IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44984

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Alfred Centofanti, III, was convicted of first-degree murder for the shooting death of his ex-wife Virginia (Gina). Centofanti was sentenced to serve two consecutive life terms without the possibility of parole. Centofanti appeals his conviction, arguing that he is entitled to a new trial because (1) hearsay statements were introduced in violation of Crawford v. Washington[1] and the evidentiary rules, (2) the jury engaged in various forms of misconduct, (3) the prosecutor committed misconduct, and (4) the State destroyed evidence. We conclude that Centofanti's arguments are without merit, and we affirm the judgment of conviction.

[1]514 U.S. 36 (2004).

Hearsay statements

Centofanti argues that he is entitled to a new trial because various hearsay statements were admitted at trial that violated Crawford and his Confrontation Clause rights. Specifically, he challenges Officers Lourenco's and McGregor's testimony regarding Gina's statements to them when they arrived to investigate the December 5, 2000, domestic violence incident; Counselor Mark Smith's testimony regarding Gina's statements to him over the telephone in the domestic dispute; and Officers Lourenco's and McGregor's testimony regarding LVMPD dispatch's statements on December 5 relaying information Smith provided concerning Gina's statements. Centofanti also argues that the testimony of Tricia Miller, Gina's best friend, regarding Gina's statements to Miller on the day following the domestic violence incident were introduced in violation of the evidentiary rules. We conclude that his arguments are without merit.

Crawford only governs testimonial hearsay. The United States Supreme Court recently clarified the distinction between testimonial and nontestimonial statements made during police interrogations in Davis v. Washington, and its companion case, Hammon v. Indiana.[2] We have also recently addressed this distinction in Harkins v. State.[3]

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[2]547 U.S. ___, 126 S. Ct. 2266 (2006).

[3]122 Nev. ___, 143 P.3d 706 (2006).

In Davis and Hammon, the Supreme Court concluded that if the circumstances objectively indicate "that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," the statements made during a police interrogation are nontestimonial.[4] In Harkins, we adopted a general rule and listed a series of factors to be considered when deciding whether a statement is testimonial under the general rule.[5] The general rule for determining whether a statement is testimonial is "whether the statement would, under the circumstances of its making, lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[6] A "nonexhaustive list of factors" for courts to consider in deciding this issue includes:

> (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question (e.g. whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events made in a more formal setting sometime after the exigency had ended.[7]

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[4]Davis, 547 U.S. at ___, 126 S.Ct. at 2273-74.

[5]122 Nev. at ___, 143 P.3d at 714.

[6]Id.

[7]Id.

Confrontation Clause violations are subject to a harmless error analysis.[8] An error is harmless "where it is clear beyond a reasonable doubt that the guilty verdict actually rendered in the case was 'surely unattributable to the error.'"[9] The factors to be considered are "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case."[10]

Although Gina's statements were made to State agents in response to their questions, Smith's, Lourenco's, and McGregor's inquires and Gina's responses were for the purpose of providing assistance during an emergency. We conclude that an objective witness in Gina's position would not reasonably believe that those statements would later be used at trial. Further, to the extent that any of Gina's statements to Lourenco and McGregor could be considered testimonial because they occurred after the emergency had concluded, any Crawford violation is harmless as their testimony was cumulative and was corroborated by other testimony. And, in light of the strength of the State's case against Centofanti, we consider any error harmless.

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[8]Power v. State, 102 Nev. 381, 384, 724 P.2d 211, 213 (1986).

[9]Flores v. State, 121 Nev. 706, 721, 120 P.3d 1170, 1180 (2005) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).

[10]Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Finally, regarding Miller's testimony, although the State impliedly concedes that Miller's statements were improperly introduced, we conclude that their introduction was also harmless. Again, Miller's testimony was corroborated by other evidence, and the evidence against Centofanti was voluminous. Accordingly, we conclude that Centofanti is not entitled to a new trial based on the admission of hearsay statements.

Juror Misconduct

Centofanti argues that he is entitled to a new trial because a juror concealed her prior felony conviction and a juror conducted his own firearms experiment.[11]

Failure to disclose felony status

Centofanti argues that he is entitled to a new trial because his conviction was not the product of a unanimous verdict issued by twelve "qualified" jurors, as required by NRS 6.010. Centofanti also contends that Juror Barrs intentionally concealed her prior felony before and during voir dire and her participation in the verdict requires a new trial. We disagree.

Although under NRS 6.010 a convicted felon is not a qualified juror unless her civil right to serve on a jury has been restored, "the participation of a felon-juror is not an automatic basis for a new trial."[12] However, a felon-juror's presence on the jury can be the basis for a new

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[11]Centofanti also argues that he is entitled to a new trial because a juror wore a tee shirt that read, "Do you know what a murderer looks like" and because two jurors were sleeping during trial. Centofanti failed to object to both instances of the alleged misconduct, and we conclude that neither instance amounted to plain error.

[12]Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1059 (9th Cir. 1997).

trial if the defendant can show actual bias or prejudice.[13] We conclude that Centofanti has failed to demonstrate that Juror Barrs was actually biased against him or that he suffered prejudice from her jury service. Accordingly, Juror Barrs' mere presence on the jury is insufficient to warrant a new trial.

We further conclude that Centofanti is not entitled to a new trial based on Juror Barrs' misconduct during voir dire. Juror misconduct during voir dire implicates the Sixth Amendment right to an impartial jury.[14] When deciding whether a defendant is entitled to a new trial based on juror misconduct during voir dire, we examine whether the juror intentionally concealed information and whether the misconduct was prejudicial.[15]

From the record, it appears that Juror Barrs intentionally concealed her felony status. However, Centofanti has not shown that he was prejudiced by Juror Barrs' misconduct. When deciding whether a juror's misconduct was prejudicial, we look to whether there was actual or implied bias.[16] "Actual bias exists when a juror fails to answer a material question accurately because he is biased,"[17] and the defendant must prove actual bias "through admission or factual proof."[18] In "extreme

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[13]Id. at 1059.

[14]United States v. Wood, 299 U.S. 123, 133 (1936).

[15]Canada v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997).

[16]See Wood, 299 U.S. at 133.

[17]U.S. v. Bishop, 264 F.3d 535, 554 (5th Cir. 2001).

[18]Id.

circumstances" a court may imply juror bias as a matter of law.[19] Juror bias may be implied "where a juror's actions create 'destructive uncertainties' about the indifference of a juror."[20]

We conclude that Centofanti has not demonstrated that Juror Barrs was actually biased and that this is not an "extreme circumstance" where bias should be implied as a matter of law. Juror Barrs' misconduct was the failure to disclose a more-than-twenty-year-old felony conviction for obtaining property in exchange for a worthless check. This conviction is unrelated to the instant crime, and we conclude that Juror Barrs' misconduct did not "create 'destructive uncertainties'" about her indifference as a juror. Accordingly, because Centofanti has demonstrated no implied bias or prejudice, he is not entitled to a new trial.

Firearms experiment

Centofanti argues that he is entitled to a new trial because Juror Wheeler conducted his own firearms experiment. When a juror is exposed to extrinsic evidence, we do not conclusively presume that that exposure is prejudicial; instead, we examine the nature of the extrinsic influence in the context of the trial as a whole.[21]

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[19]Id.; see also Solis v. Cockrell, 342 F.3d 392, 395 (5th Cir. 2003).

[20]Green v. White, 232 F.3d 671, 677 (9th Cir. 2000) (quoting Dyer v. Calderon, 151 F.3d 970, 983 (9th Cir. 1998)).

[21]Meyer v. State, 119 Nev. 554, 565, 80 P.3d 447, 456 (2003).

Here we conclude that any exposure Juror Wheeler had to extrinsic information through the purported firearm experiment was minimal in the context of the trial as a whole, considering the overwhelming evidence supporting Centofanti's conviction. Accordingly, we conclude that Centofanti has failed to demonstrate that misconduct actually occurred or, if it did, that the misconduct was prejudicial. Therefore, Centofanti's argument is without merit.

Prosecutorial misconduct

Centofanti argues that he is entitled to a new trial because the State committed prosecutorial misconduct by repeatedly referring to Gina as a "victim," the shooting as a "murder," and the location of the shooting as the "crime scene."[22]

We will not overturn a conviction solely because of prosecutorial misconduct "unless the misconduct is 'clearly demonstrated to be substantial and prejudicial.'"[23] We conclude that Centofanti has not demonstrated substantial and prejudicial misconduct. The majority of the references to "victim" and "crime scene" occurred during the examinations of law enforcement officers when they testified about their investigation, and the State did not use the terms in an inflammatory manner.

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[22]Centofanti also argued that the State committed prejudicial misconduct by twice improperly and sarcastically questioning Centofanti and impermissibly expressing the prosecutor's opinion about the veracity of Centofanti's testimony. Although the State's questions were improper, Centofanti objected to this line of questioning, the district court sustained the objection, and the State moved on. We conclude that any error was harmless.

[23]Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (quoting Sheriff v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996)).

Regarding the word "murder," Centofanti only twice objected to the use of the word murder, and the district court sustained the objection and admonished the State. And, the jury was instructed on Centofanti's theories of the case, including first- and second-degree murder, manslaughter, and self-defense. Accordingly, we conclude that Centofanti has not clearly demonstrated substantial and prejudicial misconduct, and we will not overturn his conviction on this basis.

Destruction of evidence

Centofanti argues that the Las Vegas Metropolitan Police Department destroyed his telephonic messages to Sharon Zwick, which prejudiced him in presenting his defense. When the State loses or destroys evidence, the loss or destruction will amount to a due process violation if the defendant demonstrates that (1) "'the State acted in bad faith or [(2)] that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.'"[24]

Centofanti has not shown that the State acted in bad faith with regard to erasure of his messages. Zwick testified that the LVMPD's standard procedure was to erase each message after it was played and the information recorded. Centofanti has failed to demonstrate that the exculpatory value of the messages was apparent before it was destroyed. Finally, Centofanti has not demonstrated that he suffered undue prejudice from the destruction of this evidence. Zwick's testimony was focused on Centofanti's demeanor during their telephone conversation and not his

[24]Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) (quoting Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)).

messages. Therefore, we conclude that Centofanti's due process rights have not been violated.[25] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.

Parraguirre, J.

Shearing, Sr. J.

cc: Hon. Donald M. Mosley, District Judge
Carmine J. Colucci & Associates
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger ✓
Clark County Clerk

[25]We conclude that because of the evidence against Centofanti, his contention that cumulative error requires a new trial is without merit.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 44984

FILED

JAN 18 2007

CLERK OF SUPREME COURT

BY DEPUTY CLERK

PETITION FOR REHEARING

COMES NOW Petitioner, ALFRED P. CENTOFANTI, III, by and through his attorney, CARMINE J. COLUCCI, ESQ., and petitions this Court for an order allowing rehearing of the issue set forth herein and reconsideration by this Court of that issue as it relates to the Order of Affirmance filed in this case on December 27, 2006.

DATED this 16th day of January, 2007.

CARMINE J. COLUCCI, CHTD.

CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 000881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Appellant

RECEIVED

JAN 18 2007

CLERK OF SUPREME COURT

By DEPUTY CLERK

POINTS AND AUTHORITIES

The issue presented to this Court is whether this Court inadvertently overlooked or misapprehended a material fact in the record or a material question

of law which was applicable thereto.

NRAP Rule 40 states in pertinent part as follows:

Rule 40. Petition for rehearing.

...

(c) Scope of application; when rehearing considered.

...

(2) The court may consider rehearings in the following circumstances:

(i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(Ii) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

...

In this Court's Order of Affirmance, this Court noted that Petitioner had failed to demonstrate that Juror Karens Barrs, who this Court found had intentionally concealed her prior felony conviction throughout the course of Petitioner's case and the post conviction proceedings as well, was biased against him. This Court stated:

> "However, a felon-juror's presence on the jury can be the basis for a new trial if the defendant can show actual bias or prejudice. We conclude that Centofanti has failed to demonstrate that Juror Barrs was actually biased against him or that he suffered prejudice from her jury service. Accordingly, Juror Barrs' mere presence on the jury is insufficient to warrant a new trial." (Order of Affirmance, pp. 5-6)

Petitioner asserts that because the district court did not grant Petitioner an evidentiary hearing on this issue, as he requested in his Motion For New Trial, he was not given the opportunity to present evidence to show actual bias or

prejudice. The district court did not allow the defense to present witnesses or evidence on this issue. This conduct by Juror Barrs was egregious enough for this Court to make a finding that she intentionally concealed her felony status in order to serve on this jury. Petitioner should have been given the opportunity through the examination of this and other jurors to show actual or implied bias. How could the Petitioner show actual bias "through admission or proof" without a hearing? This Court may have inadvertently thought that Petitioner had been afforded that opportunity.

In the aforementioned order, this Court also found that Petitioner had failed to show that the gun experiment alleged to have been conducted by one of the jurors also unduly prejudiced Petitioner. Again, Petitioner was deprived of the opportunity to have an evidentiary hearing on that issue by the district court.

Petitioner was also deprived of any opportunity to have an evidentiary hearing on the other issues raised in the Motion For New Trial, i.e. including the nature, extent and possible influence of the extrinsic firearms test and the impact of the prosecutor's improper use of the term "murder" during questioning even after objections to that term had been sustained and yet this Court made a finding that Petitioner had failed to show that he was prejudiced thereby. Petitioner asserts that since the district court did not grant him an evidentiary hearing on the issues that he raised, as Petitioner had requested, he did not "fail" to show prejudice. He simply was not given the opportunity to do so. The district court simply denied his motion for new trial on jurisdictional grounds because the

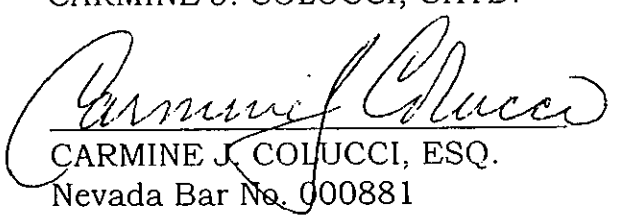
motion was filed more than seven (7) days after the verdict (AA Vol. 8, pp. 226-227).

Petitioner also asserts that this Court may have been unaware that Petitioner had asked for an evidentiary hearing in district court but had been denied that hearing. Petitioner raised this issue in his original appeal. See Opening Brief pp. 11, 17, 19, 23. If that is the situation, then under NRAP 40, Petitioner is entitled to a rehearing.

For the aforementioned reasons, Petitioner seeks a rehearing and reconsideration of the issues raised on appeal and seeks an order vacating the Order of Affirmance and instead the issuance by this Court of an order remanding this case back to the district court for an evidentiary hearing on the issues raised in this appeal.

DATED this 16th day of January, 2007.

CARMINE J. COLUCCI, CHTD.



CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 000881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16 day of January, 2007, I deposited in the United States Mail at Las Vegas, Nevada, a true and correct copy of PETITION FOR REHEARING enclosed in a sealed envelope upon which first class postage has been fully prepaid, addressed to:

DAVID ROGER
DISTRICT ATTORNEY
200 Lewis Avenue, 3rd Floor
Post Office Box 552212
Las Vegas, Nevada 89155-2212

CATHERINE CORTEZ MASTO
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Attorneys for Respondent

Zoe McCreight
an employee
of CARMINE J. COLUCCI, CHTD.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44984

FILED

FEB 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Douglas, J.
Douglas

Parraguirre, J.
Parraguirre

Shearing, Sr.J.
Shearing

cc: Hon. Donald M. Mosley, District Judge
Carmine J. Colucci & Associates
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 44984

District Court Case No. C172534

REMITTITUR

TO: Charles J. Short, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 27, 2007

Janette M. Bloom, Clerk of Court

By: _____
Chief Deputy Clerk

cc: Hon. Donald M. Mosley, District Judge
Attorney General Catherine Cortez Masto/Carson City
Carmine J. Colucci & Associates
Clark County District Attorney David J. Roger

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on _____.

_____
District Court Clerk

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED
JUL 17 12 19 PM '01
Shirley B. Parraguirre
CLERK

24

* * * * *

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

Vs

ALFRED P. CENTOFANTI, III,

Defendant.

CASE NO. C172534

DEPT. NO. VII

BEFORE THE HONORABLE:

MARK GIBBONS DISTRICT JUDGE

THURSDAY, JUNE 14, 2001, 12:12 P.M.

APPEARANCES:

FOR THE STATE: CHRISTOPHER J. LAURENT
& BECKY GOETTSCH
Deputy District Attorneys

FOR THE DEFENDANT: DANIEL J. ALBREGTS, ESQ.

RECEIVED
JUL 17 2001
COUNTY CLERK

REPORTED BY: PATSY K. SMITH, C.C.R. #190

CE11

THURSDAY, JUNE 14, 2001, 12:12 P.M.

THE COURT: Case number C172534, State of Nevada versus Alfred Centofanti, III.

The record will reflect the presence of the defendant together with his attorney Dan Albregts, State of Nevada represented by Deputy District Attorneys Christopher Laurent and Becky Goettsch.

This is on for two matters, trial setting, also for the evidentiary hearing to the State's motion to revoke the defendant's bail.

Mr. Albregts, go ahead.

MR. ALBREGTS: Your Honor, as you'll recall the last time we were here, I had requested that these matters be sealed. I don't recall my exact wording, but I did indicate, among other things, that the divorce decree that was included as an exhibit had been sealed by the Family Court.

THE COURT: Right.

MR. ALBREGTS: My intention, when I requested that, was to seal the whole proceeding as it relates to this and, in fact, I indicated that I would be filing my response under seal, which, of course, I did. At that stage, I didn't receive any objection from the State regarding this matter being sealed.

As you can see from the sealed document,

without getting into it until you make a ruling on the sealing, there are issues in there that I believe would warrant it being sealed just given the nature of some of the exhibits and some of the other matters. That's why I asked it be sealed and I would ask that you continue to seal this, at least until such time that you have heard the evidence in argument and then reconsider the decision at that time.

THE COURT: Mr. Laurent.

MR. LAURENT: Judge, it's come to my attention that this sealing of the divorce was made the 21st day of December, 2000, the day after the homicide. The fact that it was sealed is extremely relevant to the issue today.

Additionally, Judge, I don't understand why they are so concerned about the information that's contained in there. Most of the information is public record but for the sealed stuff, which would have been public record had not Gina Centofanti been murdered.

THE COURT: Okay, the motion to seal the proceedings is denied. I will seal the divorce decree, though, because it has been sealed by a Family Court order, I believe, under NRS 125.110. I'm not going to interfere with the decision of the Family Court under NRS 125.110.

(Off the record discussion not reported.)

THE COURT: The filing of the decree is under seal, but not this hearing.

MR. ALBREGTS: Thank you.

THE COURT: Mr. Laurent, I have read the motion and response by Mr. Albregts.

MR. LAURENT: Couple of matters first, Judge.

First of all, I believe the Court needs to canvass the defendant to make sure that he's authorized his attorney to file the documents that are contained in the sealed motion.

THE COURT: Is that correct, Mr. Centofanti, did you authorize Mr. Albregts to file those documents in a sealed motion?

THE DEFENDANT: If that's what Mr. Laurent just said. I didn't hear him.

THE COURT: He wanted to know if you have authorized Mr. Albregts to file the particular pleadings you did under seal?

THE DEFENDANT: Correct.

THE COURT: And that has your authorization?

THE DEFENDANT: Yes, sir, he does.

THE COURT: Very well.

MR. LAURENT: Next is to determine to what extent the attorney/client privilege has been waived in this matter because, as an exhibit, the affidavit purports to -- the affidavit of Mr. Albregts talks about information that he could have only gotten from his client and reports to tell things that his client told him.

Additionally, there is a letter that Mr. Albregts sent to Mr. Shaner. It's attached as one of the exhibits which talks about Mrs. -- or Gina Centofanti refusing --

MR. ALBREGTS: I'm going to object because that's sealed and this is why I asked for the hearing to be sealed as well.

MR. LAURENT: The letter is not sealed. The divorce is sealed.

MR. ALBREGTS: My pleading was filed under seal, Judge, and you just reaffirmed that.

THE COURT: Okay, what I'm going to do, Mr. Albregts, is this. The pleading itself can be filed under seal. I'm not going to close the hearing here on that and either one of you can make arguments. I'm just not going to open the pleadings up for inspection because the divorce -- or, frankly, if the divorce court unseals

the divorce decree, which they certainly have a right to do, I'm going to unseal the case here, but that's the only reason I'm doing it is because of the Family Court order, but Mr. Laurent can certainly refer to anything he referred to and, likewise, you can as well for purposes of your arguments.

MR. LAURENT: For that purpose, Judge, because of those three -- at least three instances where the attorney/client privilege has been waived since the defendant has authorized his attorney to make those, we need to have a hearing to that extent so I can discuss that.

Additionally, since the attorney/client privilege is waived, that makes Mr. Albregts a potential witness in this case, a witness in this case here. It makes him a witness in the trial because of motive, it makes him a witness in the penalty phase, and he is going to have to have new counsel.

THE COURT: Mr. Albregts.

MR. ALBREGTS: Well, Judge, once again, I'm left to think on my feet as it were and address these issues because I have not been given any notice whatsoever as to this.

MR. LAURENT: We got his documents yesterday late, Judge.

THE COURT: Well, do you need more time?

MR. ALBREGTS: Your Honor, if I may?

THE COURT: Go ahead.

MR. ALBREGTS: If he wants to throw that stone from that glass porch, I received the original motion to revoke the bail at about 3 p.m. the day before our motion to continue the hearing without any forewarning or notice, when I was in Tucson on two other cases. I certainly -- I don't know what time he received it. I sent my runner over as soon as this was completed yesterday morning at about 10 a.m. and instructed him to deliver a courtesy copy to their office and have their secretary call Ms. Goettsch to have her come pick it up.

Regardless, Judge, I don't think you need to get to those issues, as I have outlined in my moving papers. The State, it's our position, is upset, number one, at the original setting of the bond. That's indicative by the fact that they continue to rehash the factual section, all of the facts that the Court was aware of that set -- you set the bond relating to the original incident that relates to the charge.

Now they are trying to manipulate these things to, number one, get him back in custody and, number two, get new counsel on the case when all along they have been upset because they claim Mr. Centofanti -- I'm the

third lawyer and there's been problems.

What we have, Judge, is a situation where he posted the house as a collateral bond way back in January. That clearly shows he didn't have an intent to defraud anybody or to keep this thing a secret. He posted that as a part of collateral and nobody made any comments as to that.

Thereafter, the tenants stopped paying rent in December and this property was going into default. Unfortunately, you are right, given the nature of the circumstances --

MR. LAURENT: Judge, I'm going to object at this time. What I'm trying to resolve right now is whether there's any waiver of the attorney/client privilege. I haven't even begun to argue my motion yet and that's where we are at.

THE COURT: Let's do this and I think Mr. Albregts has a right to respond to the attorney/client privilege issues, Mr. Laurent, because I know, I understand the argument here. I'm concerned if I agree with you, the effect it has on the defendant and getting into the financial effect and all that as far as changing attorneys.

So, Mr. Albregts, do you want time to respond to the issue of the attorney/client privilege and

these other matters Mr. Laurent wants to go into?

MR. ALBREGTS: I do because I will tell you, as a preface to that, whether I will be successful at it or not, I really made an effort in that moving paper not to invoke the attorney/client issues and I believe -- I don't recall, but I think I put a note in there that I was trying to stay away from that in that affidavit --

THE COURT: Okay.

MR. ALBREGTS: -- but I do need to respond to that.

THE COURT: I will --

MR. LAURENT: Judge, I can solve that problem for you right now. For the purpose of this hearing then, what I'd suggest is that we strike the affidavit because it does contain information that can only come from the defendant and purported conversations from him. Mr. Albregts can't bring it in anyway because he would have to put the client on the stand and then he would be subject to cross examination. That should be stricken as well as the letter. I could bring it in of course, but, for that purpose, we could just strike the affidavit at this time because it does purport to bring in information that he got from his client.

THE COURT: Mr. Albregts.

MR. ALBREGTS: Well, again, I would like

some time to think about these issues.

MR. LAURENT: Judge, we continued this and they got it continued from Tuesday. The State is very concerned about the fraud that's been committed in this case, the continued manipulation of not only the courts, not only the people buying the property, but also the attorneys by this man. I'm not saying the attorneys are manipulating. I'm saying they are being manipulated. We are of the opinion that this person is a substantial flight risk at this time and if there were a continuance of this matter, it just increases the likelihood that we are going to lose him.

MR. ALBREGTS: Judge, there is absolutely no evidence of that in any part of this record. The house arrest records are clear and I have them here. If you would like to see them, I'm not going to give it to them because I think they will be used against us and I'll offer to show them to you in camera.

MR. LAURENT: To which we would object.

MR. ALBREGTS: But, Judge, he has not done anything since he has been released to indicate at all that he's a flight risk.

