. (Respondent's Answering Brief, p. 8, ll. 9-20)

Under NRS 175.021, criminal trial juries, in felony cases **"must"** consist of twelve(12) jurors. In order to be a juror, the person must meet the qualifications of NRS 6.010. The language contained in NRS 175.021, "must consist of 12 jurors," clearly mandates that, absent a statutory exception which is not present here, by the plain meaning of its wording, the number of jurors required is not discretionary. Since the State now concedes that Barrs was unqualified, Appellant did not have a jury which consisted of twelve (12) jurors as mandated by NRS 175.021. Further, denial of this right to be judged by a jury of twelve (12) "jurors" violated his constitutional rights under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the Constitution of the United

States. Every other defendant in a Nevada criminal case is given twelve (12) "jurors" but Appellant was not afforded that right.

In support of their position that twelve (12) qualified jurors are not required in a felony trial, the State has cited a plethora of federal cases, mostly civil cases, that are distinguishable both on the facts and the law. Appellant asserts that they are largely inapplicable. The State failed to cite *Green v. White*, 232 F.3d 671 (2000), which Appellant asserts is directly on point. In that case, the United States Court for the Ninth Circuit, decided the issue now before this Court, reversing the United States District Court's decision and remanding the case to the district court with instructions to grant a writ of habeas corpus for the appellant in that case unless the state court granted that appellant a new trial within a reasonable of time.

In *Green*, a "juror" had a felony conviction for passing bad checks in 1965. The United State Court of Appeals noted that because of the felony conviction, he was not eligible under California law to serve as a juror. Yet, because he had concealed his criminal history from the state trial court, he was impaneled as a juror in a felony case. This same juror was untruthful with the Jury Commissioner about his criminal past and also did not disclose his felony conviction during voir dire. The similarities to the facts of the instant case are uncanny.

In *Green*, as in this case, the juror continued to mislead the parties and the court. In *Green*, the court in its analysis of the effects of the unqualified juror's actions stated (citing another Ninth Circuit decision):

In *Dyer*, an *en banc* panel of this court was faced with a juror whose lies concealed information that would have kept her off the jury. n6 While the panel was unable to find any actual bias on the part of the juror, *see Dyer, 151 F.3d at 981*, this court nevertheless presumed bias on the juror's part, inferring from her pattern of lies a desire to 'preserve her status as a juror and to secure the right to pass on Dyer's sentence.' *Id. at 982*. While the court was unable to say exactly what motive the juror had to stay on the jury, it believed, that, 'the individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.' *Id.* Thus, in *Dyer's* crucial passage, this court held that bias should be presumed where a juror's actions create 'destructive uncertainties' about the indifference of a juror:

> A juror . . . who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process . . . . [A] perjured juror is unfit to serve even in the absence of . . . vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror - to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions - with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.
>
> Id. at 983.
>
> ...

As this passage indicates, *Dyer* was decided not on the basis of the juror's past history, but on the pattern of lies that juror engaged in to secure her seat on the jury. Given this, Adams' conduct raises serious questions about his ability to impartially serve on a jury. Adams lied twice to get a seat on the jury; when asked about these lies, he provided misleading, contradictory, and outright false answers. . . .

While the district court, in the instant case, refused to hold an evidentiary

hearing on the issues raised in Appellant's Motion for a New Trial, even the State concedes in Respondent's Answering Brief, at p. 6 that there "is a question of fact as to what actually happened during Barrs' initial contact with the Jury Commissioner's Office." Appellant contends that there are no questions of fact about what happened with the Jury Commissioner's Office. It is apparent that Barrs did not disclose the felony conviction during the telephone survey or during her subsequent three separate contacts with the Jury Commissioner. She did not write down on the jury information sheet anything about her felony conviction because if she had the State would have produced it at the hearing on the motion for new trial and they would have attached it to Barrs' affidavit which was used to support their opposition.

The affidavit of the Jury Commissioner and the records attached thereto show the number of separate occasions that Barrs had contact with the Jury Commissioner and yet no entry was made by the Jury Commissioner or anyone on her staff that Barrs had disclosed the felony conviction. Further, if Barrs had disclosed the conviction to the Jury Commissioner, why did she not disclose it to anyone else including the district judge on voir dire? His question to the prospective jurors, about prior contact with the criminal justice system, was clear in its wording and intent.

