ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 53080

SIMPSON, ORENTHAL J.

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

ON APPEAL FOR THE STATE OF NEVADA DISTRICT COURT
IN CLARK COUNTY, C-237890-GLASS

APPELLANT'S OPENING BRIEF

Yale L. Galanter, P.A.
Yale L. Galanter, Esquire
3730 N.E. 199 Terrace
Aventura, Florida 33180
Ph. (305)576-0244
Attorney for Appellant
Admitted Pro Hac Vice

Malcolm P. LaVergne, Esquire
The LaVergne Law Group
320 East Charleston Boulevard
Suite 203
Las Vegas, Nevada 89104
Ph. (702)448-7981
Nevada Bar No. 10121

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320 East Charleston Boulevard
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Las Vegas, Nevada 89104
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STATEMENT OF THE CASE

Nature of the Case

This is a criminal appeal from the State of Nevada District Court, Clark County, The Honorable Judge Jackie Glass presiding.

Course of Proceedings in the District Court

Appellant, Orenthal James Simpson (referred to as "Simpson") was charged with a twelve (12) Count Information. Simpson entered a not guilty plea to the charges. Simpson was charged with:

COUNT 1- CONSPIRACY TO COMMIT A CRIME (Gross Misdemeanor) in violation of NRS § 199.480; COUNT 2- CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony) in violation of NRS § 199.480, 200.310, 200.320; COUNT 3- CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in violation of NRS § 199.480, 200,380; COUNT 4 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS § 205.060; COUNT 5 - FIRST DEGREE KIDNAPPING WITH USE OF DEADLY WEAPON (Category A Felony) in violation of NRS § 200,310, 200,320, 193.165; COUNT 6 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS §200,310, 200.320, 193.165; COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §200.380, 193.165; COUNT 8 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §200,380, 193.165; COUNT 9 - ASSAULT WITH A DEADLY WEAPON (Category B Felony) in violation of NRS §200.471; COUNT 10 - ASSAULT WITH A DEADLY WEAPON (Category B Felony) in violation of NRS §200.471; COUNT 11 - COERCION WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §207.190, §193.165; COUNT 12 - COERCION WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §207.190, §193.165.

Simpson entered not guilty pleas to all charges. The matter having been tried before a jury and Simpson having been found guilty of the crimes of:

COUNT 1- CONSPIRACY TO COMMIT A CRIME (Gross Misdemeanor) in violation of NRS §199.480; COUNT 2- CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony) in violation of NRS §199.480, §200.310, §200.320; COUNT 3- CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in violation of NRS §199.480, 200,380; COUNT 4 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS §205.060; COUNT 5 - FIRST DEGREE KIDNAPPING WITH USE OF DEADLY WEAPON (Category A Felony) in violation of NRS §200,310, §200,320, §193.165; COUNT 6 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS §200,310, 200.320, 193.165; COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §200.380, 193.165; COUNT 8 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §200,380, 193.165; COUNT 9 - ASSAULT WITH A DEADLY WEAPON (Category B Felony) in violation of NRS §200.471; COUNT 10 - ASSAULT WITH A DEADLY WEAPON (Category B Felony) in violation of NRS §200.471; COUNT 11 - COERCION WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §207.190, 193.165; COUNT 12 - COERCION WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS §207.190, 193.165.

Disposition

Sentence was entered on December 5, 2008, Simpson was adjudicated guilty and sentenced as follows:

COUNT 1 - TO TWELVE (12) MONTHS in the Clark County Detention Center (CCDC); AS TO COUNT 2 - TO A MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS, COUNT 2 to run CONCURRENT with COUNT 1; AS TO COUNT 3 - TO A MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS, COUNT 3 to run CONCURRENT with COUNT 2; AS TO COUNT 4 - TO A MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-SIX (26) MONTHS, COUNT 4 to run

CONCURRENT with COUNT 3; AS TO COUNT 5 - TO A FIXED term of FIFTEEN (15) YEARS with Parole Eligibility after FIVE (5) YEARS plus a CONSECUTIVE Term of SEVENTY-TWO (72) MONTHS MAXIMUM with MINIMUM Parole Eligibility of TWELVE (12) MONTHS for the Use of a Deadly Weapon, COUNT 5 to run CONCURRENT with COUNT 4; AS TO COUNT 6 - TO A FIXED term of FIFTEEN (15) YEARS with Parole Eligibility after FIVE (5) YEARS plus a CONSECUTIVE term of SEVENTY-TWO (72) MONTHS MAXIMUM with a MINIMUM Parole Eligibility of Twelve (12) MONTHS For the Use of a Deadly Weapon, COUNT 6 to run CONCURRENT with COUNT 5; AS TO COUNT 7 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of SIXTY (60) MONTHS plus a CONSECUTIVE term of SEVENTY-TWO (72) MONTHS MAXIMUM with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS for the Use of a DeadlyWeapon, COUNT 7 to run CONCURRENT with COUNT 6; AS TO COUNT 8 - TO MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of SIXTY (60) MONTHS plus a CONSECUTIVE term of SEVENTY-TWO (72) MONTHS MAXIMUM with a MINIMUM Parole Eligibility of TWELVE (12) MONTHS For the Use of a Deadly Weapon, COUNT 8 to run CONCURRENT with COUNT 7; AS TO COUNT 9 - TO A MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility fo EIGHTEEN (18) MONTHS, COUNT 9 to run CONSECUTIVE to COUNT 8; AS TO COUNT 10 - TO A MAXIMUM OF SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of EIGHTEEN (18) MONTHS, COUNT 10 to run CONSECUTIVE to COUNT 9 in Nevada Department of Corrections (NDC); with SIXTY-FOUR (64) DAYS credit for time served. COUNTS 11 & 12 were DISMISSED.

Simpson was further sentenced to restitution in the amount of $3,560.00 to be paid to Mr. Fromong (Referred to as "Fromong") by the Defendants jointly and severally. The TWELVE (12) Joe Montana lithographs were ordered turned over to Fromong. It was further ordered upon the domestication of the California turnover order this Court shall order the

remaining items to be returned to Los Angeles County Sheriff's Department pursuant to the turnover order, as well as a $25.00 administrative assessment fee and $150.00 drug analysis fee.

A timely Notice of Appeal was filed on January 9, 2009.

STATEMENT OF THE FACTS

The events that lead up to Simpson's arrest in September of 2007, start approximately six weeks prior, when Alfred Beardsley (hereinafter referred to as "Beardsley") has text and phone conversations with Thomas Riccio (hereinafter referred to as "Riccio"). (JAA. 3062-3064). During those communications, Beardsley tells Riccio that he has Simpson's property that was stolen from Simpson's trophy room. (JAA. 3065). Beardsley was emphatic to Riccio, that the goods were stolen from Simpson's home. (JAA.3068). Beardsley further told Riccio that the items taken included family photos, commemorative footballs, and items that were of a very personal nature, rarely seen by memorabilia dealers. (JAA. 3068-3073). These items had little or no value in the commercial memorabilia market, they would have the most value to Simpson. (JAA. 3073).

Based on the information received from Beardsley, Riccio contacts Simpson on the 12th or 13th of August, 2007. (JAA. 3080-3081), Riccio explains to Simpson the nature of the items in Beardsley's possession. Simpson confirms that those items were taken from his home. Simpson further expresses to Riccio , during their initial phone calls, that he wanted to get these family heirlooms back so he could pass them on to his children. (JAA. 3083-3084).

Riccio contacted local law enforcement and spoke to them at length about the situation, but they expressed they had no interest in Simpson's stolen property. (JAA. 3085). After getting no empathy from local law enforcement, Riccio then contacts the F.B.I. who also expressed no interest in the stolen property. (JAA. 3094-3097).