THE COURT: Well, Mr. Albregts, I'm really not that concerned about that issue. I'm more concerned about the house and the circumstances and the

filing of the affidavit that says filed joint tenants and the issues that the State has raised in their original motion, the impropriety of all those actions, not so much the flight risk issue.

MR. ALBREGTS: I agree, Judge, and the impropriety of that, whether you deem it improper enough to revoke the bond or not doesn't require you to have this hearing today when these issues are out there or take Mr. Centofanti into custody pending this.

THE COURT: Okay. Why don't counsel approach.

(Off the record discussion not reported.)

THE COURT: Mr. Laurent, I would be inclined to continue the matter to Monday at 11 a.m. to give Mr. Albregts a chance to look at this issue here, but to have a resolution on it at that time.

Does the State object to that?

MR. LAURENT: Yes, Judge, we object for the following reasons. It's the State's position, as contained in our pleadings and as we wanted to argue today, that the defendant has committed a fraud at least twice while he's been out on bail.

His divorce proceedings, which take a

home that was held in joint tenancy by the attorney he hired where his wife is not represented by an attorney, in which it's explicitly explained going from joint tenancy to tenancy in common with a right of first refusal and that the house was to be sold, that they would share in the profits.

Knowing this, that documentation was never filed. It was never changed in California. This is property in California and the day after the murder, the defendant, through an ex parte order -- motion to move to seal the divorce proceedings, thereafter that home, that property was -- which did not belong to him in its entirety -- was posted as bail, posted as collateral for bail, fraud number one, defrauding the bail bondsman by saying, hey, this is mine. It wasn't his. Half of it was his.

Fraud number two, the defendant then signs over or sells the property in April or begins the sale proceedings in April. He signs an affidavit of death of joint tenant. There is no joint tenancy at this point. He signs an affidavit of joint tenancy, death of joint tenancy. He signs a grant deed saying that he is the widower. He provides a death certificate in the real estate disclosure statement, page three, where it says, encroachment that may effect interests, he puts, yes,

there is such an encroachment that may effect interests. Then on the explanation down below, he says, homeowners association and owners have right to CC&Rs.

Additional disclosures, he says, legal action, and claims -- there is nothing listed there. He puts no, no, though, all the way down on there. Are you aware of any lawsuits, arbitrations pending, threatening of claims effecting the property? No. Are you aware of any judgment, tax liens, mechanic's liens or claims of any other kind effecting the property? No. Are you aware of any lawsuits or arbitrations pending or threatening of claims against any owner that may effect the owners' ability to transfer the title to the property? No. Are you aware of any past lawsuits or arbitrations effecting the real property including any construction defects? No. Have you received any compensation? Goes on; no, no defects.

Additional information on the following pages of that document says, I had been an absentee landowner and have not inspected the property since December 1999. Had to recently convict hostile tenants. There may be further unknown damage to the property. Seller makes no warranty to selling condition as selling property as is.

Doesn't say that it's his ex-wife's

property, doesn't say that at all.

He does file a document. There is a document contained in the defense's exhibits that talks about potential litigation, but look how it's sugar coated. It says potential litigation disclosure April 4th, 2001. It says disclosure confirms the previous verbal discussions prior to entering into the agreement to purchase, dated 3/27/2001, for the above referenced property.

The buyer understands there was a small, small possibility that the subject property may become tied up in a lawsuit filed by the seller's deceased wife's family. First of all, small possibility? It's not even his property. Half of it is. It's not the deceased wife, it's the ex-wife and she is the owner of the other half. There is definitely going to be a lawsuit concerning the property.

Then there is the intent to keep the money. When he sold the property, he didn't immediately tell the estate that the property had been sold pursuant to the divorce decree that he had drafted by his attorney, as an attorney, saying that they would share the proceeds. He has a letter that is attached in there from his attorney indicating that he shouldn't be held to the burden of understanding what a tenancy in common is. I

just find that spurious.

Judge, this person has defrauded not only the bail bondsman, but the entire property system in the State of California and the reason he did that, the reason he filed that sealing is so no one can find it on a title search, so no one can find out, hey, maybe we are going to look a little deeper. Nobody can find the divorce decree.

This whole thing shows a contemplated act where he is defrauding everyone because he is trying to remain out of custody. It's inappropriate, it's a crime, and he should be revoked immediately on it and the Court, it's the position of the State, if we are going to have a continued hearing on this, he should be incarcerated until Monday and held until Monday so we can make a determination. The Supreme Court --

THE COURT: Has there been any problems with the house arrest reporting as far as you know?

MR. LAURENT: There has been no problems with house arrest reporting as far as I know, Judge.

THE COURT: Okay. Thank you.

Mr. Albregts, it's your request. I will continue the matter to Monday at 11 a.m. The house arrest will continue since there's been no violation of the house arrest order and, as of the moment, I will plan to hear the case in Department XVIII for both sides because I will

be hearing civil matters up on the fourth floor in Department XVIII Monday morning. So I would ask counsel to plan to go up there as opposed to Department VII then.

MR. ALBREGTS: Your Honor, in regards to the issue related to the attorney/client privilege and my potential as a witness, given, number one, what I have indicated at the bench my personal situation is the next couple of days and, number two, the fact that the hearing is Monday, I prefer not to file a pleading unless you order me to, but I would certainly provide the Court and CC the District Attorney's Office with case law on things that we would be referring to.

THE COURT: Fine, do whatever you want. Whatever you send to me, just make sure you send it to the State as well.

MR. ALBREGTS: Absolutely.

MR. LAURENT: Judge, with that in mind, since that's the area we are going into on the waiver, might it be prudent to also have the public defender present at that time?

MR. ALBREGTS: For me?

MR. LAURENT: Not for you. I would do it.

MR. ALBREGTS: That's on there, right?

THE REPORTER: That's on there, but I think it's a joke.

THE COURT: I'm not going to tell the defense -- I understand where you are coming from, Mr. Laurent. Let me see what is going on Monday and go from there.

MR. LAURENT: My only concern is we gave the defense ample opportunity to respond. They asked for time. The State didn't object. It was suppose to be on Tuesday. It got kicked again from Tuesday. Now because of the pleadings they have filed waiving the attorney/client privilege, we are talking about privileged communication where potentially we're getting a continuance again. What the State is trying to do, Judge, is to protect the public and to --

THE COURT: Okay, what the Court will do, the Court will ask the Special Public Defender to have someone present here on Monday just in case there's an issue with Mr. Albregts. I'm just going to basically for Mr. Albregts' benefit as well.

MR. LAURENT: I'm not asking to represent Mr. Albregts --

THE COURT: No.

MR. LAURENT: -- just to step forward.

THE COURT: I understand. I will ask my office to contact the Special Public Defender to see if somebody can be here.

THE DEFENDANT: Your Honor, if I can be heard real briefly?

I was served with a subpoena today to appear in a civil case filed by Mr. Shaner's office as a potential witness. We sent a letter saying, of course, I can't be in two places at the same time. I would like the district attorney to know I'll be in further contempt of this case by disobeying a subpoena for Family Court. We are trying to process and quash that and we have not been able to do so. I wanted to make the Court aware of that.

THE COURT: Okay. Well, I expected you here today and I expect you here Monday at 11:00 and we will so advise Family Court.

MR. ALBREGTS: And I neglected to tell you that, Judge, and I sent a letter to Mr. Shaner's office yesterday telling him of the hearing and asking him for a professional courtesy in not going back to court.

THE COURT: I will ask Mr. Shaner's office to make that representation to the Court as well and I will leave it up to the Family Court judge and whatever that judge does, but, sir, I expect you here on Monday at 11 a.m. in Department XVIII.

THE DEFENDANT: Thank you, your Honor.

THE COURT: Thank you.

. . .

(Off the record at 12:35 p.m.)

* * * * * *

ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF PROCEEDINGS.

PATSY K. SMITH, C.C.R. #190

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ALFRED P. CENTOFANTI, III

Defendant.

No. C172534
Dept. No.XIV

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

March 12, 2004
9:30 a.m.
Department XIV

APPEARANCES:
For the State:
MS. BECKY GOETTSCH
Deputy District Attorney

For the Defendant:
MS. ALZORA JACKSON
MR. ALLEN BLOOM
Attorneys-at-Law

Reported by:
Joseph A. D'Amato
Nevada CCR #17

THE COURT: Case C172534, State versus Alfred P. Centofanti, III. Record reflect the presence of the Defendant, his counsel, Mr. Bloom and Ms. Jackson. We have Ms. Goettsch and Mr. Peterson present for the state.

We are assembled here Friday afternoon on the 15th of March -- excuse me -- 12th of March to resolve any pretrial matters that need to be given attention prior our trial starting the 15th, which is Monday.

We discussed some things in chambers.

Counsel, would you care to make a record?

MR. PETERSON: We would.

Judge, I think there are a few housekeeping matters we wanted to take care of. The first one is that there is some recent case law that indicates that a Defendant can subsequently claim that he has not had an offer communicated to him, if one was made.

I'd like to put it on the record before start of trial in this case -- and I understand it's not much of an offer that Mr. Bloom or I believe the Defendant is inclined to accept, but I simply need to make a record of it so it can't be claimed that it was not known about.

The offer in this case -- the Defendant is charged with First Degree Murder with use of deadly weapon through an Open Murder theory.

If convicted of First Degree Murder, he

could face conviction of a category A felony and use of deadly weapon would be an equal consecutive term. Those terms are either a term of 20 to 50, 20 to life or life without the possibility of parole with of course an equal and consecutive term.

The offer we've made in this case is to plead guilty to First Degree Murder with use and stipulate to a sentence of life with the possibility of parole which would be a 20 to life, plus a 20 to life consecutive, just for the record.

THE COURT: All right. Mr. Bloom, you are aware?

MR. BLOOM: I am aware, Your Honor. I've conveyed that offer to my client, such as it is described as an offer, and we reject that offer.

THE COURT: All right.

MR. BLOOM: We've made a reasonable offer in return and the people have not accepted.

THE COURT: Do you want to make a record of what you've offered?

MR. BLOOM: No. We don't have to make a record.

THE COURT: Mr. Centofanti, you are aware of what's been discussed here now?

THE DEFENDANT: Yes, Your Honor.

THE COURT: One thing I want to add -- and I mentioned this to your attorney and to the State -- is that my policy -- and it's an absolute policy in this Court -- is that a negotiation can be entered into up until we begin the jury impaneling process. This will be 1:30 Monday or thereabouts.

Once I begin impaneling a jury the only negotiation that can be accepted is a plea straight up to the charges.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: This precludes -- and there is a good reason behind it and I won't go into all the thinking -- this precludes us wasting all of the time of going halfway through a trial and all of a sudden people want to stop and what they should have done two weeks ago now they are ready to do and we waste a lot of time.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: Go ahead.

MR. PETERSON: Another matter raised orally prior to a trial, the State made a request that the Court canvass Mr. Centofanti and ask if he has authorized his attorney to concede that he was the shooter in this case.

The reason being that I have stated that is

they are raising a self-defense claim. A self-defense claim does, by necessity, admit one of the elements of the offense that the State would otherwise have to prove which is the Defendant is the person who shot the victim.

I don't expect this to be problematic.

The difficulty is that if his attorney proceeds with a self-defense theory during trial we are essentially sort of leaving a mistrial in the hands of the defendant to subsequently testify later differently which would perhaps result in a mistrial.

I have raised the matter with Mr. Bloom, I think in chambers. He said he didn't have an opposition to the matter.

We're not asking him how much are you going to focus on self-defense, just simply ask the question do you authorize your attorney to concede that he is the shooter in this case?

THE COURT: And do you understand that, Mr. Centofanti?

THE DEFENDANT: Could I have a moment to confer with my counsel, Your Honor?

THE COURT: Go right ahead

(DISCUSSION OFF THE RECORD)

MR. BLOOM: Your Honor, I didn't get a chance to speak to my client regarding this issue. I told

you about that in chambers.

My position was -- and I'll state for the record what we talked about in chambers -- my position was the people have absolutely no right to make this request.

In fact now as I think about it I think they made the request in front of Judge Gibbons and it might not have been allowed.

It might not, having presumed on one way or another. I wasn't going to object. However, I want a few few moments to be able to talk to my client.

I'd defer this for a few moments until the end of the days calendar and give us a few moments outside. We have other things to do. I would like to do that.

THE COURT: I don't think I could reasonably preclude you from talking to your client before he makes a decision. We'll put this in abeyance.

MR. PETERSON: In addition, judge, to that matter it was raised orally by Mr. Laurent before Judge Gibbons and it was not ruled on, as several other of these housekeeping matters weren't, because the trial had been continued.

The next matter we brought up is there was a pending unruled on request by the State to have the father and mother of the Defendant who will be called by the

State in our Case in Chief be considered adverse witnesses under the statute.

The statute doesn't require showing of hostility. It requires that they be considered to be identified with the party.

In this case clearly they are identified with Mr. Centofanti.

We filed this request in advance of trial simply because we didn't want to have to in the middle of trial, should the direct go problematically, and there is a request in front the jury making a big deal about having the judge declare them adverse witnesses.

I think we came to an interim resolution that we would try our best to do a traditional direct examination, once it became problematic. We've now advised the Court of the matter. We can just approach the bench and address it further at that time.

THE COURT: That was our discussion.

Do you concur in that, Mr. Bloom?

MR. BLOOM: I do.

THE COURT: Very good.

MR. PETERSON: I think we also submitted potential Voir Dire questions to the Court. We had discussions about it.

The State understands the Court is going to

ask several of the questions we proposed, particularly regarding domestic violence. The State has every confidence in the way the Court will craft those questions.

In addition, I believe there was a request that the court ask the jury regarding the photos that may be seen in the case as well as whether or not the jury has any prejudice against lawyers, in general, with the Defendant being a lawyer.

The State doesn't have an objection to those questions other than to simply state we would ask the Court to ask the question regarding photos in a neutral term and not I guess say gorey photos, but simply say you will be seeing photographs of the decedant in that case or in this case, terms along those lines.

Other than that, we've done that in chambers.

THE COURT: Do you concur in that as well, counsel?

MR. BLOOM: I do.

I would have a very slight difference in terms of that. To make it clear, as the defense we requested the Court conduct some Voir Dire regarding what I would call the graphic photographs in this case to ensure that the jury does not allow their motions to

overcome their objectivity in terms of looking at very graphic photos.

And secondly, to ask the Court to Voir Dire the jury with regards to the fact that my client is an attorney and to make sure that the jurors are -- how do I put this -- without getting too graphic myself -- that they are not so angry at lawyers that they would allow his profession to somehow impact on their thinking.

I had also asked the Court to make sure to emphasize in this case that the Court will convey to the jurors that there's no right or wrong answers here. Sometimes people like chocolate; sometimes they like vanilla and there's no right or wrong about it as long as they tell us what their real feelings are.

THE COURT: That's correct.

Anything else, procedurally?

MR. BLOOM: There is one thing before we get to today's motions. The people and I have put on the record something that the State and the defense has entered into an agreement with regard.

One of the experts the defense expects to call in this case is Doctor Glenn Lipsin. Doctor Lipsin is a psychologist and he did, at a point a long time ago, examine and interview my client.

He is going to be called in this trial, but

nothing of his testimony will be based in any part upon his interview of my client or anything having to to with that. He's going to testify generically as to human factors as to heightend awareness and heightened fear.

He happens to have been the psychologist who treated many of the law enforcement personnel who responded to the San Ysidro matter at a McDonalds several years ago down at the border south of San Diego.

There was a terrible shooting and a lot of law enforcement came there and he observed how, afterwards, how they kind of like had a post traumatic situation as time went on afterwards, a very heightend awareness and caution, having faced that very traumatic factor.

That in this case has relevance because we have a response, from the Defense point of view, a response on December 20th very much based upon the incident on December 5th.

I don't just mean a domestic violence incident of being hit in the head by a picture frame which caused a cut and caused her to be arrested.

I'm talking about from the defense point of view and what will come out in this case is my client's statement that Virginia had a gun and pulled the trigger and but for the fact she didn't know how to properly load

it he would be dead.

That had the traumatic influence on the behavior he took and so forth. That's the general purpose.

The State has agreed that unless I open the door for the -- or the doctor opens the door in some fashion as to getting into anything having to do with the contact that he specifically had with my client, if he doesn't do that, that they are not going to attempt to get into any of that contact and background.

If we somehow make a mistake and open that up, which I'm sure we will not, but if somehow we do, then it becomes fair game, but we're not going to. He, in effect, now will be testifying having nothing to do with examining my client, just in this generic way.

MR. PETERSON: That is an agreement, but there was one additional caveat with that. Normally when the defense calls an expert who has not spoken with the Defendant I get to do a cross-examination something like this.

Well, you're just telling us today about these experiences, in general. You've never actually interviewed the defendant in this case, have you?

In this case I'm sort of not allowed, in a sense, to make that, do that cross-examination, because he

has in fact interviewed Mr. Centofanti.

I indicated to Mr. Bloom my cross-examination would, I think, be impermissibly hindered by their choice and I think we came to a generalized understanding which was in this case you have in fact interviewed Mr. Centofanti.

However, you are not testifying today based on any of that information.

And I'm going to attempt to establish that, that he has in fact spoken with Mr. Centofanti and has not and is not testifying today based on that and that the decision was not his to do so, because I think --

MR. BLOOM: What decision?

MR. PETERSON: He is not in control of whether or not he can talk about the interview with Mr. Centofanti.

MR. BLOOM: Well, that part we didn't discuss. The first part we did discuss, that they have every right to ask the question, something along the lines of you're not basing anything about getting any information from the client or anything like that or the question, as he said, you've talked to him, but this has nothing to do with your conversation.

I don't think it would be proper to, in any way, go beyond that and start talking about he is not in

charge of whether he talks about or doesn't talk about it.

MR. PETERSON: I'll agree with that.

THE COURT: Now, there's something I think that underscores all of this. As I understand it, Mr. Bloom, your Dr. Lipsin would not take the witness stand and testify, given all his experience and expertise, how the circumstances in this case unfolded or how this man was affected or how this man's mind might have been changed or affected; am I correct?

MR. BLOOM: You're absolutely correct.

I will never ask my experts to go into the deliberation room and give their opinion as to anything. They will speak about the human factors that go into that, speak about it in a generic sense.

It has a foundation because it's a hypothetical in terms of foundational facts are there. I do not ask any experts the question of so is he guilty or something or anything like that.

THE COURT: You would be surprised how many times I've experienced that, something similar to that, but I appreciate that.

MR. PETERSON: We have the two recently filed motions by the State that came up as a result of discussions with Mr. Bloom where, if he and I couldn't work out an acceptable solution, we would bring it by

motion to the Court.

That is a Motion in Limine to admit evidence regarding the victim's state of mind and additionally there is another Motion in Limine to preclude drug use and an alleged prior violence, unless and until Defendant testifies he was aware of such violence.

If I could have a moment to ask Mr. Bloom a question, judge.

Judge, I've spoken with Mr. Bloom and I think in an abundance of caution as a prosecutor I'm going to withdraw a part of the latter motion which is In Limine precluding evidence regarding the victim's alleged prior drug use.

What I believe to be true I just confirmed with Mr. Bloom and that is that his client will say this alleged prior drug use went to his state of mind in determining his need to use self-defense.

Now, we're comfortable with that, because the evidence will be -- I think that any of this alleged drug use is very remote and that on the night in question the toxicology screen shows there were no drugs in her system, no alcohol in her system.

We're simply seeking to omit bad character regarding drug use that the Defendant did not know of and use this in his alleged formulation of his self-defense.

So I'm trying to be cautious.

The case law says it only goes as to violence, but I don't want an appellate issue on what I perceive to be a clean trial.

MR. BLOOM: That's correct.

Even in chambers when we were here a week ago and all of us thrashed out this situation, the Court -- we apprised the Court that part of the reason why my client did what he did and part of the things that caused him to be fearful of his ex-wife was his belief as to her violence and how that played with explosiveness when she was using drugs.

He became aware of that, for example, when he was told by the plastic surgeon that when they were doing a nose job her nose had been deteriorated because of the ingestion of so much drugs it caused holes in the septum.

We knew that was of December 20. It was part of his thinking, part of his fear as to what was going on. I don't disagree with the people's toxicology conclusion.

As it turns out, she did not at that time have anything in her system, but the factors -- to the extent he knew about it, these factors today are relevant and --

THE COURT: Let me see.

MR. PETERSON: I have one concern.

I still think I would object to to the doctor relating evidence regarding drug use to the Defendant. If there are specific incidents of drug use he's aware of, that's one thing, but a doctor's summary conclusion in discussion to the Defendant I don't think is the type of character evidence that we're talking about.

If he has other instances of drug use that the Defendant has observed or is aware of, that we're withdrawing our objection to.

We would still make an objection to a doctor's sort of statement to Mr. Centofanti about well, I'm going to have problems with the nose job because of drug use.

That we do have a problem with. If he has other evidence of drug use, that we're withdrawing our objection to.

MR. BLOOM: With regard to that particular point, that is one of the things he knows about. That's -- that puts it into the reliability part of what the people can say and what they know.

What it would be improbable to do is attack when my client says, I knew this about it, by saying it never really happened, did it? You never got that

information about the drug use?

You never had any idea about the violence?

He says, yes, I did.

Then the people say well, where is the evidence that supports it? That's why the law allows the defense to present that.

In this case the reason why that came to his attention was because the doctor in fact informed him of that, then he talked to Virginia and then it got confirmed in that way.

THE COURT: She admitted it?

MR. BLOOM: Sure, sure.

THE COURT: Mr. Peterson, I don't know it matters how we get into the subject, if she admitted it.

MR. PETERSON: Judge --

MR. BLOOM: It's -- my point is that it wasn't just out of the clear blue she said by the way, Mr. Centofanti, my husband, I use drugs at this time.

You know, the reliability of it, the veracity, the credibility that goes to it was the consequence of how it came about. It came about because she was going to have a nose job and then the doctor did the examination and told my client there is a problem here. One of the problems is that the holes in there have to do with the problem in the nose.

He talked to her about it. That puts the context and that adds the truth to it. That makes it -- it is the truth and that explains it. I think it's important to present that.

Do I expect to call this physician or anything else to do that? No.

In this case I'm not going to be following it up with that sort of thing. I don't think we're talking about an undue amount of time to deal with that.

MR. PETERSON: Is your client intending to say that he was told that by a doctor?

MR. BLOOM: Yes.

THE COURT: Is he going to testify?

MR. BLOOM: Yes.

MR. PETERSON: To establish self-defense, I think he's going to have to testify.

THE COURT: I'm not prepared to tell him he has to do anything.

MR. PETERSON: In my evaluation of how it's going to go, I still do have a problem with this doctor's testimony.

I may actually have a problem with Gina's statement to him about doing drugs. I think what the evidence code talks about is opinion or reputation evidence concerning a trait of character, which would be

he can say yes, I knew her to use drugs.

He can say that, and there's specific instances of conduct which are only admissible if he knows about specific instances of conduct. I have an objection to him stating I learned that she had previously used drugs, but, you know, I think that's where we're at.

MR. BLOOM: Your establishing the specific instance of conduct and if she admits to having done it that goes to his state of mind of why he knew it to be so.

THE COURT: That's one of the things we need to discuss. As I understand it, there's going to be various occasions where testimony is going to be sought as to what the victim said, whether she's afraid of this man, things like that, to show state of mind.

The same thing in reverse. What's his understanding of her situation by virtue of her declarations?

She is not available obviously. The same problem applies. There's no way to cross-examine. I think that the Court may well allow some latitude on both sides of that issue.

MR. PETERSON: I don't have a problem with the court allowing some latitude on that. We wanted our issue for the record.

My problem primarily is with this story of I

was told by a doctor issue. In none of the documents we've seen does the doctor document that there is some problem as a result of drug use.

MR. BLOOM: Three days ago I got from Dr. Sessions who did the rhinoplasty, the plastic surgeon, I received a -- the handwritten notes. I was going to ask Becky.

I have them. They are very cryptic. There's a lot of stuff. She had breast augmentation and other things that were done. Mostly they deal with that. The rhinoplasty has that note.

I wasn't going to call Dr. Sessions to come in to present it. I will give that to you. It shows the perforated septum.

MR. PETERSON: I'll review that and we may raise it at a later date, with the Court's permission.

THE COURT: Let's indicate as things stand assuming, as an officer of the Court your representation satisfies Mr. Peterson and Ms. Goettsch, that there is a basis for the allegation that the doctor did explain there was this problem with the nose, then I'm going to allow it because it tends to give credence to, as you say, Mr. Bloom, why this young man thought what he thought or asked what he asked of her.

It didn't come out of the blue. That makes

a certain amount of sense.

There's one question I have here.

What kind of narcotics or drugs are we talking about here, in total?