As in the *Green* case cited above, the State's misrepresentations of fact to the district court in the instant case that Barrs' civil rights had been restored, in the face of overwhelming evidence to the contrary, must have come from false representations that Barrs had made to the prosecutors. If that is not the

situation, then the conduct of the prosecutors must be carefully examined.

Juror misconduct in this case has been clearly proven. As in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998), and *Green*, bias must be presumed based upon the circumstances of this case. Barrs was untruthful from the beginning and continued her untruthfulness all through the trial and even during post-trial proceedings. It is apparent that she engaged in this pattern of behavior in order to improve her chances of serving on the jury and afterwards in an effort to cover her tracks.

Now, the State finally concedes that she was unqualified. The evidence that she was unqualified from the beginning has not changed. The State has had this evidence since the defense filed the Motion for a New Trial. The State obtained the Jury Commissioner's records, by way of subpoena, before the defense did. They were provided with the records of her Florida conviction and proof that her civil rights had not been restored.

Had Barrs disclosed her felony conviction to the district court, the district judge would have been required by law to remove her from the pool of prospective jurors. Had her prior conviction been disclosed, she certainly would have been subject to a challenge for cause if the district judge did not feel compelled to disqualify her himself. The fact that she "slipped through," no matter what that means, violates state law and federal law for the reasons mentioned above. To hold otherwise would be to reward her for this unacceptable behavior.

If a person does not really have to be "qualified" to be able to sit as a juror, the logical extrapolation of that would be that none of the jurors really need to be

"qualified" under NRS 6.010. However, that would seem to fly in the face of the obvious meaning of the language in NRS 6.010 and NRS 175.021.

Further, while Appellant asserts that Barrs' concealment and misstatements about her felony conviction were intentional, Appellant further asserts that whether it was intentional or not, she was not qualified under state law. She could not thereafter somehow become qualified because she "slipped through." Her vote cannot be counted and the verdict cannot be validated.

Appellant contends that he is entitled to a jury of twelve (12) unbiased and qualified jurors for the reasons set forth above. The violation of this right, standing alone, is enough to require reversal. Appellant's Motion for a New Trial should have been granted by the district court. The fact that the district court would not even grant an evidentiary hearing on the issues raised in that motion further served to deny Appellant his rights to due process and equal protection of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States in addition to the violations of the applicable state laws which have been cited above.

B. APPELLANT IS ENTITLED TO A NEW TRIAL BASED UPON JUROR MISCONDUCT BECAUSE JUROR JOSHUA WHEELER PERFORMED HIS OWN FIREARM TESTING EXPERIMENT DURING THE TRIAL.

Juror Wheeler told Appellant's investigator that he went shooting for the specific purpose of conducting his own firearms test (AA Vol. 8, pp. 76-77). Appellant's investigator put that in an affidavit which was used to support Appellant's Motion for a New Trial (AA Vol. 8, pp. 76-77). That certainly created a dispute as to the facts and required the holding of an evidentiary hearing. The

district court judge refused to hold a hearing because he agreed with the State's position that a motion for a new trial was precluded by NRS 176.515. Now, however, the State concedes that is not the case.

Further, whether the juror engaged in a test with the same model weapon or not, conducting any "test" using information or equipment not admitted during the trial is impermissible. Going out and shooting while a juror is engaged in a trial and then discussing that aspect of the trial with a family member is also not permitted. Arguing that this was just part of Wheeler's "everyday life" is like saying that wearing a shirt is part of everyday life even when the juror wears a shirt bearing the message "What Does a Murderer Look Like?" during the murder trial where he sits in judgment. That simply is not the case either. Wheeler was residing in an urban area and shooting may have been something that he occasionally did.

The State's unsupported evaluation of the shooting test results as not being valid, because different guns were used, is not relevant. It is not permissible in the first instance to conduct the test because it is unknown what information the juror was seeking from the test results and how he ultimately used that information.

The State opines at page 14 of Respondent's Answering Brief:

> However, if Wheeler happened to have a life experience that he may or may not have used in his own mind to form an opinion, such as 'it would be impossible for it to come on a target all six times in under four seconds even. It would be real tough,' (citation omitted) he has not committed misconduct.