According to Riccio, Beardsley "spills his guts" to the Las Vegas Police Department about all of the items being stolen on the night of the incident. (JAA. 3103).

From the first initial contact between Riccio and Simpson and the day this event took place, September 13, 2007, Riccio and Simpson had numerous phone calls. During that communication, Simpson only expressed to Riccio that he was interested in retrieving his family heirlooms. Simpson also stated he had no interest in anything that didn't belong to him. (JAA. 3106-3109).

Simpson is excited about the prospect of recovering his stolen family heirlooms. Simpson does not keep the recovery plan a secret and tells many people that he has an opportunity to recover his stolen property. (JAA. 3116-3117). On the afternoon before the incident, Riccio meets Simpson at the Palms Hotel Pool, where Simpson was gathered with friends. Simpson introduced Riccio to strangers at the pool as the person that was going to "get his stolen stuff back". (JAA. 151 at 35:15).

Because law enforcement would not get involved, Riccio created a plan to recover the stolen items for Simpson by pretending he knew a buyer for the goods. (JAA. 155). Riccio told Beardsley he knew a high profile buyer who would look at the stolen goods and pay money for them. *Id.* at 155.

Riccio rented the room where the incident took place and also gave permission for Simpson to enter the room. (JAA. 3177).

Riccio places a tape recorder on a piece of furniture in the hotel room at the Palace Station. Unbeknownst to all the entire event is tape recorded. (JAA. 3179).

The incident takes place at the Palace Station Hotel, in Riccio's room. (JAA. 3185). When Simpson enters the hotel room he starts scolding Bruce Fromong (hereinafter referred to as Fromong) and Beardsley about having Simpson's stolen property . (JAA. 3187). Riccio never hears Simpson speak about a gun or firearm in the room. (JAA. 3188-3189). Riccio states that Fromong is very apologetic to Simpson about the stolen merchandise and says to Simpson "Mike stole it, I got it from Mike". (JAA. 3191). Riccio further states that both Beardsley and Fromong while apologizing, were pushing the stolen items back towards Simpson as if they didn't want it. The incident inside the Palace Station hotel room takes about six minutes. (JAA. 3192).

Fromong had felt that Simpson was a good friend of his. Prior to September 13, 2007, there had never been a cross word between them. Fromong was not scared at any time during the incident. Simpson never made any verbal threats towards Fromong. (JAA. 2099-2101). After the event, Fromong was interested in calling the television tabloid, Inside Edition, and making money from this event. (JAA. 4258).

Breadsley did not want to prosecute the case and tried to have charges dropped against Simpson. (JAA. 4223-4225) Breadsley had seen the items that were displayed at the Palace Station hotel room on September 13, 2007, in Simpson's California home (JAA. 4253).

Anything mistakenly taken, Simpson expresses that he's going to give back and leave at the hotel front desk. Simpson also makes it clear that nothing is to be taken out of the room that's not his. (JAA. 3195-3196). While at the Palm's pool the day this event occurred, Simpson says, "Listen, I just want my private things. (JAA. 3050-3052). Riccio states that he never heard Simpson mention anything about a gun before or during this event.

SUMMARY OF ARGUMENT

Simpson's trial was fundamentally unfair. The District Court committed numerous reversible errors, including, inflicting itself into the trial proceedings, chastising the attorneys in the presence of the jury, making rulings from the bench that were not based in the law and wholly without any authority. The District Court improperly instructed the jury, improperly admitted, hearsay and intimidation evidence. The District Court did not allow the defense to exercise full and complete cross examination of witnesses and prohibited counsel from conducting a meaningful unbiased voir dire of potential jurors.

The District Court refused to allow counsel to examine prospective jurors about their known and unknown bias's. The District Court forced defense counsel to abandon inquiring into unknown prejudices that would have insured fairness in the jury selection process. Because of the unique nature of this case, a full and complete questioning of potential jurors needed to take place. The District Court gave no deference to the fact that Simpson brought a lot of baggage into the courtroom. The District Court also allowed the prosecution to challenge the only two African-American prospective jurors eligible to be on the jury panel in a discriminatory manner.

The District Court would not permit theory of defense instructions to be given and would not allow a definition of General or Specific Intent to be given to the jury.

The District Court admitted rank hearsay violating Simpson's right to confrontation by an unidentified declarant.

The District Court allowed questions to be asked about witness intimidation when the witness who was the target of that intimidation swore it never occurred. The prosecution never produced any evidence of intimidation.

The District Court allowed Simpson to be convicted of, and sentenced him on redundant charges. The cumulative error in this trial is vast. Any one of the errors discussed would warrant reversal, taken as a whole they mandate it.

ARGUMENT

I. Did the District Court Commit Error in Not Giving the Jury a Requested Theory of Defense Instruction?

Simpson's theory of defense throughout the trial was that he only intended to recover property that was his and never intended to commit a crime. Riccio testified that the Property at the Palace Station had been stolen years earlier from Simpson's trophy room, according to information he had received from Beardsley. (JAA. 2835). Numerous witnesses and evidence showed that Simpson was only trying to retrieve what was his. (JAA. 2978).

Simpson was charged with various specific intent crimes as defined under Nevada Law. They were First Degree Kidnapping with a Deadly Weapon, Assault, Coercion, Burglary, as well as Conspiracy to Commit a Crime, Conspiracy to Commit Kidnapping, and Conspiracy to Commit Robbery.

Simpson was also charged with Robbery, a General Intent Crime. The Defense requested and was denied a Theory of Defense Instruction that defined General Intent and Specific Intent. (JAA. 5156-5168). The District Court did not give any of the proposed Defense Instructions. (JAA. 5160:4-10).

Simpson's defense rested on Intent. The Court did not define the different types of Intent, or which type of intent was required to convict Simpson of a particular crime. The Court lumped it all together. Instruction 20 given to the jury stated: (JAA. 5357)

> **that a good faith belief of a Right or Claim to the property taken is not a defense to the crime of Robbery.**

This statement was confusing to the Jury because it did not delineate Robbery as the only General Intent crime charged, and it did not state that the defendant needed to have the intent to commit a crime to be convicted of that crime.

The proposed defense instruction on Robbery (Theory of Defense Instruction, (JAA. 5539-5541)) more accurately stated the law. The Linchpin case in interpreting Robbery as a General Intent Crime is *Litteral v. State*, 97 Nev. 503 1981. While *Litteral* made Robbery a General Intent Crime in Nevada, it did not make Robbery a per se Crime. Even with a General Intent Crime you are still required to have the mens rea to commit the crime of Robbery.

NRS §193.200 defines Intention as follows.

> **Intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused.**

In *Litteral, Id.* at 504, quoting Black's Law dictionary it says:

> **What is relevant then is the substantial interference temporary or permanent with Property Rights without Consent.**
>
> **The intent to steal may include the Intent to permanently deprive but is not limited to it and extends to the taking away, stealing, or even preventing the owner from his or her continued and free enjoyment of his property. *Id.* 505.**

Simpson thought he was the owner of the property. Whether rightfully so, he had a Good Faith belief that the property taken was owned by him. Simpson states in the room he only wants to take property that is his and not take anyone elses. (JAA. 2978:7) (See Riccio testimony at (JAA. 2979:7)).

Simpson's Good Faith belief that he was taking back his own property and not preventing the "owner" of his continued free enjoyment goes to his lack of Criminal Intent, or mens rea. The District Court in not giving the defenses theory of defense instruction made Robbery tantamount to a per se crime. This is error. It deprived the Jury of the option of finding Lack of Criminal Intent (mens rea), which is required for all crimes.

A defendant has the Right to have the Jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible the evidence might be. *Margetts v. State*, 107 Nev. 616, 619-620.

Simpson as supported by the evidence asked that the Jury be given the following instruction.