MR. BLOOM: Okay. I'll tell you what I think the evidence will show in this situation. It's going to show a long-term use of crystal methamphetamine at a time period which is very remote or pretty remote. It's like seven, eight years.

It's going to show a use of alcohol, both recent and remote. It's going to show a use of some fairly recent use of painkiller and ephedra, to the extent that's going to come in.

That's the extent of the drugs.

I will concede and I'm never going to infer that there's any -- there's any evidence that at the time of her death that these substances were present. I mean, I don't have the evidence.

There is limits to what testing they can do. A lot of these drugs do go away. You can have the residue and it can be in there, but I'm not going to concede it's never been used, but -- and there is a limit to the expertise that can be presented here.

A doctor or a lab person may say this shows nothing was in there now, but I can't -- this test goes

back 48 hours or something. I can't tell you what happened before then.

In terms of what's in there now I don't have any evidence to show at the time of her death there were these substances there.

THE COURT: What was the pain killer; do you know?

MR. BLOOM: It's in the records.

I know it had to do with when she got the medication. I think it was vicodin. I don't know. I can't remember.

It had to do with wisdom teeth impactions relative recent to this.

THE COURT: A question I have here is what does this drug usage, either remote or more recent, have to do with her propensity for violence and more importantly the defendant's belief that she was violent?

MR. PETERSON: That's what led us to raise this motion in the first place is the remoteness and the sort of tenuous connection.

I'm sure Mr. Bloom --

THE COURT: Let me overstate the situation and we can work back from there. As probably all of us in this room know, sherm sticks, PCP, all these things we come in contact with cause a violent reaction.

Sometimes these people are on PCP. It takes four or five policemen to subdue them. I've heard of no evidence that what this young lady had been taking, taking recently or anything or at anytime the Defendant would observe her would cause her to be violent.

Methamphetamine, frankly I don't know. I've seen a lot of crazy things happen on methamphetamine. I don't know the answer to that.

We've got this remoteness issue. To some extent, it is seven or eight years.

How would that cause the victim's husband to think that seven or eight years ago she used methamphetamine extensively evidently and now she's going to be more violent?

Then the more recent things, whatever the the pain killer is, ephedra, I don't know if that has anything to do with a propensity for violence. There has to be that connection.

We can't paint her as a drug addict. By the way, I was a little concerned she might be violent because she used these drugs.

MR. BLOOM: Those are very fair questions. I asked them myself and after I have reviewed the extensive evidence that has to do with Mrs. Centofanti -- are we going to refer to her as Eisenman or Centofanti --

I don't know -- Virginia Centofanti.

THE COURT: I think, offhand -- this isn't a ruling -- I think we might stick with Centofanti.

MR. BLOOM: Her name is Virginia Ramos Eisenman Centofanti, at various stages. I have -- this woman had an enormous -- I would say a very extensive violent history. My client became aware of all of it.

It's a history -- and I didn't bring it today, but it's a history which is some three, four inches thick of probation reports and police reports, and this is a woman who committed a number of violent acts and almost all of it was related to drug use.

It was always while she was to some degree under the influence either of alcohol or crystal. The violence was quite excessive.

She attempted to run somebody over and the victim of that is coming to Court. In fact, when he was one of the people I was in Court with yesterday in San Diego he had such a fear of coming to Court, the fear that he had of being run over caused him considerable concern even coming now.

He didn't want to make waves. The family still lives up there. It was a palpable thing. I didn't bring this up. He brought it up.

I didn't believe it was an excuse to have to

avoid coming to Las Vegas.

Do I really have to go? Apparently the violence was quite considerable. She tried to run him down with a car.

Two hours later a crossing guard was walking down the street. She tried to steal the crossing guard's chair and when the crossing guard said what are you doing she took the chair and tried to beat the crossing guard with it.

Later that evening when she was arrested -- and by the way, every one of these people are coming in to testify -- when she tried to -- started to be arrested, Gary Floyd, a sherrif's officer in San Diego, tried to arrest her and she was so violent in attempting to avoid the arrest he ended up breaking her arm.

He said she was the most violent person he's ever seen. Two days later she was seen in juvenile hall. She was a juvenile at that time, 17, 16.

MR. PETERSON: Fifteen.

MR. BLOOM: I know her record went until she was 16, but in any event, she was so violent that she was seen clubbing a girl with the cast that was put on her as a result of the arm having been broken.

She's a violent person.

Now, there have been other instances after

that of her extreme violence.

THE COURT: Let me stop you there.

MR. BLOOM: All related to drugs.

THE COURT: That's the kicker here.

I want to talk about drugs. I understand there's an allegation for violence. What we need to connect is your client's fear of her propensity of violence exacerbated by drugs.

MR. BLOOM: That's exactly right.

THE COURT: That is what I'm trying to look for.

MR. BLOOM: That's exactly what the situation was. He -- my client's fear was of her explosiveness and unpredictability, how violent she becomes during the use of drugs.

He had seen himself her recent use of the drugs. He had known of --

THE COURT: Let's stay with the older incident and we'll come forward.

MR. BLOOM: The older stuff.

THE COURT: Was your client aware of this running down of a person in the street using methamphetamine?

MR. BLOOM: Yes, but not when they first met.

By the time the divorce came about -- it came actually about in some respects from a variety of sources, including Mrs. Centofanti's own family who tried to keep them apart saying they couldn't get together.

Did you know about it? They would bring it up and she would talk to them and Virginia would say that was a long time ago. Yes, that happened.

THE COURT: In other words, her family told him about these instances?

MR. BLOOM: Yes.

She would confirm it and he found out about it that way. Over the course of their relationship it was a very happy time. It started off very much -- this wasn't somebody that they met in some sort of domestic violence class where they were going to therapy or something.

They met at a happy time. Things were good. They had a courting period. Things were wonderful. They got married, had a child. He very much wanted the child, but things --

MR. PETERSON: I can cut this really short.

We're withdrawing our motion, because I cannot wait to hear a grown man in Court say he was afraid of this diminutive, unarmed woman because of something he knew about from when she was 15 years old.

Our Supreme Court has reversed cases with some frequency in self-defense situations where the State tries to prohibit evidence.

I don't want to prohibit it. I say bring it. If he wants to tell a jury -- if that man wants to look a jury in the eye and say I was afraid because of that, if they don't laugh him out of court I'm certainly going to talk about it in closing argument.

I don't object to it.

I know the Court is in a quandry about this drug matter. I think they have tried to tie it and as long -- and this is the one part of the motion that we're still sticking with is this: As long as the Defendant gets up and actually says that he was aware of those things and they went to his decision of self-defense, that then they are admissible.

If he never does that I may make a motion to strike it or take other action. Presuming he says that, which counsel has said over and over he will say, I don't want to fight its admissibility.

Frankly, I can't see a Nevada jury believing for a moment that any of that can make a grown man afraid.

MR. BLOOM: I can see a Nevada jury doing just that. I'm glad we agree with the state in this regard. It was very much in my client's mind.

These are the fears he had, especially then when it manifested on December 5th, that incident of domestic violence where it all exploded.

By the way, it was on the night of the 4th that she came home just absolutely sloshed drunk and still next morning shaking that off when that big violence happened on the 5th.

THE COURT: As a procedural matter how much of this will be set out by independent witnesses?

Can we sort of agree that, yes, the family told him this on a certain date about the methamphetamine and the crossing guard or are we going to have to bring all these people in here and go through this?

MR. PETERSON: His client will have to testify to that, obviously to establish it. I may, in rebuttal, call the family members to say no, that's not exactly what we told him, to the extent he says something different than what they will say.

We're certainly not bringing --

MS. GOETTSCH: We might have one family member.

MR. PETERSON: -- in our Case in Chief. We're not going to call her regarding that stuff.

THE COURT: My concern is we'll have a trial going back to when she was 15. We'll have a little trial

there on that issue.

MR. PETERSON: The unfortunate reality is that in Dorian Daniel our Supreme Court has said if the evidence goes to self-defense he has a right to try to corroborate.

In Dorian Daniel the Court did make the following observation, which I wanted to quote for the court. Of course, even specific acts of conduct can be limited by the Court.

Evidence of a victim's specific acts is limited to the purpose of establishing what the Defendant believed about the character of the victim. The trial court should exercise care that the evidence of acts of violence of victim not be allowed to extend to the point that it is being offered to prove the victim acted in conformity with those character traits or tendency.

There's some limit. He certainly should be allowed to corroborate it or at least that's what the case law says.

THE COURT: How many witnesses on the issue of your list of witnesses? How many are going to testify to this?

Do you know, offhand?

MR. BLOOM: Six, seven. Lot of violence.

THE COURT: Are you talking about violence

and the drug use combined?

MR. BLOOM: I think the total is about six or seven. She had a number of incidents and we have -- I think basically what we have is a victim for each; I believe independent witness for each and a police officer for each.

I think that's what.

MS. GOETTSCH: That means there's two. From the discovery I have there's two.

MR. PETERSON: There's two instances of violence. I think we're getting a little cumulative when we're corroborating one event with three witnesses.

We'll perhaps revisit that at a later time. To our knowledge, there are two instances of violence.

MR. BLOOM: She was charged with attempted murder five different crimes, assault by force likely to produce great bodily injury, two separate incidents.

Officer Gary Floyd was the officer who did the arrest. She was charged with resisting arrest but there was violence as part of that. Those are --

THE COURT: We have three.

MR. BLOOM: -- separate instances. There was also a simple battery that was beforehand.

THE COURT: Excuse me. What was that?

MR. BLOOM: A simple battery.

She had things -- what the people are concerned with, she had a history that involved taking an auto. I'm not going to present any of that.

THE COURT: As to violence you said simple battery. What were you referring to?

MR. BLOOM: I can't remember if they charged her for clubbing that person.

THE COURT: With the cast?

MR. BLOOM: But that's part of the same arrest, part of the same reports. The people can call it one incident, but these are acts of violence.

THE COURT: Excuse me?

MR. BLOOM: I have a total of six witnesses that will deal with these issues altogether, judge. There might be seven, but I think it's six.

MR. PETERSON: In any event, I would ask the Court to at least do this: We should not be referring to charging of a juvenile or proceedings. We can talk about the events themselves, but as far as alleged criminal prosecutions of a juvenile, it's the acts that would allegedly give the defendant, a grown man, this fear, not the charging of a juvenile.

At the very least, we should restrict that.

MR. BLOOM: Juvenile or adult, I totally agree with that. I think it's the acts, but I believe we

get to go into the acts in as much detail as we need to.

THE COURT: To the extent your client is aware of the acts; is that correct?

MR. BLOOM: Obviously only to that extent.

THE COURT: As I read the applicable law here what we're looking at here is people being called that can testify as to her reputation in the community for violence.

MR. BLOOM: They are going to be eye witnesses to it.

THE COURT: That's one category, her reputation.

Then the very blanket question are you aware or were you aware of the victim?

Yes.

Did you know her?

Yes.

She lived in what community?

Yes.

Did she have a reputation to be violent?

Yes, or whatever.

Is that what you're going to inquire?

MR. BLOOM: No.

MR. PETERSON: He wants to do specific acts.

THE COURT: If we're going to do specific

acts we're talking about what he knows. I don't know the answer to these questions, how much of this he knew about.

All the things you just related, the hitting of the person with the cast, struggle with the officer, did your client know of these --

MR. BLOOM: Yes.

THE COURT: -- things?

MR. BLOOM: Yes.

As this progressed, as the courting turned into a relationship, as the relationship turned into romance and then as the romance turned into a marriage, at various times as things would come up throughout that process the family would interject information and he would say come on, that didn't really happen.

He would talk to Virginia and Virginia would tell him yes, that really did happen, but that was a long time ago. That's when I was in the gang back then and I was doing this and I was in that. I'm not there any more.

She had a tatoo, a moniker. She's a gang member, Fly Girl. They talked about the removal of the tatoo. She didn't want to have the gang tatoos anymore.

THE COURT: Let me stop you just a moment. I want to inquire.

This material or information that was related to your client by the family, was this during the

courtship or after marriage?

MR. BLOOM: I think both.

THE COURT: But all prior to the 5th of December?

MR. BLOOM: Absolutely.

THE COURT: This question --

MR. BLOOM: Before the 20th of December and before the 5th of December, yes.

THE COURT: -- this question of a gang, now, you know, going over this, a lot of things could be called a gang.

Does a person's membership in a gang mean they are violent, necessarily? What gang was it?

MR. BLOOM: It's the Southside Gang in Escondido, California. It's so well documented in the materials that she was a member of this gang.

One of the incidents of her trying to run over somebody was because she was angry and saw a rival gang member and got out of the car and started to beat that rival gang member. That's so documented in the reports.

I wasn't going to bring a gang expert to come in and talk about violence of gangs. I was simply going to allow those specific incidents to come in. That's very much a fabric of my client's thinking.

He knows about that for a number of reasons. He found out about it in a variety of ways. The removal of the gang tatoos, that's one of the reasons they went to a plastic surgeon.

She wanted to have that done. He finds out about the drugs, the hole in the nose, et cetera.

THE COURT: Let me ask counsel for the prosecution is there a connection in your judgement between the gang and the propensity of violence?

MR. PETERSON: I believe he will claim it officially to make it admissible. That is what I believe.

I believe a murder defendant will make that claim when he takes the witness stand sufficient to make it admissible and for that reason I'm presuming under that theory it will be. If he does something different on the witness stand, we might revisit it.

At this point I'm willing to believe this merely is going to come up. We may talk about how much we limit it, but Daniel says they have the right to corroborate his belief, but it shouldn't become sort of a character assassination trial of the victim.

He does have a right to corroborate his client's belief and as I stated to the Court before, if that's going to be his claim I'm happy to hear it.

That's why we're withdrawing our objection.

My belief was he would attempt to tie this drug use to his client's alleged belief she would be violent towards him despite the the fact it's 15 years ago and she's the mother of his four-month old baby and he loved her enough to marry her.

I'm looking forward to hearing that claim.

THE COURT: What else?

MR. PETERSON: That ends it.

MR. BLOOM: May I approach and give you my copy of this motion?

THE COURT: Yes.

MR. BLOOM: Thank you.

I responded to both issues. I'm prepared to argue the issue with regards to the admission of her state of mind or the victim's state of mind information.

MR. PETERSON: For the court's information, a part of the state of mind issue has already been addressed by Judge Gibbons when the prior bad acts ruling was ruled on.

Judge Gibbons ruled that the individual's statements regarding the domestic violence incident on the 5th are admissible in state of mind as they go to that incident.

What I'm talking about are other issues such as the victim's fear or lack of fear, because as the case

law indicates the question for the jury in a self-defense case is to determine who is the likely agressor, in addition to other issues such such as was she even armed?

They have to decide who was the likely aggressor. The cases indicate that in a case of self-defense the state of mind of the victim is a relevant issue as to whether or not she fears him or does not, whether she's ready to move on with her life or is not so the jury can determine whether or not who was the actual aggressor in a self-defense case.

The Schultz Case [phonetic] I cited talks about a case where the Court held out such evidence because they noted it was not a self-defense case. In a self-defense case material like that is admissible.

Similarly in the recent Tabish and Murphy appeal our court reaffirmed Schultz and a case called Brown in a footnote talking about how state of mind evidence is -- overcomes almost any prejudice in a case where self-defense is raised.

Obviously, we'll do what wasn't done in Tabish which is ask the Court for an instruction to say your receiving these statements from the victim is just to determine the matter of self-defense and who was the likely agressor.

And that is our motion.

We're asking for that merely because we intend to refer to a couple of those quotes from the victim in our opening and we wouldn't want to create a mistrial by mentioning them and have them not be admissible in a situation where we believe the case law clearly indicates these types of statements are admissible.

I should point out this: One, the defense has made these admissible by raising a self-defense claim and two, the defense has made the witness unavailable by his actions murdering her.

I think those are sort of important matters to keep in mind when ruling on the topic.

THE COURT: What quotes are we talking about?

MR. BLOOM: That that should be the starting point. That I would not know right now. The motion doesn't say what quotes and from what sources these are coming.

MR. PETERSON: I haven't made an exhaustive list. I don't expect it to be lengthy, but just to simply say I'm going over to pick up the baby from Chip. It should be okay because his mom and dad are there.

For example, she says that to Tricia Miller the night of the actual crime. The Court -- Judge Gibbons

already made rulings regarding her statements regarding the incident of the 5th are admissible.

May I consult with Ms. Goettsch?

I can't recall what other direct statements regarding the 5th would be -- yes. There are comments she makes regarding she is intending to get a divorce -- she says this to other persons -- that she is expecting to move on with her life, to show that she is not acrimonious over this divorce, there is -- for on the night in question, she is not going over there to kill him over this divorce.

She's not the one that's mad. The jury needs to understand that state of mind.

MS. GOETTSCH: Something else is that the time period between the domestic violence and the divorce, she made comments to people about you know what? I just want out of here. I just want out of this marriage. I don't care. He can have the house. The baby, I'll get custody. I'll worry about custody of Nicholas later. I need to get out of here and move on with my life.

She is not angry. Not like I can't believe he's leaving me. I can't believe he has custody of my baby that.

It wasn't her state of mind. It's not likely she would have been the aggressor when she went

over to visit him or visit the baby on the 20th of December, comments like that.

That's not exhaustive.

MR. PETERSON: That's the type of evidence that the case law indicates is the type of evidence that's admissible to state of mind, which is an issue that the defendant has made relevant by his choice of defense.

That's our sort of proffer to the Court.

THE COURT: All right. Mr. Bloom?

MR. BLOOM: I don't think we can do this in a vacuum, because I'm going to now outline what I think the state of the law is regarding the admissibility of such type statements, but I have to do it in a generic way because the people haven't given me enough information or the Court to know -- to answer the questions as to each of them. Here is what the defense position is.

One: Judge, Judge Gibbons' ruling did not allow for her statements regarding her fear. Her statements regarding what happened on December 5th was allowed in.

He had the gun and held it on me. That's one of the statements that she makes.

He says she had the gun and she held it on him. Both those statements can come in.

My view is that at no time did Judge Gibbons

say with regard to the December 5th incident that she could then say I'm fearful of him. He threatened to kill me. He threatened to kill the kid, stuff like that.

At no time do I believe Judge Gibbons ruling ever --

MR. PETERSON: I'll look at transcript of that. I don't believe that's correct. There is another quote. In speaking with Ms. Goettsch --

MS. GOETTSCH: On the hearing I do remember the part of the hearing was that not only was it state of mind, but a lot of that was admissible because of excited utterance.

We had an entire Petrocelli Hearing on that and the the officers testified about her demeanor when it happened, all of that regarding the December 5th incident.

Judge Gibbons ruled that it's not only admissible as state of mind, but it's also an excited utterance.

Anything around the time where she's under the influence of the December 5th incident was ruled as admissible to not only state of mind, but excited utterance.

He also made the ruling that anything that the defendant said at that time is probably admissible as well, even though it's the defendant soliciting his own

self-serving statements.

That was the ruling from the Petrocelli Hearing.

It's not just state of mind. It is excited utterance as well for December 5th.

MR. BLOOM: With regards to that I'm lucky to have co-counsel present who advises me of a case I have yet to have a chance to review. I would invite the Court to consider the Crawford case.

I understand it came down only very recently, perhaps yesterday. It may have shed some light as to whether or not these matters can be considered and called excited utterances. I'll have to review that and I haven't done it.

My sense is somewhat different than Ms. Goettsch. I'm not saying -- I don't -- I try to make a difference between when I absolutely know something, I'm certain of it, because I have a clear recollection as when I'm not.

My recollection is it wasn't as Ms. Goettsch talked about. I believe there was a distinction between the fact of Judge Gibbons saying he could -- that both sides will be able to talk about what everybody says about the December 5th incident, meaning it's -- a Petrocelli Hearing definitely was held for the purpose of whether or

not that's admissible.

In my view of my recollection -- we have the Petrocelli Hearing, we can review it. My recollection is saying that her statement afterwards was admissible, because --

THE COURT: After what?

MR. BLOOM: After the incident she wrote out a statement, not just something to the police officers, but this statement about he was going to kill me and the kid. He said he would kill me and the kid and himself.

To me, all that is hearsay, of course, has to have a foundation of an indicia of reliability. The confrontation clause of the United States Constitution says you should have the right to cross-examine someone who is presenting against you.

The people say they are not going to attempt to move -- the State says they will not attempt to move this document in.

MS. GOETTSCH: Will somebody testify to that, that yes, this is what she told me?

I'm not marking it State's exhibit A here.

MR. BLOOM: Whether it comes in written form or comes in -- my point of reliability goes to the fact that at the time she made such a statement she was being charged. She was being prosecuted.

She has an enormous motive. Maybe charged is the wrong word. She was being arrested for this incident.

THE COURT: Is not this arrest of the victim part of the excited utterance, what was said during the arrest?

Was that Judge Gibbons' determination or not?

MS. GOETTSCH: Yes.

MR. BLOOM: I don't think he made a determination that the statement was part of that. If I'm wrong --

THE COURT: We'll look at it.

MR. BLOOM: That's the one thing that's important to me.

Indicia of reliability is very important. For example, every one of the cases that the people cite -- and they are all in front of me here -- it's on page three of their motion, some -- it's on page three of lines 15 through 26.

This is the motion that's entitled Motion in Limine to admit evidence regarding the victim's state of mind.

Lines 15 through 26 is a string cite.

THE COURT: What page?

MR. BLOOM: Page three. It starts at paragraph -- it says recently, in Tabish versus State --

MR. PETERSON: For the record, that string cite is from United States versus Brown.

MR. BLOOM: They cite Tabish and Brown and then a variety of cases that follow. Amley [phonetic] And Finch and Livingstone and Spencer and Uhaas [phonetic]. Most of them happen to be California cases.

In every one of those cases there was an indicia of reliability. One case talked about a lady who the night -- it was a man -- who the night before called this lawyer and said if I happen to be killed tomorrow, take so and so out of the will, because I think it was her that did it.

At that time there was no prosecution against him. He was not being arrested. Indicia of reliability was there. I looked at every one of those cases and every one of them has that indicia of reliability.

I suggest the threshhold thing we have to do with regard to any statement is whether or not it was made at a time when it would have been self-serving trying to somehow assist her.

We have to have the statements, first, in order to make that determination. That's the starting

point. The State's motion has not talked about that. I believe that to be the starting point.

If there's an indicia of reliability, then you get to this question of relevance versus prejudice. You evaluate and do that balancing.

Cases have turned about, some cases have been reversed when it's been determined that the prejudice is too great. If the Court then determines that relevance exceeds prejudice, then there must be a limiting instruction and the instruction must be very precise.

For example, I suggest if we even get the that point it must include a statement that the jury should consider if the statement was made at a time when she was motivated to manufacture a defense to a possible criminal charge.

THE COURT: Where did that come from?

MR. BLOOM: Comes from the language of these cases.

THE COURT: Is there a case that embraces that particular instruction?

MR. BLOOM: The wording of this instruction I will take credit for. I believe I take credit for it, having read the cases here, because they talk about what's necessary in a limiting instruction.

We don't -- the people immediately -- the

State immediately jumps to let's deal with our limiting instruction and simply tell him it's goes to is this being offered for state of mind?

We quote in our response a very real circumstance from the United States Supreme Court that concerns the admissibility of such evidence, because the jurors are being asked to, with surgical precision, consider for one purpose and not consider it for the enormously other powerful purpose of establishing my client's dangerousness.

Isn't that what we're really worried about?

It's not to be considered for that purpose at all, but Justice Cordoza [sic] Speaks to that issue and talks about how it's very easy to make that leap and how the jurors, quite frankly, are unable often to be able to differentiate.

The Court itself brought up the issue, what's good for the goose and good for the gander, talking about admissibility of out of court statements.

One very different thing is my client is coming in. He's going to be available for cross-examination.

Mr. Peterson says he can't wait to get him on cross-examination. Confrontation in the other direction is clearly legal. It's clearly a difficulty or

an impossibility in this case.

I want to say one more thing. The mere fact that Virginia Centofanti said this many times doesn't equate to reliability.

Whether she said it once or said it a hundred times doesn't mean it was somehow, because you multiply the number and she told a lot of people that she was making -- if she was making a self-serving statement and doing it to kind of protect herself you would expect it to be lots of times.

The mere number of them shouldn't add any credibility.

THE COURT: I agree with that.

MR. PETERSON: Briefly, I would believe this has already been ruled on, at least as to the 5th, but regardless, the question that has been placed at issue and placed at issue by the defense is the manner of state of mind and the determination of likely agressor.

The cases said the victim's state of mind is relevant to determine who is the likely agressor. The quote from these cases is in a state of mind, in a self-defense case, admission of state of mind hearsay is relevant and overcomes almost any possible prejudice.

The comments that we're going to hear about are comments that she talks about from the incident on the

5th and also incidents about I'm going over to see Chip. There shouldn't be any problems. His mom and dad are at home.

