BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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HABITUAL CRIMINAL – MULTIPLE CONVICTIONS – SAME ACT

1990

The Nevada Legislature enacted NRS 207.010 to increase the penalties for habitual criminals. This statute provides that:

2. Every person convicted in this state of ... any felony, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony ... shall be punished by imprisonment in the state prison for life with or without possibility of parole.

Generally, two or more convictions arising out of the same act, transaction or occurrence and prosecuted in the same indictment for the purposes of the habitual criminal statute are utilized as a single "prior conviction." Rezin v. State, 95 Nev. 461 (1979) (prior conviction of Rape and Robbery under a two—count indictment committed during same transaction or occurrence treated as one prior conviction for the purposes of enhancing the defendant's sentence for Possession of Marijuana); Halbower v. State, 96 Nev. 210 (1980) (three prior felonies committed during a single transaction could only be used as one "prior conviction"); State v. Henry, 734 P.2d 93 (Ariz. 1987) (prior conviction of Burglary, Robbery and Rape used as single prior, with explanation that if they had occurred separately, then they would be separate convictions). Therefore, for separate felony counts to be used as separate "prior convictions" for habitual criminal enhancement, each offense must have occurred on a separate date or in a separate location, even if prosecuted in a single charging document.

The Court of Criminal Appeals of Tennessee held that convictions for burglaries of three separate businesses allegedly occurring on the same, unspecified day were "separate offenses" within the meaning of the habitual criminal statute in State v. Moore, 751 S.W. 2d 464 (1988). In Moore, the defendant was sentenced as a habitual criminal after he was convicted of a bank robbery. The Court based its habitual criminal finding on three convictions for the burglary offenses committed on the same day, but committed against three separate and distinct businesses. The Court

rejected the defendant's argument that the offenses were all part of the same crime spree and, therefore, they constituted one offense.

In Moore, the Court relied on State v. Cook, 696 S.W.2d 8 (1985) to define the phrase "on separate occasions" as referring "to separate events or happenings, each unrelated to the other." In Cook, the Supreme Court of Tennessee ruled two armed robberies committed on the same day against unrelated victims, occurring approximately forty minutes and six miles apart occurred "on separate occasions" within the meaning of the statute.

In State v. Bomar, 376 S.W. 2d 446 at 450 (Tenn. 1964), the Supreme Court of Tennessee affirmed the conviction of the defendant as an habitual criminal. The defendant was convicted of burglary and of being an habitual criminal because of his prior convictions for two separate felonies of housebreaking and larceny committed at separate times. The defendant pled guilty to both offenses at one hearing. The Court reasoned that for each conviction to be separate, it is not necessary for a defendant to be tried and convicted on separate days. Thus, all that is required for enhancement purposes is the commission of separate offenses at separate times.

Similarly, in Cox v. State, 499 S.W.2d 630 (Ark. 1973), the Supreme Court of Arkansas held that the three separate burglaries, though guilty pleas were entered on the same day, constituted three separate convictions. In Cox, the defendant robbed three separate grocery stores. The Court reasoned it would be difficult to simultaneously commit burglaries of separate locations at the same time, so the burglaries of separate stores were each separate offenses.

Factually similar to Cox is State v. Clague, 68 S.2d 746 (1952). The defendant in Clague had been convicted previously of two burglaries committed on the same day in adjoining premises of a double structure. The Court treated the two burglaries as separate offenses for enhancing the defendant's sentence for a third burglary conviction. The Court reasoned that it was mandatory that the defendant be tried and convicted of two previous offenses, but it is not necessary that the defendant be convicted as a double offender before he can be convicted as an habitual criminal. See also, State v. Williams, 77 S. 2d 575 (La. 1955) (court held the defendant subject to sentencing as a fourth offender after previous convictions for three burglaries committed on the same date, but at separate locations).

Additionally, in Blackmon v. State, 612 S.W.2d 319 (Ark. 1981), the Supreme Court of Arkansas held that each plea of guilty to separate offenses constitutes separate prior convictions for purposes of the habitual criminal statute, even though the pleas were entered simultaneously. At one hearing in Blackmon, the defendant pled guilty to four separate charges of burglary arising out of four separate incidents. The defendant was later convicted of robbery and sentenced as an habitual criminal because the prior four burglaries were all separate offenses.

"Sentencing statutes should not be interpreted to provide a criminal with a discount card to commit as many crimes as he might desire without incurring any additional penalty. Cf. State v. Henry, 734 P. 2d 93 at 96 (Ariz. 1987).

HEARSAY – EXCITED UTTERANCE

First, the admission of Humphrey's testimony is justifiable as an excited utterance, because, at the time Hernandez spoke with Humphrey, Hernandez was still in the hospital following the attack, i.e., a startling event, and while she was worried and scared, and therefore under the stress of the excitement caused by the attack. Accord, NRS 51.095. The fact that the information was conducted in an interview two and one-half hours after the startling event occurred does not ruin its admissibility. Accord, Dearing v. State, 100 Nev. 591, 592, 691 P.2d 419 (1984) - a statement given in an interview one and one-half hours later was still admissible under the excited utterance exception; Hogan v. State, 103 Nev. 21, 23, 731 P.2d 422 (1987) - statement given one hour after the startling event was still admissible; compare Felix v. State, 109 Nev. 151, 179, 849 P.2d 220 (1993) - wherein a one-year lapse of time after the event plus substantial prodding and suggestive questioning ruined the admissibility of the excited statement.

Secondly, the admission of Hernandez's out-of-court statements is justified as present sense impressions. Defendant disputes the application of this hearsay exception, because Hernandez described an event that took place two and one-half hours earlier, and were uttered at the hospital and not at the crime scene.

There does not appear to be a physical proximity requirement that must be met before the present sense impression exception applies. Consequently, the fact that the statement

was made at the hospital and not at the crime scene is not fatal to admissibility.

In addition, although the statement was two and one-half hours old, the circumstances of this case suggest that, consistent with the policy underlying this exception to the hearsay rule, the time lapse would not have permitted reflective thought, or calculated misstatement or defective memory. Moreover, the victim's account to Humphrey was corroborated by the physical evidence at the crime scene, the blood on Defendant's own pants, and particularly by the eyewitness testimony of Brixtany Marquez. Accordingly, the error in admitting the testimony, if any, was harmless.

INDENTIFICATION SUPPRESSION - 1995

The Nevada Supreme Court in Canada v. State, 104 Nev. 288 (1988), stated:

> The test is whether upon review of the totality of the circumstances "'the confrontation conducted. . .was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'" Banks v. State, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (quoting Stovall v. Denno, 388 U.S. 293, 301-302 (1967)).

The United States Supreme Court in Manson v. Brathwaite, 97 S.Ct. 2243 (1977), stated:

> (a) reliability is the linchpin determining the admissibility of identification testimony for confrontations occurring both prior to and after Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, wherein it was held that the determination depends on the "totality of the circumstances." j~., at 302, 87 S.Ct., at 1972. The factors to be weighed against the corrupting effect of the suggestive procedure in assessing reliability are set out in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401, and include the witness' opportunity to view the criminal, at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. pp. 2250-2253.

(b) Under the totality of the circumstances in the is case, there does not exist "a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247.

Both the United States and Nevada Supreme Courts have set a very high standard that must be met before eyewitness identification is excluded. Even though several of the witnesses did admit that they had seen television coverage of the robber, each and every one of those involved testified in court that defendant Pope was the person who had committed the robbery from their independent recollection on the date of the robbery.

The Nevada Supreme Court first addressed this issue in Barker v. State, 95 Nev. 309 (1979) wherein the jury foreman completed independent research during the course of the trial and reported his findings to the jury. The court did find that there was juror misconduct, however, refused to order a new trial, since the error was harmless beyond a reasonable doubt. This decision was affirmed by the Nevada Supreme Court. In Barker, the Nevada Supreme Court stated: "Not every incidence of juror misconduct requires the granting of a Motion for a new trial." The Court went on to state that a new trial must be granted unless it appears beyond a reasonable doubt that no prejudice has resulted. This determination lies entirely within the discretion of the trial court since in Barker, the Nevada Supreme Court stated:

> It is for the trial court to determine in the first instance whether misconduct on the part of the jury has resulted in prejudice to a litigant, and its judgment thereon will not be overturned unless an abuse of discretion is manifest. George C. Christopher and Sons, Inc. v. Kansas P. and C. Company, Inc., 523 P.2d 709, 720 (Kan. 1974). See Ryan v. Westgard, 530 P.2d 687 (Wash. App. 1975].

Russell v. State, 99 Nev. 265 (1983) and Pendleton V. State, 103 Nev. Adv. Op. 19 (1987) both dealt with a juror doing independent investigation during the course of deliberations and then reporting the results back to the rest of the jury. The Nevada Supreme Court found this type of conduct to be egregious and reversed and remanded both cases. In Russell, there was no evidence presented involving the actual driving time between Reno and Carson City, even though that was a major point of concern. In Pendleton, the conduct of the juror involved going to and viewing the scene months after the occurrence of the accident. Neither of these factual situations apply to the instant case.

In State v. Thacker, 95 Nev. 500 (1979), the trial court granted the motion for a new trial and it was appealed by the State. The Nevada Supreme Court upheld the decision of the trial court, since they did find that there had been juror misconduct and

that they could not say that the prejudice to respondent was harmless beyond a reasonable doubt. In that case, a juror was the superintendent in charge of the cattle operations at the ranch where the cattle in question had been impounded. During the deliberations, he furnished information as to what he believed the calves weighed at the time they were impounded at the ranch. There had not been any testimony furnished during the course of the trial on this particular issue.

In Bushnell v. State, 95 Nev. 570 (1979), an allegation was made that the jury foreman totally misrepresented a note that was sent in by the judge in response to one of their inquiries. This case was sent back to the trial court to determine whether or not the alleged misconduct actually did occur. The Nevada Supreme Court went on to state that a new trial must be granted unless it appeared beyond a reasonable doubt that no prejudice resulted.

The latest case from the Nevada Supreme Court on the issue of jury misconduct was in Hui v. State, 103 Nev. Adv. Op. 71 (1987). In this case, a juror advised the other jurors of a newspaper article which stated that the defendant had been convicted in a previous trial. The Nevada Supreme Court relied on MRS 175.121, which prohibits a juror from declaring to his fellow jurors any fact relating to the case as of his own personal knowledge. The information concerning the prior conviction or the newspaper article had not been presented to the jury during the course of the trial. The Nevada Supreme Court again cited Barker for the proposition that every incidence of juror misconduct does not require the granting of a motion for a new trial.

LESSER INCLUDED OFFENSE – SUA SPONTE INSTRUCTION

Defendant was charged with armed robbery and that was what was submitted to the jury. The jury instructions were settled on the record. Defendant did not request an instruction allowing for consideration of the lesser included offense of unarmed robbery. Trial Transcript, Vol. II at 153-163. The record does not demonstrate whether Defendant insisted on the "all or nothing" approach. Perhaps that will eventually be brought to light in a post-conviction hearing. As it is, though, defense counsel had every opportunity to object to instructions and to propose instructions. The defense elected against consideration of the lesser offenses.

Defendant now contends that the district court had a duty to override the tactical decisions of the defense camp and to sua sponte allow consideration of the lesser offense. The State disagrees.

The state of the law concerning the duty to instruct sua sponte on lesser offenses is somewhat ambiguous. This Court has often summarily ruled that absent a request for an instruction, the court will not consider the propriety of the instruction on appeal. See e.g., Hollis v. State, 95 Nev. 664, 667, 601 P.2d 62, 64 (1979). On the other hand, this Court has ruled that there are circumstances in which the court should give an instruction even without a request. See e.g., Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966). The State contends first that this case does not fall within the guidelines discussed in Lisby, and second, that a request for an instruction would have been properly rejected and

fiDefendanty that the Court should reject the reasoning of Lisby and hold that a defendant has a right to be tried on the charges in the information. If a defendant elects to "roll the dice" and seek an acquittal of all charges rather than risk a possible compromise verdict of guilty of a lesser offense, the district court should not be required by law to overrule that decision and force an instruction on a lesser included offense on a defendant who has no wish for such an instruction.

The State contends that even under the reasoning of Lisby, there was no error in failing to give instructions relating to unarmed robbery. The Lisby court described four situations involving lesser included offenses. The first is where "there is evidence which would absolve the defendant from guilt of the greater offense or degree but which would support a finding of guilt of the lesser offense or degree." 82 Nev. at 187. In that case, held the Court, the district court should give the instruction sua sponte.[1] In contrast, the fourth situation described by the court is where the State has met its burden of proof on the greater offense, "[b]ut, if there is any evidence at all, . . . on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must if requested, instruct on the lower degree or lesser included offense." 82 Nev. at 188 (emphasis added). The casual reader may believe that the two situations are identical. They are not.

[1]Below, the State will ask this court to reject that ruling.

In subsequent cases, this Court has explained that the duty to instruct sua sponte arises only where there is affirmative evidence tending to show the commission of the lesser offense. Davis v. State, 110 Nev. 1107, 1115, 881 P.2d 657, 662 (1994). That is, where the grounds for an argument on a lesser included instruction focus on the strength of the State's evidence in support of a disputed element, then the court must give the instruction only upon request. In contrast, where the evidence includes affirmative evidence tending to show the commission of only the lesser offense, only then should the court give the instruction sua sponte. As applied, the question here is whether there was affirmative evidence tending to show that Defendant committed an unarmed robbery. There is none. While the arguments of counsel did touch on the strength of the evidence presented concerning the use of the weapon, there was no affirmative evidence put forth tending to show that Defendant robbed his victims without the use of a weapon. Accordingly, this would appear to be a case where the court may have been required, at most, to give an instruction on lesser offenses upon request, but not sua sponte.

Not only did this case not give rise to a duty to sua sponte instruct on a lesser offense, Defendant may not have been entitled to such an instruction even upon request. It has long been the rule of law that an instruction on a lesser offense is appropriate only where the defendant's theory of the case is that he is only guilty of the lesser. In Johnson v. State, 111 Nev. 1210, 902 P.2d 48 (1995), this Court ruled that an instruction on

a lesser offense should be allowed only where the defendant concedes or admits some conduct which constitutes the lesser crime. Here, although counsel may have argued that the evidence that the robbery was committed with the use of weapon was slight, there was nothing approaching an admission of even minimal culpability. The State also suggests that this Court should reconsider the reasoning behind the pertinent portion of Lisby. In Moore v. State, 109 Nev. 445, 447, 851 P.2d 1062 (1993), one of the grounds for reversal was that the court had given an instruction on a lesser related offense over the objection of the defendant. This Court suggested that the defendant has the right, if his chooses, to elect an all-or-nothing strategy, avoiding a potential conviction on a lesser charge.[2] This Court may want to reconsider Lisby and adopt the more intuitive rule to the effect that a defendant may, if he wishes, form his defense around the technical elements of the sole offense charged. If a defendant may elect that approach, it would follow that the failure to request an instruction on a lesser included offense precludes the defendant from asserting error on appeal from the district court's failure to sua sponte override that tactical decision. That would be in keeping with the general rule of appellate procedure that the failure to bring an error to the attention of the trial court precludes raising that same alleged error on appeal.

E. THE STATUTE DEFINING A DEADLY WEAPON IS NOT UNCONSTITUTIODEFENDANTY VAGUE.

[2]Such a right would be of particular interest to an alleged habitual criminal for whom there would be no advantage in conviction of a lesser felony.

Appellant contends that the reasonable person could not know if the penal law of this state precluded him from committing a robbery while displaying a knife. The State again disagrees.

A criminal statute must be sufficiently specific to allow a person of ordinary intelligence to determine if a proposed course of conduct is prohibited. Sheriff v. Anderson, 103 Nev. 560, 562, 746 P.2d 643, 644 (1983). A *caveat*, one who engages in clearly proscribed conduct, cannot be heard to complain that the statute may be vague as applied to others. Id. A term in a statute ought not to be considered vague if reference to a standard dictionary would clear up the ambiguity. Id.

Defendant's argument is premised on the contention that he might have placed an empty knife handle on the counter of the store while threatening the clerk. As indicated above, that premise is unsound. There was no affirmative evidence that the handle was empty. Instead, it seems that enough of the blade was visible to allow the victim to be certain that what she saw was indeed an unopened folding pocket knife. Therefore, the State contends that the proper question before this Court is whether NRS 193.165 is sufficiently clear to allow one to know that it is unlawful to display an unopened knife to a store clerk while threatening to "get wild" and demanding money.

Prior to the 1995 amendment adding the statutory definitions of a deadly weapon, the statute was not unconstitutioDefendanty vague. Woods v. State, 95 Nev. 29, 588 P.2d 1030 (1979); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396

(1975). Thus, Defendant now contends that by amending the statute and including both of the prior common law definitions, the statute became vague.

He first argues that the subsection adopting the "inherently dangerous" test is vague because there has been dispute in the courts over whether a knife is an inherently dangerous instrument. As noted above, the confusion has arisen because the term "knife" has been applied to things such as an "exacto" knife. When it comes to the type of device ordinarily thought of as a "knife," there has been no dispute. A knife, an implement designed for cutting and stabbing, is a deadly weapon. See Steese v. State, supra (butcher knife); Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996)(boning knife). It defies logic to argue that a reasonable person could not know that a real knife such as an ordinary folding pocket knife is a deadly weapon. Anyone who wished to know could readily determine that such an implement is considered a device that when used as designed is likely to cause deadly harm.

Defendant also contends that he could not know that it was a crime to place an innocuous item such as a string on the counter during a robbery. Fortunately, that is not the instant case. He used a knife. In order to be complete, however, the State would point out that NRS 193.165 requires that a device other than an inherently dangerous weapon must be actually used or threatened to be used in a deadly fashion before the enhancement applies. That is, placing string on a counter during a robbery does not make it an armed robbery unless the robber threatens to

fashion a cravat and kill the victim. Here, the threat to deploy the knife in a deadly weapon was fairly explicit and clearly perceived by the victim. Anyone who wished to know could readily determine by reading the statute that a crime will become an armed crime if the defendant actually uses or threatens to use an ordinary implement in a deadly fashion.

Under the functional test as defined at common law and now by statute, the focus was on the acts of the accused. For instance, mere possession of a table fork during the commission of a crime would certainly not subject the defendant to the enhancement. On the other hand, where the defendant actually uses or threatens to use a red hot table fork in the commission of the crime, then the crime is properly enhanced. Clem v. State, 104 Nev. 351, 357, 760 P.2d 103, 106 (1988). If Defendant had used some household implement rather than a knife, he would not be subject to the enhancement unless he actually used or threatened to use it in a deadly fashion. As it is, though, that rule would not be available to this defendant because the knife was inherently dangerous and because he threatened to use it in a deadly fashion.

Defendant seems to argue that the statute became vague because the legislature adopted both of the prior common law definitions. He proposes that the definition of an inherently dangerous weapon is subsumed by the definition of an implement used in a deadly fashion and that as a consequence neither section may stand. This state will contend that the two definitions stand separately. The primary question, though, is what rule of

constitutional law would invalidate the statute if in fact it were drafted so that one subsection described a variant of the other? Such a construction might make a statute somewhat silly, or in counsel's words, "tautological," but that does not mean that it violates some rights of accused persons.

The State contends further that the two statutory definitions are indeed different. Where the weapon at issue is an inherently dangerous weapon, then it matters naught how it was employed. For instance, a burglar who used a gun to shoot out a window and thereby effect entry into an unoccupied building has used a deadly weapon in the crime even though no person was endangered by the shot. On the other hand, if the same burglar used a baseball bat to prop the door open, he would not be subject to the enhancement. Although the ball bat can be used in a deadly fashion, because it is not an inherently dangerous weapon there is no enhancement until and unless a perpetrator uses it in a deadly fashion.

The statute is sufficiently clear to allow appellant Defendant, as well as other hypothetical defendants, to know just what conduct is prohibited. It is unlawful to use an inherently dangerous weapon in any felony and it is unlawful to use or threaten to use other implements in a deadly fashion. Therefore, this Court should rule that the district court did not err in refusing to strike the allegation that the crimes were committed with the use of a deadly weapon.

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III. CONCLUSION

Appellant Defendant was fairly tried and convicted. The judgment of the Second Judicial District Court should be affirmed.

DATED: May 13, 2003.

RICHARD A. GAMMICK
District Attorney

By_____
TERRENCE P. McCARTHY
Deputy District Attorney

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CERTIFICATE OF SERVICE

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I forwarded a true copy of the foregoing document, through the Washoe County Interagency Mail, addressed to:

CHERYL BOND

Appellate Deputy
Washoe County Public Defender's Office
Reno, Nevada 89501

DATED: May 13, 2003

_____

CERTIFICATE OF COMPLIANCE

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

DATED this _____ day of June, 1998.

_____
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STATUTE OF LIMITATIONS – SECRET OFFENSE

Defendant contends that the lower court erred in failing to dismiss the prosecution on the grounds that the statute of limitations had run. The State submits, that given the applicable legal standards and the facts of this case, Defendant's contention lacks merit. We will begin with the legal standards.