> **In order to find the Defendant guilty of Robbery, the State must Prove that the Defendant intended to do that which the law prohibits by taking property from the Person of another by physical force or threats of Physical force. If you believe that a Defendant made a reasonable mistake or was ignorant of a material fact when committing an act that constitutes a crime of General Intent, then he lacks the necessary criminal intent to convict and you must find him not guilty. Consequently, if**

> **you find the Defendant was under the mistaken impression that he was recovering his own property, then you must find that he lacks the General Intent to commit a prohibited act and render a not guilty verdict.** *Citing* NRS §200. 38 *Winnerford H. v. State*, 112 Nev. 520, 526 (1996), *Honeycutt v. State*, 118 Nev. 660 (2002). NRS §194.010. (4), *Crawford v. State*, 121 Nev. 744. 2005. *Brooks v. State*, 180 P. 3d, 657 (Nev. 2008). (See Simpson's proposed jury instructions (JAA. 5534,5539)).

This Court has ruled that "A District Court has an affirmative obligation to cooperate with the Defendant to correct the proposed instruction or to incorporate the substance of such an instruction in one drafted by the Court.". *Carter v. State*. 121 P. 3d 592 at 596.

Even assuming arguendo that the District Court believed the defense requested robbery instruction was poorly drafted, (there is no indication of that in the record), denying the requested instruction with no attempt to correct it is error.

a. Did the District Court Commit Error by Improperly Instructing the Jury on Co-Conspirator Liability?

The Court gave the following instruction to the jury:

> **That every conspirator is legally responsible for an act of co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even if it was not intended as part of the original plan and even if he was not present at the time of the commission of such act. (Court's instruction #6) (JAA. 5343).**

Simpson objected to Court's instruction number six, which was overruled by the Court at (JAA. 5157:20).

This Court held in *Bolden v. State*, 124 P.3d 191 (NV. 2005), to reject the natural and probable consequences doctrine for co-conspirator liability respecting Specific Intent Crimes is the absence of a statutory basis for it.

> **Our decision is limited to vicarious co-conspirator liability based on that doctrine for Specific Intent Crimes only and goes on to define General Intent Crimes and Specific Intent Crimes. Exactly what the defense requested. *Id.* at 201. To hold a defendant criminally liable for a Specific Intent Crime, Nevada requires proof that he possessed the State of Mind required by the Statutory Definition of the crime.**

This Jury was instructed that Simpson could be found Guilty of the Specific Intent Crime of Burglary and Kidnapping as long as the Commission of those offenses was a natural and

probable consequence of the conspiracy, even if Simpson never intended the commission of these crimes. That was error. The District Court erred by not giving the Theory of Defense Instructions defining Specific and General Intent Crimes, and by instructing the Jury on the Court's rejected Theory of Natural and Probable consequences.

b. Was it Error to Not Instruct the Jury on the Lesser Included Offenses of Larceny and Second Degree Kidnapping?

The jury instructions further prejudiced Simpson because the court did not instruct the jury on the lesser included offenses of Larceny (for Robbery) and Second Degree Kidnapping (for First Degree Kidnapping) as requested by the defense. (*See* defenses' proposed jury instructions. (JAA. 5543-5547)).

Under Nevada law the defendant is entitled to a jury instruction on a lesser included offense, if there is any evidence (however slight) that the defendant could be convicted of that offense. *Rosas v. State*, 147 P. 3d 1101, 1106(2006). The law does not require that the defendant present a defense or evidence consistent with the lesser included offense in order to obtain a lesser included offense instruction. *Id.* At 1109. It is "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Rosas*, (citing *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 36 (1973)). Defendant Simpson was entitled to a lesser included offense instruction of Larceny, and Second Degree Kidnapping.

In general, a lesser offense is included in a greater offense when all of the elements of the lesser offense are included in the elements of the greater offense. *Barton v. State*, 117 Nev. 686, 690 (2001). Larceny is the taking of property owned by another person. NRS §205.220. Robbery is the forcible taking of property from the person of another. NRS §205.270. Robbery is a combination of the crime of assault with that of larceny. *State v. Fouquette*, 67 Nev. 505, 527 (1959). Depending on the circumstances of the case, Nevada has recognized larceny as a lesser included offense of robbery. See *Jefferson v. State*, 108 Nev. 953 (1992), *Lisby v. State*, 82 Nev. 183, 187 (1966). Simpson was entitled to a jury instruction on the lesser included offense of Larceny.

The Court erred by not instructing the jury on the lesser included offense of Second Degree Kidnapping. Statutorily, Second Degree Kidnapping is the same as First Degree

Kidnapping, but for the requirement that the person is kidnapped with the intent to commit robbery, sexual assault, or extortion. NRS §200.310. In this case, if the jury found that the defendant did kidnap Fromong and Beardsley by using Riccio to lure them to the Palace Station, but did not find that this luring was done with the intent to commit robbery, the jury could reasonably have found the defendant guilty of Second Degree Kidnapping instead of First. Based upon this and other jury instruction errors, Simpson is entitled to a new trial.

II. Did the District Court Commit Error When Sentencing Simpson for Both Robbery and Aggravated Assault with a Deadly Weapon?

The gravamen of the charges brought against Simpson is that he and others went into a hotel room to retrieve by force or fear property of another that he was not entitled to. (See Amended Information, (JAA. 0053). The State charged Simpson with 12 separate felony counts for his conduct in the hotel room on September 13, 2007. The charges were:

Count 1: Conspiracy to Commit a Crime.
Count 2: Conspiracy to Commit Kidnapping.
Count 3: Conspiracy to Commit Robbery.
Count 4: Burglary While in Possession of a Deadly Weapon.
Count 5: First Degree Kidnapping with use of a Deadly Weapon. (Fromong)
Count 6: First Degree Kidnapping with Use of a Deadly Weapon. (Beardsley)
Count 7: Robbery with use of a Deadly Weapon. (Fromong)
Count 8: Robbery with use of a Deadly Weapon. (Breadsley)
Count 9: Assault with a Deadly Weapon. (Fromong)
Count 10: Assault with a Deadly Weapon. (Fromong)
Count 11: Coercion with use of a Deadly Weapon. (Fromong)
Count 12: Coercion with use of a Deadly Weapon. (Breadsley)

The jury despite the Courts instruction that they could not find Simpson guilty of both Robbery and Coercion, convicted Simpson of all Twelve Counts.

At sentencing the Court dismissed Counts Eleven and Twelve, Coercion with use of a deadly weapon, but refused to dismiss Counts Nine and Ten, Assault with Use of a Deadly Weapon as requested by the Defense. (JAA. 5476:1), (JAA. 5482:22-23). Simpson was sentenced on Count Seven and Eight, Robbery with Use of a Deadly Weapon, to a minimum term of sixty (60) months and a maximum term of one hundred eighty (180) months with a consecutive twelve (12) to seventy-two (72) months as an enhancement because a gun was used.

The Court additionally sentenced Simpson on Count Nine Assault with a Deadly Weapon to a minimum term of eighteen (18) months to a maximum term of seventy-two (72) months consecutive to Count Seven, Robbery, and additionally sentenced Simpson on Count Ten,

Assault with a Deadly Weapon to a minimum term of eighteen (18) months, to a maximum term of seventy-two (72) months with Count Ten running consecutive to Count Eight.

The District Court punished Simpson to an additional thirty-six (36) months eighteen (18) for each Assault on top of the six (6) year minimums he received for Robbery with Use of a Deadly Weapon.

This violates the legislative intent of both the Robbery and Assault statutes and the double jeopardy clause of the United States Constitution.