That shows she is not in an aggressive situation, which is for the jury to determine. There are statements she makes that say you know, I believed he was going to to kill me or whatever.

If the Court wants, we're happy to make a list over the weekend of what particular statements we're concerned about. I don't know we necessarily need to get there.

I think basically everything between 5th and the murder, those 15 days reflects on her state of mind regarding their dissolving relationship and determining who is or is not an agressor in a self-defense case.

THE COURT: In think a list is well advised for no other reason than to expedite your presentation to know exactly where you're headed.

Let me explain one thing to Mr. Bloom and perhaps counsel, it's my take -- perhaps I'm addressing everyone here.

On this question of excited utterance in the State of Nevada there's been some, I'll say, confusion, perhaps a little murkey. As we all know when we went to law school, the textbook example was a person is standing

on the street corner. A car runs through the red light, hits another car. Someone yells the green Chevy hit the blue car and the light was red. An excited utterance.

No time to think, and there was indicia of reliability.

The Supreme Court has enlarged this in practice, at least to the extent that often times you'll have a domestic violence situation. The police are called. The police show up 30 minutes, 15 minutes later. The prospective offender is gone and the victim stands there and says my husband hit me and he went to the bar, excited utterance.

I have made the distinction, in my own clumsy way, perhaps, that there is a difference between an excited utterance and an angry utterance. I don't know what this Crawford case says, but Ms. Jackson and her --

MR. PETERSON: I'm familiar with it.

THE COURT: It may give us some light on this subject.

MR. PETERSON: It doesn't.

MS. GOETTSCH: Yes, it does.

THE COURT: Just a minute.

MR. PETERSON: Mr. Crawford talks about the confrontation right of testimonial hearsay. Luckily, in Nevada, we don't really develop into this problem.

Here is what happened in Crawford. A witness was unavailable. It was actually a spouse of the defendant.

She was unavailable by the invocation of the spousal privilege. Whether the defendant invoked it or she invoked it is unclear from the case. She was unavailable.

The State sought to introduce her statement, the taped statement to the police officer that she made using that sort of hearsay catchall exception that "Well, it's not an excited utterance; it's not this." They tried to get the statement against penal interests, but the Court didn't buy that.

The Court introduced it on something that frankly I've never gotten on in front of any of our courts. It's that catchall "Well, it's got a general indicia of reliability. Let's let it all in."

I think our courts have, in the past -- I don't think our office has particularly pursued that general kind of catchall exception, but in any event the Washington court admitted it under that generalized exception.

Scalia, who wrote the majority opinion, said "Wait a minute. First of all, we're going to draw a distinction on two types of hearsay. The first one is

testimonial," I mean, statements given in prior proceedings or statements to a law -- like a taped interrogation by a law enforcement officer.

THE COURT: Sworn statements?

MR. PETERSON: Correct.

Whether it's sworn or not, if there's no chance for cross-examination that doesn't come in, but Crawford does not get rid of established hearsay exceptions, nor does it apply to what they call non-testimonial, meaning -- let's say I were to make a comment to Ms. Goettsch.

What we're talking about is marking and introducing, for example, this document.

This document is a statement of Virginia Centofanti to law enforcement. Whether or not it may go to state of mind, I think that's -- frankly, Crawford is pretty vague as to what is really testimonial hearsay, but they say what it is is a statement to law enforcement like a written, transcribed interrogation of an individual and in Crawford the woman whose statement was used, she was a suspect.

But what the court did in Crawford is said no, because she was unavailable and because there was no cross-examination and what you basically used was her statement, like a written statement to the police or her

taped statement to the police, you can't do that.

THE COURT: It's not an excited utterance if she's sitting there writing?

MR. PETERSON: No.

What they are saying is that, alone, is not against its admissibility. Had it been an excited utterance possibly it would have been admissible; had it been a business record. It doesn't do away with the traditional hearsay problem or exceptions.

What it does do is it gets away with the sort of abusive use of this generalized reliability to just introduce police statements into evidence; the concept being we don't do trial by affidavit, but it does not overturn the traditional hearsay exceptions such as state of mind, et cetera.

I will also -- I'll leave it at that. The case specifically says we don't have a problem with the traditional hearsay exceptions, but that is not how this evidence was admitted.

In Crawford -- my reading of the Crawford case -- and it was cursory -- it seemed to specifically talk about these domestic violence situations where the prosecutors are using statements by law enforcement and others at a time when, for whatever reason, the victim in this case -- it was a female -- is not available and they

talk in particular about the excited utterance.

I think it would be well advised by this Court to revisit Judge Gibbons' decision in light of Crawford because one of the reasons why our office was -- we were discussing it with the sexual assault team over at the regular public defender's office and Mr. Scott Coffee who practices in this courtroom every day -- the Court is aware of police knowledge over this area -- he was very excited about the case and advised me to read it. He felt it impacted directly on point these domestic violence type situations and the Court.

In fact, I understood to discuss excited utterance and there was a very lengthy discussion and is not dicta [sic] That I think should relate to her holding. My reading was very cursory. I haven't finished reading it, but that was my understanding.

I think that Judge Gibbons' ruling needs to be revisited, in light of this Supreme Court ruling.

THE COURT: I remember reading this case.

MR. BLOOM: I didn't realize that was the Crawford case. I read the blurb. I remember it because it was -- I was so surprised and everyone was surprised it was Justice Scalia who would talk about it.

He is not usually one who writes decisions in terms of limiting police efforts and so forth. That's

why it came to my mind.

I didn't read it either. We should look at it.

MR. PETERSON: I can furnish it to you. I don't have the cite, off the top.

THE COURT: Send a copy down. I'd appreciate it. We're going to do two things. Get that to me and get a look at the transcript as to what Judge Gibbons ruled on.

MR. BLOOM: Also with regards to the list, I think it's very important we have some -- if We're going to make ruling, one of my concerns is making a ruling in a vacuum without having the specific statements coming in.

It behooves us to try to focus. If we know what the statements are, beforehand, then we ought to try to get our rulings on it beforehand.

I understand the people if they say something could come up in any of their examination they don't anticipate and that would be in trial. Of course, those things will come up.

We can't anticipate every single witness's statement. To the extent we can, if there's a list that's available --

THE COURT: Along that same line, Mr. Bloom, you might be looking at the same situation from your

persepctive. I don't know if there's anything you're going to offer in that regard, but if there is --

MS. GOETTSCH: Because in our opening statements is when this will become urgent.

MR. PETERSON: I agree with that. That's why we brought this motion.

How often does a Motion In Limine to admit, which is what we're trying to do to get this clarified so we don't steer into error.

I'll prepare a list over the weekend with Ms. Goettsch's assistance and we'll take this up perhaps Monday prior to getting rolling so we'll be all crystal clear for openings on Tuesday.

THE COURT: One thing. Monday promises to be another one of these mornings. There's even more complication this Monday than most.

The point is what I would encourage counsel to do is perhaps prior to 1:30 or prior to our meeting in chambers see if there's any meeting of minds on these issues.

We'll be under a little bit of a time crunch.

MR. PETERSON: I'm doubtful there will be. I will also E-Mail it to your clerk so she will have it in the morning on Monday rather than having it just before we

come in. That sort of handles also most of the issues, except a couple.

Judge Gibbons did grant the other bad act motion regarding the 5th. It can be argued who it's really a bad act against. In any event, it's admitted pursuant to sort of a Petrocelli Hearing we had.

Since that Petrocelli Hearing was had a case has come down from the Nevada Supreme Court saying when a prior bad act is admitted the State must request a limiting instruction of the court.

It's my obligation. I'm making that request of the Court. We will provide an instruction to the Court.

When we mention the incident of the 5th in opening we will indicate this Court will so instruct the jury about that evidence and before we call witnesses on that issue we will ask the Court to give an instruction at that point, too.

It's the requirement of the recent case.

THE COURT: It requires that I instruct them before you do your case-in-chief?

MR. PETERSON: No. As close as possible in time, within reason, to the receipt of the evidence the Court should admonish the jury. I think it's overly --

MR. BLOOM: I think it would be when the

witness is going to testify or has just testified about the matter when the Court would admonish the jury.

MR. PETERSON: Right. We'll provide that to the Court.

Other than that, Mr. Bloom and I discussed the fact that -- I know this may be his first time in our courthouse here, but the physical facility often causes defendants who are out of custody and witnesses and jurors to be sort of mixed in the hallway.

I wanted to let him know about that, ask him if he, as a matter of professional courtesy, will ask his client to come into the courtroom as expeditiously as possible. We will do our best to have our witnesses up in Victim/Witness or in another area where they are not milling about where jurors could be. Given we have an out of custody murder defendant, that was an appropriate request on my behalf.

I don't think Mr. Bloom has a problem with that.

MR. BLOOM: I guess I'll cancel that case of champagne I was going to extend to each juror.

THE COURT: The facility is pretty hard to deal with.

MR. BLOOM: I would ask my client and any witness we bring to be kept apart. We don't have a

witness holding room, but we would acknowledge to try to keep everyone apart.

MR. PETERSON: I think that gets us back to the issue of canvassing the defendant regarding the concession he was the shooter.

MR. BLOOM: I have one other matter. It's come to my attention that the State, both counsel, have diligently spoken to a number of witnesses very recently, and they have every right to do so. That's what the purpose is of us giving them lists and exchange of discovery.

However, it is my belief that everything that they say regarding a witness is entirely protected and is work product. They do not have to provide it, but it also my belief that if a witness gives a subsequent statement to anyone, whether it be a police officer or whether it be an interviewer from the State, meaning the attorneys themselves, a statement itself is discoverable.

If there are any notes as to actual statements made by a witness and they have them, the continuing duty of discovery I think requires that to be provided.

I don't know if they made notes. I'm not saying they did. I'm just believing that is a requirement.

I've been contacted by some witnesses saying that Mr. Peterson -- I can't remember if it was Ms. Goettsch, but Mr. Peterson --

MR. PETERSON: It was me.

MR. BLOOM: -- likes to call people and he's talking to them. He has every right to do so.

If he made any notes on witness statements as opposed to his own views about them, they should be discoverable.

THE COURT: I take it you're referring to Bradey Material, primarily?

MR. BLOOM: Of course.

MR. PETERSON: I have spoken to several of his experts, one of them in particular, somewhat about the case and about their findings. These were experts.

In my experience expert's findings are findings. They are not adversarial witnesses. My notes I make for myself are not discoverable, in my view.

I don't believe Mr. Bloom's notes, nor would I ask Mr. Bloom for his handwritten notes of notes he makes to himself regarding witnesses he talks to. The witnesses themselves are Mr. Bloom's witnesses and I haven't seen reports from them. If they have notes, I'd like them.

I'm not going to give him any notes I may

have taken to myself as an attorney in speaking with a witness, nor would I expect Mr. Bloom to turn over such notes.

I will indicate this. I have not discovered any Bradey Material in speaking with them at all.

THE COURT: I think we know what we're talking about here. We're talking about any kind of statements that might benefit the defense.

Anything else other than the latter issue that we discussed?

MR. BLOOM: No.

THE COURT: Have you had a chance to speak with your man? Off the record.

(Discussion off the record.)

THE COURT: We've had a recess.

Mr. Bloom, have you had an opportunity to speak to your client concerning the issue Mr. Peterson brought up?

MR. BLOOM: Yes, I have.

It's my understanding what the State wants is a request -- a statement from my client that my client understands that I am going to be presenting the issue of self-defense and that he was the shooter in this case; am I correct?

MR. PETERSON: Yeah, essentially that he has

authorized you to concede that he was the shooter, yes.

MR. BLOOM: Yes. My client is prepared to do that.

THE COURT: Mr. Centofanti, is that true?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Simply stated, so that I'm clear in my mind and we understand what we're talking about, simply stated, when a defense is proffered of self-defense it in essence says "Yes, I shot the person, but I was justified, under the circumstances."

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And so obviously when that is submitted to the jury there is that admission, tacit admission at least.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: That's the way you want to go with this, Mr. Centofanti?

THE DEFENDANT: On the advice of counsel that's what I'm prepared to do.

THE COURT: Do you have any questions?

THE DEFENDANT: No.

THE COURT: Thank you. You can have your seat.

One other thing I wanted to bring up. Maybe I'm borrowing trouble here. It's something that came to mind.

As I understand it, the defendant is saying that he is knowledgeable as to the violent propensities of the victim by virtue of what the victim's family had told him from time to time and he inquired of her and confirmed it.

That basically is what we're talking about.

MR. BLOOM: I'm not sure if you mean is that the only source he has, but no, he has a variety of sources, but that's one of the sources.

THE COURT: I'm thinking more of the things that relate back many years.

MR. BLOOM: No.

He knows this information. It sort of unravels, sometimes from the doctor, sometimes from the tatoos, sometimes from the family, then there would be discussion about it. Another time there would be other family discussion about it.

It doesn't come from a single source. I'm not quite sure where the Court is going. His mind is -- his knowledge is that these events occurred and just the way it would in any marriage or relationship you don't sit down and let me take a look at your probation file.

It comes out through a variety of different ways throughout the relationship.

THE COURT: That may answer the problem.

This is my concern, again very simply stated: For discussion purposes we have the defendant who would be knowledgeable of these incidents by virtue of the victim's family. For purposes of my discussion, that would give him specific knowledge of specific events.

That would enable us to go into the particulars of the events. Then the family gets on the stand and says no, I didn't tell him that.

Where are we there?

MR. PETERSON: I think it still stays admissible. We just discuss the legitimacy of his belief in self-defense. I think it still stays in and we just have to argue it.

If the family takes the stand -- and I think I'm seeing the Judge's question -- if the family takes the stand and contradicts what he says I will not make a motion to strike it or to consider that.

We'll just have to argue the matter.

THE COURT: Again, I'm foreseeing possibility. I don't mean to cast aspersions at all. I don't want the cow to get out of the gate and say we've got to get the cow. I don't know if that will work or

not.

MR. PETERSON: That's the problem with a self-defense claim, is that this evidence, the spectre of its admissibility is clearly raised and gets to come into evidence. The genie, to some extent, comes out of the bottle.

MR. BLOOM: The state of the law is quite clear. I believe, Mr. Peterson, the state concedes and we expect to present this. I'm going to make -- it is the whole case. It was his mind.

This is not -- someone else may disagree with this, but I'm going to tell this court sincerely, this is not some sort of recently fabricated thought we're coming up with.

This is truly what was in my client's mind and his thoughts. It is the defense case and it is what we will present to the jury from the very beginning of the case.

THE COURT: Okay. Anything further?

MR. PETERSON: No. Other than to ask the court to remember that when you're ruling on the admissibility of her state of mind, since that is the case.

MR. BLOOM: Actually, it's interesting. I think there's two different issues there. Confrontation

clause at a trial.

MR. PETERSON: Sorry?

MR. BLOOM: I make the distinction.

THE COURT: We'll get to that issue.

Have a nice weekend.

ATTEST that this is a true and complete transcript of the proceedings held, DATED this 11th day of April 2005.

J. A. D'AMATO CCR #017

INSTRUCTION NO. 26

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 9

Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements--willfulness, deliberation, and premeditation--must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

3	135	Camille Centofanti (State's witness on direct)	in response to an objection by bloom Peterson says: Well, I'm trying to explore why there's a minimizing and backing off from the statement made near the time of the murder.	Yes. Bloom says: Your honor I object to the character-ization. He can argue that when he gets to closing argument, but now he's supposed to ask questions, so the form of the question.	Does not rule on the use of the word murder specifically.
3	135	Camille Centofanti (State's witness on direct)	Q. You observed him from when you moved into town for several days, up to and including the date of the murder on Dec 20th, is that correct?	No	N/A
3	144	Camille Centofanti (State's witness on direct)	Q. Since the murder have you spoken with your husband about what happened that night?	No	N/A

3	148	Defendant's father (State's witness on direct)	Q. ...From the time frame from the time you arrived in Las Vegas, until the day of the murder, did your son go to work every day?	No	N/A
3	149	Defendant's father (State's witness on direct)	Q. Just before the murder and when you lived in LV, you were living with him in his house, right?	No	N/A
3	150	Defendant's father (State's witness on direct)	Q. And the time that you lived in your son's house prior to the murder, did you ever see any suspicious characters lurking around your house	No	N/A
3	150	Defendant's father (State's witness on direct)	Q. And I'm going to take you to the day of December 20th, the day of the murder	Yes	Ruling in favor of defense - judge says to refer to it as a killing or the incident.

3	176	Robbie Dahn (State's witness - crime scene analysis)	Q. Did you understand this particular gun to be the murder weapon?	No	N/A
3	184	Robbie Dahn (State's witness - crime scene analyst)	Q. Did you find, in fact, the victim in that area?	No	N/A
3	186	Det. LaRochelle (State's witness on direct)	Q. Is that a standard practice regarding a residence that is also a murder scene?	No	N/A
4	48	Sergeant David Winslow (State's witness)	Q. And he gave you a version of the story that conflicted somewhat with what you had heard from the victim; is that true?	No	N/A
4	113	Sara Smith (State's witness - coworker of Defendant)	Q. Basically within a month of the murder, is that right?	No	N/A

4	229	Jimmy Trahin (defense expert - State's cross exam.	Q. Just act it out. Be the motion of the victim	NO	N/A
4	229	Jimmy Trahin (defense expert - State's cross exam)	Q. That would require, however, the victim to be standing square to the shooter, or essentially square to the shooter, is that not true?	No	N/A
4	234	Jimmy Trahin (defense expert - State's cross exam.)	Q. I mean, if she's not attacking and its not self defense, then it's murder. Then does it really matter which shot comes when?	Yes but not to the use of the word murder, instead it was objected to as argumenta-tive.	N/A
5	72	Defendant's testimony on cross	Q. Sir are you aware that the toxicology screen from her autopsy after you killed her was that it was totally clean, no drugs, no alcohol, no nothing?	No	N/A

5	75	Defendant's testimony on cross	Q. Let's hear it, at the time of the murder, and up to the time of the murder today?	Yes Bloom says: what murder is that, your honor? Are we talking about the killing on Dec 20?	No ruling really the judge just says: that is what you're referring to?
5	91	Defendant's testimony on cross	Q....this is you the night of the murder, right?	Yes	Judge says it would be more proper to say "killing"
5	91	Defendant's testimony on cross	Q. If that's the night of the murder and you lost—	No	Ct says: excuse me. The night before?
5	96	Defendant's testimony on cross	Q. The night of the murder you — the night of the killing of your ex wife you were downstairs...	No	N/A
5	147	Michael Edwards (defense witness) on cross	Q. Did you know the facts of the murder at that time?	No	N/A

5	159	Angelo Ciavarella (defense witness) on cross	Q. If I told you Chip didn't get those guns back until the morning of Dec. 20th would that perhaps lead you to understand that you had talked to Chip after the murder?	No formal objection Bloom just said "after the killing."	N/A

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 44984

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction (Jury Trial)
Eighth Judicial District Court, Clark County

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Case No. 44984

RESPONDENT'S ANSWERING BRIEF

Appeal from a Judgment of Conviction (Jury Trial)
Eighth Judicial Court, Clark County

STATEMENT OF THE ISSUES

1. Whether Defendant is entitled to a new trial because of alleged juror misconduct.
2. Whether Defendant's right to a fair trial and due process were violated by alleged prosecutorial misconduct.
3. Whether the District Court erred by admitting various hearsay statements.
4. Whether the District Court erred by denying Defendant's motion to exclude evidence and dismiss charges.
5. Whether Defendant's right to a fair trial and due process were violated by cumulative error.

STATEMENT OF THE CASE

On January 10, 2001, Alfred Paul Centofanti, III (hereinafter "Defendant") was charged by way of an Indictment with one count of Murder with Use of a Deadly Weapon (NRS 200.010, 200.030, 193.165) for the murder of his wife Virginia Centofanti that occurred on December 20, 2000 in Las Vegas, Nevada. (Appellant's Appendix, Volume 1, at 55-57 [hereinafter "A.A. Vol. X"]). Defendant went to trial on March 15, 2004, and was convicted by a jury on April 16, 2004. Defendant was sentenced on March 4, 2005 to a sentence of Life Imprisonment without the

possibility of parole plus a consecutive sentence of Life Imprisonment without the possibility of parole for the deadly weapon enhancement. (A.A. Vol. 8: 228-29). The Judgment of Conviction was filed on March 11, 2005. Id. Defendant was given 374 days credit for time served. Id. Defendant filed a notice of appeal on March 24, 2005. Id. at 230-31.

STATEMENT OF THE FACTS

Defendant, who was a licensed attorney in the State of Nevada, married the victim Virginia Centofanti (hereinafter "Centofanti") on February 14, 1999. On July 25, 2000, their son Nicholas Centofanti was born. (A.A. Vol. 2: 84; 141; A.A. Vol. 5: 42). Centofanti also brought a nine-year-old son, Francisco "Quito" Sanchez, from a previous relationship. (A.A. Vol. 5: 43). On the morning of December 5, 2000, police were summoned to the Centofanti home at 8720 Wintry Garden Avenue in Las Vegas as a result of a 911 call. Defendant and Centofanti had gotten into an argument over the fact she had arrived at home in the early morning hours on December 5, 2000, after being out all night with friends. The argument escalated beyond control and Defendant, enraged, put a gun to her head and told her that he was going to kill her and the kids. (A.A. Vol. 2: 88). While trying to struggle with Defendant for the gun, Centofanti received a split lip. Defendant then got on the phone to call Centofanti's boss to accuse him of having an affair with Centofanti. Id. at 89. In order to stop Defendant from embarrassing her at her place of work by calling her supervisor, Centofanti broke a picture frame over the defendant's head and ripped his shirt. (A.A. Vol. 5: 59). However, due to the fact Centofanti had admitted to breaking the picture frame over Defendant's head, she was arrested for Battery Domestic Violence. (A.A. Vol. 4: 54). The police decided to impound the weapons that were in the house—including the weapon Defendant used to shoot Centofanti, a 9mm Ruger semi-automatic pistol—for safekeeping due to the domestic battery that had occurred. Id. at 56-57.

On December 6, 2000, Defendant applied for and received a Temporary Protective Order against Centofanti. His basis for the Temporary Protective Order was the Battery Domestic Violence that occurred the day before. On December 11, 2000, Defendant filed for a divorce with the aid of an attorney. (A.A. Vol. 3: 134). Centofanti was not represented by counsel. The divorce was uncontested and on December 12, 2000, the final decree of divorce was entered in which Defendant was given primary physical custody of Nicholas and the family residence on Wintry Garden Avenue. In the meantime, Centofanti had obtained an apartment on the other side of town and proceeded on with her life. (A.A. Vol. 4: 97). On several occasions from December 5 to December 20, Defendant contacted the police attempting to get the impounded weapons back. He expressed specific interest in retrieving the 9mm pistol. (A.A. Vol. 4: 95-96). Due to the fact Defendant had a clean background check and Centofanti was deemed the primary aggressor in the domestic violence, the guns were returned to Defendant. Id. at 96-97. The day the guns were returned to Defendant is the day he shot Centofanti. Id. at 97. On Wednesday, December 20, 2000—the last day of Centofanti's life—she was scheduled to pick up Nicholas for visitation. Centofanti called her friend Trisha Miller and told her that she would be going to pick up Nicholas and would meet her and her parents for dinner around 7:00 o'clock at a hotel on the Las Vegas Strip. (A.A. Vol. 2: 93). Shortly before 7:00 p.m. on December 20th, Centofanti arrived at Defendant's home at 8720 Wintry Garden Avenue to pick up her son. Defendant's parents, Alfred Centofanti, Jr. (hereinafter "Alfred Jr."), and Camille Centofanti (hereinafter "Camille"), were watching television upstairs on the second floor of the house. (A.A. Vol. 2: 70). Camille and Alfred Jr. heard no arguing or yelling prior to hearing gunshots and did not even know that Centofanti had arrived at the home.

During the time that Camille and Alfred Jr. were upstairs watching TV, Defendant and Centofanti were alone in the downstairs family room. Defendant produced a 9mm Ruger—the same one that he recovered from the police earlier in the

day—and shot Centofanti numerous times in the head, chest, arm, finger, and back. Specifically, Centofanti sustained gunshot wounds to the temple, cheek, and jaw, some of which were at point blank range. She also sustained a gunshot wound to the upper left arm and left breast and right finger with indications of at least one of these shots being at point blank range. Centofanti also had a gunshot entry wound in her lower back and a gunshot wound to the back of her left arm. When Alfred Jr. and Camille heard the gunshots, they ran downstairs to find Defendant with the 9mm Ruger in his hands. Camille called 911 and took Defendant and Alfred Jr. next door to the neighbors' house. Camille told the neighbors that Defendant had shot Centofanti. By the time the police arrived, Centofanti was dead. As soon as police walked into the neighbor's house, Alfred Jr. blurted out "I can't believe he shot her," referring to Defendant. (A.A. Vol 2: 67). Defendant was sitting next to the murder weapon wrapped in a blue towel. Id. at 67-68. Later, Camille stated "I can't believe he shot Gina," again referring to Defendant. Id. at 68. There was no sign of forced entry into the Centofanti home. Id. at 77. Defendant was subsequently placed into custody. Id.