The leading Nevada case, Walstrom v. State, 104 Nev. 51, 752 P.2d 225 (1988) deals, as do virtually all other Nevada cases on this subject, with a case of child sexual assault or lewdness involving children. Indeed, NRS 171.095, appears to have been enacted with cases involving offenses against children in mind. The application of the section to felony embezzlement may be a case of first impression in Nevada.

The Walstrom Court found that, while the burden was on the State to prove that the crime was committed in a secret manner in order to toll the Statute of Limitations, the burden was not one of proof beyond a reasonable doubt, but only by a preponderance of the evidence. That distinction is critical in this case.

Drawing a comparison between a child sexual assault case and an embezzlement case is difficult but not impossible. For example, if a mother notices that her eight-year-old daughter is acting unusual around the only male member of the household and is demonstrating peculiar behavior, does the clock begin to tick at that moment in time? Is a mere suspicion that something is amiss sufficient to start the three year limitation on the crime to run?

In our case, does the mere suspicion on the part of some of the homeowners that something is afoot trigger the statute? It is strongly urged that it does not.

Assuming a single sexual encounter and after three years of continued strange behavior, the mother takes the child to a general practitioner, who, following a physical examination, offers the opinion that there is some evidence of abuse but he is unsure. He recommends that a specialist examine the child. Has the statute begun to run? It is urged that it has not. Two years and 361 days before the criminal complaint is filed, the specialist gives the opinion that there has been penetration but not necessarily sexual activity. Has the statute been triggered? Is there now sufficient evidence to formally charge the only adult male with whom the child has had contact?

Finally, the child is interviewed by a Sheriff's Department deputy. She names her assailant, but she is sufficiently ambivalent about the facts that no charging decision can be made. Has the statute been triggered? Only when the child is interviewed by a specialist at the request of the District Attorney does it become clear that an offense has been committed and the suspect clearly identified. Probable cause has been established and at that point a complaint is filed.

It is argued that the earliest possible date in the hypothetical case that "discovery" could be found would be the date of the opinion of the specialist. Anything earlier would be based on speculation. To hold that "discovery" occurred earlier

would open the door to speculation and would force the prosecution to file criminal complaints on mere suspicion of criminal wrongdoing. Determining that a criminal offense has been committed and identifying the individual responsible, in other words, probable cause, is the sole responsibility of the District Attorney. It is argued that embezzlement is, by its very nature, a secret offense and a mere suspicion by a victim who is unable to verify wrongdoing, as is the case here, is insufficient to trigger the statute. The Judge found that the statute had not begun to run. The Walstrom Court held that if there was substantial evidence to support a determination that a crime was committed in a secret manner, the Court would not disturb this finding on appeal.

If Walstrom, the Appellant in the case cited, had sold copies of the pictures taken to total strangers who had no personal knowledge of the child victim, could Walstrom be heard to say that the offense was no longer secret simply because a third party had evidence of the crime in hand? The answer, of course, is no.

The Appellant cites State v. Greiner, 518 N.W. 2d 636 (Minn. App. 1994) as authority for the proposition that if the money has been spent, it is no longer a secret offense. The Greiner case was based on a rather peculiar statute involving

theft with the intent to exercise temporary control. Neither the facts nor the law in Greiner have any relevance here.

Next, Defendant contends that, if an embezzler gives the victim enough knowledge of discrepancies in financial records, the crime is no longer secret. Defendant cites State v. Bachman, 396 P.2d 370 (Kan. 1964) to support this claim. The facts in Bachman disclose that Bachman's supervisor was aware of the discrepancies from the beginning and had continuous access to the books and records of the company and complete control over them. The facts in the Bachman case bear no relationship to the case at bar. The reverse is, in fact, true. The victims here had absolutely no control of, or even access to, the books and ledgers.

Similarly, another Defendant authority, State v. White, 939 S.W.2d 113 (Tenn. CR App. 1996), is equally off the mark. The Court made it clear there that even discoveries of discrepancies in the financial records do not by themselves lead to the conclusion that the Appellant was misappropriating funds. That is the very heart of the State's contention. There was a suspicion. There was evidence of discrepancies. But these facts alone do not trigger the Statute of Limitations nor should they.

Finally, Appellant cites People v. Kronemyer, 234 Cal. Rptr. 442 (1989), and asserts that knowledge of the facts sufficient to put one on alert of suspicious criminal activity equals discovery. What he conveniently fails to point out is that the Court there held that "discoverers" includes **only** those persons who are direct victims **and** who are under a legal duty to

report and investigate crime. Discoverers would, by this definition, include the Sheriff's Department, the District Attorney's office and perhaps the auditor. It certainly would not include individual homeowners. It should be noted that the Kronemeyer Court pointed out that the underlying rationale for the Statute of Limitations (Sec. 800 in the case of California) is to protect individuals from having to defend themselves against charges after material facts have become obscured by the passage of time.

IMPLIED MALICE

THE INSTRUCTIONS CONCERNING IMPLIED MALICE DID NOT IMPROPERLY INSTRUCT THE JURY THAT EXPRESS MALICE SHOULD BE PRESUMED FROM A FINDING OF IMPLIED MALICE.

Murder is a homicide accompanied by malice "either express or implied." NRS 200.010. Both terms, express malice and implied malice, are defined in NRS 200.020. Appellant Milton seems to contend that murder requires a finding of express malice and that implied malice is a method of proving express or actual malice. Thus, he contends that implied malice is a finding that allows a jury to find actual malice and the instructions in the instant case were deficient in failing to include the instruction pertinent to permissive presumptions described in NRS 47.230.[3]

There are some jurisdictions that allow a murder conviction only upon a finding of actual or express malice. Typically, those jurisdictions will instruct a jury that in the absence of direct evidence of actual malice, actual intent to kill, the jury may infer or deduce the existence of such an intent by the existence of other circumstances falling under the general classification of "implied malice." See e.g., Yates v. Evatt, 500 U.S. 391, 396-397 (1991)(South Carolina instruction stating in part that "The words 'express' or 'implied' do not mean different kinds of malice, but they mean different ways in which the only

[3]Related issues, addressed below, arise because the instructions actually given to the trial jury deviated from the statutory definition by substituting "may" for "shall."

kind of malice known to the law may be shown."). Thus, the South Carolina jury was instructed that the circumstance known in that state as "implied malice" was not itself sufficient to find that the homicide was murder, but instead the circumstance was merely a method of proving actual or express malice.

The difference between South Carolina law and Nevada law on this subject is significant. In South Carolina, because implied malice is described as a method of proving express malice, actual intent to kill, an instruction on implied malice would be appropriate in the state on a charge of acting with the specific intent to kill. In Nevada, implied malice is not a method of proving the specific intent to kill. Instead, it is a circumstance that will allow a conviction for murder despite the lack of a specific intent to kill.

In contrast to states such as South Carolina, Nevada law defines a homicide as murder where the killing is accomplished either with express malice, or under those circumstances to which we append the term "implied malice." NRS 200.010. Nevada law, then, more closely approximates the common law rules that allow a murder conviction under some conditions even absent an intent to kill. The most common example of that phenomena is found in the felony murder doctrine. See e.g., Ford v. State, 99 Nev. 209, 214, 660 P.2d 992, 995 (1983).

The concept that implied malice, an abandoned and malignant heart, may act as a substitute for express malice and not as a method of proving express malice, is not new or unique.

That has been the general rule in many jurisdictions for quite some time now. See Davis v. People of Utah, 151 U.S. 262 (1894). See also, 2 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 7.1 (1986)(Describing common law origins of the unintentional "depraved heart" murder).

It appears that Nevada law has always recognized that a homicide may be murder absent express malice where the killing evinces an abandoned and malignant heart. State v. Salgado, 38 Nev. 413, 150 P. 764 (1915). More recently, this Court confirmed the long-standing construction of the statutes and ruled, once again, that a finding of implied malice itself justifies a murder conviction even where the killing was not accomplished with express malice. Witter v. State, 112 Nev. 908, 918, 921 P.2d 886, 893 (1996).

In Ruland v. State, 102 Nev. 529, 728 P.2d 818 (1986), and in Riebel v. State, 106 Nev. 258, 790 P.2d 1004 (1990), the Court ruled that "implied malice" has no place in a trial for attempted murder because attempted murder requires an actual intent to kill and implied malice is not a method of proving actual intent. It is, instead, a circumstance that allows a conviction for murder even where the killer does not entertain the actual intent to kill. That is, the Court ruled that an attempted murder cannot be shown with the theory that the defendant intended to unintentionally kill with an abandoned and malignant heart. See also, Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988).

In several cases where the charge was murder, this Court has similarly found no error in the instructions informing the jury that implied malice, an abandoned and malignant heart, will warrant a murder conviction even where the accused does not harbor the actual intent to kill. See Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998); Greene v. State, 113 Nev. 157, 167-68, 931 P.2d 54, 60-61 (1997); Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 582-83 (1992). Thus, it seems that when the jury is properly instructed, it may find that the killing is murder if it is accomplished with an abandoned and malignant heart without regard to the actual intent to kill. The State's primary position, then, is that a jury in a murder case is properly instructed that a murder conviction is warranted upon a finding of implied malice.

Turning from the statutes to the actual instructions, the issues are clouded just a bit because the court deviated from the statutes by informing the jury that malice "may" be implied rather than "shall" be implied.[4] As a whole, the net effect of that deviation, if there was any effect, was to increase the burden on the prosecution. Because a murder conviction would be warranted based solely on a finding of implied malice, the instruction that malice "may" be implied either had no effect at all, or it instructed the jury that a finding of an abandoned and

[4]This type of confusion could be avoided by changing the shorthand terminology from the legislative "implied malice" to the "depraved heart murder" favored by scholars, or even the "abandoned and malignant heart" murders as that phrasing is used in the statutes. That, however, seems to be more a matter of customary usage than something that can be resolved by this Court.

malignant heart was not in itself sufficient to warrant a conviction for murder. It is difficult to see how the defense could be prejudiced by an instruction that may have increased the State's burden.

The district court also found, alternatively, that if the instructions were seen as describing a method of proving express malice, an intent to kill, that the error was harmless because the instruction only allowed a permissive inference, not a mandatory presumption. Permissive inferences, in contrast to mandatory presumptions, are not prohibited. Thompson v. State, 108 Nev. 749, 838 P.2d. 452 (1992). Here, the instruction used the permissive term "may." Therefore, there was no mandatory presumption and therefore no error.

The jury in this case found Milton guilty of first degree murder. The instructions for first degree murder required the jury to find not only malice, but actual deliberation and premeditation. It is quite difficult to see how the jury could have found actual deliberation and premeditation without having found express malice, an actual intent to kill. Cf. Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996)(if instruction was error, the error was harmless as jury necessarily also found premeditation

MIRANDA

Defendant's argument regarding his motion to suppress falls into two areas. He first claims that his initial inquiry regarding talking to a lawyer required the officers to

immediately stop the interrogation. He also claims that he did not fully understand his rights. The latter is readily disposed of. The tape provided substantial evidence by which the court was able to determine that Defendant was fully aware of his rights. For instance, at one point Defendant indicates that he does not wish to be a "bitch" and does not wish to terminate the interview by requesting a lawyer, but that he will do so if the officers do not convince him that they have indeed talked to the other suspects. From that comment the district court was able to determine that Defendant was fully aware that he had the ability put a stop to the interview any time he wished merely by asserting his right to counsel. The court could also determine that Defendant specifically declined to stop the interview for his own purposes.

Where findings of fact concerning whether a defendant understood his rights are supported by substantial evidence, this Court should defer to those findings. Brimmage v. State, 93 Nev. 434, 567 P.2d 54 (1977). Here, the substantial evidence is the tape of the interview itself. One viewing the tape is left with the inescapable conclusion that Defendant was fully aware of his rights and elected to continue the interview.

There comes, then, the question of whether the officers should have terminated the interview.

In 1966, the Supreme Court decided Miranda v. Arizona, supra, announcing the general principle that before a suspect is interrogated in a custodial setting, he should be advised of his

fifth and sixth amendment rights. The Court later made it clear that this warning is not itself a constitutional requirement but is, instead, a judicially created prophylactic rule designed to guard against involuntary, and therefore, unreliable confessions. Michigan v. Tucker, 417 U.S. 433, 444 (1974). Lately, the Court agreed to consider the continuing vitality of the decision in light of a federal statute governing the admission of evidence in federal courts. See Dickerson v. United States, Order Granting Writ of Certiorari, Docket No. 99-5525, December 6, 1999.

Since Miranda, the Court has explained and modified the scope of that decision with some regularity. For instance, in Edwards v. Arizona, 451 U.S. 477 (1981), the Court announced that if a suspect clearly invokes his right to counsel, the interrogation must cease until the defendant has the opportunity to confer with counsel. More recently, the Court ruled "[w]e decline petitioner's invitation to extend Edwards and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney." Davis v. United States, 512 U.S 452, 459 (1994). The Court held that the interrogation must cease only after the suspect makes a clear and unambiguous objective display that he desires to consult with counsel before answering any further questions.

The Court went on in Davis to rule that an ambiguous request for counsel does not mean that the interrogator is limited to seeking clarity. Instead, ruled the Court, absent an unequivocal demand for counsel, officers are free to just continue

the interrogation. The Court noted "we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." 512 U.S at 461-62. Four concurring justices took issue with that portion of the opinion, but that minority position did not carry the day. See Souter, J., concurring, joined by Blackmun, J., Stevens, J. and Ginsberg, J.

The prevailing majority did not make their decision in ignorance of the real life difficulties some defendants may face. The Court noted "[w]e recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who--because of fear, intimidation, lack of linguistic skills, or a variety of other reasons--will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves. '[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'" 512 U.S at 460.

Some police officers might well have inquired into Defendant's subjective desires when he asked about the timing of talking with a lawyer. It is clear, however, that no rule of constitutional law requires that solicitude and neither does the judicially created prophylactic rule of Miranda and its progeny.

As the Davis Court noted, there had been some great

dispute among courts on the subject of ambiguous requests for counsel. Some courts had held that an ambiguous request for counsel had no effect, others had held that an ambiguous request for counsel absolutely prohibited further questioning until after the suspect consulted with counsel. A third group of courts had held that an ambiguous request for counsel means that there should be no further questioning except questions designed to clarify the suspect's wishes. This Court had apparently ruled with the third group of courts that an ambiguous mention of counsel allowed clarifying questions only. Sechrest v. State, 101 Nev. 360, 705 P.2d 626, 630 (1985). In that case, this Court relied on two decisions of the Fifth Circuit Court of Appeals. Those decisions have now been discredited by Davis.

In Davis, the Court resolved the debate by noting that the Miranda rules were not themselves constitutionally required except as a tool to ensure that unreliable involuntary confessions are not presented to the jury. The Court noted that the Miranda warnings themselves provides the primary protections afforded suspects who are subject to custodial interrogation.

Of course, an equivocal assertion of the right to counsel will always be a factor in determining if a confession is voluntary. See Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996). Indeed, the Davis Court recognized that as well. The Court held, though, that the prophylactic rules should be limited to their proper function of aiding the trial court in the search for the truth by ensuring that involuntary and unreliable

confessions do not taint a verdict. The Miranda rules standing alone, ruled the Court, should not create a barrier to the search for the truth by creating "wholly irrational obstacles to legitimate police investigative activity." 512 U.S. at 460. The State contends that Davis has announced the correct rule of constitutional law, and that Defendant's inquiry about when he might be talking to a lawyer was not such an unambiguous request to meet with counsel before any interrogation that the officers were required to stop the interrogation.

The State also contends that even under the now-rejected minority rule described in Sechrest, there was no error in allowing the jury to hear the confession. Defendant asked the officers, "Just out of curiosity, when do I get to talk to a lawyer." His comment can be taken literally to indicate that he was merely curious about the mechanics of the assertion of his rights, or his comments could be taken as a sort of casual feeling that he might wish to speak to a lawyer at some point. Thus, it is ambiguous or equivocal. The response of the officers in the instant case was much like the response of the interrogator in Sechrest. The officers reminded Defendant of his rights, in which he had been informed that he could "stop answering at any time until you talk to a lawyer." Defendant was explicitly reminded that he could stop the interview at any time. Detective Beltron asked, much like the officer in Sechrest, "You wanna talk to us?" Defendant replied forcefully, "sure." Detective Canfield then again reminded Defendant that he could "stop at any time," and

Defendant again acknowledged being aware of his ability to stop the interview at any time. Only then did the officers continue the interrogation.

The State contends, then, that even under the Sechrest analysis there was no error. Nevertheless, the State invites this Court to recognize that decision in Sechrest has been undercut by the subsequent decision in Davis and to rule that the district court not only reached the correct conclusion, but employed the correct analysis.

MIRANDA – "CUSTODIAL" INTEROGATION

THE DISTRICT COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS.

A police officer must give a suspect certain warnings prior to initiating "custodial interrogation." Miranda v. Arizona, 384 U.S. 436 (1966). At least some courts have ruled that at a motion to suppress, the defendant, not the State, bears the burden of demonstrating whether the circumstances of the interrogation amounted to "custodial" interrogation. See United States v. Charles, 738 F.2d 686, 692 (1994).

In order to determine if an interview amounted to "custodial" interrogation, the pertinent question is whether under the totality of the circumstances, the reasonable person would have felt free to leave. California v. Beheler, 463 U.S. 1121, 1125 (1983). The mere fact that an interview took place at a police station does not make it "custodial". Id. at 1125. See also Oregon v. Mathiason, 429 U.S. 492, 493, 495 (1977)(mere fact that parolee was interrogated at police station does not render interrogation "custodial."); Thompson v. Keohane, 116 S.Ct. 457 (1995).

Ultimately, the "inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." Stansbury v. California, 114 S.Ct. 1526, 1529 (1994).

The test is whether the totality of the circumstances reveal that the suspect's will was overborne by police misconduct. Colorado v. Connelly, 479 U.S. 157 (1986). A confession obtained by torture or physical coercion cannot be used at trial. Brown v. Mississippi, 297 U.S. 278 (1936).

A trial court's ruling on a motion to suppress evidence will not be disturbed if the ruling is supported by substantial evidence. Brust v. State, 108 Nev. 872, 839 P.2d 1300 (1992).

POST TRIAL MOTIONS COMPLETE DISCUSSION

I. Post trial motions available under the Nevada Revised Statutes and Nevada case law.

A. Motions for new trial. NRS 176.515

B. Motions to arrest judgment. NRS 176.525

C. Post-conviction motions for a judgment of acquittal. NRS 176.165.

D. Post-conviction motions to withdraw pleas. NRS 176.165

E. Motions to correct illegal sentences. NRS 176.555

II. Motions for new trial.

A. The basics.

1. Who files? Defendant, not the prosecution.

2. Where filed? In the court of conviction.

3. When? Depends on the theory predicating the request.

a. Newly discovered evidence: two years after the verdict or finding.

i. NRS 176.515

ii. See also Layton v. State, 89 Nev. 252, 510 P.2d 864 (1973) - wherein the court held that it was okay to seek a new trial while the case was pending on appeal, and do so without requesting a remand first. A ruling denying the motion would be independently

appealable, but if the District Court indicated it was inclined to grant the motion, the District Judge must certify his inclination to grant the motion. At that point the case may be remanded from the Supreme Court.

b. "Any other ground:" seven days after verdict or finding.

i. See Depasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990) - wherein a lower court order denying a motion for a new trial was upheld because the motion was filed on the eighth day.

4. How? By filing written pleadings identifying the theory of relief, with supporting points and authorities plus supporting documentation, if any. Also be prepared to present live testimony in the hearing in support of the motion. The emphasis in this hearing should be upon the prejudice suffered by the client because the decision to grant or deny the motion is discretionary and motions for a new trial are not favored.