The Assault Counts should have been dismissed by the Court because they were part and parcel of the Robbery that Simpson was convicted for. This Court in *Dossey*, 114 Nevada 904, 964 p. 2d 782 Nevada (1998) concluded,

> **that the legislature intended the subsections of this statute to define alternative means of committing a single offense not separate offenses permitting a conviction of multiple counts based upon a single act.**

NRS §200.380 defines Robbery as follows:

> **Robbery is the unlawful taking of personal property from the person of another or in his presence against his will by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the Robbery. A taking is by means of force or fear. A force or fear is used to a) obtain or retain possession of the property, b) prevent or overcome resistance to the taking or c) facilitate escape.**

NRS §200.471 defines "Assault" means:

> **intentionally placing another person in reasonable apprehension of immediate bodily harm.**

You can't have a Robbery with a Deadly weapon by force or fear without also having an Assault that places the victims of that Robbery in fear of harm. This Court has ruled in *Albitre v. State,* 103 Nev. 281, 738 P.2d 1307 (1987), that the Courts look to the gravamen of all charges as to whether or not charges are redundant based on a course of conduct. The *Albitre* Court stated

> **we are convinced that the legislature never intended to permit the State to proliferate charges as to one course of conduct by adorning it with chameleonic attire. Although charging to the limit may be justified to cover developing nuances of proof, the Jury should have received an instruction limiting the number of conviction alternatives.**

The failure to do so was error.

The course of conduct in convicting Simpson of Robbery with a deadly weapon also encompassed Assault by its very definition. The Double Jeopardy Clause has been interpreted to prohibit multiple punishments for the same offense in a single trial. North Carolina v. Pearce, 395 U.S. at 717.

> **If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense.**

This Court in *Wilson v. State*, 114 p. 3d 285 talks at length about redundant convictions,

> **a claim that convictions are redundant stems from the legislation itself and the conclusion that it is not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct. We have declared convictions redundant when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated.....when a defendant receives multiple convictions based on a single act, this Court will reverse redundant convictions that do not comport with legislative intent.**

Counts Nine and Ten should have been dismissed as redundant to the Robbery and Burglary charges Simpson was convicted of.

III. Was There Insufficient Evidence to Support Simpson's Conviction for Kidnapping? Were the Kidnapping Convictions Redundant to the Robbery Convictions?

Simpson was charged in Counts Five and Six of the Information with Kidnapping in the First Degree. Count Two of the Information Conspiracy to Commit Kidnapping is dependent upon the survival of Counts Five and Six.

The complaining witnesses, Fromong and Beardsley were directed by Riccio, who was not charged with any crimes, to a hotel room at the Palace Station for the purpose of selling Simpson's personal items and memorabilia. Unbeknownst to Fromong and Beardsley, the purported buyer never intended to purchase the O.J. Simpson property. This was by all accounts intended to be a sting whereby Simpson would recover property that he believed he owned and was entitled to.

Simpson and other individuals entered a small hotel room at the Palace Station Casino that measured no more than a standard size hotel room. (JAA. 2977:11).

Simpson's personal items were displayed on the bed. Simpson believed them to be

stolen from him in the past. Fromong and Beardsley stayed inside the room at the Palace Station during this six minute event. No evidence was produced at trial that Fromong or Breadsley were ever bound, gagged, tied up or physically restrained.

The State formulated the Kidnapping counts in such a way that its description of the crime could be interpreted in one of two ways. Their first theory of prosecution was that Riccio, an uncharged co-conspirator, lured Fromong and Breadsley to a room where they could be robbed. There was no evidence at trial that a Robbery was ever discussed with Riccio. To the contrary, Riccio testified that Simpson never intended to commit a crime, let alone a forcible taking, that the only thing on Simpson's mind was recovering Simpson's stolen property. (JAA. 2979). Under this scenario purported by the prosecution, the Kidnapping would have taken place before the alleged Robbery occurred and before Simpson was on the Palace Station property.

The second theory espoused by the State was the traditional Kidnapping accusation of confinement during the Robbery. This Court has stated that any movement or restraint incidental to the underlying offense that is inherent in the crime charged it will not expose the Defendant to dual criminal liability under the first or second degree Kidnapping statutes. *Mendoza v. State,* 122 Nevada 267 130 p 3d 176 (Nevada 2006).

If the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in a Robbery or where the movement of a victim substantially exceeds that required to complete the associated crime dual convictions under the Kidnapping and Robbery statutes are proper.

This Court stated in *Wright v. State*, 95 Nevada 415 581 p 2d 442 @ 444 1978, that where the facts allegedly construing Kidnapping and robbery are contemporaneous, the Kidnapping charge would only lie;

> **if the movement of the victim results in increased danger over and above that present in the crime of Robbery. Furthermore, if the movement of the victim is incidental to the commission of the Robbery and does not substantially increase the risk of harm over and above that necessarily present in the crime of Robbery itself the Kidnapping conviction cannot stand.**

This Court then decided in *Garcia v. State,* 113 p 3d 836, (citing *Jefferson v. State,* 95 Nevada 577, 599 p 2d 1043 (1979)

that where a person has been charged with second degree Kidnapping and a separate associated crime the charge of second degree Kidnapping will only lie where the movement of the victim was over and above that required to complete the associated charge.

Garcia, argued that there was insufficient evidence to support his conviction for both Robbery and Kidnapping arising out of the same criminal incident and that the State must show that the movement of the victims was beyond that required to complete the associated Robberies.

The facts in Garcia in this case are squarely on point with the facts here. Taken in a light most favorable to the prosecution the facts in this case indicate any movement of Beardsley or Fromong was incidental to the Robbery. Confinement for Robbery and Kidnapping are very different. No evidence established a Kidnapping separate and apart from a Robbery took place within in the Palace Station hotel room.

Even under the State's alternative theory that the Kidnapping occurred as Fromong and Beardsley were being led to the room by Riccio that theory ignores requirements of confinement and restraint necessary for a Kidnapping to exist. There must be an intent to hold and or detain which would flow from the enticement. There is a complete lack of evidence that when Riccio led Fromong and Beardsley to the room there was any intent to detain which was required over and above the alleged Robbery.

This Court clarified all of the criteria for dual convictions for Kidnapping and Robbery when such charges arise from a single course of conduct in *Mendoza. Id.* The movement or restraint must substantially increase the risk of danger to the victim over and above that necessarily present in the crime of Robbery, or the seizure, restraint, confinement or movement, must substantially exceed that required to commit a Robbery. Dual culpability will only result if the act of Kidnapping stands alone with independent significance from the act of Robbery itself.

In this case there was no independent significance separate and apart from Robbery itself nor was there any risk of danger, movement etc. that exceeded that which was required to commit a Robbery. The record indicates that any movement by Beardsley or Fromong during this incident was incidental to the incident and without an increased danger to them. There was no evidence of bodily harm to either Fromong or Beardsley during the course of this incident at trial. To the contrary, evidence was deduced at trial that immediately following this incident both Beardsley and Fromong were more concerned with calling Inside Edition and receiving

payment for their story, than getting any medical care. (JAA. 2216-2221).

This Court has concluded that to sustain convictions for both Robbery and Kidnapping arising from the same course of conduct any movement or restraint must stand alone with independent significance from the act of Robbery itself. This record is devoid of any evidence that would give independent significance apart from the Robbery itself that any movement created an increased danger on the part of Fromong and Beardsley. Counts Two, Five and Six should be vacated.

IV. Did the Court Error by Admitting Inadmissible Hearsay Statements Against Simpson?

To satisfy the requirements of the confrontation clause, if the State seeks to introduce hearsay statements against a criminal defendant, such evidence must bear adequate indicia of reliability by either falling within a firmly rooted hearsay exception, or the State must demonstrate that the statement possesses particularized guarantees of trustworthiness. If the statement does not fall within a firmly rooted hearsay exception, the statement is "presumptively, unreliable and inadmissible for confrontation clause purposes." *Ramirez v. State*, 114 Nev. 550, 958 P.2d, 724, 729 (Nev. 1998) (citations omitted).