ARGUMENT

I

THERE WAS NO JUROR MISCONDUCT; IN THE ALTERNATIVE, ANY MISCONDUCT WAS HARMLESS AND NOT PREJUDICIAL TO DEFENDANT

Defendant alleges that several instances of juror misconduct occurred that entitle him to a new trial.

A. Juror Caren Barrs' Felony Conviction

On July 2, 1980, juror Caren Barrs (hereinafter "Barrs") was convicted in Florida on a felony charge of Obtaining Property in Return for Worthless Check. She was sentenced to four (4) years of probation. (A.A. Vol. 8: 85-87). Defendant now argues that Barrs committed juror misconduct by intentionally concealing her two-decade-old felony conviction from both the Jury Commissioner and the trial court,

"which would have precluded her from meeting the statutory requirements for being a person qualified to sit as a juror in this case," and that he is consequently entitled to a new trial. Appellant's Opening Brief, at 9-11. Defendant characterizes what Barrs allegedly did as "intentional misconduct." Id. at 11. There is most certainly room to question this characterization. First, Defendant maintains that

> It is ... clear from the affidavit of the Clark County Jury Commissioner, Judy Rowland, which was presented to the district judge during Appellant's Motion For New Trial, that Barrs had also not been truthful with the Jury Commissioner, about meeting the statutory requirements for jury service, as each prospective juror was asked during his or her initial contact by phone with that office, whether he or she had sustained a felony conviction prior to being ordered to report for service. [Barrs] answered the pertinent question by indicating that she did *not* have a felony conviction so that she could be included in the jury pool without being subjected to further inquiry about this. The affidavit of the Jury Commissioner also shows that [Barrs] had contact with members of the Jury Commissioner's staff on three additional occasions and never disclosed her felony conviction during these opportunities to do so. [Emphasis in original]. [Citations omitted].

Appellant's Opening Brief, at 10-11.

Defendant attached the above-mentioned affidavit as part of his Reply to State's Opposition to Defendant's Motion for New Trial. (A.A. Vol. 8: 141; 159-66). Attached to the same Reply is an affidavit from Barrs herself in which she states that she was convicted of a felony involving bad checks over twenty (20) years ago in Florida; that when she called into the Jury Commissioner's Office and completed a telephonic survey she indicated that she had a felony conviction; that she also indicated in writing that she had a felony conviction; that she had her civil rights restored and was eligible to vote and maintain her nursing license; that since she had already disclosed this information on prior occasions, she was under the impression that the Court and other relevant parties knew about her conviction; and that she did not intentionally conceal the conviction from the Court or any relevant parties. Id. at 168-69. As Defendant observed, it would appear that "either [Barrs] is being untruthful or the Jury Commissioner and her staff are being untruthful." Appellant's Opening Brief, at 12. This alone does not prove misconduct, as it still remains a

question of fact as to what actually happened during Barrs' initial contact with the Jury Commissioner's Office.

Barrs, for instance, indicated to the prosecutor when this issue first arose that she did in fact disclose the conviction to the Jury Commissioner's Office, but she was told to appear anyway. This is certainly plausible, considering the office's well-known informal policy of requiring persons to appear despite the disclosure of potentially disqualifying information because many persons fabricate or embellish things in order to escape jury duty. Consequently, it is certainly possible that Barrs did in fact disclose her conviction status to the Jury Commissioner's office, as she indicated in her affidavit. Ultimately, it is not clear at this point whether or not Barrs notified the office. Assuming that she did not notify the office, she was nonetheless empanelled so the relevant question then becomes whether she committed misconduct by failing to inform the parties of the conviction during voir dire.

Whether Barrs' failure to mention her prior felony warrants a new trial is a two step inquiry. The first inquiry is whether there was "misconduct." To constitute misconduct, the failure of a juror to answer a question touching upon potentially prejudicial information must amount to an "intentional concealment." Canada v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997); Lopez v. State, 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989); Hale v. Riverboat Casino, 100 Nev. 299, 305, 682 P.2d 190, 193 (1984). As the United States Supreme Court has stated, "[t]o invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." Hale, 100 Nev. at 306, 682 P.2d at 194, quoting McDonough Power Equipment v. Greenwood, 104 S.Ct. 845, 850 (1984). In the above-mentioned Barrs affidavit, she explained that she believed she did disclose her prior felony conviction. She entered the appropriate data via telephone and in person and was nevertheless told to appear for jury duty. She also wrote the information down on the Jury Commissioner information sheet. There has been no "intentional concealment"

on her part, and it is not juror misconduct. See Echavarria v. State, 108 Nev. 734, 740 (1992) (failure to disclose assault by juror was not intentional because juror considered it a "fight" not an assault where he was a victim).

The second inquiry (if intentional concealment is found by the court) is whether the misconduct amounted to harmless or prejudicial error. Canada, 113 Nev. at 941, 944 P.2d at 783, citing Geary v. State, 110 Nev. 261, 265, 871 P.2d 927, 930 (1994) vacated on other grounds by Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996); see also Hale, 100 Nev. at 306, 682 P.2d at 194. "A new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted." Canada, 113 Nev. at 941, 944 P.2d at 783, quoting Lane v. State, 110 Nev. 1156, 1163, 881 P.2d 1358, 1362-64 (1994). Not every incident of misconduct justifies a new trial. Meyer v. State, 80 P.3d 447 453 (2003). Factors to be considered when determining whether juror misconduct constituted harmless error include "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Canada, 113 Nev. at 941, 944 P.2d at 783, quoting Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 943 (1989).

The character of the error made by Caren Barr is minimal. Her crime occurred more than twenty (20) years ago. The crime was for obtaining property in return for a worthless check. Most importantly, however, 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. In addition, there is absolutely no prejudice to Defendant. Normally, a juror's prior conviction for any crime would seemingly be prejudicial to the State and not the defendant. Also, Defendant had no problem with Barr being on the jury in light of the fact her son is currently in prison in New York, having served eighteen years of incarceration, which she did disclose during voir dire. Furthermore, the question of guilt or innocence was not so close in this case that a twenty-year-old worthless check conviction for one juror would prejudice Defendant.

Most importantly, however, it is well established that the fact a juror on voir dire, concealed bias or prejudice, and thereafter was sworn and served, does not constitute the type of misconduct covered by the statute for a new trial. Such misconduct that warrants a new trial is only that which occurs after the jury has been empanelled and sworn. State v. Marks, 15 Nev. 33 (1880); State v. Harvey, 62 Nev. 287, 290 (1944) (noting that legislative intent dictates that a subsequently discovered ground for challenge of a juror cannot be used as grounds for a new trial and judicial construction to avoid the harshness of the rule would be improper). This analysis, however, seemingly applies to a *qualified* juror. 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; (A.A. Vol. 8: 154). Nevertheless, Barrs made it through the juror selection process and sat on a jury that rendered a verdict. This situation therefore requires further analysis than that effected above. There is, however, very little controlling authority (and no Nevada case law) that governs such a situation.

The federal courts have addressed this issue on several occasions and the fact patterns are strikingly similar to the instant case. In United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992), the D.C. Circuit declined to order a new trial where the defendant discovered after conviction that one of the jurors was a felon. The court concluded that the Sixth Amendment right to an impartial jury "does not require an *absolute bar* on felon-jurors." [Emphasis in original]. Id. at 633. The court did, however, remand the case to the district court with instructions to hold an evidentiary hearing to determine whether the juror's failure to disclose his felon status resulted in

"actual bias" to the defendant. Id. at 634-35. In United States v. Humphreys, 982 F.2d 254 (8th Cir. 1992), the Eighth Circuit held that no new trial was required where an embezzler sat on a jury which convicted the defendant of income tax invasion. The felon-juror revealed his prior conviction during voir dire but mistakenly indicated that his civil rights had been restored. (It should be noted here that Barrs similarly may have been under the mistaken impression that her civil rights had been restored due to the extended passage of time between her felony conviction and the instant trial.) The defendant sought a new trial based on the felon-juror's participation in the verdict. The court held that a defendant presenting such a post-verdict challenge had to demonstrate actual bias or prejudices affecting the juror's impartiality and the fairness of the trial. Id. at 261. In Coughlin v. Tailhook Association, 112 F.3d 1052 (9th Cir. 1997), the Ninth Circuit held that the participation in a civil tort trial in a federal district court here in Nevada of a felon-juror that had been convicted of marijuana possession was not an automatic basis for a new trial. The court deemed that such participation can be the basis for a new trial only if the juror's participation in the case results in actual bias to one or more of the parties. In this case, the felon-juror failed to disclose the conviction both when filling out the pre-service jury questionnaire and subsequently during the trial court's questions during voir dire. Id. at 1058-59.

The legal authority for this "actual basis" test is derived from the United States Supreme Court's holding in McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845 (1984). There, the Court addressed a claim for a new trial due to a juror's failure to answer honestly the court's voir dire questions. The case concerned products liability, and the juror failed to reveal that his son had been injured as the result of an exploding tire even though the trial court specifically asked whether any prospective juror or juror's family member had suffered a severe injury as the result of

an accident at home.[1] The Court rejected the argument for a new trial and indicated that it was nearly impossible to give each litigant a trial free from any error, and reversed the lower court's ruling that the juror's failure to disclose his son's accident required a new trial. Id. at 553, 104 S.Ct. at 848-49. The Court went on to adopt the following test: "We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Id. at 556, 104 S.Ct. at 850.

The Ninth Circuit clarified McDonough's holding in United States v. Edmond, 43 F.3d 472 (9th Cir. 1994). In that case, the defendant was charged with armed robbery, and an empanelled juror failed to reveal that he had been a victim of an armed robbery some years earlier. After an evidentiary hearing, the district court ordered a new trial, even though it concluded that the juror had simply forgotten about the experience. The Ninth Circuit reversed, holding that "the district court abused its discretion when it concluded that [the juror]'s simple forgetfulness fell within the scope of dishonesty defined by McDonough." Id. at 474. Bringing this Court's attention back to Coughlin, in that case, the Court assumed that the juror's responses to the court's voir dire inquiry into his criminal history were in fact dishonest, but that any such dishonesty "was related to non-material, collateral matters" and "had no impact on his ability to serve as a juror in [the trial.]" Coughlin, 112 F.3d at 1061-62.

This Court should adopt the above-enunciated "actual bias" test in determining whether Defendant is entitled to a new trial due to Barrs' felony conviction. Under such a test, Defendant cannot prevail. The relevant conviction here was one for writing a bad check over twenty (20) years ago; Defendant, on the other hand, was on trial for capital murder for shooting his wife seven (7) times with a handgun. Barrs'

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[1] This is analogous to the trial court's inquiry in the instant case as to whether Barrs, a close friend, or a family member had "ever been involved in the criminal justice process, either in prosecuting a case, or as a witness, or as a defendant." (A.A. Vol. 7: 62).

failure to disclose such an antiquated conviction for a non-violent offense therefore did not result in any bias or prejudice to Defendant. If anything, Barrs' prior conviction served a potential bias against *the State*, since she could have used her prior run-in with the criminal justice system as the basis for animosity and incredulity towards law enforcement. It should come as no surprise to this Court that the prosecutor actually contemplated using a peremptory challenge to exclude Barrs, especially after learning that her son was in prison in New York for committing burglary. (A.A. Vol. 62-64).

Whether or not a juror's answers and/or failures to disclose are honest or dishonest, "it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias, or, in exceptional circumstances, that the facts are such that bias is to be inferred." McDonough, 464 U.S. at 558-59, 104 S.Ct. at 851 (Brennan, J., concurring). "Implied bias" can serve as the basis for a new trial in "extraordinary" or "extreme" circumstances. See Smith v. Phillips, 455 U.S. 209, 222, 102 S.Ct. 940, 948-49 (1982) (O'Connor, J., concurring). In Tinsley v. Borg, 895 F.2d 520 (9th. Cir. 1990), the Ninth Circuit illuminated four general fact situations where bias might be presumed or implied: (1) "where the juror is apprised of such prejudicial information about the defendant that the court deems it highly unlikely that he can exercise independent judgment even if the juror states that he will"; (2) "[t]he existence of certain relationships between the juror and the defendant"; (3) "where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern"; and (4) "where it is revealed 'that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial ... or that the juror was a witness or somehow involved in the [underlying] transaction." Id. at 528. The State submits that not only is there no actual bias, but there is no implied bias as well.

While the above Circuit Courts of Appeals cases are clearly not controlling authority, due to the dearth of Nevada precedent concerning a juror who served despite being statutorily barred from doing so, this Court should at the very least find the cases persuasive, especially considering the fact that they are all premised on federal courts' interpretation and application of the Sixth Amendment's right to a fair and impartial jury and a controlling United States Supreme Court case. Consequently, this Court should adopt the "actual bias" test and find that Defendant suffered no actual (or implied) bias by Barrs' service on the jury and uphold his conviction.

B. Juror Joshua Wheeler's Alleged Firearm "Experiment"

Defendant next argues that he is entitled to a new trial because juror Joshua Wheeler (hereinafter "Wheeler") allegedly conducted his own firearm testing experiment during the trial. Appellant's Opening Brief, at 17. Defendant further alleges that

> [d]uring the initial interview of Joshua Wheeler, which was conducted by state licensed private investigator Mike Pfriender on June 21, 2004, juror Joshua Wheeler told him that during the time that he served as a juror in the instant case, he went shooting with this father for the specific purpose of conducting a firearms test which related to [sic] testimony prosecutors and defense witnesses.

Id.

First, it must be established that Joshua Wheeler even conducted an inappropriate test, reenactment, or experiment and therefore committed misconduct. Although Defendant's investigator indicates that such an experiment was conducted, Wheeler completed an affidavit in which he stated that he did not conduct any test or experiment regarding a 9 mm weapon. (A.A. Vol. 8: 124-25). Wheeler did at some point during the pendency of the trial have an opportunity to shoot a .357 Magnum with his father as part of his everyday life. There is nothing inappropriate about a juror going about living his daily life and using his daily experiences and common sense to deliberate and reach a conclusion. It should be noted here that the differences

between firing a .357 Magnum revolver and a 9 mm semi-automatic pistol are profound and make it wholly non-conducive to conducting the "experiment" Defendant purports Wheeler completed. Using a .357 Magnum revolver to time the speed and test the accuracy of the shots in relation to a 9 mm pistol is akin to using a Chrysler Sebring to evaluate the speed and handling of a Chevrolet Corvette. It is reasonable to assume that Wheeler knew that, and therefore he never considered the shooting with his father to be an experiment or a test. He never discussed it with anyone in the jury room and never even discussed firearms experience with the other jurors. This is clearly indicative of how Wheeler treated the experience of shooting with his father as a non-issue in the case or during deliberations. Id.

Assuming, however, that Wheeler did in fact conduct an "experiment" with the .357 and used its "results" improperly, it does not automatically warrant a new trial. This Court has held that

> [a] denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed. However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate.

Meyer v. State, 80 P.3d 447, 453 (Nev. 2003).

"Not every incidence of juror misconduct requires the granting of a motion for a new trial." Id. at 454, quoting Barker v. State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979). "Each case turns on its own facts, and on the degree and pervasiveness of the prejudicial influence." Id., quoting United States v. Paneras, 222 F.3d 406, 411 (7th Cir. 2000). "The district court is vested with broad discretion in resolving allegations of juror misconduct." Id. Here, the district court denied Defendant's motion based on the allegation of Wheeler's misconduct.

NRS 50.065 states in pertinent part:

> 2. Upon an inquiry into the validity of a verdict or indictment:
> (a) A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

However, where the misconduct involves extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted. Meyer, 80 P.3d at 454. A motion for a new trial may only be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental processes of *any juror*. Id. This Court's factual inquiry is limited to determining the extent to which jurors were exposed to the extrinsic evidence. Id. at 456.

If, for example, Wheeler told the jury, "I went out and conducted a test and this is the result and this means he's guilty," that would certainly be an extrinsic effect on a jury and subject to proof via affidavit. 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," (as cited in Appellant's Opening Brief, at 17-18) he has not committed misconduct. But most importantly, his statements regarding this are simply not admissible to impeach a verdict as it gets into his mental processes. The latter reflects the situation at bar. This conclusion is supported by Meyer. In Meyer, the defendant was convicted of the sexual assault of his estranged wife. The victim later recanted her story. At issue were raised bumps on the victim's scalp and whether they were from abusive hair pulling or Accutane medication. During deliberations one juror discussed how the bumps were similar to hair pulling she had

seen in her work with domestic violence victims. Another consulted a publication regarding the medication. The defendant sought a new trial based on juror misconduct. See also Barker v. Nevada, 95 Nev. 309, 311, 594 P.2d 719, 720 (1979) (fact foreperson reported to jury effects of heroin on body was harmless error).

In Meyer, this Court found no misconduct on the part of a juror using her every day experience with domestic violence victims. This is similar to Wheeler shooting with his father. This Court went on to hold that consulting the medication publication, *and relaying it to other jurors*, was prejudicial misconduct. In the case at bar, however, Wheeler never even discussed his shooting experience with other jurors. Therefore, any impeachment of the verdict by Wheeler's mental processes is impermissible. Furthermore, *prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.* Id. at 454. A conclusive presumption of prejudice applies only in the most egregious cases, such as jury tampering.

> However, other types of extrinsic material, such as media reports, including television stories or newspaper articles, generally do not raise a presumption of prejudice. *Jurors' exposure to extraneous information via independent research or improper experiment is likewise unlikely to raise a presumption of prejudice.* In these cases, the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict.

Id. at 456.

To determine whether there is a reasonable probability that juror misconduct affected a verdict, a court may consider a number of factors.

> For example, a court may look at how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). *In addition, a court must consider the*

extrinsic influence in light of the trial as a whole and the weight of evidence. [Emphasis added].

Id. See also United States v. Rogers, 121 F.3d 12, 17 (1st Cir. 1997) (use of dictionary by juror not prejudicial per se).

There does not appear to be any evidence that Joshua Wheeler even *discussed* his shooting *experience* with other jurors, let alone the performance of any sort of test or experiment. It should also be noted that it was uncontroverted in this case, by both the defense and prosecution experts, that there were two separate shooting "moments" at the murder scene due to the fact one set of shell casings was between the end table and the end of the couch and the other set of shell casings were near the victim's body, by the fireplace and exercise bike. Even the defense expert said that the shooting took place in two parts, or the shots were separated by a pause, and it appeared that the defendant followed the victim around the coffee table, all of which supports a first degree murder conviction regardless of how fast the defendant could empty the gun—the alleged nature of Wheeler's purported experiment. (A.A. Vol. 8: 223; 227). In light of that overwhelming evidence against Defendant, no credible evidence of self-defense as put forth by him, and the fact that none of Wheeler's experiences regarding guns were brought into the deliberations, Wheeler's shooting a .357 with his father is of no consequence and does not justify a new trial.

C. Juror Chris Kelly's T-shirt.

Defendant next argues that juror Chris Kelly (hereinafter "Kelly") wore a t-shirt to trial, during the evidence portion, that read, "Do you know what a Murderer looks like?" or something similar. One juror, later to be elected the jury foreperson, noticed the t-shirt and pointed it out to the bailiff and to the juror that it was not appropriate. The juror then apparently made efforts to conceal it during trial. Neither party noticed it during the trial and no record was made regarding any shirts worn by jurors. There is no evidence the shirt was made specifically for the trial or that the juror was making any comment on the evidence. The t-shirt appeared older and pertained to a local

band. Several jurors completed affidavits stating that their judgment was in no way affected by the shirt. (A.A. Vol. 8: 124; 126; 127-34).

It is inconceivable how this fact could warrant a new trial and an undoing of months of time and expense by our Courts and the taxpayers of Nevada. A juror's clothing choice does not per se constitute misconduct absent a factual finding that the clothing reflects a preconceived opinion or is otherwise inappropriate for Court. There was no such finding in the instant case. The defense cites no authority to the contrary and there is absolutely no authority for the defense's position that a juror's clothing choice automatically warrants a new trial. This is especially true since no record was made at the time it was worn and no inquiry was made as to the juror intent by wearing the shirt, if any. There is no misconduct in a juror wearing whatever he or she wants, within reason, to Court. There is now no method of inquiry as to what the juror meant by the shirt, if it affected what he was thinking about the case, or how it factored in to his deliberations if at all. To make such an inquiry of the juror at this time is inadmissible intrinsic juror testimony precluded by NRS 50.065, as discussed supra. Consequently, this Court should not overturn Defendant's conviction.

D. Jurors Sleeping.

Defendant next argues that he is entitled to a new trial because two jurors slept during the trial. Appellant's Opening Brief, at 21. Again, here Defendant must first establish misconduct, i.e., that the jurors were in fact sleeping during the trial. Defendant accuses Wheeler and Kelly of sleeping. Id. at 22. Wheeler, however, denied ever falling asleep during trial. (A.A. Vol. 8: 124-25). There is some evidence that Kelly did nod off a few isolated times during the trial. The juror sitting next to him, Matt Adams, indicated that he nudged him immediately each time and Kelly then woke up. Id. at 124-25; 128. These were during times when the evidence was becoming tedious, repetitive, and soporific. Id. There is no evidence that this juror missed critical portions of testimony or had trouble participating in deliberations

because he missed evidence due to sleeping. Furthermore, if courts of review are going to grant a new trial every time a juror nods off during trial, the justice system will undoubtedly become untenable and overworked. Courts uniformly decline to order a new trial in absence of convincing proof jurors were actually asleep during material portions of testimony. Hasson v. Ford Motor Co., 32 Cal.3d 388, 411 (Cal. 1982). It is inconceivable that the nodding off on a limited basis over a month long trial has somehow prejudiced Defendant to the point of needing a new trial. Cf. Geary v. State, 110 Nev. 261, 264, 871 P.2d 927, 929 (1994) (fact juror wrote brief note to daughter during trial but testified she did not miss evidence and participated fully in deliberations did not warrant new trial); Callegari v. Maurer, 4 Cal.App.2d 178, 184 (1935) (fact juror slept during trial is not grounds for disturbing verdict if it does not appear that sleep was for such a length of time or at such a stage of trial to affect ability to fairly consider case).

It should also be noted that the defense did not raise an issue during trial regarding juror inattentiveness even though Defendant sat closest to the jury. See Rivera v. United States, 295 F.3d 461 (5th Cir. 2002) (defendant waived misconduct claim based on jurors sleeping when it was not raised until after verdict). There was no record made, no objection lodged and no call for an admonition by the trial court. As a result, this issue was not properly preserved and furthermore, it is virtually impossible to now determine, assuming arguendo that anyone was sleeping, when it took place, by who, or for how long. The United State Supreme Court long ago addressed the danger to the administration of justice when jurors are allowed to later comment upon the sanctity of deliberations to impeach their verdict:

> Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took party in their publication and all verdicts could be, and many would be followed by an inquiry in the hope of discovering something which might invalidate a finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of the facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured

> could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation – to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68, 35 S.Ct. 783, 784 (1915).

This is exactly what has occurred in this case. After a conviction of First Degree Murder, Defendant has hired an investigator to fish for any slight or perceived inappropriate behavior on anyone's part. This cannot justify the flushing of months of judicial resources, nor does any of it prejudice the fair trial of Defendant, nor is it fair to jurors. The Court summed it up effectively by stating:

> Allegations of juror misconduct, incompetency, or inattentive-ness raised for the first time in days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, juror's willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of lay people would all be undermined by a barrage of post-verdict scrutiny of juror conduct.

Tanner v. United States, 483 U.S. 107, 121 (1983).

This Court should not deem that there was juror misconduct in the instant case.

II

DEFENDANT'S RIGHT TO A FAIR TRIAL WAS NOT VIOLATED DUE TO ALLEGED PROSECUTORIAL MISCONDUCT.

Defendant argues that "[t]he prosecutors' continuous use of the terms 'murder' and 'victim' in the questions that they posed during the trial rendered his trial fundamentally unfair and resulted in a denial of due process in violation of [Defendant's] rights as guaranteed under the Constitution of the United States and under state law." Appellant's Opening Brief, at 23. First and foremost, claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001); Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997). The State concedes that although it could argue that Defendant did not properly preserve this particular issue for review

due to the fact that he did not object at all instances of the prosecutor using the relevant terms, this Court may nonetheless consider the issue *sua sponte*. See Coleman v. State, 111 Nev. 657, 662, 895 P.2d 653, 656 (1996).