The only way Wheeler could have a "life experience" and conclude that

". . . it would be impossible for it to come on target all six times in under four seconds even" is if he conducted an experiment in order to make that determination. If he conducted the experiment then that is misconduct because he is considering extrinsic evidence.

The speed with which the shots were fired and the shooter's ability to be accurate within a certain time frame were the subject of the testimony of the crime scene investigators and the experts presented by both sides. Wheeler apparently supplemented the testimony of these witnesses and concluded, "It would be real tough" as he decided how fast the shots could be fired regardless of what the experts said.

Since the mens rea which accompanied the shooting was the key issue in this case and because the time taken in order to formulate the different possible states of mind were critical to different possible verdicts by the jurors, this test became all the more important. Unless an evidentiary hearing is held, the nature, extent and use made of the information from the shooting cannot be known. While Appellant contends that there is ample evidence that an improper test was conducted, at the very least an evidentiary hearing on that issue should have been held.

C. APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR MISCONDUCT WHICH OCCURRED WHEN A JUROR WORE A TEE SHIRT DURING CLOSING ARGUMENTS WHICH READ "DO YOU KNOW WHAT A MURDERER LOOKS LIKE."

The State concedes that other jurors saw the T-shirt that juror Kelly wore that had printing on it "WHAT DOES A MURDERER LOOK LIKE?" They also concede that the court bailiff saw it. "The juror then **made efforts** to conceal it."

(emphasis added, Respondent's Answering Brief, p. 16). The efforts and their effectiveness are not reflected in the record. Further, it is clear that this matter was not brought to the attention of the district court judge so that he could inquire into the state of mind of the juror who had shown such bad judgment in wearing this shirt in the first place. Had the district court been advised about the T-shirt, he undoubtedly would have excused this juror and seated an alternate.

Wearing this shirt while seated as a juror in a murder trial, shows that this juror should have been interrogated by the district court judge and his state of mind examined. Court personnel and the other jurors failed to bring this matter to the judge's attention. This oversight and the lack of inquiry by the judge very well could have denied Appellant a fair trial. Whether we have an expression of actual bias or can infer implied bias from this juror's intentional act, this constituted major juror misconduct which was compounded by keeping this misconduct from the judge. There were alternate jurors available. Therefore, the act of this juror, the inaction by the court personnel and the other jurors worked in concert to deny Appellant a fair trial because the offending juror was either biased or so immature as to not be competent to sit and deliberate in such a serious case. The wearing of this T-shirt was an intentional act and showed a lack of respect for the court and the criminal justice process.

There is no evidence in the record to show that this T-shirt was ". . . older and pertained to a local band" as the State asserts (Respondent's Answering Brief, pp. 16-17). But even if this statement is true, is this the type of attire and the type of message that a reasonable juror would wear while sitting on a murder

case?

The State has summed up Appellant's argument by asserting, "There is no misconduct in a juror wearing whatever he or she wants, within reason, to court" (Emphasis added, Respondent's Answering Brief, p. 17). Wearing this shirt under these circumstances is not "within reason" and shocks the conscience by mocking our judicial system. That is serious juror misconduct and alone justifies reversal of the conviction as it is clear that this juror totally disregarded the seriousness of his duty as a juror. Further, he has disregarded the repeated admonition by the court ". . . not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you." (AA Vol. 2, p. 147; Vol. 3, pp. 115, 151, 186, 224). By wearing the shirt, he has expressed his opinion.

D. APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR MISCONDUCT AS TWO JURORS SLEPT DURING THE TRIAL IN THIS CASE.

Appellant asserts that no additional argument is necessary on this issue.

E. THE PROSECUTORS' CONTINUOUS USE OF THE TERMS "MURDER" AND "VICTIM" IN THEIR QUESTIONS DURING TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS AS GUARANTEED UNDER THE CONSTITUTION OF THE UNITED STATES AND UNDER STATE LAW.

Appellant asserts that he has met his burden to show that the remarks used by the prosecutors in this case were "patently prejudicial." *Ricker v. State*, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995). It is clear from the choice of words used by the prosecutors, to form their questions, that they either consciously or subconsciously were expressing their personal opinions or at least

were improperly arguing their position throughout the trial. It is also clear that after the first admonition by the court to stop using the word "murder," they continued to do so until the second admonition slowed them down. Nevertheless, they managed to use this word 31 times.