The District Court admitted an improper hearsay statement during the direct testimony of Riccio. Riccio was being questioned about conversations that transpired at the Palms pool the afternoon of September 13th, 2007. During the exchange, the prosecution asked Riccio about a sister of Simpson's giving advice to Simpson. (JAA. 3242:24). Riccio starts to answer the question when Defense counsel objects. (JAA. 3243:4). A discussion ensues in the presence of the Jury, wherein the prosecution states, "that there were people that were cautioning Mr. Simpson that this was a bad idea." at (JAA. 3243:12-14). Defense counsel is strenuously arguing with the Court about the admission of this statement advising the Court that the statement is clearly hearsay. (JAA. 3243:24-25). The Court overrules the objection at (JAA. 3244:12). Defense counsel still pleads with the court against its admissibility on other grounds. Again the Court overrules the new objection. (JAA. 3245:13-20). The Prosecution asks....

Q. What did Simpson's sister say to him?

Objection: Can we attach a name.....

I have no idea who the person is?

Q. Do you know the name?

A. I don't recall the name....

Again at (JAA. 3246:10), Defense counsel objects.

The Court, **I've already overuled it,....Just stay where you are**. *Id.* At 11. Riccio then proceeded to relate these unknown individuals feelings about Simpson's plan to retreive his property. At (JAA. 3246:19), Defense Counsel again objects to the admission of the unidentified persons statement. The prosecution then talks to Riccio more extensively about the persons statements.

> **Whenever..... a hearsay statement by a non-testifying declarent that does not come within any exception to the hearsay rule....is admitted against a criminal defendant, there is presumptively a confrontation clause violation, subject only to the prosecutor's ability to meet its burden of showing that the circumstances under which the statement was made gave it adequate particularized guarantees of trustworthiness. Id at 729.**

Simpson did not even know the name of the person making the statement, let alone, the ability to confront and challenge it.

This is patently inadmissible hearsay, that fell under no firmly rooted exception. It was used against the defendant to prove the truth of the matter asserted. The confrontation clause was violated, it was unjust and unfair. It denied Simpson his fundamental right to cross-examine and challenge evidence admitted against him.

V. Did the Prosecution Commit Prosecutorial Misconduct by Eliciting Testimony of Witness Intimidation?

The prosecution committed prosecutorial misconduct by asking repeated unfounded questions to its lead detective about witness intimidation (JAA. 4412:20).

Beardsley is a named victim in the State's Information against Simpson. (See Amended Information (JAA. 0055)). Beardsley, a reluctant witness, did not want to testify or have the prosecution of Simpson go forward. (JAA. 4223-4224).

Beardsley was on direct examination when he was asked to verify and authenticate a tape recording made by Riccio of the events on September 13, 2007. The following exchange took place. At (JAA. 4214:5).

Q. Is that an accurate record of what happened?

A. I'm not authenticating it; considering the source, I can't authenticate the tape.

A. I consider..... we consider that tape to be a work of art. At L22.

The prosecution is unhappy that its named victim and witness does not want this case to go further. Beardsley states that he absolutely does not wish to be a part of this case. During a dialogue with the Court, the prosecution is attempting to come up with a reason why their witness won't authenticate tapes. (JAA. 4279:14-22). Instead of accepting the plain answers that Breadsley does not want to be there. The prosecution opines that it is because Beardsley is in custody (JAA. 4278:12). The prosecution is casting a shadow that Beardsley was intimidated at first by going back to jail, then asserts intimidation by Simpson. Defense counsel in order to rebut the prosecutor's implication that Beardsley was not testifying favorably because of intimidation asks the following question. (JAA. 4282:22).

Q. Well, you know the implication by the District Attorney was that somehow your testimony was colored here. Did Mr. Simpson ever discuss your testimony today with you back in September of 2007.

A. Never.

Q. Has everything you've said in this courtroom today been the whole truth and the absolute truth?

A. Absolutely.

Federal Courts have consistently held that a prosecution's references to or implications of witness intimidation by a defendant are reversible error unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation. *Lay v. State,* 110 Nevada, 1189, 886 P. 2d 448. Breadsley not only denies any intimidation but also states that everything he says has been the truth, the whole truth and nothing but the truth. There is no evidence of intimidation in this record.

The prosecution, not willing to accept Beardsley's testimony at face value, also not having any credible evidence to rebut Beardsley's truthful statements recalls Detective Caldwell. Detective Caldwell is asked the following leading question. (JAA. 4412:20-23).

Q. All right. At the time you heard these phone calls from the detention center, you were already concerned with efforts by Mr. Simpson to dissuade and influence...L23

Objection by defense counsel

Defense Counsel objects because of the leading nature of the question and improperly implying intimidation towards Beardsley, despite Beardsley's sworn testimony to the contrary. There was no evidence in this record to support a good faith basis to ask these questions.

The Defense calls Breadsley again to rebut this continuous implication at (JAA. 4857:16).

Q. Okay and prior to giving those public statements and those media statements, did Mr. Simpson ever try to either manipulate your testimony or tell you how to testify in this cause?

A. Absolutely not.

This entire line of questioning by the prosecution was misconduct. It was error for the Court to allow it. The issue of intimidation came before the jury unsupported by fact or evidence. The defense was in a position where they had to prove a negative.

This Court discusses in *Lay*, that this type of questioning is prosecutorial misconduct. The Federal Courts have reversed convictions where prosecutors have implied the existence of threats, "In the contempt of the whole record." *Id.*

Here the Court allowed the improper questions offered by the prosecution over objection by the defense. The record is clear of any evidence of intimidation.

See *United States v Rios*, 611 F. 2d 1335, 1343 (10th Cir. 1979); *United States v Peak*, 498 F. 2d 1337, 1339 (6th Cir. 1974); *United States v Hayward*, 420 F. 2d 142, 147 (D.C. Cir. 1969); *Hall v United States*, 419 F. 2d 582, 585 (5th Cir. 1969). *United States v Muscarella*, 585 F. 2d 242, 248-49 (7th Cir. 1978).

VI. Did the District Court Violate Simpson's 6th Amendment Right to Confront Witnesses When it Prohibited Defense Counsel from Conducting Full and Complete Cross-examination?

The cornerstone of our criminal justice system is that the accused enjoys the right to confront all witnesses against him. *U.S.C. Const p. amend. 6.* The Constitutional right of cross-examination may be a defendant's only recourse to refute evidence against him. When a witness gives testimony that is false or evasive the confrontation clause is satisfied only by giving the defense full and fair opportunity to probe and expose these infirmities through examination. *Pantaro v. State*, 138 P. 3d 477 (Nev. 2006).

The State called Walter Alexander (hereinafter referred to as "Alexander") as a witness. Alexander was the first individual to cooperate with law enforcement and gave the police the initial version of events. Alexander testified twice under oath. First he testified at the preliminary hearing and then at trial. Prior to that, he gave a sworn statement to law enforcement officers as part of his cooperation agreement. (See sworn statement of Alexander, (JAA. 001)).

The gravamen of Alexander's statement was that he was completely open and honest with law enforcement. He told law enforcement that he gave his statement to tell all, and reiterated he was truthful with police. Because of that, he believed he should get a good deal. Alexander told the police and testified at the preliminary hearing that he was a Realtor and that's how he earned his income. (JAA. 261 at 94:11-17).

At the preliminary hearing, Alexander was questioned as to whether he was truthful with the police in his statement. He stated at the preliminary hearing (JAA. 261 at 95:20), that there were "things he had done that he did not care to talk about."