For those claims that have been properly preserved for review at trial, or which are reviewed *sua sponte*, the burden falls upon Defendant to show "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This standard is based on a defendant's right to have a fair trial, not necessarily a perfect one. See Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. See Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986); Anderson v. State, 118 P.3d 184, 187 (Nev. 2005). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was *materially prejudiced*. Libby, 109 Nev. at 911, 859 P.2d at 1054. [Emphasis added]. Furthermore, "[t]his [C]ourt must consider the context of [the allegedly prejudicial] statements, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Id. Finally, reversal is only warranted when it is found that the comments or statements are not "harmless beyond a reasonable doubt." Anderson, 118 P.3d at 187. The comments or statements are harmless beyond a reasonable doubt if "(1) the comments were merely passing in nature, or (2) there is overwhelming evidence of guilt." Id.

First and foremost, the prosecutor used the terms at issue here as a force of habit, not as part of a sinister plan to deprive Defendant of his rights. (A.A. Vol. 5: 91; 96). Moreover, the State submits that here the prosecutor's comments were harmless beyond a reasonable doubt because the evidence against Defendant was overwhelming. There was no dispute that Defendant shot the victim, as he offered the affirmative defense of self-defense. The only question was whether Defendant had

the *mens rea* required to sustain a first-degree murder conviction. Despite Defendant's claim of self-defense, he was unable to establish at trial that Centofanti had a weapon or posed a threat to him at the moment she was shot. Centofanti's lack of having a weapon the night Defendant shot her seriously challenged his claim that he was in jeopardy or fear of death or substantial bodily harm at the hands of Centofanti. The State presented evidence that showed that she was the victim of domestic violence by the hands of Defendant. Centofanti's friend testified that on December 5, 2000 Defendant placed a gun to her head and stated that he was going to kill Centofanti and the kids. (A.A. Vol. 2: 88). This, combined with the fact that Centofanti was 5 feet 3 inches and weighed 117 pounds as opposed to Defendant's 6 feet 1 inch and 200+ pounds, was enough to cast doubt on the defense's proposition that Defendant was in fear of his life because of Centofanti. (A.A. Vol. 5: 177). The day after this incident, Defendant sought and got a Temporary Protective Order against Defendant. Yet he declined to extend it. (A.A. Vol. 5: 96) Moreover, Defendant himself testified that Centofanti never manifested violent tendencies towards him. (A.A. Vol. 5: 50).

Defendant claimed self-defense, yet he testified that he didn't remember shooting her or recall the circumstances surrounding the shooting. He provided no evidence to suggest that Centofanti was attacking him or about to harm him before he shot her. Id. at 71-72. He alleged that he was afraid of her because of her alleged gang involvement from when she was a juvenile. Id. at 76. Nevertheless, Defendant never mentioned Centofanti's gang involvement until the time of trial. He did not mention it when the police responded to the domestic disturbance call at their residence on December 5, 2000, nor did he mention it as a basis for seeking the protective order. Id. at 76-77. There was testimony indicating that Centofanti was terrified of Defendant on the night of the December 5, 2000 incident, not the other way around. Id. at 94. Additionally, he had not requested that anyone supervise the child visitations; a jury could have reasonably inferred that this was an indication that

Defendant was not actually afraid of Centofanti. Id. at 96. The jury's perception that Defendant was not truly afraid of Centofanti, combined with the lack of anything on the record suggesting that Defendant had to go somewhere and retrieve the gun (meaning that he likely had it on his person or nearby when Centofanti arrived) could have led the jury to deduce that Defendant had the necessary intent to kill Centofanti. One of Centofanti's ex-boyfriends testified that he never experienced any violence at the hands of Centofanti. Id. at 182; 211. Other witnesses similarly testified that Centofanti was not the violent and fear-inspiring woman that Defendant attempted to portray her as. Id. Defendant also gave testimony that was directly contradicted by another witness (concerning whether or not Centofanti's doctor told Defendant about Centofanti's alleged drug use). (A.A. Vol. 5: 197-198). There was also evidence that Defendant tried to kill Centofanti previously. (A.A. Vol. 2: 88; A.A. Vol. 3: 126). In light of the overwhelming evidence against Defendant such as the above-cited testimony, and the lack of Defendant's credibility, the State submits that any prosecutorial conduct committed at trial by virtue of the prosecutors' use of the words "murder" and "victim" was harmless beyond a reasonable doubt and therefore does not warrant a reversal.

III

THE ADMISSION OF HEARSAY TESTIMONY IN THIS CASE DOES NOT ENTITLE DEFENDANT TO A NEW TRIAL

Defendant argues that pursuant to the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) the trial court committed error by admitting certain statements into evidence. Specifically, Defendant is challenging the following testimony: (1) statements Centofanti made to the officers who came to the Centofanti residence in response to a domestic violence call on December 5, 2000; (2) statements Centofanti made to social worker Mark Smith regarding Defendant holding a gun to her head during the December 5, 2000 incident; (3) statements Centofanti made to her friend Trisha Miller in which

Centofanti stated that Defendant had placed a gun to her head; and (4) statements Mark Smith made to the police dispatchers where he repeated what Centofanti told him had transpired in the house. Appellant's Opening Brief, at 29-35. The State submits that not all of the statements Defendant has taken issue with qualify as hearsay. One of the responding police officers' statements that he received information from dispatch that "a male had put the gun to a female's head," for instance, was presented to explain why police went to Centofanti's residence on December 5, 2000, not to necessarily prove that it in fact had happened. The same can be said for the other responding officer's statement.

The standards regarding the admission of hearsay evidence changed when the United States Supreme Court decided Crawford. In Crawford, the Court abrogated the former Roberts[2] test of reliability and established a new one, holding that out-of-court statements by witnesses that are *testimonial* are barred, under the Confrontation Clause of the U.S. Constitution, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses. Id. at 68, 124 S.Ct. at 1374. The Court defined "testimonial evidence" as at a minimum applying to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id. The Court left the admission of non-testimonial hearsay to the state courts, holding that "[w]here non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." Id. This Court acknowledged the shift in Flores v. State, 120 P.3d 1170 (Nev. 2005).

In Flores, this Court explained that

> [i]n abandoning the Roberts test for admission of "testimonial hearsay," the Court expressly declined to provide a comprehensive definition of that term. The Court, however, went on to identify

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[2] See Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980).

> several "formulations of [a] core class of 'testimonial' hearsay" from the briefs submitted, including: (1) "ex parte in-court testimony or its functional equivalent," e.g., "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; and (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"

Flores, 120 P.3d at 1176-77 (quoting Crawford).

The State concedes that the hearsay statements at issue (with the exception of Centofanti's statement to Trisha Miller) here fall under the category of being "testimonial" and therefore are subject to the rules promulgated in Crawford. The statements were made to either police operatives or, in the case of Mark Smith, to a person tasked with reporting incidents such as that which occurred on December 5, 2000 to law enforcement. As such, Defendant's inability to cross examine the declarant (because she was deceased) rendered the statements inadmissible.

Assuming that the hearsay statements were testimonial under Crawford, this Court must resolve whether the error compels reversal. Under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), an appellate court may find some constitutional errors harmless where it is clear beyond a reasonable doubt that the guilty verdict actually rendered in the case was "surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078 (1993). It cannot be said here that the guilty verdict was secured substantially because of the improperly-admitted testimonial statements. The State focused very little on these statements during closing arguments. It primarily focused on the forensic evidence, the fact that it was objectively unreasonable for Defendant to be in fear of his life at the hands of Centofanti, and the fact that Centofanti was unarmed. Any error here, therefore, does not require reversal. The same can be said for the admission of non-testimonial statements by Centofanti to Trisha Miller. Assuming that the statements do not qualify as an excited utterance, as Defendant argues, when testimony has been

improperly admitted in violation of the hearsay rule, this Court must again determine whether the error was harmless beyond a reasonable doubt. "Evidence against the defendant must be substantial enough to convict him in an otherwise fair trial, and it must be said without reservation that the verdict would have been the same in the absence of error." Weber v. State, 121 Nev. Adv. Op. 57, 119 P.3d 107, 124 (2005). Again, as recounted above, the evidence in total here was certainly substantial enough to convict Defendant. Consequently, this Court should not reverse the jury's verdict.

IV

THE DISTRICT COURT DID NOT ERR BY REFUSING TO GRANT DEFENDANT'S MOTION TO EXCLUDE EVIDENCE AND DISMISS THE CHARGES AGAINST HIM

Defendant claims that it was reversible error for the district court to deny his Motion to Exclude Evidence and Dismiss Charges filed in response to the Las Vegas Metropolitan Police Department's destroying of evidence. The relevant evidence here is audio recordings of voicemail messages Defendant left for Sharon Zwick (hereinafter "Zwick"), whom Defendant spoke with on several occasions in attempts to retrieve his confiscated weapon. Appellant's Opening Brief, at 37. This Court reviews a district court's decision to suppress evidence under an abuse of discretion standard. Zabeti v. State, 120 Nev. 530, 96 P.3d 773 (2004); see also Lambert v. State, 94 Nev. 68, 71, 574 P.2d 586, 587 (1978) (holding that the trial court did not abuse its discretion in denying defendant's motion to suppress identification testimony). Here, the district court did not abuse its discretion. Whenever a defendant seeks to have his conviction reversed for loss of evidence, "he must show either (1) bad faith or connivance on the part of the government or, (2) that he was prejudiced by the loss of the evidence." Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 216 (1979).

"The State's loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was

apparent before it was lost or destroyed." Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775, 778 (1996); see also Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988). Where there is no bad faith, the defendant has the burden of showing prejudice. Warner, 112 Nev. at 1240, 926 P.2d at 778. The defendant must show that "'it could be reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense.'" Id. (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)). It is not sufficient to show "'merely a hoped-for conclusion'" or "'that examination of the evidence would be helpful in preparing [a] defense.'" Id. "'It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence.'" Id. at 1240, 926 P.2d at 778 (citation omitted). "[M]ere assertions by the defense counsel that an examination of the evidence will potentially reveal exculpatory evidence does not constitute a sufficient showing of prejudice." Id. at 1242, 926 P.2d at 779.

The State submits that in no way could it have been reasonably anticipated that the content of the voicemail messages would have been exculpatory and material to the defense. Zwick likely received dozens of calls and voicemail messages a day from citizens wishing to have their weapons returned to her. It is likely standard procedure for her (or anyone, for that matter) to delete voicemail messages after a certain period of time. Zwick likely deleted the message after writing down the information of the person calling, as most people do. She did not have the foresight to know specifically that Defendant would later claim that these messages would somehow be critical to the defense of someone on trial for murdering his wife. Requiring Zwick to possess this level of foresight would be to essentially require her to preserve all of her voicemail messages indefinitely, just in case anyone who calls her about retrieving their confiscated weapon goes on to commit a specific-intent crime with it. Such anticipation can hardly be deemed "reasonable." The district court therefore did not abuse its discretion, and this Court should not disturb its ruling. Defendant's conviction consequently should not be reversed.

V

CUMULATIVE ERROR DID NOT DEPRIVE DEFENDANT OF HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW

Defendant contends that the cumulative effect of the previously discussed errors denied him a fair trial. Appellant's Opening Brief, at 40-41. "Relevant factors to consider in evaluating a claim of cumulative error include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996) (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288 (1985), cert. denied, 519 U.S. 1012, 117 S.Ct. 519, 136 L.Ed.2d 407 (1996); see also Lay v. State, 110 Nev. 1189, 1199, 886 P.2d 448, 454 (1994). In the instant case, Defendant's claims of error largely lack merit. Most importantly, the issue of innocence or guilt is in no way "close." The evidence against Defendant is objectively substantial, and even more so when considering the fact that Defendant contributed a paltry amount of evidence to support his affirmative claim of self-defense. Defendant clearly did not meet his burden.

The prosecutorial misconduct that allegedly occurred was not particularly egregious, nor were the other errors materially prejudicial. Any errors that occurred were minor when placed in context, and even when taken together, do not warrant reversal. Defendant's due process rights were not violated, and therefore he is not entitled to a new trial.

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CONCLUSION

Based on the above arguments of law and fact, the State respectfully requests that the denial of the District Court of Defendant's Postconviction Petition for a Writ of Habeas Corpus be affirmed.

Dated this 23rd of December 2005.

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on December 23, 2005.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 44984

APPELLANT'S REPLY BRIEF

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

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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.

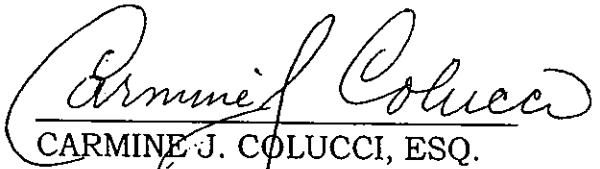
In addition to the issue of guilt or innocence, the jury also had to decide whether Appellant was guilty of a certain degree of murder or guilty of manslaughter. The above errors were certainly instrumental in directing the jury towards the first degree conviction. These errors and the mischaracterization 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.



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CERTIFICATE OF COMPLIANCE

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

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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:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI III,

Appellant,

vs.

E.K. McDANIEL, WARDEN,
ELY STATE PRISON

Respondent.

DOCKET NUMBER: 58562

APPELLANT'S APPENDIX, VOLUME IX

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EXH

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DISTRICT COURT

CLARK COUNTY, NEVADA

ALFRED P. CENTOFANTI, III, Petitioner, vs. E.K. McDANIEL, WARDEN, ELY STATE PRISON, Respondent.	CASE NO. C172534 DEPT NO. VII

EXHIBITS 1 THROUGH 11 TO THE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Attached hereto are Exhibits 1 through 11to the Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) and more particularly described as follows:

Exhibit 1	Nevada Supreme Court Opening Brief
Exhibit 2	Nevada Supreme Court Answering Brief
Exhibit 3	Nevada Supreme Court Reply Brief
Exhibit 4	Nevada Supreme Court Order of Affirmance
Exhibit 5	Nevada Supreme Court Petition for Rehearing
Exhibit 6	Nevada Supreme Court Order Denying Rehearing
Exhibit 7	Nevada Supreme Court Remittitur
Exhibit 8	Reporter's Transcript of June 14, 2001 proceedings

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Exhibit 9 Reporter's Transcript of March 12, 2004 proceedings

Exhibit 10 Jury Instruction No. 26

Exhibit 11 Jury Instruction No. 9

DATED this 29th day of February, 2008.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify pursuant to NRCP 5(b), that on this 29 day of February, 2008, I mailed a true and correct copy of the foregoing Exhibits 1 through 11 to the Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) addressed to:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

FILED

OCT 27 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
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DEPUTY CLERK

APPELLANT'S OPENING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S OPENING BRIEF

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

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.

II.

STATEMENT OF THE CASE

On January 9, 2001, the State presented their case against Appellant, ALFRED PAUL CENTOFANTI, III (hereinafter referred to as CENTOFANTI), to the Clark County Grand Jury which returned a true bill (AA Vol. 1, pp. 55-57). On January 10, 2001, an Indictment was filed in the Eighth Judicial District Court charging CENTOFANTI with Murder with Use of a Deadly Weapon (AA Vol. 1, pp. 55-57).

This case was tried before a jury from March 15, 2004, to April 16, 2004, in District Court Department XIV (AA Vol. 6, pp. 17-175). The jury ultimately

returned a verdict of guilty of First Degree Murder with Use of a Deadly Weapon (AA Vol. 6, p. 3). Thereafter, on March 4, 2005, CENTOFANTI was sentenced to consecutive terms of life in prison without the possibility of parole (AA Vol. 8, pp. 228-229). The Judgment of Conviction was filed on March 11, 2005 (AA Vol. 8, pp. 228-229). CENTOFANTI filed his Notice of Appeal on March 24, 2005 (AA Vol. 8, pp. 230-231).

III.

STATEMENT OF FACTS

The homicide trial, which is the focus of this appeal, was the result of the homicide of Virginia "Gina" Centofanti (hereinafter referred to as Gina) which occurred on December 20, 2000. Prior to the homicide, CENTOFANTI and his wife, Gina, were involved in a domestic battery incident which had occurred on December 5, 2000. The facts about these two events are set forth below.

A. Prior Battery Domestic Violence.

CENTOFANTI and Gina were married on February 14, 1999 (AA Vol. 5, p. 43). Their son, Nicholas Centofanti, was born on July 25, 2000. Gina also had a son, Francisco (nicknamed Quito), by a prior relationship (AA Vol. 5, p. 43).

During the early morning hours of December 5, 2000, Gina returned home after spending the night out with one of her co-workers until 5:00 a.m. (AA Vol. 4, p. 76 and AA Vol. 5, pp. 57-58). During, her marriage, she had spent the night with her boyfriend and co-worker, Steve Cuilla, on other occasions as well(AA Vol. 4, p. 76). Later that morning, CENTOFANTI confronted his wife about his belief that she was having an affair with someone at her work. CENTOFANTI informed

her that he had taken their son, Nicholas, for medical treatment that evening because their son had been ill (AA Vol. 5, p. 57). They proceeded to engage in a heated argument concerning these events (AA Vol. 5, pp. 57-59).

During this argument, when Gina's cellular telephone started to ring, CENTOFANTI grabbed it in an attempt to see if it was Gina's boss calling whom CENTOFANTI thought was the person with whom Gina was romantically involved (AA Vol. 5, p. 58). A struggle ensued over the possession of the telephone and after letting go, Gina grabbed a picture frame and struck CENTOFANTI in the back of his head (AA Vol. 5, p. 59). The glass frame broke cutting CENTOFANTI'S head (AA Vol. 5, p. 59). Gina's nine year old son, Francisco, was in the room asleep but heard the glass break (AA Vol. 5, p. 59).

There was a gun in the bedroom and both CENTOFANTI and Gina struggled to get control of it (AA Vol. 5, p. 59). Gina told the police who investigated this incident that her lip was cut, by accident, during the struggle (AA Vol. 4, p. 58). As a result of this struggle and the preceding battery upon him, CENTOFANTI suffered injuries in addition to the aforementioned cut on his head (AA Vol. 4, pp. 11-13). CENTOFANTI managed to get control of the gun and put it in the hallway cabinet (AA Vol. 5, p. 59). Aside from the accidental cut lip, Gina suffered no additional injuries (AA Vol. 4, p.52).

At some point during this argument, after the gun was put away, CENTOFANTI called his employer in order to get the telephone number for their Employee Assistance Program Hotline (AA Vol. 5, p. 60). He was given the telephone number of Mark Smith in New York City. After CENTOFANTI had

spoken by telephone with counselor Mark Smith about Gina's drinking and anger problems, Mr. Smith asked to speak with Gina alone. CENTOFANTI apparently left the room and did not interfere with Gina while she spoke with Mr. Smith (AA Vol. 5, p. 60). He asked her various questions about the domestic battery she had committed on CENTOFANTI and it was during his questioning that she told him that CENTOFANTI had pointed a gun at her (AA Vol. 3, p. 126). Mr. Smith then called 9-1-1 in Las Vegas and told them what Gina had told him. He told police that Gina told him that there were two children in the house (AA Vol. 3, p. 127). Officers from the Las Vegas Metropolitan Police Department were immediately dispatched.

When the police arrived at the Centofanti residence, they found that CENTOFANTI had scratches on his hand, rug burns on his knees, a cut on his head and that his shirt had been ripped (AA Vol. 4, p. 53). Gina's only injury appeared to be the swollen lip (AA Vol. 4, p. 52). Gina admitted to the police that she struck CENTOFANTI in the head with a picture frame (AA Vol. 4, p. 52). Gina was arrested on a battery domestic violence charge (AA Vol. 4, p. p. 54). Gina was transported to and booked into the Clark County Detention Center.

CENTOFANTI filed for divorce from Gina. They were divorced six days later on December 11, 2000 (AA Vo. 3, p. 134). In the divorce, CENTOFANTI had been awarded the family residence and primary physical custody of their son, Nicholas. Gina thereafter resided at a different residence with her other son Francisco (Quito) (AA Vol. 3, p. 134; AA Vol. 4, p. 97).

/ / / / /

B. Instant Offense

On December 20, 2000, Gina was intentionally late to pick up her infant son, Nicholas, at 8720 Wintry Garden for her scheduled child visitation. She had been working out at her gym and had made dinner plans with Trish Miller even though she knew that would conflict with her scheduled visitation time (AA Vol. 2, p. 93). After a series of telephone calls to CENTOFANTI'S residence and a request to reschedule, which was denied, she finally arrived to pick up Nicholas at about 7:00 p.m. (AA Vol. 2, p. 93).

When Gina finally did arrive at CENTOFANTI'S residence, CENTOFANTI, their son, Nicholas, and CENTOFANTI'S parents, Alfred and Camille Centofanti, were there (AA Vol. 3, p. 137). While CENTOFANTI'S parents and Nicholas were supposedly upstairs and while Gina was supposedly in the house on the first floor alone with CENTOFANTI, Gina was shot in the head, chest, arm, finger and back (AA Vol. 5, p. 209).

CENTOFANTI'S parents testified at trial that at the time of the shooting, upon hearing loud popping sounds from an unknown location in or near the house, CENTOFANTI's father ran downstairs to investigate (AA Vol. 3, p.139). His father testified that he saw CENTOFANTI with a 9mm Ruger in his hands which he was holding to his own head (AA Vol. 3, p. 167). A call to 9-1-1, which originated from CENTOFANTI'S home telephone, was made at about 7:05 p.m., but that was only a hang up (AA Vol. 3, p.139). The 9-1-1 dispatcher attempted to re-establish contact with someone at the residence but only got the telephone answering machine (AA Vol. 3, p. 101). Camille Centofanti called 9-1-1 at 7:15

p.m. to report the shooting (AA Vol. 3, 140). When the call was concluded, she picked up Nicholas and went next door to the home of Marilee and Mark Wright (AA Vol. 3, 143).

Appellant's father, Alfred Centofanti, testified that he took the gun away from his son, who had it pointed at his own head (AA Vol. 3, p. 167). He then wrapped it in a towel (AA Vol. 3, p. 168). He then took CENTOFANTI next door to the Wrights' residence and took the gun with him (AA Vol. 3, p. 169). That night, CENTOFANTI was arrested at his neighbors' home for the murder of Gina Centofanti (AA Vol. 2, p. 74). The gun, which had been handled by Alfred Centofanti, Appellant's father, was impounded by the police at that time (AA Vol. 2, p. 68). Various witnesses, including Officer Tiffany Gogian, testified at trial that CENTOFANTI appeared to be in a catatonic state before, during and after his arrest (AA Vol. 2, pp. 72,73, 75, 76).

CENTOFANTI was ultimately indicted on murder charges (AA Vol. 1, 55-57). A jury trial was scheduled. Prior to the commencement of the trial, each prospective juror was sent a notice about his or her future jury service. With each notice, prospective jurors were each sent instructions which contained information about the court parking facilities, general jury information and information about the qualifications for jury service which included four of the mandatory juror qualification requirements (AA Vol. 8, p. 79). One of the qualifications was: "You must be without a felony conviction" (AA Vol. 8, p. 79).

On March 15, 2004, CENTOFANTI'S jury trial commenced. Voir dire was conducted by the Court and by counsel for the respective parties (AA Vol. 6, pp.

17-175; Vol. 7, pp. 1-205). A jury was selected from the panel furnished through the Clark County Jury Commissioner's office. The jury trial proceeded after the jury was selected and impaneled. On April 16, 2004, the jury returned with its verdict of guilty of First Degree Murder With Use of a Deadly Weapon (AA Vol. 6, pp. 3, 4-12). CENTOFANTI was scheduled to be sentenced on May 28, 2004.

In May, 2004, prior to sentencing, CENTOFANTI decided to discharge his trial counsel and to retain new counsel (AA Vol. 6, pp. 13-14). Sentencing, which had been scheduled for May 28, 2004, was continued until July 9, 2004, by stipulation of the parties, as an accommodation to new defense counsel so that he could obtain the files from the defendant's trial counsel (AA Vol. 6, pp. 15-16). CENTOFANTI was formally sentenced on March 4, 2005 (AA Vol. 8, pp. 228-229). He was sentenced to consecutive sentences of life without the possibility of parole (AA Vol. 8, p. 228-229; Reporter's Transcript of Sentencing pp. 1-29).

IV.

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.

1. Intentional Concealment Before Selection as Juror.

During a review of the pleadings and transcripts of CENTOFANTI'S case and after interviewing various people who had attended the trial, CENTOFANTI'S post-trial counsel decided to investigate the background of each juror. During the course of this investigation, it became apparent that at least one juror, Caren

Barrs, had concealed her prior felony conviction, which would have precluded her from meeting the statutory requirements for being a person qualified to sit as a juror in this case (AA Vol. 8, p. 79). NRS 6.010 states in pertinent part as follows:

> **6.010 Persons qualified to act as jurors.**
>
> Except as otherwise provided in this section, every qualified elector of the State, whether registered or not, who has sufficient knowledge of the English language, and who has not been convicted of treason, a **felony**, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which he resides. 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 pursuant to NRS 176A.850, 179.285, 213.090, 213.155 or 213.157. (Emphasis added)

It is clear from a review of this statute, that, in order to qualify to be a juror, the prospective juror must not have a felony conviction which had not been expunged or sealed or she must otherwise qualify under NRS 176A.850. The certified documents which were submitted as exhibits in CENTOFANTI'S Motion for a New Trial, show unequivocally that Caren Barrs, a member of the jury impaneled in the instant case, was a convicted felon at the time that she was selected as a juror and at the time that she sat and deliberated in this case (AA Vol. 8, pp. 81-87; Vol. 8, p. 154). She had not been pardoned nor had her conviction in Florida been expunged or sealed (AA Vol. 8, p. 154).