B. Theories for relief.

1. Newly discovered evidence.

a. Evidence is newly discovered when the showing satisfies the seven factor test from McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978) and its progeny.

b. Examples.

i. Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) - upheld lower court ruling denying new trial request despite claim that a defense witness

changed her testimony after meeting with a prosecutor and thus making her unavailable to testify at trial and subject to impeachment. Held: the new evidence "would merely impeach" the witness and was not such as would create a reasonable probability of a different result.

ii. Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997) - upheld a lower court ruling denying a new trial request despite a claim that a co-defendant confessed to another inmate. Held: no reasonable probability of a different outcome.

iii. D'Agostino v. State, 112 Nev. 417, 915 P.2d 264 (1996) - upheld a lower court order denying new trial request despite claim that prosecutor had an undisclosed plea bargain with a prosecution witness. Held: since defense counsel examined the witness concerning any agreements or possible bias regarding "pending charges," defendant failed to exercise reasonable diligence to discover information "during trial" and no reasonable probability of a different outcome would result.

iv. Jones v. State, 108 Nev. 651, 837 P.2d 1349 (1992) - wherein a lower court order denying a new trial request was reversed because a witness who was subpoenaed by the defense elected to remain silent, but the election was the result of coercion.

v. Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991) - reversed a lower court order denying a new trial request because the newly discovered evidence would have impeached a key witness on a material matter thus rendering a different result reasonably probable.

vi. Clem v. State, 104 Nev. 351, 760 P.2d

103 (1988) - upheld a ruling denying a new trial request because the newly discovered evidence would merely contradict a witness' prior testimony.

vii. Young v. State, 103 Nev. 233, 737 P.2d 512 (1987) - upheld a lower court ruling denying a new trial request despite a claim indicating Young failed to testify at trial about the involvement of another alleged murderer owing to fear of reprisals. Held: Young knew of the alleged involvement of the alleged murderer prior to trial and the evidence was therefore not newly discovered; the presentation of this "newly discovered evidence" was not such as would make a different result probable on re-trial.

viii. McCabe v. State, 98 Nev. 604, 655 P.2d 563 (1982) - upheld a lower court ruling denying new trial relief. The nature of the newly discovered evidence was not disclosed in the opinion, but the court nevertheless referred to it as "newly available" evidence (whatever that means).

ix. Mannon v. State, 98 Nev. 224, 645 P.2d 433 (1982) - upheld a lower court ruling denying a new trial request despite the claim that Mannon's lawyer had represented another fellow who confessed to the crime to Mannon's lawyer, who in turn remained silent respecting the admission or confession. Held: the information did not constitute newly discovered evidence because counsel had timely knowledge of its existence. Nevertheless, the Court reversed Mannon's conviction owing to ineffective assistance of counsel stemming from a violation of his duty of loyalty. Counsel should have withdrawn from his representation of Mannon and

informed the Court of the conflict of interest which necessitated his withdrawal.

x. King v. State, 95 Nev. 497, 596 P.2d 501 (1979) - Upheld a lower court ruling denying new trial request despite a claim that a prosecution witness committed perjury. The evidence showed that while the witness had been tape recorded by a defense investigator and in that interview admitted lying at trial, she denied making the statements to the detective and affirmed her original trial testimony in the motion hearing. Held: the newly discovered evidence could only be used to impeach the witness; such evidence may be sufficient to justify the granting of a new trial if the witness impeached is so important that a different result must follow. Here the witness' testimony was not so crucial that a different result would be required if she were impeached.

xi. McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978) - upheld lower court order denying new trial request despite a claim that an eyewitness' failure to identify a second suspect in a robbery drew her eye-witness identification of McLemore into question. Held: the failure of the eyewitness to identify the second suspect was immaterial to the eyewitness' credibility in positively identifying McLemore as the robber.

xii. Lightford v. State, 91 Nev. 482, 538 P.2d 585 (1975) - upheld lower court ruling denying new trial request despite claim that new evidence showed Lightford to have been entrapped because Lightford failed to prove an unlawful entrapment in the motion hearing. Held: no reasonable probability of a different result on re-trial.

xiii. Biondi v, State, 101 Nev. 252, 699 P.2d 1062 (1985) - upheld a lower court order denying a new trial request despite the submission of an affidavit from Biondi's co-defendant indicating that he, not Biondi, stabbed the decedent and had lied during the trial when he disclaimed any responsibility for the killing. Held: the affidavit was not newly discovered because the information was developed by the defense investigator prior to trial, and would not constitute evidence which would probably change the result because the co-defendant's statements exculpating Biondi had been presented to the jury through other witnesses and been rejected at trial.

xiv. Oliver v. State, 85 Nev. 418, 456 P.2d 431 (1969) - upheld a lower court order denying a new trial request. Oliver argued he did not make a hand to hand sale of heroin, but rather merely handed another fellow a dime for a phone call. The other man was subpoenaed for trial, but later refused to testify, citing the fifth amendment and the impact of that invocation on his impending request for probation. In the motion hearing, however, the man confirmed Oliver's account, admitting the heroin came from a third person, not Oliver. Held: the evidence was not newly discovered, but could have been acquired through reasonable diligence. The Court rejected the claim that the invocation of the fifth amendment made the man unavailable, because Oliver's lawyer "capitulated" in the merits of the privilege assertion without first testing its "legal correctness."

xv. State v. Crockett, 84 Nev. 516, 444 P.2d 896 (1968) - upheld lower court order

granting new trial request. The new evidence involved an eyewitness account of the murder which included sworn testimony that Crockett was neither involved in the murder or present at the crime scene. While the account contradicted a prosecution witness who said he saw Crockett running from the scene, the court held this contradiction was not mere impeachment, but went to the essence of Crockett's defense; the court also found that while the defendant had known of this witness pretrial, the defense used reasonable diligence to secure his attendance, even though they were unsuccessful.

xvi. Pacheco v. State, 81 Nev. 639, 408 P.2d 715 (1965) - upheld a lower court order denying a new trial request despite the discovery of evidence that would constitute an alibi. Held: since the moving papers disclosed only a conclusionary statement that new evidence has been discovered, material to the defense and which could not with reasonable diligence have been discovered and procured at trial and the conclusionary claim was not backed up with proof in the motion hearing, Pacheco failed to establish reasonable diligence. Accordingly, the court did not decide whether the new evidence was cumulative, or whether it would probably have changed the result in a re-trial.

2. "Other Grounds"

a. Juror Misconduct (Note: NRS 50.065)

i. White v. State, 112 Nev. 1261, 926 P.2d 291 (1996) - upheld lower court denial of new trial request despite claim of juror misconduct. Misconduct involved blatant racial bias occurring during jury deliberations, but was found not to deprive defendant of a fair trial.

ii. Roever v. State, 111 Nev. 1052, 901 P.2d 145 (1995) - reversed lower court order denying new trial request. Misconduct involved witness-juror contact during recess designed by the witness to curry favor with the juror. Held: while not all witness/juror contacts require new trials, relief must be granted unless it appears beyond a reasonable doubt that no prejudice occurred; here, the burden was not satisfied.

iii. Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994) - upheld a lower court order denying a new trial request despite claim of juror misconduct. Misconduct involved a juror who brought extrinsic information (a jury "handbook") into the jury room and read it to fellow jurors during deliberations. Held: no abuse of discretion because (1) the juror was removed, (2) the remaining jurors were canvassed regarding any influence that may have been caused, if any, by the removed juror's misconduct, and (3) the jury was ordered to start deliberations anew. This showing overcame the presumption of prejudice and proved beyond a reasonable doubt that no prejudice was present.

iv. Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992) - upheld a lower court denial of a new trial request despite a claim

of juror misconduct. Misconduct involved (1) juror's failure to advise he had been a victim of a crime twenty four years earlier, which was rejected owing to the fact that no evidence of intentional concealment was shown, (2) a juror researched whether he could sit on a capital case and remain true to his religious beliefs was rejected given the voir dire questions and the absence of any and (3) claims that some jurors watched news reports was also rejected because the jurors denied having done so in the motion hearing and the defendant failed to prove any influence.

v. Rowbottom v. State, 105 Nev. 472, 779 P.2d 934 (1989) - reversing a lower court order denying a new trial request based on juror misconduct. The misconduct involved an independent investigation, the results of which were allegedly communicated to other jurors in a capital murder trial. Held: lower court ruling that misconduct was harmless was erroneous.

vi. Hui v. State, 103 Nev. 321, 738 P.2d 892 (1987) - reverse lower court order denying a new trial request based on juror misconduct. The misconduct involved the disclosure by one juror to other jurors the contents of a newspaper article regarding the defendant's first trial. Held: even though the district judge examined each juror regarding the effect of this disclosure and all but one disclaimed any affect, one juror was enough to find prejudicial error.

vii. Pendleton v. State, 103 Nev. 95, 734 P.2d 693 (1987) - reversing a lower court order denying a new trial request based on juror misconduct. The misconduct involved a visit to the accident scene in a felony DUI case the results of which were reported to

the jury and weighed in their deliberations on causation. See also Russell v. State, 99 Nev. 265, 661 P.2d 1293 (1987) - wherein a juror timed the drive from Carson City to Reno and this conduct was deemed prejudicial.

viii. Isbell v. State, 97 Nev. 222, 626 P.2d 1274 (1981) - upheld a lower court order denying a new trial request. The misconduct involved a juror who expressed a change of heart after the verdict was in, another juror who discussed evidence in deliberations with her husband, and a third who indicated Isbell had to be guilty because the Grand Jury indicted him. Held: the prosecutor sustained his burden of showing no prejudice, because the change of heart came too late and no new vote was taken; the husband had no contact with the case and did not advise or threaten the juror to render a certain verdict, and the third juror denied making the statement deemed prejudicial and this statement was corroborated by six other witnesses. Consequently there was no intentional concealment by the third juror of any alleged bias.

ix. Little v. State, 97 Nev. 149, 625 P.2d 512 (1981) - upheld a lower court order denying a new trial request based on juror misconduct. The misconduct involved concealment regarding disbelief in the presumption of innocence and the ability to follow jury instructions. Held: while juror affidavits are not generally admissible to impeach a verdict, they will be admissible on

a claim of "intentional concealment" of potential bias or prejudice. The record in this case, however, revealed no intentional concealment.

x. Bushnell v. State, 95 Nev. 570, 599 P.2d 1038 (1979) - reversing a lower court order denying a new trial request. The misconduct involved a foreman's misrepresentation of an answer a district judge gave in response to a jury questionnaire during deliberations. The misconduct was supported by one affidavit of one juror. The district judge held the affidavit was not admissible to impeach the verdict. Held: Reversed for inquiry into whether misconduct occurred,

and

if so, new trial would be granted unless it appeared beyond a reasonable doubt that no prejudice resulted from the foreman's misconduct.

xi. Walker v. State, 95 Nev. 321, 594 P.2d 710 (1979) - upheld a lower court order denying a new trial request. Misconduct involved juror's failure to reveal he had been the victim of a crime and who had commented on this event during jury deliberations. The district judge found no intentional concealment, and, after an evidentiary hearing, found no juror was improperly influence by the alleged misconduct.

xii. State v. Thacker, 95 Nev. 500, 596 P.2d 508 (1979) - upheld a lower court order granting a new trial. Misconduct involved a presentation by a juror of special knowledge regarding a fact crucial to Thacker's prosecution. Relief was premised on the juror's own testimony in the motion hearing; no evidence regarding the influence of this evidence was presented by the State. Accordingly, the presumption of prejudice remained intact.

xiii. Barker v. State, 95 Nev. 309, 594 P.2d 719 (1979) - upheld a lower court order denying a new trial request. Misconduct involved independent research of the effects of heroin on the human mind. Held: misconduct was present, but not prejudicial given the facts of Barker's case.

xiv. Lewis v. State, 94 Nev. 727, 588 P.2d 541 (1978) - upheld a lower court order denying a new trial request. Misconduct involved discussion of evidence and testimony by three jurors before case was submitted to them for deliberation. Held: district judge did not err in denying the motion, because (1) jurors indicated their decision was based solely on the evidence presented at trial, (2) jurors indicated their discussions did not affect their deliberations, and (3) the defendant's right to a fair trial was not prejudiced.

b. Sufficiency of evidence (or when the district judge disagrees with the jury's verdict after an independent evaluation of the evidence.)

i. State v. Corinblit, 72 Nev. 202, 298 P.2d 470 (1956) - wherein the court held it was error for the trial court to take the case from the jury by dismissing the action at the close of the prosecution's case in lieu of giving the jury an advisory instruction to acquit because of insufficient evidence, which instruction the jury could freely ignore.

ii. State v. Busscher, 81 Nev. 587, 407

P.2d 715 (1965) - wherein the court stated the district court may grant a motion for a new trial following a guilty verdict where the court finds the evidence is in conflict and disagrees with the jury's resolution.

iii. Washington v. State, 98 Nev. 601, 655 P.2d 531 (1965) - wherein the Supreme Court, in contrast to the district court's ruling, concluded that the trial court possesses lawful authority to consider motions for new trial premised on the theory of insufficient evidence. In doing so, the court held that "other grounds" exist when the district judge disagrees with the jury's verdict after an independent evaluation of the evidence, citing Busscher. The court also made the fine distinction between cases in which the trial judge disagrees with the jury's resolution of conflicting evidence and cases in which the court concludes the evidence is not sufficient to justify a rational jury from finding guilt beyond a reasonable doubt. In the latter situation, a new trial is not permitted and the defendant is released. In the former, a new trial is required.

iv. State v. Wilson, 104 Nev. 405, 760 P.2d 129 (1988) - wherein the court, in an effort to clarify the dicta in Washington, concluded that the district courts of Nevada do not have authority to dismiss criminal charges for insufficiency of evidence following a jury verdict of guilty. Accordingly, the lower court order was reversed to allow the trial judge to consider a motion for a new trial.

v. State v. Walker, 109 Nev. 683, 857 P.2d 1 (1993) - wherein the court attempted to resolve the apparent confusion between grants of new trial premised on insufficient evidence versus grants of new trial based on

independent evaluation of evidence that is conflicting. In doing so, the court observed that insufficiency of evidence occurs when the prosecution has not produced a minimum threshhold of evidence upon which a conviction may be based. In contrast, the court remarked, a conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but the evidence is contested and the district judge, in resolving the conflicting evidence differently from the jury, believes the totality of evidence fails to prove the defendant guilty beyond a reasonable doubt. (Note: Crockett v. State, 84 Nev. 516, 444 P.2d 896 - wherein the court ruled that credibility alone is not the test; instead, the trial judge must review the evidence "in their entire light." The court went on to further amplify the distinction by noting that the double jeopardy clause does not bar the prosecution of a defendant where new trial is granted because the trial judge disagrees the jury's resolution of conflicting evidence. But where a district judge concludes that the evidence was not sufficient to justify a rational jury in finding guilt beyond a reasonable doubt, a new trial is not permitted and the defendant must be released. Consequently, the court held that a district judge could grant a new trial following the return of a guilty verdict where he or she disagreed with the jury's resolution of conflicting evidence, but not where there was insufficient evidence to support a guilty verdict. The latter exercise could be conducted by the appellate court on review. (On October 1, 1991, the legislature enacted NRS 175.318 which affords

the trial courts the power that did not exist at the time Walker was decided).

vi. State v, Purcell, 110 Nev. 1389, 887 p.2d 276 (1994) - wherein the court reaffirmed the standard in Walker in a State appeal of a granted new trial request. Held: lower court order affirmed.

c. Witness recantations and the confessions of others.

i. Callier v. Warden, 111 Nev. 976, 901 P.2d 619 (1995) - wherein a State witness recanted her testimony regarding who killed the decedent. A motion for new trial was filed but denied in the trial court. The Supreme Court affirmed. In doing so, the court announced the following four-part test for evaluating recantation cases (1) Was the trial court satisfied that the trial testimony of the recanting witness was false, (2) the evidence showing that the false testimony is newly discovered, (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence, and (4) it is probable that had the false testimony not been admitted, a different result would have occurred at trial. Each component must be satisfied in order for a new trial to be granted. In Callier's case, there was a multiple failure.

ii. Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) - wherein a State witness was accused of changing her testimony after meeting with the prosecutor, but the Supreme Court ruled that the evidence was not newly

discovered; it was available but omitted as a result of a tactical decision, and was not of sufficient weight as to lead to a different result.

iii. Cutler v. State, 95 Nev. 427, 596 P.2d 216 (1979) - wherein Cutler's co-defendant, Michael Bowman, made himself unavailable for Cutler's trial on the advice of counsel, but later admitted that he had demonstrated a stranglehold on the decedent, tied the victim up and hidden him behind a bed. Implicitly, Bowman suggested Cutler had not committed the murder. Consequently, Cutler sought a new trial given Bowman's newly disclosed information. The Nevada Supreme Court, however, upheld the lower court order denying the new trial request concluding that the testimony of co-defendants or accomplices who, following, their own convictions, attempt to exculpate another by accepting responsibility, should be embraced with extreme caution. The trial judge, presumably, found Bowman's remarks incredible, and the Supreme Court agreed, noting as well that Bowman's information, considered in conjunction with the trial transcript, was cumulative, contradicted and in part, inculpatory.

d. Prosecutorial misconduct.

i. Brady violations. See for example Armstrong v. State, 96 Nev. 175, 605 P.2d 1142 (1980) and Simmons v. State, 112 Nev. 91, 912 P.2d 217 (1976).

ii. State v. Carroll, 109 Nev. 975, 860 P.2d 179 (1993) - wherein a new trial request was predicated on improper references to the defendant's in-custody status, despite an order in limine to the contrary. Although the trial court granted the motion for a new trial, the Nevada Supreme Court reversed since it was undisputed that the

prosecutor's mention of Carroll's in-custody status was inadvertent and unintentional. The Supreme Court also noted that Carroll's conviction rested on overwhelming and uncontroverted evidence of guilt. Accordingly, the court ruled that the trial judge had abused his discretion.

III. Motions to arrest judgment.

A. Statutory authority: NRS 176.525. The court shall arrest judgment if the indictment, information or complaint does not charge an offense or if the court was without jurisdiction of the offense charged. A motion in arrest of judgment shall be made within seven days after determination of guilt or within such further time as the court may fix during the seven day period.

B. Case law.

1. Nevada cases. None of recent vintage.

2. Decisions from other jurisdictions.

IV. Post-conviction motions for a judgment of acquittal.

A. Statutory authority: NRS 175.381 . . .

(2) The court may, on a motion of a defendant, or on its own motion, which is made after the jury returns a verdict of guilty, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction.The motion for a judgment of acquittal must be made within seven days after the jury is discharged, or within such further time as the court may fix during that period.

(3) If a motion for a judgment of acquittal after a verdict of guilty pursuant to this section is granted, the court shall

> also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally, and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally, the defendant on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

B. Cases:

i. Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996) wherein the court, relying on NRS 175.381 (2) reaffirmed its view that a district court lacks authority to grant a new trial based on insufficiency of evidence.

The court held that when there is truly insufficient evidence to convict, a defendant must be acquitted. Consequently, the trial judge must set aside a verdict of guilty and enter a judgment of acquittal premised on NRS 175.381 (2). Evans, however, argued that the standard of review was the same for grants of new trial. The court rejected this claim and stated in contrast to conflicting evidence, insufficiency of the evidence occurs when the prosecution has not produced a minimum threshhold of evidence upon which a conviction may be based, even if such evidence were believed by the jury.

> Consequently, the court held that this standard clearly does not allow the district court to act as a "thirteenth juror" and re-evaluate the evidence and credibility of witnesses. Since Evans had confused the two standards, his claim that the trial judge erred in failing to grant his motion for a judgment of acquittal lacked merit.

IV. Post conviction motions to withdraw pleas.

V. Motions to correct illegal sentences.

THE USE OF PHOTOGRAPHIC EVIDENCE

PRESENTATION BY

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I . INTRODUCTION

Photographic evidence is some of the most powerful evidence you can use in a trial to convince a jury that yours is the good and just cause. “Photographs” are defined to include still photographs, xray films, video tapes and motion pictures. See FRE (Federal Rules of Evidence) 1001. Photographs can bring the crime scene, the victim, the defendant and all other aspects of the crime before the jury. As one of the most dynamic types of evidence, photographs can make or break a case.

Experts in the field tell us that sight contributes to seventy-five percent of our learning curve. We retain twenty percent of what we hear, thirty percent of what we see and fifty percent of what we both hear and see. The use of photographs to help explain a point greatly increases what a jury will retain when they retire to deliberate your case.

Most of the references in this outline and during the presentation focus on the Federal Rules of Evidence which are found in Title 28 of the United States Code. While most jurisdictions have adopted the Federal Rules of Evidence in all or in part, you are cautioned to use this outline as the starting point for your research and not as the end all authority.

Photographic evidence is some of the most damaging evidence to the defense. It is not readily subject to impeachment nor can it be easily cross-examined. A photograph *is* what it is and *says* what it says. For these reasons it will be subject to rigorous attacks. You need to be fully prepared to present your photographic evidence. A photograph truly is “worth a thousand words”.

II. TYPES OF PHOTOGRAPHS

There are generally two very broad evidentiary categories for photographs. Demonstrative evidence includes those photographs that depict the crime scene, the surrounding area, dangerous items such as explosives or firearms, and commonly to depict vehicles, since they are generally too large to drag into a courtroom. **Real** evidence, also known as the "silent witness" appears in the form of surveillance tapes or photographs. Crimes in convenience stores, banks, or casinos will very often involve this type of evidence.

A. CRIME SCENE PHOTOGRAPHS

Crime scene photographs allow you the opportunity to transport the jury to the actual location where the crime actually occurred. All too often, by the time the matter goes to trial, the crime scene is changed to such an extent that a personal visit is not appropriate. There is also the practical consideration that most judges don't want to interrupt a trial to make arrangements to transport a jury to the scene.

In addition to the scene itself, photographs need to be taken of the surrounding area to show such things as avenues of approach or escape (ingress/egress) and possibly a *modus operandi.* Aerial photographs are also of great benefit where the scene covers a large geographical tract, or it is helpful to show the jury how the crime scene fits in the big picture.

B. VICTIM

It is imperative, and far too often overlooked, that photographs be taken of the victim at the scene or immediately thereafter. Time and again, cases go to trial where the jury is presented an oral description of victim's injuries without receiving the benefit of that 8 x 10 or 16 x 20 glossy photograph. If bruising or loss of a function of some member of a person's body is at issue, then arrangements should be made to take follow up photographs a few days later when those injuries are most pronounced.