Defense counsel knew what those things were and in an effort to expose Alexander's veracity for truthfulness and honesty sought to cross-examine him based on his statements. The Defense knew he was in fact not being truthful and forthright with police because Alexander earned his living as a Pimp and as a Golf hustler.

He testified at the preliminary hearing under extensive cross-examination that he took pictures of naked women. (JAA. 264 at 107:5-6). That he acknowledged e-mail communications with the name Walter on them. And also acknowledged knowledge of a

Website named "yourprivategeisha.com". And when asked (JAA. 263 at 102:6-7) how he knew of that website he stated that he preferred not to answer that question. He was asked (JAA. 266 at 113:5) " where you actually deliver a girl to the hotel room or somebody's home, correct". Answer at L.7, "not necessarily for prostitution it could be for a massage or anything else."

When called as a witness at trial, Alexander came to court with Bible in hand and started reading it in front of the Jury. (JAA. 3869:20-25). This was objected to by the Defense as being prejudicial and improper. The Court admonished Alexander not to bring the Bible to the witness stand. The cat however was already out of the bag and the Jury was left with the impression that Alexander was a God-fearing, bible worshiping individual.

The District Court after lengthy discussion with Defense counsel sustained the State's objection and disallowed questioning of Alexander about what he really did for a living under the theory that he couldn't be cross-examined for the prior bad act of being a Pimp and a Golf hustler. The District Court did not see the distinction between prior bad acts, and testing Alexander as a key cooperating witness for his truth and veracity, both to law enforcement and in his preliminary testimony. (JAA. 3873:1-25, 3874:1-13). The Court ruled that the entire line of questioning was impermissible. (JAA. 3876).

In *Cox v. State,* 721 p 2d 358 this Court ruled that the confrontation clause of the 6th and 14th amendments to the United States Constitution guarantees a Criminal Defendant the right to confront his accusers and the opportunity to demonstrate the existence of a possible bias or prejudice of a witness in support of the defendant's theory of the case. It also includes the right to introduce evidence challenging the witnesses credibility in order to dispel an inference which the Jury might otherwise draw from the circumstances. *Id* at 360.

In *Cox* the Jury heard evidence that the complainant was a born-again Christian. This Court opined that because the Jury heard evidence that the complainant was a born-again Christian that the Defendants theory of the case may not be as believable. The Defense in the *Cox* case had evidence that the born-again Christian complainant had in fact applied for an escort license. This Court reversed, ruling that *Cox*'s rights under the 6th and 14th amendment to the United States Constitution to challenge a witness's credibility was paramount to precluding the prior bad act testimony.

When Alexander came to court carrying that bible leaving the inference that he was a good Christian man, his credibility and veracity for truthfulness was ripe for challenge by the Defense. The District Court never allowed the question to be asked as to whether Alexander lied to the police about how he made a living and therefore the issue of whether or not extrinsic proof would have been admitted was never at issue.

In *Lobato v. State,* 120 Nevada. Adv. Op. No. 57 this Court went through a lengthy dialogue on the use of prior inconsistent statements and the collateral fact rule when coupled with a specific contradiction. This Court ruled that extrinsic proof of a prior inconsistent statement is inadmissible unless the statement is material to the case at hand. This Court stated

> **District Court's have wide discretion to control cross-examination that attacks a witnesses general credibility, however a trial court's discretion is ...narrowed or bias (motive) is the object to be shown and the examiner must be permitted to elicit any facts which might color a witnesses testimony. *Id.***

The Defense should have been permitted to ask witness Alexander the question as to what he really did for a living and whether he lied in his statement to the police. His motivation was to give false testimony is always proper cross-examination for a witness. *Id.*

Federal Courts have also ruled that restrictions on cross-examination to establish a key prosecution witness has likely lied under oath is a denial of a defendant's right to confrontation. *Slovik v. Yates,* 545 F. 3d. 1181, (9th Cir. 2008). In *Slovik*, the Court prohibited the Defense from establishing that a witness had lied about being on probation. The 9th Cir. in Slovik (citing *Davis v. Alaska,* 415 US 308), stated that the right of confrontation

> **means more than being allowed to confront the witness physically, but the main and essential purpose of confrontation is to secure for the opponent the opportunity to cross-examine.**

Confrontation clause rights have been violated when a defendant is "prohibited from engaging in otherwise appropriate cross-examination to expose to the Jury the facts from which the Jurors could appropriately draw inferences relating to the reliability of a witness." (quoting *Davis,* 415 US at 318.)

The Simpson Jury might have received a significantly different impression of Alexander and his credibility if Defense Counsel had been permitted to cross-examine on the

issue of whether the witness lied in his sworn statement to police and lied at the preliminary hearing about how he truly made a living.

NRS §50.085(3) permits impeaching a witness on cross-examination about questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used. By refusing to allow the questioning of Alexander whether he lied about being a pimp was improper. It didn't matter what he lied about, it was the fact he lied that was relevant.

The credibility of the State's first cooperating witness, Alexander was critical to the prosecution's case by preventing the Defense from conducting a complete, full cross-examination of this witness, the Court improperly restricted Simpson's right of cross-examination and violated his 6th amendment right to confront the witness against him.

VII. Did the District Court Commit Error During Jury Selection by Denying the Defenses Batson Challenges, Challenges for Cause, and Improperly Restrict Jury Voir Dire?

BATSON

The Court erred when it denied Simpson's Batson objection to the State's use of peremptory challenges to impermissibly exclude African-American panelists. The State used two of its peremptory challenges to exclude African-American panelists 060209 and 060177. Simpson's objections were overruled by the Court. The striking of these two panelists caused there to be no African-Americans on the Jury. (JAA. 1886:10) (denied at JAA.1908).

Panelist 209 was questioned extensively by the Prosecution, Court and Defense. Defense Counsel asked prospective juror 209 the following:

Q. Can you base your verdict solely on the evidence brought out at the trial and the law that I give you and the instructions I give you without caring about what other people, persons, your friends, your relatives, your co-workers or anyone else in this world is going to think about this verdict?

A. "Yes." (JAA. 1129:13-19).

Prospective juror 209 was asked by the defense at (JAA. 1143:25) the following:

Q. Do you feel that you can take the law from Judge Glass, apply it to the facts of this case and render a fair and impartial verdict.

A. Of course, yes.

Prospective juror number 177, was also questioned extensively by the Court, Prosecution and Defense. After extensive questioning by the Prosecution in an obvious attempt to have juror 177 disqualified for cause, the Prosecutor at (JAA. 1775:15) asked:

Q. If you were in my shoes sitting here right now looking at this questionnaire and knowing that all that you know about your inner self, would you feel secure having a juror such as yourself sitting on the jury.

A. Yes, I would.

The Defense at (JAA. 1777:9) asked prospective juror 177

Q. Is there any doubt in your mind that you are going to be able to follow the law exactly as Judge Glass gives it to you.

A. No doubt.

Q. Is there any doubt in your mind that you can be fair and impartial and listen to that law as Judge Glass gives it to you?

A. Yes. I can.

The State used two of its peremptory challenges to strike African-American prospective juror 209 and 177. The Defense (JAA. 1886-1895), implored the District Court not to allow this to occur, objected to the peremptory challenges and moved to strike the veneer. Both Defendants in this case, Simpson and C.J. Stewart, are African-American.

The Supreme Court in *Batson v.Kentucky*, 476 U.S. 79 (1986), recognized that a criminal defendant has a right to be tried by a jury who's members are selected pursuant to non-discriminatory criteria. If the State uses its peremptory challenges to exclude African-Americans in a discriminatory manner, they have violated the Defendants rights under the equal protection clause of the 14th Amendment. *Id.* at 86. Under *Batson* if a Defendant makes a prima facie showing that the peremptory challenge was exercised on the basis of race, then the prosecution must put forth a race neutral reason for striking the juror.