Further, since the defense investigator was easily able to obtain certified court documents evidencing this juror's felony conviction without a court order, it was evident that Barrs' conviction had not been sealed or expunged. This fact was confirmed. The certification from Janet H. Keels, the Coordinator of the

Office of Executive Clemency of the State of Florida shows that her conviction had not been sealed or expunged and that she had not been pardoned (AA Vol. 8, pp. 154). Therefore, she sat on the jury in this case despite her status as a convicted felon.

Additionally, during the defense investigator's interview with Barrs, she acknowledged the felony conviction and that she had not sealed her record, had not had the conviction expunged or had her civil rights restored pursuant to Florida law or NRS 176A.850 (AA Vol. 8, pp. 179-181). She was therefore ineligible, by statute, to sit as a juror and deliberate in this case as she had not met the requirements of NRS 176A.850 or NRS 6.010 (See certified copies of Florida court documents) which were attached to CENTOFANTI's Motion for New Trial (AA Vol.8, pp. 80-87).

It is also clear from the affidavit of the Clark County Jury Commissioner, Judy Rowland, which was presented to the district judge during Appellant's Motion For New Trial, that Barrs had also not been truthful with the Jury Commissioner, about meeting the statutory requirements for jury service, as each prospective juror was asked, during his or her initial contact by phone with that office, whether he or she had sustained a felony conviction prior to being ordered to report for service. Ms. Barrs answered the pertinent question by indicating that she did **not** have a felony conviction so that she could be included in the jury pool without being subjected to further inquiry about this (AA Vol.8, pp. 158-166). The affidavit of the Jury Commissioner also shows that Ms. Barrs had contact with members of the Jury Commissioner's staff on three additional occasions and never

disclosed her felony conviction during those opportunities to do so (AA Vol. 8, pp. 158-166).

Thereafter, apparently, relying on the truthfulness of Ms. Barrs' survey response, the Jury Commissioner did not feel there was any need to verify Barrs' response to the felony conviction question. Consequently, the Jury Commissioner did not remove Ms. Barrs from the prospective jury pool. To further demonstrate and compound Ms. Barrs' intentional misconduct, she later executed an affidavit, again under oath, after the jury verdict and was totally untruthful to the district court about her complete failure to disclose her conviction to the Jury Commissioner prior to her jury service(AA Vol. 8, pp. 167-169). A simple comparison of her affidavit with that of the Jury Commissioner makes this crystal clear (AA Vol. 8, pp. 158-161, 167-169). The District Court Judge did not order an evidentiary hearing in order to resolve this obvious conflict prior to entering his order to deny CENTOFANTI'S motion for a new trial (AA Vol. 8, pp. 226-227).

In the State's Opposition to Defendant's Motion For A New Trial (AA Vol. 8, pp. 110-135) incredibly, despite their complete lack of evidence and in the face of the defendant's conclusive evidence otherwise, the prosecutor asserted, as the truth, the following information about Ms. Barrs:

> . . . Her civil rights had been restored and she was allowed to regain 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).

How could the prosecutors make these assertions and how could they

attribute those statements to the Jury Commissioner in light of their conversation with her and her staff and in light of the totally contradictory and impeaching statements in her affidavit? A review of the Defendant's Motion For New Trial and his Reply To State's Opposition To Motion For New Trial, shows conclusively that Ms. Barrs did not ever have her civil rights restored in Florida (AA Vol. 8, pp. 65-105, 141-181) With respect to registering to vote in Nevada, she had merely checked the box on her voter registration card which indicated that she did not have a felony conviction despite executing this under penalty of perjury (AA Vol. 8, pp. 141-181). Her right to vote had not been restored, she merely incorrectly filled out the registration card in order to get it in Nevada.

The State had already obtained the Jury Commissioner's records prior to the final hearing on the Defendant's Motion For New Trial, so they knew that Ms. Barrs did not disclose her felony conviction and that the Jury Commissioner could not possibly have told her to report for jury duty despite her felony conviction as they alleged (AA Vol. 8, pp. 159-169). The bottom line on this issue is that either Ms. Barrs is being untruthful or the Jury Commissioner and her staff are being untruthful. The state made allegedly truthful factual statements to the district court despite being in possession of overwhelming evidence to the contrary.

The state also had the capacity to contact the same Florida officials that defense counsel contacted in order to verify whether or not Ms. Barrs was a convicted felon or had had her civil rights restored. During the hearing on CENTOFANTI'S Motion for New Trial, defense counsel challenged the State to show proof that their statements about her non-convicted status were true (AA Vol. 8,

p. 205). They could not despite the fact that they had had much greater access to law enforcement records and government documents than defense counsel. They simply chose not to verify the truth of the statements that they made. They took the same position with respect to the records and potential testimony of the Clark County Jury Commissioner who directly and totally refuted the statements in Ms. Barrs' affidavit and to whom the State had immediate and unqualified access. The Jury Commissioner, whose office and staff are located on the first floor of the same court house building that housed the District Attorney's Office, also verified in her affidavit dated August 24, 2004, "That all juror information about Ms. Barrs was previously provided to the District Attorney's office pursuant to this Court's (District Court) previously issued order." (AA Vol. 8, p. 161). The prosecutors had Ms. Barrs' official records which showed that she did not report her felony conviction as she had claimed. This reckless conduct by the prosecutors cannot be tolerated as not one but both prosecutors intentionally ignored the truth. This was prosecutorial misconduct.

2. Intentional Concealment During Jury Selection

Prior to the commencement of voir dire, the court clerk administered the oath to the panel of prospective jurors using the language set forth in NRS 16.030 (5) which states in pertinent part as follows:

> **NRS 16.030. Drawing and examination of jurors; administration of oath or affirmation.**
>
> ...
>
> 5. Before persons whose names have been drawn are examined as to their qualifications to serve as jurors, the judge or his clerk shall administer an oath or affirmation to them in substantially the

following form:

> Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly answer all questions put to you touching upon your qualifications to serve as jurors in the case now pending before this court (so help you God)?

After the above-stated oath was given and during the voir dire conducted by the district judge on March 16, 2004, the Court gave Ms. Barrs yet another opportunity to mention her prior criminal history, which included her felony conviction. She was asked:

> THE COURT: Have you or a close friend or family member ever been involved in the criminal justice process, either in prosecuting a case, or as a witness, **or as a defendant**? (Emphasis added)
> (AA Vol.7, p. 62).

A review of her response to the question asked by the district judge shows that she evaded a direct response about her own record by responding to the Court's question by talking about her son's New York case and by not responding directly to the question about her own experience (AA Vol. 7, pp. 62-63). She also avoided mentioning that she ever lived in Florida, the actual location of her felony conviction, by responding to another of the District Court's questions as set forth below:

> THE COURT : And he (her son) moved to New York at some point ?
>
> PROSPECTIVE JUROR BARRS : No I'm originally from New York State, and we moved out here, and he and his other brother stayed in New York State. **One son came out here with us.** (Emphasis added)
> (AA Vol. 7, pp. 62-63)

While this may have been a truthful answer on its face, the fact that she lived in Florida after moving from New York and before moving to Las Vegas was intentionally omitted. It is clear that her intention was to

mislead the court and the parties into thinking that she had moved directly from New York to Las Vegas which was not true (AA. Vol. 8, pp. 81-87).

In *Meyer v. State* 119 Nev. 554, 571, 80 P.3d 447 (2003), the Nevada Supreme Court stated:

> Jurors who fail to disclose information or give false information during voir dire commit juror misconduct, which, if discovered after the verdict, **may be grounds for a new trial** under the standards established for juror misconduct during voir dire as opposed to misconduct that occurs during deliberations. (Emphasis added)

At the very least, the District Court should have held an evidentiary hearing in order to determine whether the Florida officials and the Clark County Jury Commissioner were telling the truth or if Ms. Barrs was telling the truth. If a hearing had been held, the district court judge would have found intentional juror misconduct and that he should have granted CENTOFANTI'S motion for a new trial as it would have been clear that Ms. Barrs failed to disclose a material fact and failed to honestly answer a material question on voir dire and that an honest response would have provided a valid basis for a challenge for cause at the very least instead of finding a reason to avoid addressing this issue [i.e. violation of the seven day rule of NRS 176.515(4)] which he used as his basis for erroneously denying CENTOFANTI'S motion, not on the merits but on a technicality. CENTOFANTI'S motion for a new trial was the correct way to address that issue.

3. Intentional Juror Misconduct After Verdict

The felony conviction of Caren Barrs was not discovered by the defense until well after the jury verdict was rendered. As explained above, it was intentionally

concealed before, during and even after the trial. It is apparent, from the State's Opposition to Defendant's Motion for a New Trial, that Ms. Barrs continued to mislead the State and the district court about her status even after CENTOFANTI'S trial. The State continued to turn a blind eye to the truth about it. The intentional concealment and resulting post-trial factual misrepresentations are apparent. Therefore, the intentional concealment pattern continued well after the verdict was rendered and even after the motion for a new trial was filed. She had been evasive and untruthful several times, especially about her contact with the Jury Commissioner. The district court should have held an evidentiary hearing as her failure to disclose her felony conviction deprived CENTOFANTI of his opportunity to use a challenge for cause or to use a peremptory challenge in an informed manner.

Juries must consist of 12 jurors except as provided in NRS 175.021 which is inapplicable. NRS 175.481 requires the verdict to be unanimous. Therefore, CENTOFANTI is also entitled under this statute to have the jury verdict vacated, as it was not unanimously rendered by twelve "qualified" jurors as required by this statute. He is also entitled to a new trial not only under state law but also because he was denied equal protection, a fair trial and due process of law as guaranteed by the Constitution of the United States. An unqualified person unlawfully sat and deliberated with lawfully qualified and selected jurors in contravention of state law.

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

Once the jury selection process was completed, the clerk administered the oath which the jurors took pursuant to NRS 16.070 (AA Vol. 1, p. 40):

> **NRS 16.070 Jury to be sworn; court may order jury into custody of officer.**
>
> 1. As soon as the jury is completed, the judge or his clerk shall administer an oath or affirmation to the jurors in substantially the following form:
>
> Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly try the case now pending before this court and a true verdict render according to **the evidence given** (so help you God)? (Emphasis added)

During the initial interview of Joshua Wheeler, which was conducted by state licensed private investigator Mike Pfriender on June 21, 2004, juror Joshua Wheeler told him that during the time that he served as a juror in the instant case, he went shooting with his father for the specific purpose of conducting a firearms test which related to testimony prosecutors and defense witnesses. (AA Vol. 8, p. 76-77). This fact was not discovered until well after the verdict had been rendered. One of the critical issues in this case was whether CENTOFANTI fired all of the shots prior to formulating the intent necessary for first, second degree murder or even manslaughter. Experts for both sides testified on this issue (AA Vol.4, 191-195, 219-220). The amount of time required to fire the shots from the semi-automatic pistol was a critical issue which had a direct bearing on the defense's and the state's theory of the case.

Juror Wheeler concluded from his experimental shooting session that, "it

would be impossible for it to come on a target all six times in under four seconds even. It would be real tough" (AA Vol. 8, p. 7). This comment was made in reference to the testimony of the firearms experts and the theory that the defendant had fired his weapon in an extremely rapid fire manner but was still able to hit the decedent with every shot. This was relevant to the determination of the state of mind of CENTOFANTI at the time that the shots were fired.

In the follow-up interview of June 24, 2004, juror Wheeler advised the investigator that he and his father went shooting and the reason that they did so (AA Vol. 8, p.12, 180-181). He stated that he specifically wanted to go out and see how many seconds that it took to empty the gun he was shooting (AA Vol. 8, pp. 76-77, 180-181). That constituted an improper experiment and at the very least constituted improper consideration of extrinsic evidence by juror Wheeler and perhaps the other members of the jury if he shared it during juror deliberations. Whether juror Wheeler alone or if other members of the jury considered this extrinsic "evidence," consideration of these test results, by even one juror, constituted a violation of the defendant's right to be present and to confront the witnesses against him which essentially Wheeler had become. *Barker v. Nevada*, 95 Nev. 309, 594 P.2d 719 (1979). See also *Meyer*. An evidentiary hearing would be necessary to determine, if in fact, he "shared" his shooting experiment results with the other jurors and the impact that it may have had on them.

Whether he shared or not, Joshua Wheeler violated the terms of the jurors' oath by rendering his own decision partially based on evidence that was not presented to him in court. The conduct of juror Wheeler met the two-prong test

for a new trial as set forth in *Meyer,* in that the misconduct occurred (the independent juror test) and the misconduct was prejudicial since it provided information that may have undermined the defense's theory. In *Meyer at p. 563-563,* the Nevada Supreme Court stated:

> Before a defendant can prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial. Once such a showing is made, the trial court should grant the motion. Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.

This test also violated the mandate of Jury Instruction #27 which clearly and succinctly summarized the duty of each juror to avoid the consideration of extrinsic information in their deliberations (AA Vol. 6, pp. 2). This also violated the last part of the district court's regular admonition to the jurors which he gave multiple times daily before breaks in the trial or at the end of the day (AA. Vol. 6, pp. 174; Vol. 7, p. 205; Vol. 8, p. 64; Vol. 2, pp. 147; 3,115, 151, 186, 224; Vol. 4, pp. 38, 83, 123, 151, 187, 234, Vol. 5, pp. 31, 65, 110,183). The admonition states as follows:

> It is your duty not to discuss among yourselves, or with anyone else, any subject connected with the trial; or read, watch or listen to any report of, or commentary on the trial or any person connected with the trial by any medium of information, including without limitation, newspapers, television and radio; **or form or express any opinion on any subject connected with the trial until the cause is finally submitted to you.** (Emphasis added)

(AA. Vol. 6, pp. 174)

Therefore this juror's shooting experiment constituted juror misconduct entitling the defendant to the relief sought herein based upon state law as stated

above as well as the Confrontation Clause, right to a fair trial and due process clause as guaranteed by the Constitution of the United States.

C. CENTOFANTI 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."

During closing argument, juror Chris Kelly sat as a juror dressed in a tee shirt which bore the writing, "DO YOU KNOW WHAT A MURDERER LOOKS LIKE?" (AA Vol.8, pp. 72-73, 77, 124, 127, 130). He wore the shirt in plain view of everyone. In light of the seriousness of the murder charge upon which he was sitting in judgement, the potential consecutive sentences of life in prison without the possibility of parole, and the right of the defendant to a fair trial, this constituted serious juror misconduct. It clearly evidences the improper state of mind of this juror and his manifest immaturity.

Dressing in this type of attire is clear evidence of a lack of respect for the court process. It also is evidence that juror Chris Kelly failed to take his oath and duties as a juror seriously. It left no doubt that he thought that this was a joke as he wore this tee shirt bearing this message during closing argument. It also shows that juror Kelly had already formulated the opinion that the defendant was a murderer otherwise there was no reason to wear it.

It is unknown by the defense whether this behavior was ever brought to the district judge's attention as it should have been. The affidavits of jurors, Josh Wheeler, Alan Miller and Nancy Gordinier, which were filed in response to CENTOFANTI'S Motion for a New Trial, show that they saw the shirt (AA Vol. 8, pp. 124, 127, 130). Others in the courtroom must also have seen it. There is no

question that he wore a shirt bearing those words during his jury service. Apparently this juror was never judicially chastised for wearing this shirt nor did he take seriously the district court's daily admonition not to formulate an opinion before the case was submitted to the jury for deliberations (AA. Vol. 6, pp. 174; Vol. 7, p. 205; Vol. 8, p. 64; Vol. 2, pp. 147; 3,115, 151, 186, 224; Vol. 4, pp. 38, 83, 123, 151, 187, 234, Vol. 5, pp. 31, 65, 110,183). The shirt was worn to be "spiteful" as juror Josh Wheeler put it (AA Vol. 8, pp. 76-77). Further, no court admonition or curative instruction was given which could have addressed this inappropriate and prejudicial behavior which was exhibited before and during closing argument.

This shirt's message and this juror's actions evidence either his enmity or his bias against the defendant. It is clear from his actions that juror Kelly did not have the proper state of mind required to sit and objectively deliberate as a non-predisposed juror. Alternate jurors were available to replace Kelly. Some members of the court's staff or at least one of the other jurors surely had a duty to bring this matter to the district court's attention. No one did. Having Kelly sit as a juror with this attitude and lack of common sense, constituted a denial of CENTOFANTI'S constitutional rights to a jury trial, due process of law and a fair trial as guaranteed under the Constitution of the United States. This juror's misconduct was also a violation of NRS 16.070 which standing alone should entitle CENTOFANTI to an order setting aside the verdict and granting a new trial.

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

The failure to stay awake and alert during the trial also constitutes a

violation of a juror's duty under NRS 16.070 also. Appellant's counsel only learned about this misconduct during the post-trial investigation. This conduct was confirmed by juror Josh Wheeler (AA Vol. 8, pp. 76-77, 124, 128).

At this time, it is not known how often and for what periods of time the jurors slept or whether they slept at the same time. An evidentiary hearing should have been held in order to make that determination. Josh Wheeler admitted to the defense investigator that he and Chris Kelly (juror with "the tee shirt") slept during portions of the trial (AA Vol. 8, p. 77). This constituted yet another violation of their juror's oath by Chris Kelly and Josh Wheeler.

Their failure to pay full time and attention violated CENTOFANTI'S right to a jury trial, due process of law and a fair trial as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Sleeping through a trial, thereby missing testimony, deprives a juror of the ability to participate in a meaningful way in deliberations in a case where the potential penalty was so severe.

However, NRS 50.065 seems to preclude a juror from testifying about the deliberative process unless influenced by outside forces. *Echaravarria v. State*, 108 Nev. 734 at 741, 839 P.2d 589 (1992), *Reibel v. State*, 106 Nev. 258 at 263, 790 P.2d 1004 (1990) and *Barker, supra.* The acts of sleeping, committed by the **two** jurors during trial, were observable in open court and outside of the closed and protected environment used for jury deliberations. The defendant's rights under the Constitution of the United States, mentioned above, must be deemed to supersede the limitations imposed by the state statute and the case law

pertaining thereto. Therefore, for the above-stated reasons, the defendant is entitled to a new trial or at least an evidentiary hearing on this issue. This issue was raised in CENTOFANTI'S motion for a new trial which was denied without reaching the merits of any of the issues raised therein.

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. [1]

The prosecutors' continuous use of the terms "murder"and "victim" in the questions that they posed during this trial rendered his trial fundamentally unfair and resulted in a denial of due process in violation of CENTOFANTI'S rights as guaranteed under the Constitution of the United States and under state law. The state used the term "murder" at least thirty-one (31) times during their questioning of various witnesses during trial (AA Vol. 2, pp. 91, 95, 103; Vol. 2, pp. 134-135, 148-149, 150). When the prosecutors continued to use this improper term in their questioning, defense counsel objected and the state was admonished by the district court not to use that term (AA Vol. 3, p. 150). Despite the district court's ruling later in the trial, the prosecutors resumed their use of the term "murder" in their questions and again defense counsel had to object (AA Vol. 5, p. 91). Once again the objection was sustained (AA Vol. 5, p. 91). It is clear that the prosecutors chose to ignore the Court's rulings in their quest to gain a tactical advantage.

This Court can take judicial notice that both prosecutors were very

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[1]See chart attached hereto as Exhibit 1 entitled "References to Victim, Crime Scene, and Murder" for specific references to the use of these terms

experienced having both appeared before this Court numerous times and both having appeared before various members of this Court when they were presiding in the district courts. That merely makes this conduct even more egregious as both prosecutors clearly knew that this was improper conduct.

The State may argue that CENTOFANTI failed to preserve this issue for appeal by failing to object each time that this term or the others cited herein were used during the trial. Even if this was true, which CENTOFANTI is not conceding, this Court may consider the issue sua sponte. See *Coleman v. State*, 111 Nev. 657, 895 P.2d 653 (1995). However, two objections were sustained and the admonition by the court should have been enough to preserve this issue about the improper use of the term "murder" during the guilt phase of this trial.

Prosecutors also used the terms "victim" and "crime scene" when questioning both prosecution and defense witnesses. The record is replete with the improper use of these terms by prosecutors. A cursory review of the testimony of Officer Gogian is representative of the extensive use of these prejudicial and improper terms by the prosecutors (AA Vol. 2, pp. 69-82).

The district court had previously granted the defense motion in limine, regarding use of the term "victim" by prosecutors, on December 27, 2001. The district court told the prosecutors to use the decedent's name or simply to refer to her as the decedent (Reporter's Transcript, 12/27/01, p. 40, filed 5/5/05). Yet despite this admonition, not only did the prosecutors use the term "victim" but so did their witnesses at trial. (See chart attached hereto as Exhibit 1). While defense counsel did not continuously object to the use of this term, the defense

motion in limine had already been granted so use of that term was improper and the state was on notice that it was. Yet the prosecutors continued to use it in order to get a tactical advantage.

In addition, prosecutors and their witnesses also continuously used the term "crime scene" in their questions and answers (AA Vol. 2, pp. 69,72, 78-79; Vol 3, pp. 199, 201). Whether a crime had in fact occurred, at the Wintergreen residence, was an issue for the jury to decide. CENTOFANTI had claimed self-defense. While the use of the term "crime scene" was not the subject of a motion in limine or a ruling by the district court, the implications of its continuous use are clear.

While this inappropriate term being used over and over during trial might be considered harmless error standing alone, when used continuously in questions, in conjunction with the terms "murder" and "victim," it becomes crystal clear that the influential effect upon jurors during a five week trial is substantial. Yet despite his previous rulings, no further admonishments were rendered by the district judge and no curative jury instructions were requested or given.

The general standard used to determine if prosecutorial misconduct has occurred is "whether a prosecutor's statement so infected the proceedings with unfairness as to result in a denial of due process." *Anderson v. State,* 121 Nev. Ad. Op. 52, 118 P.3d 184 (August 25, 2005). The conduct must be "clearly demonstrated to be substantial and prejudicial." *Miller v. State,* 121 Nev. Ad. Op. 10, 12, 110 P.3d 53, (April 28, 2005). If prosecutorial misconduct is found, "it must be determined whether the errors were harmless beyond a reasonable

doubt." *Witherow v. State*, 104 Nev. 721, 765 P.2d 1153 (1988).

Each time the prosecutors chose to defy the court and to use the words "murder" and "victim" in their questions, it was error for the court to not react sua sponte to correct this. "Sometimes, the cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually." *Butler v. State,* 120 Nev. Adv. Op. 93, 102 P.3d 71 (December 20, 2004). CENTOFANTI contends that each time the word "murder"or "victim" was used by the state during questioning, it created reversible error. Further, the continuous use of the term "crime scene" exacerbated these errors.

It is clear from the constant use of these words that the State was continuously and improperly arguing during the trial and before closing argument, that CENTOFANTI was guilty of murder and by continuing to use these words, knowing they constituted improper argument, the jury was being told CENTOFANTI was guilty of that crime. This continuous use of these words constituted classic prosecutorial misconduct. It is clear, from this and from the other intentional improper conduct of the prosecutors, as set forth below, that they were prosecuting this case with the "win at all cost" attitude and not with any concern for fairness or the constitutional rights of CENTOFANTI. In addition to being a violation of fundamental fairness, ethical issues should be addressed by this Court.

Another instance of prosecutorial misconduct which clearly shows the prosecutors' mind set occurred when one of the prosecutors intentionally used improper questioning in an attempt to harass and embarrass CENTOFANTI during

trial. One prime example of the improper grandstanding by the prosecutor took place during the cross-examination of CENTOFANTI.

BY MR. PETERSON (Prosecutor):

Q. Okay. Do you know where Dr. Sessions is right now?
A. (Centofanti) I have no idea.
Q. He's on vacation. Want to know what he's going to do when he gets back?
Mr. BLOOM: This is really cute. Mr . Peterson always talks about experienced counsel. Experienced counsel, Mr. Peterson, knows that's an improper form.
That's an argumentative question.
If you want to call him and talk about if he can remember things from a long time ago, he can do it.
Objection. Argumentative.
The Court: Sustained.

(AA Vol. 5, p. 73)

Despite the sustained objection, the prosecutor immediately continued with the improper and sarcastic line of questioning which was intended to demean and embarrass the defendant. In addition, Mr. Peterson went even further by expressing his own personal opinion near the end of his question.