If the victim has died, arrangements should be made to obtain live or pre-death photographs. Autopsy photos should very graphically explain the cause of death at a minimum. Injuries to the body or identifying marks, as well as bruising, or particular or unique tool patterns should all be recorded. X-

rays are particularly important in child abuse cases where previous and skeletal injuries can be demonstrated.

C. DEFENDANT

Finding out two months after the crime, after the tape has already been recycled, that there were surveillance cameras at your crime scene is disappointing to say the least. One of the first things the police or your investigators should do is check for any surveillance cameras, not only in the business itself, but on adjoining businesses or in parking lot(s). With today's abundance of home video recorders, it might also be prudent to go public to see if anyone recorded your particular crime.

The "six pack" or the photo line-up is used extensively as a police investigative tool. The photographs need to be similar and any items which would suggest a prior criminal history should be removed. The original photographic line-up should be marked and placed in evidence so it is available for court.

If a physical line-up is used, again, it must not be suggestive; i.e. five men with beards and the defendant is clean shaven. All of the participants in the line-up should be photographed separately as well as photographs made of the entire line-up so that any challenges in court can be answered.

"Booking" photographs are often used in the photographic line-up. They may also be used in the courtroom as evidence of a defendant's appearance at the time of the crime and the arrest, particularly, where the defendant has altered his/her appearance. Again, all reference to the booking, as well as criminal history, must be eliminated so it is not prejudicial to the defendant. Additionally, you as the prosecutor and all of your witnesses should be aware that you are not to refer to them as "booking" photos or "mugshots".

If the defendant has particular tattoos, or identifying marks which have been relied upon by witnesses in the case, again, photographs should be taken. Remember that any type of gang affiliation must be relevant to the issues at hand before it can be given to a jury. See Dawson v. Delaware, 112 S.Ct. 1093503 US 159 (1992)

If there is an issue of injury to the defendant or a major crime has occurred, the defendant should be photographed with close-ups of the injuries. This way offensive and defensive wounds are preserved. Full length photographs are recommended where identification may be at issue.

III. ADMISSIBILITY ISSUES

A. GENERAL ISSUES

1. RELEVANT EVIDENCE

"Relevant evidence" means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FRE Rule 401. This does not mean that the evidence needs to be directed toward a matter in dispute. Charts, photographs, views of real estate, murder weapons and many other items are universally offered and admitted as an aid to understanding, although they may not be in contention.

An acquaintance of the defendant was allowed to testify that surveillance photographs taken during the course of a robbery were in fact the defendant, even though the acquaintance was not present during the crime. The defendant had changed his appearance at the time of trial making identity relevant. See FRE Rule 402; US **V.** Jones, C.A.8 (Neb.) 1977, 557 F.2d 1237.

A "mugshot" photograph was found relevant where it demonstrated the difference between the defendant's appearance at the time of the crime and at the time of trial. All writing on the photograph was taped over and the jury was instructed to draw no inferences from those concealed portions. See US v. Johnson, C.A.4 (S.C.) 1974, 495 F.2d 378, certiorari denied 95 S.Ct. 111, 419 US 860, 42 L.Ed.2d 95.

To be relevant, photographs must accurately depict the place or thing in question. The trial court properly refused photographs offered by defense as being irrelevant, when the defense claimed that the officer's view was obstructed during the course of a drug transaction. The difficulty was that the photographs did not depict the area where the officer's had conducted their surveillance. See US v. Akers, C.A.D.C. 1983, 702 F.2d 1145, 226 U.S.App. D.C. 408.

Here are some of the theories available which may be offered to a court to show the relevancy of photographs:

- to establish the corpus delicti or elements of the crime;
- to establish the cause, manner or time of death;
- to reflect on some aspect of the defendant's intent;
- to assist in establishing the degree of the crime;
- for identification of the victim or to prove that the victim was a human being;
- to refute self-defense, accident or any other defenses;
- to prove aggravating circumstances;
- to corroborate a witness statements or description; or
- to corroborate the defendant's admissions or confession.

2. BEST EVIDENCE

To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by Act of Congress. FRE Rule 1002. The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing (photograph). US v. Yamin, C.A.5 (LA.) 1989, 868 F.2d 130, 10 U.S.P.Q. 2d 1300, re-hearing denied, certiorari denied 109 S.Ct.
3258, 492 US 924, 106 L.Ed.2d 603. The best evidence rule is not always an inflexible and an unyielding rule and a reasonable discretion is vested in the trial court in the application of this rule. Atchison, T. and S.F. Ry. Co. v. Jackson, C.A.l0 (Kan.) 1956, 235 F.2d 390; Roberts v. Hollocher, C.A.8 (Mo.) 1981, 664 F.2d 200; US v. Fleming, C.A.7 (Ill.) 1979, 594 F.2d 598, certiorari denied 99 S.Ct. 2863, 442 US 931, 661 L.Ed.2d 299; US v. Franks, C.A.6 (Tenn.) 1975, 511

F.2d 25, certiorari denied 95 S.Ct. 2654, 422 US 1042, 45 L.Ed.2d 693, certiorari denied 95 S.Ct. 2656, 422 US 1042, 45 L.Ed.2d 693, certiorari denied 95 S.Ct. 2667, 422 US 1048, 45 L.Ed.2d 701.

Still photographic images made from the videotape in a bank during the course of a robbery have qualified as an original writing, recording or photograph. See US v. Perry, C.A.8 (Ark.) 1991, 925 F.2d 1077, certiorari denied 112 S.Ct. 152, 502 US 849, 116 L.Ed.2d 117.

The best evidence rule requires only that a party seeking to prove the contents of a document or photograph introduce the original, or explain why it cannot be produced. US v. Rose, C.A.7 (Ill.) 1978, 590 F.2d 232, certiorari denied 99 S.Ct. 2859, 442 US 929, 61 L.Ed.2d 297.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. FRE Rule 1003. To prevent a duplicate from being admitted into evidence, the opposing counsel has the burden of proof to show that there is a genuine issue as to the authenticity of the unintroduced original, or as to the trustworthiness of the duplicate, or as to the fairness of substituting the duplicate for the original. US v. Georgalis, C.A.5 (Fla.) 1980, 631 F.2d 1199, re-hearing denied 636 F.2d 315.

Using Federal Rule FRE 1002 and FRE 1003 in conjunction, photographs of documents from which a drug agent read at trial were admissible as duplicates of originals even though the photographs were not the “best evidence”. US v. Stockton, C.A.8 (Mo.) 1992, 968 F.2d 715, re-hearing denied.

3. PROBATIVE VALUE

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FRE Rule 403. Tests to be applied in admitting photographs is whether the prejudicial effect of photographs outweighs their probative value. The admission of photographs is within the sound discretion of the

trial court and will not be overturned unless that discretion is abused. Giblin v. US, C.A.8 (Mo.) 1975, 523 F.2d 42, certiorari denied 96 S.Ct. 1470, 424 US 971, 47 L.Ed.2d 739.

Where the identification of a drug crime defendant was at issue, and the photograph depicted him in expensive clothing with gold jewelry, the court found that it was *not* so prejudicial as to outweigh the probative value, even though a jury could possibly interpret the photograph as depicting the defendant as a "drug courier". US v. Chambers, C.A.9 (Cal.) 1990, 918 F.2d 1455.

A finding was made that the probative value outweighed any prejudicial effect in a trial for possessing an unregistered machine gun where photographs showed not only the subject machine
gun, but several other weapons. See US v. Hitt, C.A.9 (Or.) 1992, 981 F.2d 422.

A court has also held that the weighing of the probative value against any possible prejudice concerning arguably gruesome photographs could not be done *prior* to trial but would have to be done in the context of the issues *in* trial as they develop. US v. Cheely, D. Alaska 1992, 814 F.Supp. 1430, affirmed 21 F.3d 914, affirmed 36 F.3d 1439. Photographs of gunshot victims were also found to be probative of "especially heinous, atrocious or cruel" aggravating circumstance. Booker v. State, 449 S.2d 209, 216.

4. FOUNDATION/AUTHENTICATION

All too often the objection heard from defense concerning photographs is that a proper foundation has not been laid since the photographer is not available. Normally, this is one objection that borders on the ludicrous. In most instances, it is not the photograph itself that is of evidentiary value, but the subject matter of the photograph that is important. Any person who has actual knowledge of the subject matter that is depicted in the photograph can be used to lay the foundation and authenticate it as a true and accurate depiction at the time in question. For instance, the owner of a motor vehicle can look at a photograph of his stolen car and testify that that is in fact a true and accurate photograph. His/her testimony is sufficient to authenticate that photograph or lay the proper foundation.

The situation is different when a surveillance "silent witness" photograph is involved. That will be discussed further below.

Contents of writings, recordings, or photographs may be proved **by** the testimony or deposition of the party against whom offered or by that parties written admission, without accounting for the non production of the original. FRE Rule 1007. In other words, if the adverse party, in our case the defendant, admits that the photograph in question is his booking photograph, which is normally accomplished by stipulation, then there is no issue and the photograph is admissible.

FRE Rule 1004 states that the original photograph is not required if it was lost or destroyed, is not obtainable through judicial process, is in the possession and is not produced by the opposing party or involves collateral matters (is not closely related to a controlling issue). If the government loses or destroys tangible evidence, secondary evidence such as photographs will be allowed unless the defendant can show (1) bad faith or connivance on the part of the government, and (2) that the defendant was prejudiced by the loss or destruction of the evidence. US v. Loud Hawk, C.A.9 (Or.) 1979, 628 F.2d 1139; US v. Henry, 48 F.2d 912, (9th Cir. 1973). In *Loud Hawk* state officials had destroyed dynamite based on a lack of storage facilities, problems with chain of custody and public safety considerations. The only prejudice found to the defendant was the fact that they were not present for the destruction nor did they have an opportunity to analyze samples. The court found that this was insufficient prejudice and allowed the use of secondary evidence.

A photograph may be self-authenticating, when put with other circumstantial or indirect evidence, sufficiently to justify its admission into evidence. At least one court has allowed inferences from a photograph to be used as a portion of its own foundation. See US v. Stearns, C.A.9 (Hawaii) 1977, 550 F.2d 1167 citing US v. Taylor, 530 F.2d 639 (5th Cir. 1976) and People v. Bowley, 59 Cal.2d 855, 31 Cal.Rptr. 471, 382 P.2d 591 (1963)

B. SPECIFIC ISSUES

1. DEMONSTRATIVE EVIDENCE VS. REAL EVIDENCE

Just as a refresher, normally the photographer does not have to be called to the witness stand to admit photographic evidence. Most photographs can be admitted once a witness with personal knowledge about the subject matter testifies that the photograph

is a true and accurate representation at the relevant time. See People v. Donaldson, 24 Ill. 2d 315 (1962) and People v. Holman, 103 Ill. 2d 133 (1984)

When you are wanting to admit a photograph as demonstrative evidence the following elements should be established:

- The witness is familiar with the object or scene.
- The witness describes the basis of his/her familiarity with the object or scene.
- The witness recognizes the object or scene which is portrayed in the photograph.
- The photograph fairly and accurately depicts the object or scene at the relevant time.

When the surveillance tape is the only witness to all or part of the crime, the foundation is more rigorous. A person who is familiar with and actually set up the camera, whether it is video, time lapse or still photography, will need to be contacted to establish the following:

- The camera was in good working order.
- The manner in which and when the film was placed in the camera.
- The operation of the camera to include how it was activated.
- The time and manner in which the film was removed from the camera.
- The absence of gaps in the film or video tape.
- The inability to alter the operation of the camera during the filming.
- The chain of custody for the film from its removal from the camera through developing.

- Identification of that film as the source of the photographs offered in court if separate prints have been prepared.

- If applicable, an explanation of any titles such as date and time, on the video tape or photographs that were automatically placed by the camera.

2. LIVE VICTIM/BEFORE DEATH

When the case involves a deceased victim quite often the defense will raise an objection to any pre-death or live photographs of the victim on the grounds that it will unduly prejudice the jury. What they are really saying is that they do not want a photograph of a live, smiling human being with a future who's life was cut short by the conduct of their client. Even though the court does have broad discretion in the admission of photographs, you need to be able to show the court why this particular photograph is relevant.

One reason it is relevant identification of the victim. By having a photograph identified and authenticated early in the proceedings, then subsequent witnesses can identify the victim and his/her part in the story as it unfolds.

Immediately after the name of the victim in your charging document state "a human being". You are then required to prove that the victim was "a human being", which may also be required by your particular statutes, and one way to prove that is through witness identification of a photograph and testimony that the witness knew the victim when he/she was alive.

Also look at the possibility in your particular case of identifying the victim for the purpose of showing a relationship between the defendant and the victim.

The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put on, by reminding the sentencer that just as the murderer should be considered as an individual, so to the victim is an individual whose death represents a unique loss to society and in particular to his family.'" Dawson v. Delaware, 112 S. Ct. 1093, 503 US 159 (1992) citing Payne v. Tennessee, 501 US 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Although this statement was made in the context of a penalty phase, it does provide grounds to support admission of a "live" photograph of the victim.

3. AUTOPSY/DEAD BODY PHOTOGRAPHS

Just by their very nature, autopsy photographs, and in a lot of cases, photographs of deceased bodies can be considered gruesome. Whether a photograph is arguably gruesome is not a basis for denying its admission.

Admission or rejection of photographs of a deceased body lies largely in the discretion of the trial court. US v. Odom, M.D. Pa. 1972 348 F.Supp. 889, affirmed 475 F.2d 1397, certiorari denied 94 S.Ct. 182, 414 US 836, 38 L.Ed.2d 72. The photograph of a body is inadmissible only when the picture is of such a gruesome and horrifying nature that its probative value is outweighed by the danger of inflaming the jury. US v. Brady, C.A.9 (Mont.) 1978, 579 F.2d 1121, certiorari denied 99 S.Crt. 849, 439 US 1074, 59 L.Ed.2d 41. The standard to be used in determining admissibility of allegedly gruesome pictures is whether the probative value of the photographs outweighs their prejudicial effect on the jury; evidentiary value of the photographs must be balanced with their tendency to overwhelm reason and to associate the accused with crimes without sufficient evidence. State v. Thom, La.App. 5 Cir. 1993, 615 S.2d 355.

The United States Supreme Court has declined to find that relevant photographs which have been admitted, although they may be gruesome and inflammatory, are the proper subject of a due process or other constitutional attack. See Lisenba v. People of State of California, U.S. Cal. (1941) 62 S.Ct. 280, 314 US 219 cited in the dissenting opinion in Thompson v. Oklahoma U.S. Oklahoma (1988) 108 S.Ct. 2687, 487 US 815.

As with other photographic evidence, the pictures of dead bodies and autopsies have been found to be relevant and admissible under numerous grounds. Some of these include: illustrating the testimony of the pathologist (US v. Soundingsides, C.A.lO (Wyo.) 1987 820 F.2d 1232, re-hearing denied, 825 F.2d 1468 and US v. Cline, C.A.8 (S.D.) 1978, 570 F.2d 731); identity of the victim (US v. De Parias, C.A.11 (Fla.) 1986, 805 F.2d 1447, certiorari denied 107 S.Ct. 3189, 482 US 916, 96 L.Ed.2d 678); establishing the *corpus delicti* and the location of gun shot wounds (US v. Fleming, C.A.7 (Ill.) 1979 594 F.2d 598, certiorari denied 99 S.Crt. 2863, 442 US 931, 61 L.Ed.2d 299); showing the proximity of the body to certain items linked to the murder suspect (US v.

Kilbourne, C.A.4 (Md.) 1977, 559 F.2d 1263, certiorari denied 98 S.Crt. 220, 434 US 873, 54 L.Ed.2d 152); for the purpose of corroborating eye witnesses (bizarre) testimony (Giblin v. US, C.A.8 (Mo.) 1975, 523 F.2d 42, certiorari denied 96 S.Crt. 1470, 424 US 971, 47 L.Ed.2d 739); and for establishing the elements of the offenses bearing on defendant's claim of self-defense or accident (US v. McRae, C.A.5 (Tex.) 1979, 593 F.2d 700, re-hearing denied 597 F.2d 283, certiorari denied 100 S.Crt. 128, 444 US 862, 62 L.Ed.2d 83 and US v. Odom, M.D. Pa. 1972, 348 F.Supp. 889, affirmed 475 F.2d 1397, certiorari denied 94 S.Crt. 182, 414 US 836, 38 L.Ed.2d 72)

> If a court feels that color photographs of a dead body or of an autopsy are too gruesome to be shown to a jury, then a suggestion would be to present black and white photographs of the same material to the court for its consideration. However, there are cases where that has not been required. In Georgia, a trail judge did not abuse his discretion by admitting color photographs of a child's lacerated heart in a prosecution for cruelty to a child. US v. Bowers, C.A.5 (Ga.) 1981, 660 F.2d 527. "In State v. Huff, 14 N.J. 240, 102 A.2d 8, it was held that the fact that the photographs of murder victim were in color, and hence more revolting and gruesome than they would have been otherwise, was not a ground for their exclusion. We approve this holding." Cited in Morford v. State, 80 Nev. 438, 395 P.2d 861 (1964).

The defendant was not sufficiently prejudiced by gruesome black and white photographs of the charred body of a narcotics smuggler killed in an airplane crash for there to be a finding of abuse of discretion. This was held even though the manner of the smuggler's death was not at issue for the jury and the photograph was not relevant to any issue in the case. US v. Eyster, C.A.11 (Ala.) 1991, 948 F.2d 1196.

As a final note in this area, despite a stipulation by the defense that four victims in an armed robbery had died of gunshot wounds to the head, it was held that the court did not abuse its discretion by allowing the photographs of those victims before the jury. The court made a specific finding that the probative value outweighed the potential inflammatory nature of the photographs. See US v. Brady, C.A.6 (Tenn.) 1979 595 F.2d 359, certiorari denied 100 S.Crt. 129, 444 US 862, 62 L.Ed.2d 84.

4. BOOKING PHOTOGRAPHS/MUGSHOTS

Normally, booking photographs are used in lineups to identify the perpetrator or in trial to show the appearance of the defendant at the time he was booked for the crime. Precautions must be taken to remove any and all indications of a prior criminal history with respect to the defendant. That would include checking the back of the photograph, if it is mounted, to ensure there are no writings indicating a prior criminal history. As stated before, neither you nor any witnesses should make reference to the fact that the photograph in use is a booking photograph or "mugshot" unless that information has already come before the jury in some other context. See State v. Scott, 604 P.2d 943 (Wash.) 1980; Stephenson v. State, 606 Atlantic 2d 740, (1992); People v. Dent, 583 N.Y.S. 2d 301, (1992); Jones v. Kemp, 794 F.2d 1536 (11th Cir. 1986); Reiger v. Christensen, 789 F.2d 1425 9th Cir. (1986)

IV PHOTOGRAPHIC IDENTIFICATION PROCEDURES (LINEUP)

Often after a crime is committed where the perpetrator has not been identified, police will prepare photographic lineups which contain at least one suspect. These lineups are shown to witnesses to afford them the opportunity to identify the person who committed the crime. Caution should be taken that the photographic lineups are not suggestive by ensuring that all photographs are of a like nature and that the persons depicted are similar. Additionally, the police should never make any suggestions or indicate that a suspect or a particular person is in the photographic lineup. The goal of being careful in presenting these photographic lineups is not to *taint* the in court identification. It must be remembered that the standard is that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification *in court.* The *in court* identitication is the one at issue. See Stovall v. Denno, 388 US 293, 87 S.Crt. (1967) and Simmons v. US, 88 S.Crt. 967, 390 US 377 (1968)

Totality of the circumstances is the test to be applied by the court to determine if the *in court* identification has been tainted by out of court identification. See Neil v. Biggers, 409 US 188, 93 S.Crt. 375, 34 L.Ed.2d 401, (1972). Even if the procedure used is suggestive and unnecessary, such as in the case where a police officer reviewed a single photograph, there is still no *per se* rule of exclusion; the test is totality of the circumstances. See Manson v. Brathwaite, 432 US 98, 97

S.Crt. 2243, 52 L.Ed.2d 140 (1977). See also US v. Torres, E.D.N.Y. 1985, 610 F.Supp. 1089 and Moss v. Wolff, C.A.8 (Neb.) 1974, 505 F.2d 811, certiorari denied 95 S.Crt. 1662, 421 US 933, 44 L.Ed.2d 91.

V. TRIAL TIPS

During your preparation for trial, you should take the time to look at each photograph and ask yourself “why do I need to get this admitted-what does it add to my case?” If the only reason you can give yourself is that production of the photographs will cause the jury to toss their lunch, then you need to re-evaluate the purpose of that particular item. Remember all of the reasons that have been pointed out in this outline for using the photograph and find the appropriate niche in which to place it.