The District Court properly instructed the State to put forth a race neutral reason after the Defense objected to the striking of both prospective jurors 209 and 177. The Court improperly ruled in denying the defenses *Batson* challenges that the reasons were sufficiently pervasive to rebut the Defendant's prima facie showing.

When asked by the Court to state their reasons for the exclusion of juror 209 at (JAA. 1888), the Prosecution stated that she was "forgiving by nature" and goes on to state that there were some conflicts between her questionnaire answers and her answers in court. This was disingenuous and not a race neutral reason for two reasons. Being forgiving by nature was purely speculative on the part of the Prosecution. There is nothing in the record that indicates that she would have been forgiving by nature in this case. To the contrary. Juror 209 stated that she could follow the law and would follow it scrupulously. *Id.* Also, as argued to the Court by defense counsel at (JAA. 1894:14), changes in the answers to the questionnaires was an absurd reason because as jury selection transpired most of the prospective jurors changed their answers that they had put in the questionnaire. But juror 209 was the only one who was challenged by the State because of it.

The Courts in Nevada and the U.S. Supreme Court have stated that speculative reasons are not race neutral reasons. *Id.* The District Court was charged with ensuring that the jury process was fair and impartial. Prospective Juror 209 and 177 were the only eligible African-American jurors to sit on the panel, the District Court should have exercised discretion in ensuring their inclusion in this jury.

CHALLENGES FOR CAUSE

This trial was unique in the history of Nevada jurisprudence because Simpson was the Defendant.

This meant that special precautions needed to be taken to ensure a fair and impartial jury was seated for both the Prosecution and the Defense. Simpson is a nationally recognized figure that has become part of American culture. His name is mentioned in Hollywood scripts and pop songs as part of Americana. You can turn on any news program and hear some broadcaster or analyst making reference in comparisons to the issue of the day to either Simpson or Simpson's legal troubles of the past.

Few national figures have been as polarizing whether be it real or perceived as Simpson. Unfortunately this had a direct impact on the fairness of the jury selection process. Whether one considered Simpson famous or infamous, jury selection was fraught with pitfalls that denied Simpson a right to a fair trial. The Defense had requested individualized Voir Dire and thorough, complete examination of potential jurors on their opinions of Mr. Simpson. (JAA. 0446) Both of these requests were denied by the Court. (JAA. 700-701:3-14). There needed to be a heightened sense of due process, if you will, because of the unique issues that Simpson brings to the table.

Paramount to ensure a fair and impartial jury would be seated in this case, defense counsel needed to properly and completely question perspective jurors regarding any and all potential issues affecting a juror's impartiality. The Court needed to be sensitive to the issues surrounding the strong feelings evoked of Simpson's presence.

NRS §16.050 (g) confirms that a Defendant may challenge a panelist for cause when that person presents;

> **a state of mind.....evincing enmity against or bias to either party**

If a perspective juror's opinion was that Simpson was a double-murderer or was a scoundrel for writing a book "If I did it", that juror should not qualify because that juror would have "a state of mind evincing enmity against or bias" towards the Defendant.

An example of why individualized voir dire was necessary in this case, one only needs to look at the questioning of **potential juror 123**, (JAA. 1530:16) perspective juror 123 blurts out the following in front of the rest of the veneer,

> **now I don't know in regards to Mr. Simpson I'm going to throw this out there now that I feel that the case down in California to me he was someone who got away with something like that because in my opinion I feel he was guilty, you would keep yourself clean and you wouldn't come back here and pretty much commit another crime you know I ....**

Defense Counsel stands up and immediately objects. The District Court has a side bar, however the damage had already been done. The comments polluted and contaminated the rest of the veneer. *Id.* at L.22.

Prospective juror 124 stated that he was "angry" and in his questionnaire expressed heightened emotion about Simpson. (JAA. 1546:1-5). Earlier Court rulings prohibited the

Defense in asking probing questions of this type of juror. (JAA. 698-701) He was very angry about the verdict in California, felt bad for the families, stated in his questionnaire that he could not set aside his feelings. (JAA. 1560:10-11). However when questioned in court the prospective juror says he can be fair and impartial and set his feelings aside. The District Court (JAA. 1563) refused to excuse juror 124 for cause.

Perspective juror 149 was challenged for cause after he stated at (JAA. 1616:11-18) that he didn't like the book "If I did it" and thought it was inconsiderate of Simpson to title the book that way. The District Court denied the challenge.

The questioning of **prospective juror 150** provides some insight as to what the defense had to deal with in the crowded courtroom. Question to prospective juror 150, (JAA. 1645:10),

Q. You stated that Mr. Simpson got away with murder or he had someone do it.

A. That was my opinion, yes.

Then when being questioned about the civil trial prospective juror 150 stated at (JAA. 1646:25) that he agreed with the civil verdict because "he didn't get away with it altogether." Prospective juror 150 was then asked, " you had some pretty strong feelings about it," and, (JAA. 1647:5) answered, " uh-huh." Then (JAA. 1648:12), perspective juror 150 stated" here we go again." When asked whether or not he can be a fair and impartial juror, prospective juror 150 stated that he could be fair and impartial. Juror number 150 was challenged for cause at a bench conference, (not transcribed) it was denied.

Prospective Juror 181 was challenged for cause which challenge was denied at (JAA. 1847:9). Juror 181 stated that he had written the answers he wrote in his juror questionnaire for "shock value". Juror 181 made his point when being questioned about his questionnaire, stated that he (Simpson) "he's a murderer and got away with it." At (JAA. 1827:3-5) prospective juror 181 when asked whether or not he believed, still held the opinion Mr. Simpson is a murderer, and the answer to the question is "yes". At L.11 potential juror 181 is asked whether or not the theme in his questionnaire was about Simpson getting away with murder and at L.13 potential juror 181 says "yes". He then states at (JAA.1831:21) that Simpson got away with double murder. Yet the District Court in spite of all theses answers felt that this juror was not subject to a challenge for cause. Potential juror 181 stated under oath that he lied in his sworn questionnaire. He told the

Court he was being dishonest. Potential jurors who lie under oath should be excused for cause. The Court refused to strike potential juror 181.

Restriction of Voir Dire

The magnitude of selecting a fair and impartial jury in the Simpson case is undoubtedly unique. Prior to walking into the courtroom Defense Counsel knew based on jury questionnaires that many people in the pool had already admitted and believed Simpson was a double murderer who was acquitted. The potential for prejudice and bias in this type of situation is epic. For the Court to forbid Counsel from inquiring how jurors came to the impressions they had, is a fundamental denial of due process. See, *Mu'min v. Virginia*, 500 U. S. 415. The amount of pretrial publicity surrounding Simpson is enormous. The magnitude of exposure by a potential juror certainly would have an impact on the impartiality of the juror regardless of their statements that they could be impartial.

During Voir Dire questioning the Court impermissibly restricted defense counsel from asking jurors in depth questions regarding their opinions of Simpson's prior cases. (JAA. 698-701). The purpose of jury voir dire is to "discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the Court." *Johnson v. State*, 122 Nev. 1344 (2006).

Under NRS §175.031, any supplemental inquiry by the defendant or his attorney "must not be unreasonably restricted." Although the Court allowed defense counsel to question potential jurors on their general opinion of Simpson's California criminal and civil cases, the Court restricted the questioning as to whether the potential juror could set aside their feelings. Even if a juror said that they could set aside their feelings, the veracity of this statement should have been subject to inquiry by the defense.

As the U.S. Supreme Court said in *McDonough, Id.* "the bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *McDonough v. Greenwood*, 464 U.S. 548 (1983) citing *Smith vs. Phillips*, 455 U.S. 209, 221-224 (1982). Further examination of the jurors who expressed that they believed Simpson was guilty of unrelated offenses was necessary to determine whether they were concealing a bias, or whether the amount of attention that they have

paid to Simpson's past cases was so great that it rendered impartiality impossible.