The State seeks to justify this highly prejudicial choice of words by claiming it is a "force of habit" (Respondent's Answering Brief, p. 20). This is a very bad habit that had the long term effect of denying Appellant a fair trial. The State kept using the highly inflammatory words to drive home to the jury during the trial, their belief that this was a murder. It was improper argument at this stage of the proceedings and the prosecutors knew that.

By phrasing their questions using these highly charged words over and over, the prosecutors, who knew better and who chose not to follow established well known rules, attempted and did gain a tactical advantage. This behavior is not harmless error especially where it is intentional.

The State intentionally disregarded the district court's admonitions (AA Vol. 3, p. 150; Vol. 5, p. 91). This was part of a plan to gain an unfair advantage over the defense which they did. In addition to using the term "murder" 31 times, prosecutors also used the term "victim" several times even after the defense motion in limine had been granted and the State was ordered not to do so (Reporter's Transcript, 12/27/01, p. 40, filed 5/5/05; Exhibit 1 to Appellant's Opening Brief).

The defendant in a criminal trial is entitled to a fair trial. In order for the trial to be fair, the parties, including the prosecutors, must follow the rules. The

prosecutors failed to do so thereby gaining an advantage in the process of trying to convince the jurors that their position was the correct one. They cheated and cannot be rewarded for doing so. Whether Appellant is guilty or not, he is entitled to a fair trial and he did not get one.

F. USE OF HEARSAY STATEMENTS VIOLATED THE CONFRONTATION CLAUSE AND DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED UNDER THE CONSTITUTION OF THE UNITED STATES.

On October 20, 2005, this Court published its Opinion in *Flores v. State*, 121 Nev. Ad. Op. 72 (2005). The text of this Opinion contained a discussion of the impact of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), as it applies to the admission of hearsay statements in Nevada court proceedings. Appellant has asserted the same position in his Opening Brief with respect to the hearsay statements of various witnesses which were improperly admitted into evidence during Appellant's trial (Appellant's Opening Brief, pp. 29-37).

The State has conceded that the hearsay statements which Appellant asserts were improperly admitted at trial, were "testimonial" and subject to analysis under *Crawford*. This concession does not include the hearsay testimony of witness Trisha Miller (Respondent's Answering Brief, p.24) which Appellant asserts was also improperly admitted as Miller testified as to what Gina Centofanti (the deceased) told her the day after the domestic battery. This clearly was not an excited utterance (see NRS 51.095). Gina Centofanti was never subject to cross-examination in order to test her credibility about her statements to Miller. Under the *Crawford* analysis, in order to be admissible, the defendant must have had an opportunity to cross-examine the person making the

statements to a third party who later testifies about those statements.

In the instant case, Trisha Miller was Gina Centofanti's friend. Gina's statements which Miller repeated during her testimony were not properly admitted under any state law exception to the hearsay rule. The statements were made about the December 5, 2000 domestic battery case where she admitted battering Appellant and was arrested for it. Appellant had his shirt torn, had scratches and had been hit and cut by a picture frame. The statements about the incident which Trisha Miller attributes to Gina Centofanti were made the day after the incident had occurred and after Gina had plenty of time to reflect upon how to explain her arrest to her friends and how to save face in doing so.

Miller's testimony should not have been admitted even under NRS 51.315. While the declarant may have been unavailable, no special circumstances were shown which would indicate the declarant was especially reliable and that there were no strong assurances as to the accuracy of these statements. Nor were there any particularized guarantees of trustworthiness as required under *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). At the time these statements were made to Trisha Miller, the declarant was facing a domestic battery charge and future court proceedings both in the criminal and family court arenas. Trisha Miller, Gina Centofanti's friend, was potentially a witness in both future proceedings. Therefore, under the mandates of the *Crawford* and *Flores* cases and under state law which precludes the admission of hearsay statements except under recognized exceptions thereto, Miller's hearsay testimony should not have been

admitted. They were also highly prejudicial.