If you have a concern as to whether or not photographs will be admitted by the court, but you have determined that they are very necessary to your case, then you might consider approaching the judge and having your photographs reviewed before trial. Regardless of the discovery provisions in your particular jurisdiction, it is a better practice to let defense see all of your photographs well in advance of the trial so that they can raise objections in a timely manner. If possible, have a hearing and get as many issues resolved as you can as soon as you can so that you know going into trial what you will be permitted to use. If the judge is not certain as to whether he/she is going to allow a particular photograph, then ask him/her to reserve ruling until he/she can see how it fits with the rest of the evidence presented and why it is necessary. Of course, the bottom line is photographs give the jury a better understanding of what occurred so they can render their fair and impartial verdict.

After you have laid the proper foundation for the photograph, and the court has admitted it, publish that photograph to the jury. If your photograph is a 16 x 20 or larger, you can do so by walking in front of the jury, or if it is a smaller photograph, by letting them pass it around. Do not talk or put on any further evidence while the jury is reviewing the photograph. By obtaining permission of the court to publish the photograph as soon as it is admitted, you have now educated the jury as to what you are discussing and what the point of the photograph is.

Remember, in most cases, the defense does not want you to get

photographs before the jury. Therefore, you do not want to stipulate to facts in lieu of using your photographs. If the defense will stipulate to the admission of the photographs, then you are ahead.

If you have gruesome photographs that are in color and the court does not seem inclined to admit those photographs, then you may offer some alternatives, such as producing black and white photographs or even cropping the disagreeable portions. Be careful when doing this that you don’t eliminate the relevant part of the photograph.

As a final tip, whenever the defense wants to admit a photograph, always be extremely cautious. In most cases, they do not have the opportunity to be at the scene immediately after the crime. By the time they hire an investigator or in some other way go to the scene to take photographs, or photograph the general area, details have changed. Agreeing or stipulating to the wrong photograph that does not accurately depict how your scene appeared at the relevant time could cost you the trial.

VI. FUTURE TRENDS

A person would have to be Merlin the Magician to predict what’s going to happen in the area of photographic evidence in the near future. With the advent of computers and the computer image generation system, there is no telling where this is going to stop. Modern technology has advanced to the point where not only photographs can be changed, but they can be created if a person has the proper equipment. If you are not a believer in what can be done today, then look at movies such as Forest Gump and Dragon Heart.

Also due to the advancement of computers, photographs can be enhanced in order to more clearly show the images. Where does enhancement stop and alteration begin?

Although the United States Supreme Court has not seen fit to find any due process or other constitutional violations concerning gruesome photographs, is the case that will change that in our courts today? It also seems that the rapid advancements in technology will alter the foundation and authentication requirements for the admission of photographs.

ADMISSION OF PHOTOGRAPHS

1992

The Nevada Supreme Court has been very consistent in the latitude it has allowed District Court Judges in admitting photographs. In 1968, the Court in Wallace v. State, 84 Nev. 603 at 606 stated:

> The colored photograph of the nude decedent was taken at the morgue. The doctor used that photograph to explain to the jury the various wounds and their relation to the cause of death. It is not suggested that the photograph was inaccurate. Since the purpose of trial is to ascertain and disclose the truth we will not subvert that purpose and declare relevant photographic evidence inadmissible simply because it damages the defense. Langley v. State, 84 Nev. 295, 439 P.2d 986 (1968).

Speaking as to gruesome photographs, the Court in 1970 in Shuff v. State, 86 Nev. 736 at 740 Stated:

> In Morford v. State, 80 Nev. 438, 395 P.2d 861 (1964), this court said: "In State v. Huff, 14 N.J. 240, 102 A.2d 8, it was held that the fact that the photographs of a murder victim were in color and hence more revolting and gruesome than they would have been otherwise was not a ground for their exclusion. We approve this holding."

The Nevada Supreme Court addressed photographic evidence in 1974 in Nails v. State, 90 Nev. 124 at 125—126, wherein they stated:

> Photographic evidence is generally liberally admitted, so long as it sheds light upon some material inquiry. Alsup v. State, 87 Nev. 500 489 P.2d 679 (1971); Langley v. State, 84 Nev. 295, 439 P.2d 986 (1968). The fact that the appellant did not dispute the seriousness of the wound did not negate the photographs' materiality. At trial, the victim supported appellant's defense that the wound was accidentally inflicted, and minimized its severity. The photographs tended to show the angle and force of the knife thrust, which the jury were entitled to consider in determining whether to disbelieve appellant and the victim, and to believe other witnesses concerning the wound's severity and the intentional manner in which it was inflicted. (Emphasis added).

In Allen v. State, 92 Nev. 78, 82 (1975), the Court Stated:

3. Appellant also contends that the district court erred by admitting into evidence color photographs of the victims, which he claims were taken after autopsies were performed. The record clearly shows that they were taken prior to the autopsies. Color photographs of a victim used by a doctor to explain the cause of death to a jury are properly admissible because they aid in the ascertainment of truth. The probative value of the photographs outweighs any prejudicial effect they might have on the jury. Shuff v. State, 86 Nev. 736, 476 P.2d 22 (1970); Summers v. State, 86 Nev. 210, 467 P.2d 98 (1970); Walker v. State, 85 Nev. 337, 455 P.2d 34 (1969); Wallace v. State, 84 Nev. 603, 447 P.2d 30 (1968).

In Ricci v. State, 91 Nev. 373, 380 (1975), the Nevada Supreme Court upheld the use of a color photograph as opposed to a black and white photograph since the former was offered to prove facts which the latter could not.

In Theriault v. State, 92 Nev. 185, 193 (1976), the issue was again raised that the District Court had erred in admitting photographs of murder victims. The Nevada Supreme Court again addressed this issue by stating:

10. Theriault further claims that the court erred in admitting certain photographs of the murder victims, on the ground that they were so gruesome as to be prejudicial. The photos are gruesome. They do, however, depict the scene of the crime. Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime, Langley v. State, 84 Nev. 295, 439 P.2d 986 (1968), Allen v. State, 91 Nev. 78, 530 P.2d 1195 (1975), and when it reflects the severity of the wounds and the manner of their infliction, Nails v. State, 90 Nev. 124, 520 P.2d 611 (1974). In the instant case, the district judge found that the probative value of the photographic evidence outweighed the prejudicial effect, if any, and properly received the photos in evidence.

Citing Theriault, the Nevada Supreme Court in Scott v. State, 92 Nev. 552, 556 (1976), stated: "We have repeatedly held that photographs that aid in the ascertainment of truth may be received in evidence, even though they may be gruesome." In Dearman v. State, 93 Nev. 364, 370, (1977), again citing Theriault, supra, the Supreme Court stated that whether to omit or exclude photographs was in the sound discretion of the court and absent a showing of abuse of that discretion the decision would not be overturned. This position was upheld again in Ybarra

v. State, 100 Nev. 167 (1984), where it was found that the District Court did not abuse its discretion.

In 1986, the Nevada Supreme Court found that the District court did abuse its discretion in allowing the admittance of a photograph in Sipsas v. State, 102 Nev. 119. However, Sipsas was distinguished in Athey v. State, 106 Hey. Adv. Op. 97 (1990) and in Robins v. State, 106 Nev. Adv. Op. 108 (1990). In Athey, the court stated:

> Athey further contends that under Sipsas, the district court abused its discretion in admitting two autopsy photographs of Paul's head because their prejudicial impact outweighed their probative value. Sipsas is distinguishable, however, because there the witness merely said the photograph "might" help him explain the cause of death. Id. at 122, 716 P.2d at 233. Furthermore, the trial judge in Sipsas initially denied admission of the photograph after finding that the prejudicial effect outweighed its probative value; later, the same photograph was erroneously admitted on another basis. We concluded that the district court abused its discretion in admitting the photograph which it had already found to be more prejudicial than probative. Id. at 124, 716 P.2d at 234.
> By contrast, in the present case the witness stated affirmatively that the photographs would assist her in explaining the victim's injuries. In addition, the trial judge determined that the two autopsy photographs were more probative than prejudicial. In sum, we hold that the district court did not abuse its discretion in admitting the photographs. See Ybarra v. State, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984).

Even though the Nevada Supreme Court found the photographs that were admitted by the trial court to be graphic and troubling to human sensibility, they still found them not to be prejudicial and upheld the ruling of the District Court. Robins, supra. There the Supreme Court stated:

> Next, Robins contends that he was unfairly prejudiced by the entry into evidence of autopsy photographs. Robins' challenge to the autopsy photographs is based solely on a footnote from Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986), which stated in pertinent part:

> No jury could be free from thoughts of compassion and sympathy after viewing an 8"xlO" color photograph of an eviscerated child. A photograph lends dimension to otherwise non—dimensional

testimonial evidence. That an erroneous admission of a photograph would cause undue prejudice is certain. The extent of that prejudice is immeasurable..

Id. at 124, n.6, 716 P.2d at 234.

Robins' reliance on Sipsas is misplaced. There, the State's witness testified that the objectionable photograph "might" aid his explanation of the autopsy findings, and the trial judge specifically made a factual finding that the photograph was too prejudicial. The photograph was later improperly admitted during the defense's case. This court determined that the lower court in Sipsas abused its discretion by admitting the photograph which had previously been excluded as prejudicial.

On appeal, we review allegations of error concerning the admissibility of autopsy photographs under an abuse of discretion standard. Yvbarra v. State, 100 Nev. 167. 172, 679 P.2d 797, 800 (1984). Absent an abuse of discretion by the trial court, the decision will not be overturned on appeal. Turpen v. State, 94 576, 577, 583, p.2d 1083, 1084 (1978).

In the instant case, following an objection by counsel, the trial court reviewed the photographs and held:

[I]t appears to the court that based on the nature of the testimony the pictures are not unduly repetitious and I think they are illustrative of the testimony and for that reason I believe they are probative, they will assist the jury in understanding the doctor's testimony.

We have reviewed the challenged photographs and although they are indeed graphic and troubling to human sensibility, they were not prejudicial. The photographs depicted exactly what Dr. Hollander described and were undoubtedly helpful in assisting the jury to understand the nature and gravity of the wounds **inflicted** upon Brittany by Robins. The trial court did not abuse its discretion; the photographs were properly admitted into evidence.

Again, the Nevada Supreme Court upheld the wide discretion of the trial court in Riggins v. State, 107 Hey. Adv. Op. 29 (1991). In Riggins, the issue was whether the photographs were admissible under NRS 175.552 during the penalty phase. The Supreme Court found that there was no error by the trial court.

PRIOR CONVICTION - ADMISSIBILITY

1. Standard of Review

A trial court's decision to admit a prior conviction for impeachment purposes "rests within the sound discretion of the trial court, and will not be reversed absent a clear showing of abuse." Givens v. State, 99 Nev. 50, 53, 657 P.2d 97, 99 (1983).

2. The Admissibility Ruling

NRS 50.095 provides that "[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than one year." Kelly v. State, 108 Nev. 545, 551, 837 P.2d 416, 420 (1992). "The statutes and case authority of this state . . . do not limit the felonies that can be used to those specifically determined to be relevant to the witness' veracity." Givens v. State, 99 Nev. 50, 53, 657 P.2d 97, 98-99 (1983). In addition, "the trial court has discretion to admit or exclude the number and names of prior felony convictions, so long as the court does not allow interrogation as to the details of the convictions." Givens v. State, 99 Nev. 50, 54, 657 P.2d 97, 99 (1983). However, prior felony convictions may not be used if their probative value is "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." NRS 48.035(1).

See Yates v. State, 95 Nev. 446, 451, 596 P.2d 239, 242 (1979)(appellant's claim that trial court's denial of his motion in limine to preclude use of his prior conviction compelled him to

remain silent was "a weighty factor considered by the trial court in passing on the admissibility of the evidence."). On balance, the district court did not clearly abuse its discretion.

Citing Old Chief v. United States, 519 U.S. 172 (1997), Defendant contends that, because he was willing to stipulate to the fact of his prior conviction, the district court should have prevented the State from inquiring into the nature of the conviction. In Old Chief, however, the United States Supreme Court held that it is an abuse of discretion under Federal Rule of Evidence 403 to disallow a defendant's stipulation to prior felony convictions where such convictions are an element of the offense. Old Chief, 519 U.S. 172 n.7, 201 (1997)("While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon statutes."). See also, United States v. Wacker, 72 F.3d 1453, 1473 (10th Cir. 1995)(court's holding that prior drug and murder convictions inadmissible in proving felon in possession of firearm is "driven primarily by the unique nature of section 922(g), and our analysis is therefore limited to this type of case."); United States v. Harris, 137 F.3d 1058, 1060 (8th Cir. 1998)(same). Thus, Old Chief is not applicable to the present case.

Old Chief has been held not to apply where the prior conviction is used for impeachment purposes. United States v. Smith, 131 F.3d 685, 687 (7th Cir. 1997)("in Old Chief, the prior conviction was not used for impeachment purposes under Fed.R.Evid. 609; therefore, Old "Chief does not apply."). Nevada has

recognized this distinction for some time. Givens v. State, 99 Nev. 50, 657 P.2d 97 (1983)(holding that district court properly exercised its discretion in admitting name of prior, similar conviction, although defendant was willing to stipulate to fact of prior conviction absent the name of the conviction, noting that conviction was used for impeachment rather than substantive purposes); Rusling v. State, 96 Nev. 755, 758, 616 P.2d 1108, 1110 (1980)("unlike other evidence codes, the Nevada Evidence Code does not restrict the type of felony which may be used."); Yates v. State, 95 Nev. 446, 596 P.2d 239 (1979)(rejecting idea that use of prior felony convictions for impeachment should be limited to only those felonies specifically determined relevant to the veracity of the witness, although the nature of the underlying offense may affect the trial court's determination as to relevance of the conviction).

Luce v. United States, 469 U.S. 38, 42 (1984) ("Because an accused's decision whether to testify 'seldom turns on the resolution of one factor,' a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify.")(quoting New Jersey v. Portash, 440 U.S. 450, 467 (1979)); Yates, 95 Nev. at 450 (1979)("While appellant's anticipation of the state's use of his prior felony convictions may have been a strong factor affecting his decision not to testify, there are a myriad of other cogent reasons why an accused might elect not to take the stand, including his desire to exercise his Fifth Amendment rights, reliance on the presumption

of innocence, or the avoidance of proof of other bad acts not resulting in convictions which may be provable through him pursuant to NRS 48.045(1)") (citation omitted).

In Luce v. United States, 469 U.S. 38, 43 (1984), the Supreme Court held that a defendant's failure to testify at trial prevented the court from deciding whether the district court had improperly denied his motion in limine to preclude the government from impeaching him with his prior conviction if he testified. The Court first noted that the district court was required to balance the probative value of the prior conviction against its prejudicial effect, and in order to conduct this analysis, the district court "must know the precise nature of the defendant's testimony." Luce, 469 U.S. at 41 (1984). Second, the Court determined that the defendant suffered only speculative harm from the court's refusal to grant the motion in limine, since the trial court could always rule in the defendant's favor after hearing his testimony and the government might decline to use the conviction to impeach. Third, the Court noted because "an accused's decision whether to testify 'seldom turns on the resolution of one factor,' a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify." Luce, 469 U.S. at 42 (1984)(quoting New Jersey v. Portash, 440 U.S. 450, 467 (1979)). Finally, the Court found that an accused's failure to testify makes it difficult to conduct a harmless error analysis; the Court found that a detailed offer of proof was of no help because the

defendant's "trial testimony could, for any number of reasons, differ from the proffer." Luce, 469 U.S. at 41 n.5 (1984).[5]

Because Defendant failed to testify, this Court cannot gauge any prejudice that he may have suffered from the court's decision to permit impeachment with his prior conviction. Indeed, Defendant may have never testified even if the court had granted his motion; or, the court may have changed its ruling. See Rice v. State, 113 Nev. 1300, 1311, 949 P.2d 262, 269 (1997)("A pretrial order granting a motion in limine may be modified or reversed at trial."). Accordingly, this Court should decline to review Defendant's claim that the district court precluded him from testifying.

[5]Luce has been applied in a number of federal courts in varying factual situations. See, United States v. Johnson, 767 F.2d 1259, 1270 (8th Cir. 1985)(applying Luce to Fed.R.Evid. 404); United States v. Doyle, 771 F. 2d 250, 254-55 (7th. Cir. 1985)(because defendant did not testify, court would not consider in limine ruling to admit prior convictions); United States v. Godinez, 114 F.3d 583, 586 (6th. Cir. 1997)(same); United States v. Rosario, 118 F.3d 160 n.6, 168 (3d Cir. 1997)(same); United States v. Moskovits, 86 F.3d 1303, 1305 (3d. Cir. 1996)(court declined to review defendant's assertion that trial court imposed unreasonable conditions on his right to testify where defendant failed to testify); United States v. Valenti, 60 F.3d 941, 945 (2d Cir. 1995)(defendant's failure to testify foreclosed argument on appeal that trial court erred in considering to admit other act evidence against defendant if he testified); United States v. Nivica, 887 F.2d 1110, 1116-17 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990)(defendant who does not testify may not challenge ruling regarding the scope of permissible cross-examination); United States v. Gilliam, 167 F. 3d 628 n.1, 641 (1999)(court would not entertain defendant's argument that trial court should have made an in limine determination about the scope of cross-examination of one of his proposed witnesses where the witness did not testify).

PSYCH EVAL – CHILD SEXUAL ASSAULT

THE COURT PROPERLY REFUSED TO COMPEL THE VICTIMS TO SUBMIT TO A PSYCHOLOGICAL EXAM-INATION WHERE THE DEFENSE PRESENTED NO REASON TO BELIEVE THAT SUCH AN EXAMINATION WOULD YIELD ANY ADMISSIBLE EXCULPATORY EVIDENCE.

This Court has previously discussed the authority of a trial court to allow the defense to arrange a psychiatric evaluation of victims of sex crimes. Perhaps the first Nevada case on the subject is Washington v. State, 96 Nev. 306, 308 P.2d 1101 (1980). In that sexual assault case, after the trial the victim signed a "confession of perjury" recanting her testimony. The defense sought a new trial and an order requiring the victim to submit to a psychiatric examination to determine if she was a pathological liar. The motions were denied. In discussing the motion to compel a mental examination, this Court noted that the defense had failed to establish a compelling reason for the examination.

In later cases, this Court seems to have modified Washington somewhat in that, instead of requiring the defense to establish a compelling need for the examination, several circumstances must be considered, including whether the State has established a compelling need to protect the victim. Lickey v. State, 108 Nev. 191, 827 P.2d 824 (1992).

The State will discuss the other considerations below. A few comments are warranted initially, however, concerning the silent evolution of the burdens from Washington to Lickey. The general rule is that the defense, the moving party, the party

seeking to intrude on the lives of victims, must establish a compelling need for a psychological examination of the victim before the trial court may even consider granting the motion. See e.g., State v. Rucker, ___ P.2d ___ WL 499745 (Kan. July 16, 1999); State v. Doremus, 514 N.W.2d 649, 651 (Neb. App. 1994); State v. Rhone, 566 So.2d 1367,, 1368 (Fla. App. 1990); State v. Wheeler, 602 N.E.2d 826 (Ill. 1992); People v. Chard, 808 P.2d 351 (Colo. 1991); People v. Woertman, 786 P.2d 443 (Colo. App. 1989). As one court noted, a "compelling need" for an examination is a threshold to the court's consideration of the motion. State v. Tobias, 769 P.2d 868 (Wash. App. 1989).[6]

In other words, most reviewing Courts will find no error in the denial of a motion to require the victim to submit to an examination where the moving party gave no reason to believe that the examination would be anything more than a "fishing expedition." State v. Tobias, supra; State v. Nelson, 453 N.W.2D 454, 458 (Neb. 1990). Using the analysis of those Courts, there was no error here because the motion was not predicated on any facts indicating that a psychological examination would yield anything extraordinary about these victims.

[6]Some courts have gone further and ruled that a criminal court has no authority without legislative authorization to require a witness, a non-party, to do anything outside the courtroom. State v. Hiatt, 733 P.2d 1373 (Ore. 1987). The Oregon Court ruled that the defense is free to have a psychologist observe the witness in the courtroom and render an opinion based on that observation, but because a witness is not a party to the litigation the court cannot order the witness to submit to an examination.

This Court has similarly held that the motion must be based on some reason to believe that there is something extraordinary about the psychological make-up of the victim, although this Court did not phrase its opinion as though such a showing was a threshold requirement. Keeney v. State, 109 Nev. 220, 226, 850 P.2d 311 (1993). The State suggests that this Court may wish to clarify its prior ruling, and hold that as a threshold, before the trial court has any discretion to invade the privacy of the victim, the moving party must show some good reason to believe that the invasion will yield specific, admissible, material, exculpatory evidence.

This Court in Keeney discussed several factors to be considered in deciding the type of motion at issue here. The State suggests that this Court should revisit those decisions and rule that some factors are more important than others. One of the factors, the existence of a compelling need for an examination in order to yield specific exculpatory evidence, should be different. That factor should become a threshold requirement. Unless the defendant passes that threshold, the district court should not even consider the other factors discussed in Keeney.