BY MR. PETERSON:
Q. Would it surprise you to learn Dr. Sessions is going to get on a plane next week and tell this jury, unequivocally, a hundred percent, he never diagnosed Gina Centofanti with drug damage to her nose, one hundred percent, unequivocally, never said those words to you, 100 percent, unequivocally, would not share that information with you when she's the patient, and 100 percent, unequivocally, is offended you would say that, and that he attended your wife, he thought she was an angel of a girl and thought you two had a bright future together, which it turns out he was wrong about?
Are you aware of that?
MR. BLOOM: Objection. Compound.
Argumentative. Improper. And Mr. Peterson knows that.
It's a nice play for the jury.
/ / / / /

THE COURT: All right. Sustained.
Next question.

(AA Vol. 5, p. 73)

The prosecutor engaged in sarcastic improper questioning of CENTOFANTI wherein the prosecutor essentially testified and vouched for the anticipated testimony of Dr. Sessions while attempting to improperly impeach CENTOFANTI'S testimony. Defense counsel objected (AA Vol. 5, p. 73). However, the damage had been done. By his conduct and improper questioning, Mr. Peterson had improperly expressed his own negative opinion about the veracity of CENTOFANTI'S testimony. This behavior and expression of personal opinion is not permissible. He was intentionally using an improper method to try to impeach CENTOFANTI and to characterize him as a liar. See *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). He engaged in this intentionally improper conduct in order to gain a tactical advantage.

Given this conduct and the other instances of improper questioning, it is clear that the prosecutors purposely engaged in a pattern of outrageous conduct designed to gain an unfair tactical advantage and to deprive CENTOFANTI of a fair trial and due process of law. They succeeded in improperly influencing this jury.

The actions of the prosecutors clearly infected the proceedings with unfairness. Their conduct was intentionally improper, continuous, substantial and highly prejudicial. The outrageous conduct of the very experienced prosecutors caused errors in this trial of constitutional magnitude under the Constitution of the United States. These errors were not harmless beyond a reasonable doubt.

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 16, 2001, the state filed a motion to admit evidence of other bad acts from the December 5, 2000 battery domestic violence (AA Vol. 1, pp. 58-94). The State sought a pretrial ruling allowing the admission of statements which were allegedly made by Gina to the investigating officers through their testimony since Gina was deceased and therefore unavailable to testify at trial. On December 27, 2001, an evidentiary hearing was held on this motion (Reporters Transcript, 12/27/01, filed 7/5/05). Defense counsel argued that these statements by Gina to the police officers on December 5, 2000, were hearsay and were not excited utterances due to the time period that had elapsed. He also argued that she was not available for cross-examination and their admission would violate CENTOFANTI'S confrontation right (Reporters Transcript, 12/27/01, p. 67, filed 7/5/05). The Court ruled that under NRS 51.075 (general exception) and NRS 51.095 (excited utterance) that the statements were admissible (Reporters Transcript, 12/27/01, pp. 70-71, filed 7/5/05).

On March 8, 2004, fourteen days before the trial commenced, the Supreme Court of the United States rendered its decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). On March 12, 2004, the district court held a pretrial hearing in order to resolve any pending matters prior to the commencement of the trial which was scheduled for March 15, 2004 (Reporter's Transcript, 3/12/04, p. 1, filed 6/6/05). Lead defense counsel, at that time, mentioned the *Crawford* decision as a possible objection to the admission of the

hearsay statements made by Gina on December 5, 2000 (Reporter's Transcript, 3/12/04, p. 42, filed 6/6/05). He had been advised of the decision by his co-counsel. However, lead defense counsel admitted that he had not read the opinion. While the judge stated that he had read it, his discussions with counsel clearly show that he needed to re-read the opinion in order to get an understanding of it as it applied to this case (Reporter's Transcript, 3/12/04, pp. 42-55, filed 6/6/05). A discussion ensued where the district court was under the impression that the statements at issue here were admissible under the excited utterance exception to the hearsay rule as the district judge had ruled in 2001 (Reporter's Transcript, 3/12/04, pp. 36-44, filed 6/6/05). Mr. Peterson, one of the prosecutors, is the only one who claims to have read the opinion and he offered his interpretation of it to the court. Under Mr. Peterson's interpretation of the case, Gina's statements were not testimonial and he claimed that they did not fall within *Crawford* (Reporter's Transcript, 3/12/04, pp. 50-55, filed 6/6/05). The prosecutor twice acknowledged that the prior ruling on the admissibility of Gina's hearsay statements should be revisited in light of *Crawford* (Reporter's Transcript, 3/12/04, p. 54, filed 6/6/05).

Despite the fact that the district court and counsel were going to review it, there is nothing in the record to indicate that the prior ruling was revisited or that there were any other arguments or rulings on the admissibility of the statements made by Gina about the December 5, 2000 incident. These alleged statements by Gina were very damaging to the defense, particularly the statement allegedly made by Gina to the investigating police officers that CENTOFANTI, during that

incident, had held a gun to her head, pulled the trigger and it just clicked (AA Vol. 4, p. 34). Aside from her self-serving statements to various people about this, there was no corroboration to show that this was true. It was CENTOFANTI who had been hit by the picture frame, had his head cut, his shirt torn, had scratches on his hands and rug burns on his knees. He was the one who hid the gun and called the therapist. Who exhibited the violent behavior on December 5, 2000?

Additionally on December 5, 2000, Gina allegedly made similar statements about CENTOFANTI holding the gun on her to therapist Mark Smith, a law mandated reporter, while she was on the telephone with him. He testified about these alleged statements during trial. During trial, despite the prior discussion between all counsel and the district court regarding *Crawford,* Mark Smith was allowed to testify that Gina told him, "He has a gun. It's loaded. He pointed it at me and pulled the trigger" (AA Vol. 3, p. 126). Again, Gina was not subject to cross-examination on these statements. This was extremely detrimental to the defense. It implied to the jury that CENTOFANTI had previously tried to kill Gina.

Trish Miller, Gina's girlfriend, also testified at trial. Gina's same self-serving hearsay statements were also elicited by the state through Miller.

> BY MS. GOETSCH:
> Q. What did she tell you happened?
>
> BY MS. MILLER:
> A. . . . that Chip and her had a fight and he had put a gun to her head, telling her that he was going to kill her, himself, and the kids.

(AA Vol. 2, pp. 88).

It was clearly error for the district court not to revisit the prior ruling on the admissibility of Gina's hearsay statements in light of the *Crawford* decision. Even

the prosecutor had made it clear that this was necessary.

The impact of this decision must now be assessed with respect to the admissibility of Gina's hearsay statements and their impact on the jury. In *Crawford,* the issue presented was whether the procedure used to admit the petitioner's wife's hearsay statement against her husband, complied with the Sixth Amendment's guarantee that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford,* the prosecution sought to introduce against him a recorded statement that his wife had made during police interrogation. The state sought to use this as evidence that petitioner did not stab the other man in self-defense and to thereby negate *Crawford's* self-defense theory. Petitioner's wife was not available to testify at trial because of the assertion of the marital privilege. Petitioner argued that admission of the statement violated his Sixth Amendment right to be "confronted with the witnesses against him." U.S. Const. amend. VI.

The Washington state trial court admitted the statement because although it was hearsay, it had "particularized guarantees of trustworthiness." Id. at p. 3. The Washington State Supreme Court upheld the conviction and the admissibility of the statement. An appeal to the Supreme Court of the United States ensued.

The Supreme Court granted certiorari to determine whether the state's use of the wife's statement violated the Confrontation Clause. The court held that:

. . . the state's use of Sylvia's (Crawford's wife) statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.

Id. at p.15.

In the body of their opinion, the Supreme Court went through a thorough historical analysis of the background of the Confrontation Clause. The one recurring historical requirement, for admitting the statement of an unavailable witness, which was prevalent at common law, was that in order to be admissible, the defendant must have had an opportunity to cross-examine the witness. Id. at pp. 8-9.

The Court, in *Crawford*, went on to reject the view that the Confrontation Clause applied to in-court testimony only. They also rejected the notion that its application to out-of-court statements introduced at trial depended upon "the law of evidence for the time being."

> Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Id. at p. 7.

In the instant case, Officers Mark Lourenco and Craig McGregor testified respectively about statements made by Gina to Mark Smith who related them to the metro dispatcher and who then told Officer Lourenco. CENTOFANTI claims that these statements should not have been admitted at trial and were introduced solely to prove the truth of the matters asserted that CENTOFANTI had held a gun to Gina's head during the domestic dispute on December 5, 2000.

Officer Lourenco testified as follows in response to the prosecutor's question:

Q. What did you find upon your arrival at that address?

/ / / / /

A. As we arrived the details of the call were that a male had put the gun to a female's head.

(AA Vol. 4, p. 33)

Officer Lourenco then testified as to what Gina told him directly.

Q. What did she tell you?

...

A. .... She said that the struggle continued. At one point she grabbed some type of picture of them being married and hit him over the head with it.

(AA Vol. 4, p. 34)

Q. She told you they struggled over a gun and she didn't go into any more detail at that time, correct?

A. She did state that he had pointed the gun towards her head and pulled the trigger.

(AA Vol. 4, p. 43)

Officer McGregor also testified as to what Gina had said to Mark Smith and that it had been related to the dispatcher and then on to Officer McGregor as follows:

Q. What did you find upon your arrival at that location?

A. Well, I arrived with my partner, Officer Lorenco. It was a call that came out as what we call a hot call, as a crime in progress, and that there was a man and woman inside, and that the man had pointed a gun at his wife and pulled the trigger. (What Mark Smith told the metro dispatcher after allegedly being told this by Gina)

(AA Vol. 4, p. 52)

He then testified about what Gina had told him directly.

Q. Did she say whether or not she was afraid of the defendant?

A. Yes.

Q. What did she tell you about that?

A. She said that during the incident immediately after it occurred that she was afraid. She didn't want to call the police. She said that she had talked to a social worker, I believe he was out of state, and I think it was somebody that Chip wanted her to talk to try to resolve the situation.

And during that time, immediately after the incident, she said she was very fearful of him and didn't want to call the police.

Q. Did she comment at all on why she thought she was still alive at that time?

A. Yes, she did.

Q. What did she say?

A. She said something to the effect that he didn't even know how to operate his own gun, otherwise I would be dead.

(AA Vol. 4, p. 55)

In *Crawford*, the court addressed the nature of the hearsay statements made by the defendant's wife and found that because they were taken by police officers in the course of their investigation, they were testimonial in nature and thereby triggered the Confrontation Clause protection. Id. at p. 7. They reversed *Crawford's* conviction. In the instant case, since the statements by Gina, which were made by her to the testifying police officers were made during their investigation of the December 5, 2000 incident, they too were inadmissible for the same reason. The other hearsay statements about which the officers testified, were double/double hearsay when relayed to them by their dispatcher. They were highly prejudicial and their content was not needed to explain their actions. Merely stating that they got a "hot call" would have been enough. Since Gina was unavailable to testify at trial, CENTOFANTI'S right to confront his accuser was

violated by their admission. It was error for the district court, post *Crawford*, not to revisit Judge Gibbons' 2001 ruling which obviously occurred before the publication of the *Crawford* decision.

Mark Smith also testified about what Gina had told him on December 5, 2000. Mark Smith had asked to speak with Gina when CENTOFANTI called him just after the December 5, 2000 domestic battery had occurred (AA Vol. 3, p. 125). He spoke to her asking her questions which elicited information that he told her he intended to give to the police (AA Vol. 3, 127). He then called the Las Vegas Metropolitan Police Department emergency 9-1-1 number and recited the statements that Gina made to him about CENTOFANTI threatening her with a gun, threatening to harm the children and to kill himself (AA Vol. 3, pp. 126-127).

Mark Smith was a licensed therapist in New York and a law mandated reporter. He interrogated Gina in order to elicit statements from her which he intended to give to the police. He subsequently did so. In addition, the State introduced his computer notes which contained all kinds of hearsay statements made by Gina about the gun, ammunition and the clip. Therefore, Gina's statements and Smith's subsequent testimony reciting them are testimonial. This computer record is even testimonial. They all say, what Gina said and she was not available to be cross-examined. Their introduction into evidence during CENTOFANTI'S trial, under these circumstances, violated his right to confront his accuser.

As set forth above, Trish Miller also testified that Gina told her that she and CENTOFANTI had a fight and he had put a gun to her head, telling her he was

going to kill her, himself and the kids (AA Vol. 2, p. 88). Gina allegedly made the telephone call to Miller from the Clark County Detention Center on December 5, 2000 (AA Vol. 2, p. 88). It was made the next afternoon after her arrest. Gina's statements were therefore not admissible through Trish Miller under the excited utterance or present sense impression exceptions to the hearsay rule. Again, the district court's 2001 pretrial ruling that these statements were admissible should have been revisited. The hearsay statements testified to by Trish Miller were highly prejudicial and were erroneously admitted in violation of the hearsay rule (NRS 51.035) and the *Crawford* decision.

In addition, numerous other highly prejudicial and inadmissible hearsay statements were admitted against CENTOFANTI pursuant to the district court's rulings. These statements were hearsay that were not admissible under any exception to the hearsay rule.

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

On December 20, 2001, CENTOFANTI, filed his Motion to Exclude Evidence to Dismiss Charges Against Defendant (AA. Vol. 1, pp. 106-117). In the motion, CENTOFANTI asserted that the State, through the Las Vegas Metropolitan Police Department, destroyed evidence, or it was not provided to the defense, which prejudiced CENTOFANTI in the preparation of his defense (AA Vol. 1, pp. 106-117). CENTOFANTI had foreseen saw that the items destroyed would be extremely important. The State filed their Opposition to Defendant's Motion to Dismiss (AA Vo. 2, pp. 8-11). The State asserted that there was no evidence of bad faith and

that there was no evidence that "Metro" destroyed any evidence.

On April 1, 2004, Sharon Zwick, an investigative specialist for the Las Vegas Metropolitan Police Department testified about the recorded telephone calls to her, allegedly made by CENTOFANTI, between December 14, 2000, and December 20, 2000 (AA Vol. 4, pp. 94-100). The State offered her testimony to show that CENTOFANTI called persistently to get his weapons back. The prosecutor asked, "Which of the guns was he most **anxious** to have released?" They also tried to insinuate that CENTOFANTI had engaged in a sinister plan to change the gun registrations (AA Vol. 4, p. 95). The homicide had occurred on December 20, 2000. The registration of the Taurus .38, the gun Gina kept in her possession, was originally put in her name in January 22, 2000. However, the registration was changed on January 27, 2000, to CENTOFANTI'S name (AA Vol. 4, p. 99).

The telephone messages should have been preserved because there was a pending domestic battery case against Gina (AA Vol. 4, p. 96). Further, the tape recorded messages would have showed that CENTOFANTI wanted all of his guns released (AA Vol. 4, p. 95). By the tone of the prosecutor's questions to Ms. Zwick, he is trying to imply that CENTOFANTI'S main interest was the nine millimeter handgun which was ultimately linked with the homicide (AA Vol. 4, p. 96). Until this loaded question, which assumed facts not in evidence that CENTOFANTI was anxious to get the nine millimeter back, Ms. Zwick made no independent comment about that. The question and subsequently suggested answer (leading question), implied to the jury that CENTOFANTI had a plan in mind for this gun. Many people seek to have their guns returned to them when the guns wind up in police

custody for various reasons. There was nothing unusual about the timing or manner of CENTOFANTI'S request. Again this was misrepresented in an effort to improperly prejudice CENTOFANTI.

In the final analysis, the loss, erasure or destruction of these taped messages, left only the State's version of their content and that they were even made. Ms. Zwick admitted that her office destroyed the recordings (AA Vol. 1, p. 164). The prosecutor argued in his closing argument that the jury should infer premeditation from the allegation, " . . . he (meaning CENTOFANTI) starts calling everyday to get his guns back from Metro. . ." (AA Vol. 4, p. 95). CENTOFANTI did not call everyday to get his guns back (AA Vol. 1, p. 164; AA Vol. 4. p. 95). Certainly, allowing the defense and the jury to listen to the tapes would have been a much fairer situation. The defense had no witness, other than CENTOFANTI, to discuss the nature and extent of the calls. Without the tape(s) as backup, the prosecutor's characterization that CENTOFANTI was anxious to get his gun back, realistically could not be refuted. The prosecutor pounded on CENTOFANTI'S actions to get his guns back. Listening to the tone and manner of his two or three calls to get the guns back would have given the jury the appropriate evidence with which to assess the credibility of Ms. Zwick.

There is no doubt that the State had possession of the tapes (AA Vol. 1, pp. 163-164). In *Howard v. State,* 95 Nev 580, 600 P.2d 214 (1979), this Court reversed his conviction because the record indicated that the State had lost evidence within its control resulting in undue prejudice to the defense. In the instant case, due to the loss of these tape recorded messages, the defense was not

able to effectively cross-examine Ms. Zwick. Further, the prosecutor took advantage of the inequity of the situation by characterizing the tone of CENTOFANTI'S inquiry as anxious. CENTOFANTI denied that he was anxious to get the guns back and denied speaking with Sharon Zwick (AA Vol. 5, p. 96). This made the content and preservation of the tapes all the more critical.

For the above stated reasons and those set forth in CENTOFANTI'S pretrial motion including the denial of due process of law as guaranteed under the Constitution of the United States, the judgment of conviction must be reversed. The record does not show that the district court ever decided this motion, however, since Ms. Zwick testified about these matters for the State, CENTOFANTI'S motion for purposes of this appeal, must be treated as denied.

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

Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of innocence or guilt is close, (2) the quantity and character of the error(s) and (3) the gravity of the crime(s) charged. *Homick v. State,* 112 Nev. 304, 316, 913 P.2d 1280 (1996). The issue was not only one of guilt but also what degree since there were several lesser included offenses which the jury had to consider. The numerous and serious trial errors set forth above, collectively, and individually, prejudicially impacted the jury's verdict. The charge was murder which is our most serious felony. Therefore, all three of these factors come into play.

Each one of the major errors listed above requires that this conviction be

reversed. Each error has resulted in the violation of CENTOFANTI'S constitutional rights as set forth above. The hearsay statements of Gina Centofanti were admitted in violation of the Confrontation Clause, the *Crawford* decision and our evidence statutes. Any other evidence of other bad acts or statements showing "state of mind" were improperly admitted or, at the very least, constituted evidence whose highly prejudicial effect far outweighed any probative value. NRS 48.035. The State's use of the terms "murder" and "victim" and "crime scene" were improper as they assumed facts not in evidence. The use of the term "murder" thirty-one (31) times and "victim" multiple times despite the district court's ruling not to use them constituted prosecutorial misconduct.

The sarcastic, demeaning and harassing questions posed by Mr. Peterson during the cross-examination of CENTOFANTI were not only improperly phrased but were phrased in a way that constituted intentional vouching for a witness and improper impeachment which, under the circumstances, constituted misconduct.

The various acts of misconduct by the jurors contributed to the patent unfairness of the trial. Ms Barrs was a convicted felon who intentionally concealed her convictions before, during and even after the trial. She was untruthful with the district court in voir dire and after the trial was again intentionally untruthful about her interaction with the Jury Commissioner. To further compound the gravity of this situation, the State, in the face of overwhelming documentation to the contrary, continued to represent that Ms. Barrs was not a convicted felon and that she told the Jury Commissioner about her conviction. At best, the State recklessly disregarded the truth in making those

untrue statements to the district court.

CONCLUSION

CENTOFANTI'S rights to a fair trial and due process of law which are guaranteed under the Fifth, Sixth and Fourteenth amendments to the Constitution of United States were violated as set forth above. When charged, everyone in this country is entitled to a fair trial. CENTOFANTI was simply not given that.

Therefore, based upon each error mentioned above and the cumulative effect thereof, CENTOFANTI was denied due process of law, a fair trial and his conviction must be reversed and the case remanded for a new trial.

DATED this 25th day of October, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by 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 25th day of October, 2005.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 25 day of October, 2005, I deposited in the United States Mail at Las Vegas, Nevada, a true and correct copy of APPELLANT'S OPENING BRIEF enclosed in a sealed envelope upon which first class postage has been fully prepaid, addressed to:

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EXHIBIT 1

REFERENCES TO "VICTIM", "CRIME SCENE", AND "MURDER"

Volume	Page	Name of witness	question or answer	objection	Court ruling
2	69	Tiffany Gogian (State)	A. That's the victim that I ended up finding.	No	N/A
2	69	Tiffany Gogian (State)	Q. Do all three of the photographs fairly and accurately depict the living room and the victim as you found her on December 20, 2000?	No	N/A
2	69	Tiffany Gogian (State)	A. I'm not quite sure if there's any other victims or suspects in the house.	No	N/A

2	70	Tiffany Gogian (State)	A. Because at this point it's a crime scene. Q. Did you make attempts to secure the crime scene? A. Yes at this point Q. What do you do to secure a crime scene?[1]	NO	N/A
2	70	Tiffany Gogian (State)	A....then we got crime scene tape and started putting up crime scene tape. Q. Did you make efforts as the night progressed to try to keep your crime scene intact or undisturbed? A. We had – a couple gentlemen had approached the crime scene, walked beneath it.	No	N/A

[1]List of "crime scene" references is not complete. Representative only.

2	72	Tiffany Gogian (State's witness)	A....with the gun in there or the blue towel with supposedly the gun in there we had to secure that as well as the crime scene.	No	N/A
2	78	Tiffany Gogian (State's witness on cross)	Q. I want to ask you some other questions or a few more questions, really, having to do with the crime scene?...ultimately secured the Wright's house as a crime scene as well, is that right?	N/A it was Blooms question	N/A

2	78	Tiffany Gogian (State's witness on cross)	A. Yeah, they were standing, coming towards me which I'm inside the crime scene... A. Inside the crime scene... Q. ... I know the houses were crime scenes... Q. When you say crime scene, thats what I want to find out.	No	N/A
2	79	Tiffany Gogian (State's witness on cross)	Q. So its not as if they had any impact on the crime scene in any way? A. No....I don't know if these were all the crime scene photos that we had of where the tape was up.	No	N/A

2	80	Tiffany Gogian (State's witness on redirect)	Q. They were cooperative when you first made contact with them, then you went over to 8720 where the victim was and when you returned.	No	N/A
2	83	Trisha Miller (State's witness on direct)	Goettsch: I think this goes to the state of mind of both the victim and the Defendant	No (it was said in an argument concerning an objection)	N/A
2	91	Trisha Miller (State's witness on direct)	Q. Tricia, you were talking about the time frame after the domestic violence incident and the day Gina was murdered.	No	N/A
2	91	Trisha Miller (State's witness on direct)	Q. During the time after the domestic violence did - and before the day she was murdered did she talk about D's parents?	No	N/A

2	91	Tricia Miller (State's witness on direct)	Q. Did you talk to him again before the murder?	No	N/A
2	91	Tricia Miller (State's witness on direct)	Ms. Goettsch: I said the time period between December 5, and the day she was murdered.	No	N/A
2	95	Tricia Miller (State's witness on direct)	Q. Did there come a time then when you learned that she had been murdered?	No	N/A
2	103	Tricia Miller(State's witness on cross)	Goettsch: Objection. Relevance as to her opinion about good parenting, bad parenting, none of which is a defense to murder.	N/A	N/A
2	118	Tricia Miller (redirect)	A. After the murder or after	No	N/A

2	123	Marilee Wright (State's direct)	Q. If this murder that we're talking about here today happened in Dec. of 2000, how long had they been living in the house prior to that, approx.?	No	N/A
2	126	Marilee Wright (State's witness on direct)	Q. You said you did - after his parents arrived on the 7th, and then before the murder on the 20th...?	No	N/A
2	126	Marilee Wright (State's witness on direct)	Q. Between the time on the 7th when the d's parents arrived, and the night of the murder, dec. 20th...	Yes	No ruling - the objection was also to vagueness and the court simply responded by saying "I understand."

2	140	Marilee Wright (State's witness on redirect)	Q. And just to understand your relationship with the Centofantis, is it fair to say that you know them a lot better now than you did the night of the homicide?	No	N/A
3	56	Mark Wright (State's witness)	Q. You certainly weren't trying to mislead the police when you were giving them the statement the night of the murder, were you?	No	N/A

3	103	Kim Govea (911 operator-State's witness)	Mr. Peterson (in response to an objection for relevance by Bloom) ...Her demeanor on the call of murder after 15 minutes have lapsed at the house. I think that's a very important question for the jury.	No	N/A
3	104	Kim Govea	Q. Compared to other shootings or incidents of murder was the demeanor of the caller consistent with those other incidents?	No	N/A
3	134	Camille Centofanti (State's witness on direct)	Q. Between the time that you arrived in Las Vegas and the time Gina's murder,...	No	N/A