The admission of the testimony of police officer Laurenco, who responded to the December 5, 2000 domestic battery incident, and who testified that the dispatcher had told them ". . . that a male had put the gun to a female's head" clearly violated the principles recognized in *Crawford*. That testimony was not necessary to establish the reason for the police response to the domestic battery scene. The mere statement that they had responded to a domestic battery call would have been sufficient for that purpose. Instead, despite the prosecutors having knowledge of the *Crawford* decision, they insisted on using the old "for probable cause only" subterfuge to get the damaging and improperly admitted double hearsay to the jury. The additional testimony by this officer about what Gina told him clearly violated the holding in *Crawford*. Further, no limiting jury instruction was ever given.

G. IT WAS REVERSIBLE ERROR FOR THE DISTRICT COURT NOT TO GRANT APPELLANT'S MOTION TO EXCLUDE EVIDENCE AND DISMISS CHARGES AGAINST APPELLANT.

Appellant states that no additional argument is necessary on this issue.

H. THE CUMULATIVE EFFECT OF THE PREVIOUSLY CITED ERRORS DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED UNDER THE CONSTITUTION OF THE UNITED STATES AND UNDER STATE LAW.

While any one of the errors mentioned in Appellant's Opening Brief which have also been mentioned herein, should result in the reversal of his conviction, it certainly has been demonstrated that their cumulative effect totally denied Appellant his right to a fair trial as guaranteed in the Constitution of the Untied States and under Nevada state law.

The prejudicial conduct which prevented a fair trial is listed as follows:

1. Having a convicted felon sitting as a juror after concealing her conviction from the Jury Commissioner, District Judge, prosecutors and the defense;

2. Denial of Appellant's Motion for a New Trial based upon the reasons set forth therein;

3. The conducting of a firearm test by a juror during the trial;

4. Not addressing the juror misconduct when the juror wore a shirt with the message "WHAT DOES A MURDERER LOOK LIKE?"

5. Having jurors sleep during the trial;

6. Having experienced prosecutors use the words "murder" (31 times) and "victim" during their questioning even after being admonished by the district court not to do so;

7. Having the prosecutors use improper questions in an attempt to improperly impeach and the use of other tactics while questioning Appellant in an obvious effort to demean and embarrass him;

8. The improper admission of hearsay statements in violation of the *Crawford* and *Flores* decisions and NRS 51.035, NRS 51.095 and the other applicable statutes regarding hearsay; and

9. The erroneous decision not to exclude the testimony of Sharon Zwick, the investigative specialist for the Las Vegas Metropolitan Police Department about Appellant's "recorded" calls to Zwick which were subsequently destroyed thereby negating his ability to cross-examine her about the call content

(hearsay?) and the tone of his voice which became one of the focal points of the prosecutors' closing arguments.

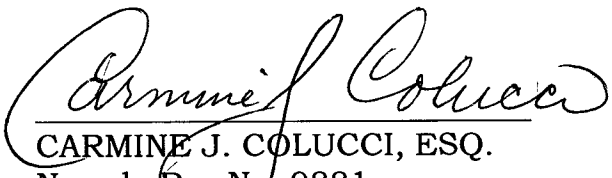
In addition to the issue of guilt or innocence, the jury also had to decide whether Appellant was guilty of a certain degree of murder or guilty of manslaughter. The above errors were certainly instrumental in directing the jury towards the first degree conviction. These errors and the mischaracterization of certain evidence which these errors created, improperly and unfairly, stripped the defense of its ability to proceed in any meaningful way. These errors were not harmless. They each and cumulatively deprived Appellant of a fair trial in violation of his rights under the Constitution of the United States and Nevada state law.

CONCLUSION

For the above stated reasons, the conviction of the Appellant must be reversed and vacated and this case remanded for a new trial.

DATED this 14th day of February, 2006.

CARMINE J. COLUCCI, CHTD.



CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 0881
629 South Sixth Street
Las Vegas, NV 89101
(702) 384-1274
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

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

DATED this 14th day of February, 2006.

CARMINE J. COLUCCI, ESQ.
Nevada Bar #000881
Carmine J. Colucci, Chtd.
629 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-1274

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14 day of February, 2006, I deposited in the United States Mail at Las Vegas, Nevada, a true and correct copy of APPELLANT'S REPLY BRIEF enclosed in a sealed envelope upon which first class postage has been fully prepaid, addressed to:

David Roger
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Post Office Box 552212
Las Vegas, Nevada 89155-2212

George J. Chanos
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Attorneys for Respondent

Jan McCough
an employee
of CARMINE J. COLUCCI, CHTD.