Whether this Court accepts the State's suggestion or not, the State contends that there was no error because a proper balancing of the Keeney factors supports the decision of the district court.

One of the Keeney factors, one which figured heavily in the District Court's decision, is whether the State has employed

an expert. Once again, the State invites this Court to expound some on that factor, and rule that the type of expert is pertinent. That is, the court may allow the defense to use an expert who has examined the victim only if the State has used such an expert who has examined the victim. If the State, for instance, were to present expert testimony regarding the symptoms of post-traumatic stress disorder, and then have a non-expert, like the mother of the victim, testify that the victim displayed those symptoms, there is no need to allow the defense to employ an expert to examine the child.

One Court has found an interesting way of making that need for parity clear. In State v. Wheeler, 602 N.E.2d 826 (Il. 1992), the Court noted that there is no practical way to compel a victim to submit to a psychological examination. The Court was right, of course. See Calambro by and through Calambro v. Second Judicial District Court, 114 Nev. 961, 964 P.2d 794 (1998). The Wheeler Court stated that where a victim refuses to submit to an examination, the sole remedy is to exclude the testimony of an examining expert for the State. Both parties, noted the Court, would still be free to bring in whatever non-examining experts were necessary. Thus, the Illinois Court seems to have recognized that the testimony of an expert for the State, as that term is used in Keeney, refers not to just any expert, but specifically to an expert who, on behalf of the State, has conducted a psychological examination of the victim. In the absence of such

an expert's examination, then the defense should likewise be limited to non-examining experts.

The State takes this opportunity to invite this Court to recognize that the type of expert discussed in Keeney is an examining expert. If the State will not be relying on an expert who has examined the victim, then that factor weighs against an order requiring the victim to submit to an examination by an expert retained by the defense.

Therefore, the district court's ruling evaluating the Keeney factors should remain undisturbed.

The State contends that an application of the Keeney factors clearly supports the decision of the district court. Nevertheless, the State will take this opportunity, once again, to suggest that the Court consider amplifying its prior decisions. There is an additional factor not mentioned by the Keeney Court that deserves to be included in the list of factors to be considered: the right of privacy of the victims. See State v. Doremus, 514 N.W.2d 649 (Neb. App. 1994). Victims of sexual crimes are sometimes improperly characterized as the prosecutrix or similar terms. Victims are not parties to the litigation. They are witnesses, no different from any other witness. A ruling allowing judges to order witnesses to submit to an examination must necessarily be applicable to all sorts of crimes and thus, all sorts of victims may be subject to harassment to the point where they decline to cooperate in the litigation. A court could

order an eye-witness to a robbery, for example, to submit to a psychological examination, or to an opthomalogical exam, or to any other type of exam, limited only by the cleverness of defense counsel. This Court should recognize that a witness may be just an innocent bystander. This Court should recognize further that cross-examination, not expert testimony, is the traditional method of inquiring into the truth of a charge. Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence, Section 1367 (J. Chadbourn rev. 1974). The tool of cross-examination is available to the defendant as a matter of right. The availability of other tools may be limited in the discretion of the trial court.

In a related context, Courts have ruled that a trial court can decide whether an issue is best resolved by expert testimony, or if cross-examination will suffice. See United States v. Ginn, 87 F.3d 367, 370 (9th Cir. 1996)(trial court has the discretion to determine that the most efficient way of attacking credibility of an eyewitness is by cross-examination, not by expert testimony). This Court should add to the list of Keeney factors whether a skilled lawyer may be able to obtain the information he seeks by cross-examination rather than by subjecting the victim to examination by a psychologist or psychiatrist.

A final word on the subject of psychological examinations of victims is appropriate. The Court in Wheeler, supra, commented on the history of motions to compel a victim of a

sex offense to submit to a psychological examination. According to that Court, the practice is founded in an attitude displayed by a comment by Professor Wigmore to the effect that rape is a charge easily made and hard to disprove. Therefore, urged the professor, rape should be treated differently from other crimes and no court should allow a charge of rape to be submitted to a jury without first requiring a thorough inquiry into such things as the mental status of the complaining witness. See 3A Wigmore, Evidence, Section 924 at 747 (Chadbourne Rev. Ed. 1970). That type of attitude has no place in modern society. The historical distrust of women by a patriarchal society should not survive. A complaining witness to a rape should be treated no differently than a complaining witness to any other battery, robbery, burglary or kidnapping. This Court recently rejected in no uncertain terms the so-called "Lord Hale" instruction which expressed the misogynous sentiments of Professor Wigmore. Turner v. State, 111 Nev. 403, 892 P.2d 579 (1995). The Court should also consider abandoning the harassment of victims that arises from those same sentiments.

Because the motion to compel the victims to submit to a psychological examination appears to be little more than a fishing expedition whereby counsel hoped to uncover something helpful, this Court should find no error in the denial of the motion.

RES JUDICATA - DOUBLE JEOPARDY

In Gulling v. Washoe County Bank, 29 Nev. 257 (1906) cited in Kernan v. Kernan, 78 Nev. 97 (1962), the Nevada Supreme Court presented a very detailed discussion concerning the doctrines of Res Judicata and Estoppel. The Court stated that once a matter was actually and fully litigated and a finding was made then the matter may not be relitigated as among the parties. In Larsen v. State, 93 Nev. 397 (1977) the Nevada Supreme Court addressed these doctrines as they may apply to a criminal case.

In Kessinger v. State, 423 P.2d 888 (Okla. 1967), the issue was over whether a retrial violated the principle of former jeopardy. In that opinion the Oklahoma Supreme Court cited Title 22 Oki. St. Ann. S951 for the proposition that has been quoted above. The Oklahoma Court, nor the defense in this matter, cited the entire statute. It reads:

> A new trial is a reexamination of the issue in the same Court, before another jury, after a verdict has been given. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew except of witnesses who are absent from the State or dead, in which event the evidence of such witnesses on the former trial may be presented; and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the Indictment or Information.

As can be seen from the above statute, the purpose of placing the parties in the same position as if no trial had been had is to prevent the former verdict from being used in any way to the detriment of the defendant. The State in this current action will agree with that proposition and opposes any extension of that proposition as urged by the defense.

Next the defense cites State v. Young, 434 P.2d 820 (Kan. 1968) for the proposition that all parties stand in the original position as if a trial had never been had. While it is true that the Kansas Supreme Court did reach that decision, the case was premised on K.S.A. 62-1602, a statute which was repealed on July 1, 1970.

The third case relied on by the defense is State v. Osburn, 533 P.2d 1229 (Kan. 1975). While the Supreme Court for Kansas again stated that when a new trial is granted on a Motion of the defendant the granting places the parties in the same position as if no trial had been had, the issue was whether or not the State could file an Amended Information on the retrial.

Although the State of Kansas has taken that position in Osburn supra, in State v. Steward, 547 P.2d 773 (Karl. 1976), the Supreme Court of Kansas upheld the use of prior testimony in a subsequent trial when the witness was unavailable due to advanced pregnancy.

As stated earlier, the State will agree with the proposition that the granting of a new trial prohibits the use of the first jury's verdict or judgment in any way in the second trial. None of the cases cited by the defense support the position that a second trial expands that holding to witnesses, motions or evidence.

In State v. Jensen, 735 P.2d 781 (Ariz. 1987) the Supreme Court of the State of Arizona was faced with the same issue that has been raised in this case. In the Arizona case a post conviction relief had been granted on the grounds of newly discovered evidence and a new trial was ordered. One of the issues raised by the defendant was that prior trial testimony had been allowed at the second trial and that it was in violation of his statutory and constitutional rights. The Arizona Supreme Court, whose statutory scheme is very similar to Nevadas, ruled that a proper showing had been made as to the unavailability of a witness and allowed the prior testimony in the subsequent trial, finding that it was not a violation of the confrontation clause. As in Nevada, the Arizona Supreme Court found that the witness in the first trial had been subject to proper cross examination against the same defendant on the same issues.

Since there is no specific statutory provisions or case law in this jurisdiction which stands for the proposition

advanced by the defense then the statutory provisions that do exist must be followed. NRS 51.055 defines an unavailable witness and NRS 51.325 lays out the parameters for use of former testimony. The granting of the Motion for a new trial does not erase everything that had occurred at the previous trial. Again, the State will agree that the prior conviction or judgment may not be used in any way with respect to the subsequent trial. However, the State takes the position that if the unavailability and former testimony criteria are met then prior testimony from the first trial may be used in the subsequent trial. Additionally, under this rationale as well as the doctrines of Res Judicata and Collateral Estoppel any rulings on previously addressed pretrial Motions must stand to include those rulings on the State Motions as well the defense Motions.

CONCLUSION

For the reasons stated above, the parties do not return to the same position as they were in as if there had been no prior trial. To do so violates the precept of judicial economy and leaves parties in the position of not knowing what decisions are appropriate in any given matter. That is the reason for the doctrines of Res Judicata and Collateral Estoppel which lend some degree of stability to the legal system.

THE DISTRICT COURT DID NOT ERR IN RULING THAT IT COULD NOT IMPOSE AS A CONDITION OF REINSTATEMENT OF PROBATION, A CONDITION WHICH WOULD BE UNLAWFUL IF IMPOSED AS AN ORIGINAL CONDITION OF PROBATION.

The record here is clear and the issue is squarely before the Court: May the district court impose a term of confinement upon reinstatement of probation for a class "E" felony where that same condition would be unlawful if imposed as an original condition of probation?

The district court was forbidden to require even a single day of incarceration as a condition of probation. Miller v. State, 113 Nev. ___, 941 P.2d 459 (1997). The question of whether the court could modify the conditions to include a term of probation turns on the interpretation of NRS 176A.450. That statute governs the trial court's discretion in modifying the terms of probation. It seems to allow the trial court to modify the terms of probation at any time, with or without any violation of the original terms. The decisions of this Court would seem to allow complete revocation of probation upon a finding that the probationer's rehabilitative efforts have not been as good as they could be. Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974). Presumably, a lesser consequence of modification of the terms of probation would require even less of a showing. The court need

only determine that different conditions of probation would better serve the defendant in his rehabilitative efforts. Thus, it would seem that modification of the terms of probation does not require a finding that the probationer has committed a crime, or violated the terms of his probation in some way. Instead, it appears that the court has virtually unlimited discretion to modify the terms of probation by virtue of NRS 176A.450.

If the court may modify the terms of probation at any time, then a ruling which would allow confinement as a modified condition even though it could not be required as an original condition, would render Miller meaningless. A court could grant probation one day then modify the conditions the next to require a period of confinement as a condition of probation.

Statutes should be construed so as to avoid absurd results. State v. Stull, 112 Nev. 23, 909 P.2d 1180, 1183 (1996). A construction which would allow a modified condition of probation which would be unlawful as an original condition, where modification is allowed under virtually any circumstance, would be absurd.

It may be simpler to examine the question in more general terms by asking, without regard to the specific condition at issue here, whether a court generally may impose a condition of probation upon reinstatement where that same condition would be unlawful as an original condition. For instance, the law provides an outside limit on the length of the probationary period. NRS 176A.500. Certainly the district court should not have the

authority to require a longer period of supervision under the guise of modifying the terms of probation under NRS 176A.450. Similarly, a court could not require an original condition of probation that was not reasonably related to the original crime, the history of the defendant or the goals of sentencing. See United States v. Smith, 972 F.2d 960 (8th Cir. 1992)(condition of probation prohibiting defendant from conceiving a child with any person other than his spouse is not reasonably related to crime of heroin possession). *Query*, should the district court be allowed to impose such a condition under the guise of modification where it would not be allowed originally? The State suggests that result would be absurd.

The State suggests that where the legislature has prohibited a period of incarceration as an original condition of probation, the law should also preclude imposing that condition as a modified term of probation. If that proposition is true, then it necessarily follows that the district court did not err in the instant case by recognizing that the only lawful way in which the defendant could be ordered to serve a term of incarceration was by revocation and imposition of the underlying sentence.

SEARCH AND SEIZURE – ABANDONMENT OF PROPERTY

Standard of Review

This Court has held that "a district court's findings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence." Stevenson v. State, 114 Nev. Adv. Opn. 77, No. 28851, (June 25, 1998).

2. The Suppression/Dismissal Order

This Court should affirm the district court's denial of the motions to suppress and to dismiss the information. The district court found that because Defendant disclaimed ownership of the cigar box, he had no legitimate expectation of privacy therein. The district court further found that pursuant to Defendant's consent, Officer Elkins was lawfully in the apartment before he searched the cigar box. Finally, the district court determined that the justice of the peace had correctly determined that there was probable cause, based on the evidence that the State had presented at the preliminary hearing, that Defendant had constructive possession of the controlled substances (Exhibit E, Fast Track Statement).

A number of theories support the district court's finding that Officer Elkins's search and seizure of the methamphetamine did not violate Defendant's reasonable expectation of privacy. First, as the district court correctly reasoned, Defendant disclaimed any interest or ownership in the box. United States v. Tolbert, 692 F. 2d 1041 (6th Cir. 1982)(disclaiming ownership to property vitiates reasonable expectation of privacy to such

property). Second, the cigar box was abandoned property. Taylor v. State, 114 Nev. Adv. Opn. 118 (Nov. 25, 1998)("A person who voluntarily abandons his property has no standing to object to its search or seizure because he 'loses a legitimate expectation of privacy in the property and thereby disclaims any concern about whether the property or its contents remain private.'")(quoting United States v. Veatch, 674 F.2d 1217, 1220 (9th Cir. 1981)). Third, Officer Elkins had probable cause to arrest Defendant, and a reasonable belief that the evidence would be destroyed. Cupp v. Murphy, 412 U.S. 291 (1973)(where there is probable cause to arrest, a limited search may be made, even if there has been no arrest, where there is reason to believe the evidence will be destroyed); Ker v. California, 374 U.S. 23 (1963)(unannounced entry into a home to prevent the destruction of evidence). Fourth, even though Officer Elkins searched the box before he arrested Defendant, the search was incident to a lawful arrest. Rawlings v. Kentucky, 448 U.S. 98, 111 (1980)("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."); Chimel v. California, 395 U.S. 752 (1969)(search incident to valid arrest is confined to the person and the area from within which he might have reached weapons or destructible evidence). Fifth, the search was part of a protective sweep. Banks v. State, 94 Nev. 90, 97, 575 P.2d 592, 596 (1978); United States v. Hernandez, 941 F.2d 133, 137

(2d Cir. 1991)(protective search can involve search for "weapons within the grab area of an individual whom the government agents have reasonable concluded is dangerous."); 2 La Fave, Search and Seizure Sec. 6.4 (c), p. 649 ("Even if the crime for which the arrest was made is not that serious, a protective search elsewhere in the premises may be warranted because the police suspect others therein are engaged in much more serious conduct, or have good reason to conclude that there were weapons in the premises."). Finally, because Defendant consented to a search of his apartment, the methamphetamine would have been eventually discovered. Carlisle v. State, 98 Nev. 128, 130, 642 P.2d 596, 597-98 (1982)("We have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence.").

Defendant's argument that the district court should have granted his motion to dismiss the information because of insufficient evidence is without merit. A jury found Defendant guilty beyond a reasonable doubt; accordingly, any error regarding the justice court's finding of probable cause would be moot and harmless. United States v. Mechanick, 475 U.S. 66, 70 (1986)(holding that because the defendants were convicted after trial beyond a reasonable doubt, probable cause undoubtedly existed to bind them over for trial; therefore, any error in the grand jury proceedings connected with the charging decision was

harmless beyond a reasonable doubt.). In any event, a quick read of the preliminary hearing transcript reveals that more than probable cause existed to charge Defendant.

CO-CONSPIRATOR STATEMENTS

APPEAL and RESPONSE - 1990

N.R.S. 51.015(3)(e), which was added in 1971, defines the hearsay exception known as co—conspirator statements and states in pertinent part:

> 'Hearsay' means a statement offered in evidence to prove the truth of the matter asserted unless:
>
> 3. The statement is offered against a party and is:
>
> (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

[Emphasis added.] Even before addition to Nevada Revised Statutes of this exception to the hearsay definition, statements of co—conspirators were deemed admissible under the common law as exceptions to the hearsay rule. State v. Ward, 19 Nev. 297 (1886) and Goldsmith v. Sheriff, 85 Nev. 295, 454 P.2d 86 (1969).

1. The "During the Course" Requirement

The "during the course" requirement of NRS 51.015(3)(e) demands that the statement be made while the plan was in existence and before its complete execution or other termination. Thus included are statements or acts concerning concealment of the conspiracy.

For instance, in Foss v. State, 92 Nev. 163, 547 P.2d 688 (1976), a murder conviction was upheld and admission of out—of—court statements concerning disposal of victim's body were held properly admitted.

2. The "In Furtherance" Requirement

In Goldsmith, supra, this Court considered whether statements of witnesses concerning the scheming of

co—conspirators among themselves to procure insurance proceeds paid upon the death of the victims were properly admitted as being in furtherance" of the conspiracy. This Court held the statements property admissible:

> Even though a crime has been committed, the conspiracy does not necessarily end, but its continues until its aim has been achieved.
>
> In International Indemnity Co. v. Lehman, 28, F.2d 1 (7th Cir. 1928) the court said:
> 'Construing the expression "in furtherance of the conspiracy" reference is not to the admission as such, but rather to the act concerning which the admission was made; that is to say, if the act or declaration, concerning which the admission or declaration is made, be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy.' Here the extra—judicial statements of the co—conspirators as related by the witness related directly to the acquisition of the insurance money and were in furtherance of the conspiracy.

85 Nev. at 306—307. [Emphasis added. I

3. The Independent Proof Requirement

Before out-of—court statements of a co—conspirator may be introduced against a given defendant under NRS 51.015(3)(e), there must be a showing by independent proof of the existence of the conspiracy as well as of the participation of the party against whom the testimony is offered. La Pena v. State, 96 Nev. 43, 45, 604 P.2d 811 (1980). The showing that must be made, however, is not even so great as a prima facie showing. Thus, according to the rule answered by this court:

> The amount of independent evidence necessary to prove the existence of a conspiracy may be slight, and it is enough that only a prima facie evidence of the fact be produced. (Emphasis added.)

Peterson v. Sheriff, 95 Nev. 522, 523, 598 P.2d 623 (1979).

Goldsmith, supra, discusses at great length the kind of showing to be made:

In Nevada, since 1886, it has not been necessary to establish a prima facie existence of a conspiracy before the hearsay statements of the co—conspirators could be admitted. However, before those hearsay statements can be considered it is incumbent upon [the court] to examine all the other evidence to determine whether, aliunde, the existence of a conspiracy was established; State v. Beck, 42 Nev. 209, 174 P 714 (1918); and, its admission is not reversible error if the conspiracy is subsequently shown; State v. Ward, 1 9 Nev. 297 (1886). In McNeil v. United States, 85 F.2d 698 (D.C. Cir. 1936), the court said: 'There is rarely in a conspiracy case direct evidence of the conspiracy proof of declarations. The evidence is nearly always circumstantial; and where such evidence is introduced disclosing conduct of persons charged with conspiracy which points to that unlawful end, it is permissible to produce it at any stage of the case. The obligation which the government assumes is to connect up the evidence so that when the case is submitted there is sufficient [evidence], when connected up, to show the guilt of the accused to the satisfaction of the jury beyond a reasonable doubt. Therefore, in all conspiracy cases great latitude in the introduction of testimony is allowed. It is enough that the evidence offered tends to elucidate the inquiry or to assist in determining the truth. Courts, as a general rule, do not reverse judgments because of the order in which the testimony was received, or because some of it was irrelevant.'

In People v. Massey [312 P.2d 365 (Cal.App 1957)], the court said: 'Direct evidence is not required to establish a conspiracy, but circumstantial evidence may be relied upon. This rule if sanctioned for the obvious reason that experience had demonstrated that as a general proposition a conspiracy can only be established by circumstantial evidence.'

[F)or the purpose of allowing the introduction of the evidence of the extrajudicial acts and the declarations of a conspirator, the conspiracy needs to be proved only to the extent of producing prima fade evidence of the fact. It need not be established by a preponderance of the evidence as in a civil action, nor beyond a reasonable doubt as in a criminal action. (Citation omitted.]

(I]f there is a competent evidence, however slight of the conspiracy, the acts and declarations of a co—conspirator made during the consummation of the conspiracy may be admitted in evidence against the defendant. [Citation omitted. 85 Nev. at 304—305. [Emphasis added.)

In accord is Cranford v. State, 95 Nev. 471, 596 P.2d 489 (1979).

It is evident that the trial court relied upon the "slight evidence rule" argued by the State in making its finding that a conspiracy existed, thereby allowing several co—conspirator statements to be used by the state against all defendants (X, 1788, 1810). Based upon the "slight evidence rule", the trial court made a prima facie finding that a conspiracy existed. (X, 1811).

Simply put, the slight evidence standard is a violation of the Sixth Amendment Confrontation Clause, in that it allows the State to make an "end run" around the constitutional guarantee. The basic tension between admission of hearsay co—conspirator statements and the Confrontation Clause was pointed out to the trial judge. (X, 1796).

The U.S. Supreme Court, speaking in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980), explained the Confrontation Clause problem with hearsay:

> The Court here is called to consider once again the relationship between the Confrontation Clause and there hearsay rule with its many exceptions. The basic rule against hearsay, of course, is riddled with exceptions developed over three centuries. See E. Cleary, McCormick on Evidence §244 (2d ed. 1972)(McCormick)(history of rule; id., SS252—324 (exceptions). These exceptions vary among jurisdictions as to number,

nature, and detail. See e.g., Fed. Rules Evid., 803, 804 (over 20 specified exceptions). But every set of exceptions seems to fit an apt description offered more than 40 years ago: "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." Morgan & Maguire, Looking Backward and Forward Evidence, 50 Harv.L.Rev. 909, 921 (1937).

The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403—405, 85 S.Ct. 1105, 1067—1068, 13 L.Ed.2d 923 (1965); Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), provides: "In all criminal prosecutions, the accused shall enjoy the right . . • to be confronted with the witnesses against him." If one were to read this language literally, it would require, on objection, the

exclusion of any statement made by a declarant not present at trial. See Maddox v. United States, 156 U.S. 237, 243, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895)("(T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"). But, it thus applied, the Clause would abrogate virtually every hearsay exception, as a result long rejected as unintended and too extreme.

[1-3] The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay. See California v. Green, 399 U.S., at 156—157, and nn. 9 and 10, 90 S.Ct, at 1934 and nfl. 9 and 10; see also McCormick §252 p. 606. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for f ace— to-fact confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross—examination." Douglas v. Alabama, 380, U.S. 415, 418, 85 S.Ct. 1074, 1076, 12 L.Ed.2d 934 (1965). In short the Clause envisions

> "a personal examination and cross— examination of the 1 witness, in which accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to fact with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox V. United States, 156 U.S., at 242-243, 15 S.Ct. at 339. This means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process." Chambers v. Mississippi, 410 U.S. 284, 295 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973), quoting Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969). (footnotes omitted].
>
> Id, at 2537—8.

This Court as well has enunciated a concern for Confrontation Clause problems with hearsay. See Stevens **V.** State, 97 Nev. 443, 634 P.2d 662 (19810.

The Ohio v. Roberts, supra decision was explained in Mechler **V.** Procunier, 754 F.2d 1294 (5th Cir.1985), as follows:

> The primary object of the sixth amendment was to prevent the use of ex parte statements against an accused who has no opportunity to confront and cross—examine the witness. It guarantees the accused an opportunity to test the recollection and shift the conscience of witness. California v. Green, 399 U.S. 149, 157—58, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). In Ohio v. Roberts, 488 U.S. 56, 100 S.Ct.2531, 65 L.Ed.2d 597 (1980), the United State Supreme Court reviewed the relationship between the confrontation clause and the hearsay rule. The Court noted that historically the focus of concern with absent witnesses has been to insure their statements demonstrate "indicia of reliability." Thus, the Court devised a two—prong test in Ohio
> **V.** Roberts, under which the confrontation clause would operate to restrict admissible hearsay in two ways: 1) the party seeking to introduce the hearsay statement must demonstrate the unavailability of the declarant who made the statement, and 2) the statement must bear sufficient "indicia of reliability." Id. at 66, 100 S.Ct. at 2539.
>
> Id at 1296—7.

It is the "indicia of reliability" problem that exists concerning co—conspirator statements which has persuaded the majority of modern federal decisions decided under Federal Rules of Evidence 801 (d)(2)(E) to require the prosecutor to show that a conspiracy exists, using independent evidence without the co—conspirator declarations, by a preponderance of the evidence. U.S. v. Monaco, 702 F.2d 860 (11th Cir. 1983), U.S. v. Ricks, 639 F.2d 1305 (5th Cir. Unit B 1981), Smith v. Updegraff, 744 F.2d 1354 (8th Cir. 1984), U.S. v. Ammar, 714 F.2d 238 (3rd Cir. 1983) cert. denied 104 S.Ct. 344, U.S. v. Jefferson, 714 F.2d 689 (7th dr. 1983), U.S. v. Holloway, 731 F.2d 378 (6th Cir. 1984), U.S. v. Singer, 732 F.2d 631 (8th Cir~ 1984), U.S. v. Jannotti, 729 F.2d 213 (3rd Cir. 1984), U.S. v. Cicale, 691 F.2d 95 (2nd Cir. 1982), U.S. v. Coe, 718 F.2d (7th Cir. 1983), U.S. v. Enright, 579 F.2d 980 (6th Cir. 1978), and U.S. **V.** Guerro, 693 F.2d 10 (5th Cir. 1982).

Further, according to the procedure used under the federal standard, the trial judge in the instant case should have made findings based upon independent evidence as follows:

(1) That a conspiracy existed at the time a given statement was made;

(2) That the defendant (in the instance McDowell] was a member of the conspiracy when the statement was made; and

(3) That the statement was made during the course of and in furtherance of the conspiracy. U.S. v. Coe, U.S. v. Jannotti, U.S. v. Singer, U.S. v. Holloway, U.S. v. Jefferson, U.S. v. Ammar, U.S. v. Monaco, all supra, and U.S. v. Gray, 659 F.2d 1296, (5th C. Unit B 1981).

It is therefore the duty of this court to bring Nevada into line with modern evidentiary standards and procedures which comport with the defendant's Confrontation Clause rights. The "slight evidence rule" must be abandoned as constitutionally infirm, and detailed findings concerning each co—conspirator statement must be required to avoid prejudice to a defendant, such as McDowell, who is not shown to be a member of the conspiracy at the time a given statement was made.

To do any less flies in the face of the collective reasoning of the federal circuit courts, well as provides the prosecution with an easy "out" from facing cross—examination of its witnesses.

Wherefore, the conviction of Roy McDowell should be reversed, or at a minimum a new trial ordered with instructions to make detailed findings as set forth above concerning co—conspirator statements and that a preponderance of evidence standard be used based upon independent evidence to find that a conspiracy existed.

THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FAILING TO SEVER APPEALLANT'S TRIAL FROM THOSE OF HIS CO-DEFENDANTS WHERE TESTIMONY BROUGHT OUT BY CO-DEFENDANTS' COUNSEL WAS PREJUDICIAL TO APPELLANT.

N.R.S. 174.165 provides:

> 174.165. Relief from prejudicial joinder.
> 1. If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in

an indictment or information, or by such joinder for trial together, the court may order an election of separate trials of counts, grant a severance of defendants or provided whatever other relief justice requires.

2. In ruling on a motion by defendant for severance the court may order the district attorney to deliver to the court for inspection in chambers any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial. (1967), p.1418).

Many courts have recognized that separate trials of co—defendants are antagonistic. U.S. v. Gallagher, 437 F.2d 1191 (7th Cir. 1971), U.S. v. Johnson, 478 F.2d 1129 (5th Cir. 1973), State v. Barkley, 412 So.2d 1380 (La. 1982), People v. Lee, 360 N.E.2d 1173 (Ill. App. 1980), Pepple v. Graham, 455 P.2d 153 (Ca. 1969), Elder v. People, 498 P.2d 945 (Cob. 1972), State v. Yoshino, 439 P.2d 666 (Ha. 1968), People v. Hoover, 342 N.E.2d 795 (Ill. 1976), Murray v. State, 528 P.2d (Okla. 1974), and State v. Suits, 243 N.W.2d 206 (Wisc. 1976).

A trial court, when assessing the merits of a Severence Motion, must balance a possibility of prejudice to the defendant against the public interest and judicial efficiency and economy. United States v. Walker, 720 F2d 1527 (11th Cir. 1983) and Parker v. United States, 404 F.2d 1193 (9th Cir. 1968). The quantity and type of evidence adduced against the co-defendants is a vital consideration in evaluating the necessity for severance. United States v. Kelly, 349 F.2d 720 (2nd Cir. 1965), cert. denied, 384 U.S. 947.

In United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980), the Court of Appeals for the District of Columbia, in discussing what is needed for a severance, reiterated the concern which the Kelly, court voiced.

The Sampol court stated that “the quality and type of evidence adduced against the co—defendants, is a vital consideration in evaluating the necessity of severance.” In the

Kelly case, there was a large amount of evidence establishing the wrongful conduct of the appellant's co—defendants. It was stated that the "shameless" "fraudulent" practices . . . must have stamped them in the eyes of the jurors as unscrupulous swindlers of the first rank. That some of this rubbed off on "appellant" we cannot doubt, . . ." 636 F.2d at 646. The Sampol, court also commented on the fact that although the Judge faithfully instructed the jury to consider the evidence against the appellant only in light of the charges against him, such instructions could not provide their intended protection against prejudice in the face of this emotional evidence that repeatedly attributed responsibility for the murder to the Cuban nationalist movement, of which (appellant) was a member if its counsel, one of its leaders, and frequently mentioned by name in such connections.

A severance should be granted if a defendant can demonstrate that a joint trial results in specific and compelling prejudice to the conduct of his defense. United States v. Marszakowski, 669 F.2d 655 (11th Cir. 1981).

As stated in the case of United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976), that with regard to severances the dangers of transference of guilt are such that a Court should use every safeguard to individualize each defendant in relation to the mass. Particularly where there is great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that the guilt will improperly "rub off" on the others. Referring to Kelly, supra, the court stated that severance is among the most important safeguards available to minimize a risk of prejudice. The Mardian Court expressed its acceptance of the rule announced in Kelly, requiring severance when the evidence against one or more defendants is "far more damaging" than the evidence against the moving party. 546 F.2d at 977. See United States V. Donaway, 447 F.2d 940 (9th Cir. 1971).

This court previously expressed its concern in Stevens v. State, supra, for problems of this kind. The only solution of the case at bar is vacation of the conviction and the ordering of a new trial separate from that of the other defendants in this case.

The "slight evidence rule" used by the trial court to find that a conspiracy existed, while based upon Nevada

precedent, is in tension with the Defendants rights under Confrontation Clause of the Sixth Amendment, and should be abandoned. The Federal rule in such cases should be adopted, which is a preponderance of evidence standard, based upon evidence independent of any co—conspirator statements.

The effect of the trial court's use of the "slight evidence rule" and failure to make detailed findings deprived defendant McDowell of due process of law and violated his right to confront the witnesses against him.

RESPONSE OF THE STATE

The planning, preparation, killings, cover-up and sharing of the inheritance and insurance proceeds was a group project. See, Lane v. Torvinen, 97 Nev. 121, 624 P.2d 1385 (1981). It was a conspiracy in which the defendant willingly and actively participated. Two witnesses testified that McDowell actually supplied one of the murder weapons.

Contrary to the defendant's allegation that the court relied on slight evidence of conspiracy in considering the admissibility of various statements, the court found overwhelming evidence of the conspiracy (f. 1811).

The court, in determining that there had been an on-going conspiracy and that many of the statements were admissible, followed the guidelines of Goldsmith v. Sheriff, 85 Nev. 295 454 P.2d 86 (1969). This Court stated in Goldsmith,

> In the case before us, it was proper for the magistrate to admit, over the objection of the appellant, all of the testimony of the state's witnesses including the hearsay statements made by Goldsmith's coconspirators. . . . in all conspiracy cases great latitude in introduction of testimony is allowed. It is enough that the evidence offered tends to elucidate the inquiry or to assist in determining the truth. Direct evidence is not required to establish a conspiracy, but circumstantial evidence may be relied upon. .Id. at 304.

The fact situation in the Goldsmith case is strikingly similar to the case before the Court. The trial court was keenly

aware of the law and appropriately admitted the statements. See, Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984); LaPena v. State, 96 Nev. 43, 604 P.2d 811 (1980); Fish v. State, 92 Nev. 272, 549 P.2d 338 (1976).

In view of the court's finding that there was overwhelming evidence of a conspiracy, this Court need not accept the defendant's invitation to reevaluate the slight evidence standard in favor of a preponderance of the evidence standard.

THE DEFENDANT WAS PROPERLY TRIED

WITH HIS PARTNERS IN THE KILLINGS.

The defendant complains about the prejudicial effect of a joint trial, but has failed to establish that any real prejudice resulted or that the "alleged" errors had absolutely any bearing on the jury's deliberations.

Every person concerned in the commission of an offense is a principal and is liable as such. Edwards v. State, 90 Nev. 255, 524 P.2d 328, 1974; NRS 195.020. The men acted together and were properly tried together. NRS 173.135 states:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately an all of the defendants need not be charged in each count.

This statute is qualified by NRS 174.165 which provides:

> 1. If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
>
> 2. In ruling on a motion by a defendant for severance the court may order the district attorney to deliver

> to the court for inspection in chambers any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

A motion for a separate trial is a matter to be decided at the discretion of the trial court. Unless the record revealed that the jury was confused or that injustice occurred because of the joint trial, there is no need for a reversal, Opper v. United States, 348 U.S. 84, 75 S.Ct. 158 (1954); United States v. Kramer, 236 F.2d 656 (7th Cir. 1956), and is subject to review only upon abuse. Olmstead v. United States, 19 F.2d 842 (9th Cir. 1927), aff'd. 277 U.S. 438 (1928). Joinder is proper in circumstances where a crime may be proved against several defendants by the same evidence and results from the same or a similar series of acts. United States v. Lebron, 222 F.2d 531 (2d Cir. 1955), cert. denied 350 U.S. 876 (1958).

In order for a motion to sever to be granted there must be a showing of sufficient prejudice resulting from such joinder. To constitute "good cause" the evidence to be introduced relative to one defendant must be admissible as to the other defendant. State v. Lewis, 50 Nev. 212, 255 P. 1003 (1927).

Sexual assault is defined by NRS 200.366 as, essentially, causing sexual penetration against the will of another. Unlike common law rape, the offense at hand does not require proof that the defendant forced himself upon a resisting person. Instead, the plain terms of the statute make it a crime to have sex with another who subjectively does not wish to have sex. Such laws, however, could work an injustice if a conviction were allowed under hypothetical circumstances where the victim acts in such a manner that the reasonable person would perceive that she consented, but then testifies in court that her subjective mental state was such that she actually did not wish to have sex despite her failure to voice or display that mental state. As a consequence of that potential injustice, legislatures and courts have generally recognized that one accused of rape or sexual assault may present a theory of defense claiming that the defendant reasonably but mistakenly believed that the victim consented to the sex. Theoretically, such a claim would negate the mens rea of the sexual assault. 1 LaFave and Scott, Substantive Criminal Law, Section 5.1(b) (1986).

The upshot is that both the objective mental state of the victim and the objective display of her mental state are critical to any trial involving a charge of sexual assault. The basic elements of the crime require evidence that the victim subjectively did not wish to have sex -- that the penetration was against her will. On the other hand, the defense tends to focus

not on the subjective mental state of the victim, but rather on the objective manifestation of that mental state.

The response of courts to the potential injustice gave rise to another potential injustice -- that the defendant by his own wrongful acts could create circumstances wherein the victim would not objectively manifest her lack of consent. The simplest of such situations, of course, is where the attacker uses immediate threats of harm. For instance, a man might say to his potential victim, "If you don't cooperate, I will kill you." In such an instance, the objective manifestation of consent is created by the wrongful acts of the accused and the jury is justified in finding that defendant guilty despite the objective manifestations of consent.

Other circumstances are treated similarly. For instance, where the evidence shows that the defendant plied the victim with alcohol to the extent that the victim was no longer able to manifest the true state of her mind, jurors are entitled to convict despite the lack of objective manifestations that the sexual act was against the will of the victim. See e.g., Hirdes v. Ottawa Circuit Judge, 146 N.W. 646 (Mich. 1914).

Modern pharmacological science has also provided us with a new and "improved" version of the mickey finn. Rohypnol allows the would-be lothario to drop drugs into the victim's drink that not only prevents the manifestation of the lack of consent, it prevents the victim from recalling the event. See, Associated

Press, Senate OKs Prison Term of Date Rape Drug Use, Reno Gazette-Journal, May 9, 1997.

In McNair v. State, 108 Nev. 53, 58, 825 P.2d 571 (1992), after discussing the difference between the subjective will and the objective manifestation of consent, this Court ruled that a conviction for sexual assault will be affirmed if the evidence shows that "for any reason", the victim is not in a position to exercise an independent judgment concerning the act of sexual penetration." Thus, it would appear that a conviction will be allowed where the victim subjectively does not wish to have sex, but the victim fails to objectively manifest her will, so long as there is some reason behind the victim's failure to demonstrate her mental state, to communicate that she does not consent to the proposed sexual act.

The McNair Court relied in part upon Dinkins v. State, 92 Nev. 74, 546 P.2d 228 (1976). In that case, the victim was a hitchhiker who apparently became frightened when the defendant who gave her a ride deviated from the appropriate route and took her to another area. The Court noted that the victim had become "inwardly apprehensive" as a result of the defendant's conduct. 92 Nev. at 76. The Court went on to rule that the lack of resistance, the lack of objective manifestations of the victim's lack of consent, did not preclude the conviction.

The McNair Court also quoted with approval from People v. Bermudez, 157 Cal.App.3d 619-625 (1984). The California Court ruled "a criminal invasion of sexual privacy does not become a

nonrape merely because the victim is too fearful or hesitant to say something to the effect that 'I guess you know I don't want you to do this.'" 108 Nev. at 57.

Other courts, too, have declared that a claim of consent was properly countered with evidence of prior abuse. In State v. Kennedy, 616 P.2d 594, 598 (Utah 1980), the Court held:

> The evidence shows a process of systematic harassment, intimidation and abuse, which included threats of violence to prosecutrix and to her father, threats of separation from the child of the marriage, threats of blackmail, etc. On at least one occasion, defendant made an attempt on the life of the prosecutrix. This psychological abuse, stretching, according to the prosecutrix, over the entire course of the marriage, would be far more effective in eroding the resolve of an ordinary person than would a single threat of violence immediately preceding the act itself. Under such circumstances, it would be unrealistic to regard the prosecutrix' failure actively to resist as evidence of consent. Defendant cannot turn force into consent by simply separating the threats and the act chronologically.

In State v. Oshiro, 696 P.2d 846 (Hawaii App. 1985), the Court considered a charge of sexual assault involving a dentist who convinced his new female assistant to try nitrous oxide so that she might be able to more fully explain the effects to future patients. While the young woman was incapacitated but only periodically unconscious, the defendant had sexual intercourse with her. The Court held that where the lack of objective manifestations of the victim's will was caused by the defendant's

own acts, then the jury is entitled to find the defendant guilty based on testimony that the act was against her subjective will, despite the lack of objective manifestations of her will.

In the instant case, there was testimony to the effect that the victim was unable to objectively manifest her subjective desire to not have sexual relations because the prior abuse at the hands of the defendant had instilled that unique condition known as the battered spouse syndrome. Therefore, in order to show that the basis for the expert opinion, the State was required to show that the victim had indeed suffered from extensive abuse by Estabrook.

Turning to the application of NRS 48.045, the State contends that there was no error in admitting evidence of the past abusive conduct by Estabrook toward his former spouse. The trial court found that the evidence was admissible to negate any claim of mistake. That is quite literally correct. The nature of the defense in the trial court, and in this Court, focused on the objective manifestations of consent, not on the subjective will of the victim. Thus the defense was, essentially, that the defendant reasonably but perhaps mistakenly believed, as a result of the objective manifestations, that the victim subjectively desired sexual relations. The evidence of the prior misconduct was admitted to show that the victim was unable to "exercise an

independent judgment" concerning sexual relations with Estabrook. The evidence was further admissible to show that any mistake based on the objective manifestations of consent was caused by Estabrook's own acts of misconduct.

Under McNair, the evidence was properly admitted both to show that the victim was unable to exercise independent judgment, and that her lack of objective manifestations of her subjective will was the product of Estabrook's own acts.

The trial court followed the established procedure for evaluating proposals to prove prior bad acts. This Court has held that where the trial court follows the correct procedure and undertakes the correct analysis, then the decision to admit evidence of uncharged misconduct will be affirmed absent an abuse of discretion. Armstrong v. State, 110 Nev. 1322, 885 P.2d 600 (1994). Here, there was no abuse of discretion. The disputed evidence was necessary to respond to the claim that the defendant reasonably, if mistakenly, believed that the victim subjectively desired sexual relations.

A final point is necessary here. The theory by which the evidence was admitted was apparently not accepted, probably because the jury was never instructed on the theory. That the jury did not accept the State's position in its entirety, however, does not mean that the evidence was inadmissible. Evidentiary

rulings should not be made with hindsight. They must be made based on what is presented to the trial court. Here, the State presented the trial court with clear and convincing evidence that the defendant's own prior acts of misconduct were relevant to his claim of objective consent. Despite the fact that the State's position was not wholly endorsed by the jury, it was nonetheless admissible.

STATUTE OF LIMITATIONS

SECRET OFFENSES - 1984

THE STATUTE OF LIMITATIONS SHOULD NOT BE A GROUND FOR REVERSAL IN THIS CASE DUE TO APPELLANT'S INACTION AND FAILURE TO RAISE THE ISSUE PRIOR TO TRIAL AND CONVICTION, AND THE UNIQUE NATURE OF THIS CASE AND THE APPLICABILITY OF THE TOLLING STATUTE.

In this case, Appellant has not argued that he is not guilty, nor has he argued that there was insufficient evidence upon which to convict him. Rather, Appellant contends that he should never have been brought to trial, for the statute of limitations has run, and has not been tolled.

The record in this case reveals that a complaint was filed in March of 1984, and that the alleged acts occurred in the summer months of 1980. The statute of limitations for this offense, Lewdness, is three years. See NRS 171.085. Simple addition and subtraction demonstrates that more than three years have gone by since the Appellant committed this offense. Thus, the statute has run.

Whether a statute of limitations has run seems to be a very obvious issue; and one which should have been brought up before trial, but never was. Appellant's brief represents the first and

only time that issue has been given any serious attention on his behalf.

Ordinarily, the State would, of course, argue that Appellant's failure to raise the statute below is a procedural bar to this Court's review. Accord Bonnenfant v. Sheriff, 84 Nev. 150, 152, 437 P.2d 471 (1968), wherein this Court stated that

> the running of the statute will require dismissal insofar as the issue is raised in defense below. Unfortunately, this Court, in a more recent, decision ruled that the statute is a jurisdictional issue, which, if necessary, this Court will raise sua sponte. See Melvin v. Sheriff, 92 Nev. 146, 546 P.2d 1294 (1976); Accord NRS 174.105(3).

The State would respectfully urge this Court to follow Bonnenfant, supra, in this particular case, thus ruling that the statute of limitations should have been raised below in the appropriate pleading, and absent that, the Court will not review this case. As we will demonstrate below, and despite the rather strong wording in Melvin, supra, this case represents a clear departure from the ordinary limitation of action case, not due to Appellant's inaction below, but due to its facts, and what would have been, and still should be, the availability of a

statute tolling vehicle. Thus, even if this Court is not inclined to follow Bonnenfant, supra, we would respectfully submit that dismissal is not the appropriate remedy.

The State could not face the members of this Court and, with a straight face, argue that the statute has not run in this case; this writer, likewise, cannot argue that the information alleges on is face that Appellant committed these illicit acts in a secret manner, for the pleading is silent on that point. To do otherwise would strain ones credibility, if not ones own sense of intellectual honesty and integrity. In

either event, the procedural drawbacks, if you will, are at the forefront of this case. Hence, why not simply confess error? The reason the State will not do so, despite our seemingly unenviable position, is due to the facts of this case, and its unique procedural and legal posture.

There is no question that a criminal pleading, such as that filed against Appellant, must be a plain, concise and definite written statement of the essential facts constituting the offense charged. See NRS 173.075(1). Appellant has not challenged the information under NRS 173.075(1); hence, we may reasonably conclude, aside from the statute of limitations

concern, that the pleading is sufficient to support the conviction, and is not defective in the sense that it failed to charge a public offense.

Similarly, it is clear that time is not an essential element of the offense with which Appellant has been charged and convicted, and therefore the State is not absolutely required to allege the exact date of the commission of this crime. See Cunningham v. State, 100 Nev. — (Nev. Adv. Op. 83, July 3, 1984); People v. Wriglev, 443 P.2d 580 (Cal. 1968). Some dates should be alleged in order to apprise the accused of the facts surrounding the offense, and the State has done that; we should not be penalized in that regard, and would respectfully submit that dismissal is not warranted here for that reason.

For instance in Grant v. Sheriff, 95 Nev. 211, 591 P.2d 1145 (1979) , the lower court had denied a pretrial habeas challenge alleging swindling and conspiracy to swindle. On appeal, Grant argued that there was no evidence adduced with regard to what date the offenses occurred or even might have occurred. This Court found that the absence of such evidence is fatal to a criminal pleading, but reversed without prejudice, thus allowing the prosecuting agency the right to initiate new

charges. In effect, that is what the State seeks in this case: namely, a remand or order dismissing appeal, as opposed to an outright reversal. It is our contention that under the terms of NRS 171.095, if the original criminal pleading is found to be defective, this case should be remanded and reinitiated on an appropriate pleading.

Our Legislature, in promulgating NRS 171.095, foresaw certain cases which could be kept secret until after the statute had run, and thus precluded the criminal from raising the statute as an absolute bar to prosecution.[2] In short, if the offense in this case, Lewdness, a felony, was committed in a secret manner, then the ordinarily applicable statute of limitations is tolled, and the pleading must be filed within

2. NRS 171.095 Secret offenses: Limit for finding indictment. If a felony, gross misdemeanor or misdemeanor is committed in a secret manner, an indictment for the offense must be found, or an information or complaint filed, within the periods of limitation prescribed in NRS 171.085 and 171.090 after the discovery of the offense; but if any indictment found, or an information or complaint filed, within the time

thus prescribed is defective so that no judgment can be given thereon, another prosecution may be instituted for the same offense within 6 months after the first is abandoned.

three years after that offense is discovered; or, if the information alleging the criminal offense is defective, the statute affords the State the right to reinitiate the same charges within six months after the defective pleading is abandoned.

The State would respectfully submit that the tolling statute requires serious attention in this case, and is applicable. Similarly, the statute tolling device would have been applicable if the Appellant had attacked the pleading before trial.[3] Again, as before, we are mindful that certain concerns must be addressed before our submission can be justified. We will now turn our attention to that discussion.

As we indicated the earlier the Information in this case is, at least arguably, defective, for on its face it alleges criminal conduct occurring more than three years prior to the filing of the pleading. Whether this is true as a matter of law is subject to some dispute. Compare People v. Strait, 367 N.E.2d 768, 771

(Ill. App. 1977) — issue raised and reserved in a pretrial motion to dismiss; People v. Zamora, 557 P.2d 75, 92

n.26 (Cal. 1977) — issue again raised and preserved in pretrial motion to set aside the indictment; with People v. Pujoue, 335 N.E.2d 437 (Ill. 1975); People v. Gilmore, 344 N.E.2d 456 (Ill. 1976); People v. Kohot, 232 N.E.2d 312, 314 (N.Y.App. 1972); Childers v. State, 203 S.E.2d 874 (Ga.App. 1974). In either

event, we will assume, without conceding, that the pleading at issue is defective. As such, the State would respectfully submit that we may avail ourselves of the second clause of NRS 171.095.

The second clause of NRS 171.095 provides as follows:

> • • . if any . . . information or complaint filed within the time thus prescribed is defective so that no judgment can be given thereon, another prosecution may be instituted for the same offense six months after the first is abandoned.

In short, the State would respectfully submit that if the previously unchallenged complaint and information are defective, then the State should be entitled to reinitiate this case. Whether the State can do so would seem to rest on one very

important consideration: namely, whether the pleading was filed within the time “thus prescribed,” i.e., if the offense was committed in a secret manner, then the pleading must be filed within three years after the discovery of the offense.[4]

In this case, there is no question that the pleading was filed within three years of its discovery by the authorities. On the other hand, Appellant has argued that this offense was not committed in a secret manner, and that the victims discovery of the offense is the State’s discovery of the offense. In short, Appellant contends that the pleading was not filed on time, for it was discovered in excess of three

4. The State would respectfully submit that the fact Appellant has already been tried, convicted and sentenced pursuant to an admittedly unchallenged pleading should be of no moment. Accord State v. Jones, 96 Nev. 71, 605 P.2d 202 (1980).

especially to the mother of a 12—year—old girl, these words alone do not constitute a criminal offense. Moreover, since we can reasonably assume that “this incident” meant Appellant’s verbal remarks, the State would respectfully submit that vicarious notice cannot be predicated on this record.

Furthermore, even if Christina had actual knowledge of Appellant's conduct, which she, as the unwilling victim, clear— ly did, that alone is not tantamount to knowledge or the reali- zation that what occurred was a crime, or something about which to inform the police. Comoare State v. Brannon, 267 S.E.2d 888 (Ga.App. 1980), a case cited by Appellant, wherein the statute ran in favor of the accused in a bad check case because the recipient, a merchant, who had knowledge of the offense and the offender, did nothing to report the matter and wherein the court held that the businessman's knowledge was attributable to the authorities; and People v. Strait, supra, wherein the 14— year— old victim was apparently a willing participant in the accussed's indecent liberties.

The instant case is therefore highly dissimilar to State v. Brannon, suora, and Peoole v. Strait, suora. In State v. Brannon, supra, the victim was an adult male who knew the offender and had knowledge of the offense. Furthermore, in People v. Strait, supra, there was no evidence of coercion, intimidation or fear; the victim simply did not report it, and did not have an excuse for doing so. Indeed, the victim was a willing participant. In the instant case, Christina is a

young, immature victim who was afraid of a man who had molested her; a man who had committed an act which his victim may not have realized was a crime, or something that should be talked about and reported quickly. These factors and their effect on a young girl simply cannot be ignored. See State v. Danielski, 348 N.W.2d 352 (Minn.App. 1984). The latter is not the type of action and responsibility the law, indeed society can reasonably expect from a 12—year—old girl, who is clearly intimidated, and the victim of offensive conduct.

In short, Clause 2 of NRS 171.095 in stating "discovery of the offense" contemplated a criminal offense. Accord People v. Clark, 278 N.E.2d 504, 510 (I1l.App. 1972). Hence, even if we accept Appellant's view that Christina discovered Appellant's conduct, we need not, and should not indulge his necessary assumption that she, as a 12—year—old, would know it was a criminal offense, and one to be reported immediately; repugnant and offensive yes, but criminal, not likely; and even less likely that she realized that she had to not only report Appellant's conduct, but report it promptly.

The State entered into its analysis by suggesting that this case is unique, and quite frankly it is. A very obvious, painfully

obvious legal issue, if not complete defense, has been simply ignored until now. That obviousness is double— edged, for the State could easily have confessed the error here, but this is not a case for futility. This case demands more than merely throwing in the towel.

In the first paragraphs of The Common Law, one of Oliver Wendell Holmes most important philosophical works, the jurist — philosopher made the following observation:

> The life of the law has not been logic: it has been experience. The felt necessities of time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Justice Holmes was essentially correct; syllogistic reasoning cannot be an end in itself. The unique nature of this case should not be ignored; blindly applying the statute of limitations to the facts of this case furthers no legitimate end. The Legislature recognized this, and enacted NRS 171.095.

Had Appellant filed a pretrial motion to dismiss or strike the information, the prosecutor, rightfully, could have availed himself to the second clause of NRS 171.095. By way of our argument, the State has demonstrated that the tolling statute applies in this case, and but for Appellant's outright failure to challenge the pleading, it would have been applicable before Appellant was tried, convicted and sentenced.

Appellant's argument should be taken for what it is: a motion to dismiss the Information. Appellant has not challenged his conviction, or any of the facts underlying it on appeal.

This Court has previously recognized that a reduced standard of review applies to post—tria1 challenges to the

sufficiency of a criminal pleading. See State v. Jones, supra,

— wherein this Court found that an already convicted appellant must show substantial prejudice after being convicted on an arguably insufficient criminal pleading.

In the instant case, Appellant cannot very well argue he was prejudiced by electing to go to trial on an arguably defective

pleading, rather than challenging it in a timely filed pretrial motion. There is no question that the defense was on notice of the alleged defect, and did nothing. Thus, while syllogistic reasoning would lead to one result, the unique facts, procedure and the applicability of the tolling statute require another. Hence, the State would respectfully submit that this Court affirm Appellant’s previously entered, factually unchallenged, conviction.

Sufficiency of the evidence – standard of review
No Information Available at This Time

SUFFICIENCY OF THE EVIDENCE TO CONVICT

This document contains the table of contents and table of authorities pre-defined. When you are finished pressing F9, mark your entries with your block key then generate the document's table of contents and authorities.

The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution. Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). A reviewing Court will not disturb a verdict on appeal if it is supported by substantial evidence. Nix v. State, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975). The question is not whether the members of this Court are convinced, but whether a jury could evaluate the evidence, decide what inferences to draw, and then determine whether the crime has been proved.

It should be noted here that the opening brief apparently relies on the proposition that, where the evidence is circumstantial, this Court must determine whether the evidence is sufficiently persuasive to exclude every hypothesis but guilt. That is not the state of the law. In Kinna v. State, 84 Nev. 642, 447 P.2d 32 (1968), this Court ruled that circumstantial evidence which excludes every other hypothesis, is sufficient, but this Court has never ruled that such an extreme standard is necessary, only that it is sufficient. Instead, the state of the law in Nevada is that the jury gets to decide whether the circumstantial

evidence is sufficiently persuasive to convince the jury beyond a reasonable doubt. Cunningham v. State, 113 Nev. 897, 909, 944 P.2d 261, 268 (1997); Deveroux v. State, 96 Nev. 388, 391, 610 Nev. 722, 724 (1980); Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976).

CASUAL CONTACT - TERRY

The Fourth Amendment provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. Certainly, Defendant's car, as an effect, and his person are protected by the Fourth Amendment. But not every officer or citizen encounter is a seizure. Indeed, in Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968), the Court observed that not all personal intercourse between police officers and citizens involves seizures of the person. Accord, State v. Burkholder, 112 Nev. ____ (Adv. Op. 74, May 1, 1996) - wherein the court observed that not all interactions between policemen and our citizenry involved a seizure of the person, and went on to observe that mere police questioning does not constitute a seizure . . . the police may randomly - without probable cause or reasonable suspicion - approach people in public places and speak with them. Having said this, however, it is far from clear that Defendant's rights were violated in this case.

Preliminarily, it should be noted that, although Defendant spreads a good bit of ink over the topic of traffic stops and why this encounter lacks sufficient cause or justification for the stop and resultant intrusion, this was no traffic stop. After all, Defendant was already parked; Defendant being stopped at the curb was not the result of State action. Accord, United State v. Kim, 25 F.3d 1426, 1430 (9th Cir. 1994).

Consequently, the first question becomes how should the Myers/Defendant initial encounter be classified and what level of cause, if any, is needed to justify Officer Myers' actions.

First, it would appear that, up and including the time that Defendant got out of his car, there was no Fourth Amendment seizure; consequently, no level of suspicion was necessary. The overwhelming majority of cases, perhaps even the uniform rule is that a police officer may approach a parked car in a public place without that action constituting a seizure or investigative stop or any other higher echelon of seizure. Accord, State v. Zubizareta, 839 P.2d 1237 (Idaho 1992); State v. Kersh, 113 N.W. 2d 566 (Iowa 1981); Crauthers v. State, 727 P.2d 9, 11 (Alaska App. 1980); State v. Marks, 602 P.2d 1344, 1350 (Kan. 1979); see generally, Lafave, 3 Search and Seizure, Section 9.2(h), pp. 408-9 (2nd Edition 1987). As a result, Officer Myers did not violate Defendant's Fourth Amendment protection by approaching Defendant in a public place and tapping on his window and asking him some questions. Accord, Florida v. Royer, 460 U.S. 491, 497-8 (1983).

In addition, and as conceded by Defendant, Officer Myers did not really know what was confronting him that evening. All he truly knew was that an unconscious man was seated behind the steering wheel of a car legally parked in a residential neighborhood with the lights on and the motor running at 11:30 p.m. Given these undisputed facts, Officer Myers was justified to approach the vehicle and, at least, check on the driver's welfare. Again, as above, the overwhelming weight of authority supports

such activity. See, for example, People v. Murray, 560 N.E. 2d 309, 312-14 (Ill. 1990) - wherein the court surveyed the weight of authority concluding it is not unreasonable for an officer to approach a car and tap on the window, or even open the door of the car in which the occupant is asleep; Atchley v. State, 393 S.2d 1034, 1043-44 (Alaska App. 1981); State v. Clayton, 748 P.2d 401, 402-4 (Idaho 1988). Indeed, Officer Myers had a duty to check on Defendant. Accord, Cady v. Dembrowski, 413 U.S. 433, 441 (1973). See also, Mason v. State, 603 P.2d 1146, 1148 (Okla. App. 1979).

In short, Officer Myers' conduct was reasonable ab initio. Once Defendant was outside the car and his state of sobriety became obvious, Officer Myers' decision to detain Defendant longer was based on articulable suspicion of DUI and was reasonable, and ultimately ballooned into probable cause and Defendant's arrest. Defendant's contention to the contrary simply lacks any merit.

UNCONSTITUTIONALLY VAGUE

Appellant contends that the reasonable person could not know if the penal law of this state precluded him from committing a robbery while displaying a knife. The State again disagrees.

A criminal statute must be sufficiently specific to allow a person of ordinary intelligence to determine if a proposed course of conduct is prohibited. Sheriff v. Anderson, 103 Nev. 560, 562, 746 P.2d 643, 644 (1983). A *caveat*, one who engages in clearly proscribed conduct, cannot be heard to complain that the statute may be vague as applied to others. Id. A term in a statute ought not to be considered vague if reference to a standard dictionary would clear up the ambiguity. Id.

Defendant's argument is premised on the contention that he might have placed an empty knife handle on the counter of the store while threatening the clerk. As indicated above, that premise is unsound. There was no affirmative evidence that the handle was empty. Instead, it seems that enough of the blade was visible to allow the victim to be certain that what she saw was indeed an unopened folding pocket knife. Therefore, the State contends that the proper question before this Court is whether NRS 193.165 is sufficiently clear to allow one to know that it is unlawful to display an unopened knife to a store clerk while threatening to "get wild" and demanding money.

Prior to the 1995 amendment adding the statutory definitions of a deadly weapon, the statute was not unconstitutioDefendanty vague. Woods v. State, 95 Nev. 29, 588

P.2d 1030 (1979); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975). Thus, Defendant now contends that by amending the statute and including both of the prior common law definitions, the statute became vague.

He first argues that the subsection adopting the "inherently dangerous" test is vague because there has been dispute in the courts over whether a knife is an inherently dangerous instrument. As noted above, the confusion has arisen because the term "knife" has been applied to things such as an "exacto" knife. When it comes to the type of device ordinarily thought of as a "knife," there has been no dispute. A knife, an implement designed for cutting and stabbing, is a deadly weapon. See Steese v. State, supra (butcher knife); Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996)(boning knife). It defies logic to argue that a reasonable person could not know that a real knife such as an ordinary folding pocket knife is a deadly weapon. Anyone who wished to know could readily determine that such an implement is considered a device that when used as designed is likely to cause deadly harm.

Defendant also contends that he could not know that it was a crime to place an innocuous item such as a string on the counter during a robbery. Fortunately, that is not the instant case. He used a knife. In order to be complete, however, the State would point out that NRS 193.165 requires that a device other than an inherently dangerous weapon must be actually used or threatened to be used in a deadly fashion before the enhancement

applies. That is, placing string on a counter during a robbery does not make it an armed robbery unless the robber threatens to fashion a cravat and kill the victim. Here, the threat to deploy the knife in a deadly weapon was fairly explicit and clearly perceived by the victim. Anyone who wished to know could readily determine by reading the statute that a crime will become an armed crime if the defendant actually uses or threatens to use an ordinary implement in a deadly fashion.

Under the functional test as defined at common law and now by statute, the focus was on the acts of the accused. For instance, mere possession of a table fork during the commission of a crime would certainly not subject the defendant to the enhancement. On the other hand, where the defendant actually uses or threatens to use a red hot table fork in the commission of the crime, then the crime is properly enhanced. Clem v. State, 104 Nev. 351, 357, 760 P.2d 103, 106 (1988). If Defendant had used some household implement rather than a knife, he would not be subject to the enhancement unless he actually used or threatened to use it in a deadly fashion. As it is, though, that rule would not be available to this defendant because the knife was inherently dangerous and because he threatened to use it in a deadly fashion.

Defendant seems to argue that the statute became vague because the legislature adopted both of the prior common law definitions. He proposes that the definition of an inherently dangerous weapon is subsumed by the definition of an implement

used in a deadly fashion and that as a consequence neither section may stand. This state will contend that the two definitions stand separately. The primary question, though, is what rule of constitutional law would invalidate the statute if in fact it were drafted so that one subsection described a variant of the other? Such a construction might make a statute somewhat silly, or in counsel's words, "tautological," but that does not mean that it violates some rights of accused persons.

The State contends further that the two statutory definitions are indeed different. Where the weapon at issue is an inherently dangerous weapon, then it matters naught how it was employed. For instance, a burglar who used a gun to shoot out a window and thereby effect entry into an unoccupied building has used a deadly weapon in the crime even though no person was endangered by the shot. On the other hand, if the same burglar used a baseball bat to prop the door open, he would not be subject to the enhancement. Although the ball bat can be used in a deadly fashion, because it is not an inherently dangerous weapon there is no enhancement until and unless a perpetrator uses it in a deadly fashion.

The statute is sufficiently clear to allow appellant Defendant, as well as other hypothetical defendants, to know just what conduct is prohibited. It is unlawful to use an inherently dangerous weapon in any felony and it is unlawful to use or threaten to use other implements in a deadly fashion. Therefore, this Court should rule that the district court did not err in

refusing to strike the allegation that the crimes were committed with the use of a deadly weapon.