The Supreme Court of Nevada has recognized the importance of voir dire examination in *Oliver*, the court stated that counsel should be granted "considerable latitude" in determining disqualification or fairness of juror. *Oliver vs. State*, 85 Nev. 418, 422 (1969).

Persuasively, the 9th Circuit Court of Appeals has echoed the United States Supreme Court by recognizing that bias may be actual or implied, and the principal purpose of voir dire is to probe each prospective juror's state of mind to expose possible biases, enabling the trial judge to determine actual bias and allow counsel to assess suspected bias or prejudice. *Scott v. Lawrence*, 36 F. 3d 871, 874 (9th Cir. 1994) cited in *U.S. v. Zavalidroga*, 158 F. 3d 1241 (9th Cir. 1998). The 9th Circuit goes even further in stating that both actual or implied bias may be grounds for reversal. *United States v. Martinez-Martinez*, 369 F. 3d 1076, 1081 (9th Cir. 2004). Because the right to a non-biased jury is a right afforded by the 6th Amendment of the Constitution, these impermissible and prejudicial restrictions on Simpson's right to examine potential jurors constitutes reversible error. *Fields v. Brown*, 503 F. 3d 755, 767 (9th Cir. 2007).

Examination of the jurors who did little but express that they believed Mr. Simpson is guilty of unrelated offenses was necessary to determine whether they are concealing a bias, or whether the amount of attention that they have paid to Simpson's past cases is so great that it renders their impartiality subject to probing. Defense counsel was not permitted to ask jurors that disagreed with the acquittal verdict how they reached that opinion. This was improper.

VIII. Did the District Court Commit Judicial Misconduct Throughout the Trial Which Prejudiced Simpson's Right to Due Process?

A trial court should act as a referee of the contest between the parties. It should be fair and impartial as between the parties and their attorneys and allow them considerable freedom in the presentation of their respective cases in their own way. A trial court has a certain amount of discretion to control the proceedings before it. The court is constrained however by a requirement that all criminal defendants are entitled to a fair trial. If the actions of the trial court prejudice a defendant's right to a fair trial then obviously an abuse of discretion is present. *Belden v. Wyoming*, 01-57, Wyo. 2003.

Trial Courts should be mindful that innocuous conduct in some circumstances may

constitute judicial misconduct. Judges should be mindful of the influence they wield. *Parodi vs. B. Washoe Medical Center,* 111 Nevada 365, 367. This court said it best in *Parodi* at 589.

> **The average juror is a laymen. The average laymen looks with the most profound respect to the presiding judge and the jury is as a rule alert to any remark that will indicate favor or disfavor on the part of the trial judge.**

Human opinion is often times formed upon circumstances meager and insignificant in there outward appearance. And the words and utterances of a trial Judge sitting with a jury in attendance are liable, however unintentional, to mold the opinion of members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby. The influence of the trial judge on the jury is necessarily and properly a great weight and his lightest word or intimation is received with deference and may prove controlling. *Starr V. United States,* 153 U.S. 614 at 626. (1894).

This Court recognized in *Parodi Id.* at 591 that trial counsel is faced with a "hopson's choice" of either objecting to the misconduct which of course has the attendant risks of antagonizing the trial judge further and exasperating the jury or by not objecting jeopardizing their right for appellate review. This Court went on to rule that by failing to object, at the time of the judicial misconduct, that appellate review would not be precluded. Errant conduct is reviewable under the plain error doctrine. *Oade v. State*, 114 Nev. 619, 960 P.2d 336 at 338.

Throughout Simpson's trial the district court repeatedly, however inadvertently and unintentionally, expressed impatience and was discourteous to trial counsel. These comments had an adverse impact on Simpson's trial counsel which in turn may have affected the acceptance of Simpson's defense.

The errors cited herein were clearly erroneous, cumulative and had a prejudicial affect on Simpson's case.

Examples of judicial misconduct in trying to usurp trial counsel's role are numerous and are seen as early as opening statement. (JAA. 1998:4). Trial counsel is outlining to the jury what the evidence will show and what Simpson's defense is. Simpson's theory of defense was that he did not have the mens rea or criminal intent to commit a crime. The court interjects attempting to limit trial counsel with what is about to be an explanation of the cornerstone of our judicial system mens rea. *Id.* at L.14.

During cross-examination of Fromong, as to the layout in the room at the Palace Station where the items that were ultimately removed were, the prosecutor objects to relevancy. The Court inquires to defense counsel and says where are you going. Defense counsel looks at the Court shocked and says "where am I going judge, and there proceeds to be a dialogue between trial counsel and the Court on an objection that should have been immediately overruled. The Court is attempting to interject it's belief in not allowing trial counsel to try its case. (JAA. 2192-2193).

At (JAA. 2199) after a number of objections by trial counsel the District Court in front of the jury at L10 shouts "**stop**". At L.12 the Court scolds trial counsel in front of the jury and goes on at L.20 and instructs everybody to "**sit down**" and again instructs trial counsel at (JAA. 2200), how the District Court wants the cross-examination to go and how she wants the witnesses questioned.

At (JAA. 2275:15) the Court scolds all defense counsel saying,

> **Stop, don't anybody talk right now**

and admonishes counsel, commenting that she doesn't know whether complete context is being given for the question and she wants complete context to be given. Again telling trial counsel on how to conduct their examination.

At (JAA. 2295:20), the Court again scolds trial counsel. Court:

> **listen folks, the last thing you want me to do as a trial judge is start losing my temper in front of the fine ladies and gentlemen of the jury and having to deal with all of you. You've been warned folks.**

At (JAA. 2296:3), the Court says,

> **and could we please conduct ourselves appropriately with regards to the questions we are asking these witnesses or it's going to be a very unpleasant event for everybody here because I'm not going to call you up at sidebar and admonish you any longer if you can't control yourselves. You've been admonished. Be warned.**

At (JAA. 2752), trial counsel is cross-examining the lead detective as to how many times he's testified in his career. The Court interjects, without objection, at (JAA. 2752:22),

> **Get to the point.**

It was the state's witness that was reluctant to answer the questions and trial counsel got

scolded. (JAA. 2769) the Court again scolds defense counsel for asking questions when a witness is refusing to answer them as opposed to instructing the witness to answer the question posed by counsel. (JAA. 2981) The Court throughout the trial would scold counsel after an objection and say the words,

stop, sit down

At L.24 trial counsel being courteous would stand up to object and instead of ruling on the objection the first thing the court would say is,

stop, sit down

(JAA. 3083-3084) trial counsel is cross-examining Riccio, the individual that set up this entire event. Trial counsel is asking whether Simpson at L.2 had ever expressed anything to the witness other than wanting his personal family heirlooms back. There's an objection by the prosecution at L.5 based on speculation, when the questioned called for a yes or no answer. This question went right to the heart of the defense that Simpson lacked the criminal intent to commit a crime. The Court, not being happy with the defense, states at L.9,

I know he's asking and he's asked it three or four times now, but the witness answers yes.

At (JAA. 3243) defense counsel was objecting to a question by the prosecution about something Simpson's sister may have said to him. This was an out-of court statement being offered for the truth of the matter asserted. And the Court at L.22 says,

stop, please stop, please stop

At (JAA. 3278), trial counsel is objecting to the prosecution asking a leading question. Trial counsel states that the prosecutor is testifying in the middle of a dialogue with Court and the Court states at L.23,

thank you for your opinion Mr. Galanter, the jury is to disregard that

At (JAA. 3279:1) the Court states in front of the jury,

pretty soon I'm going to be disregarding everything and we might as well stop because it will be you guys talking and not the witness

At (JAA. 3281:22), the Court states,

I'm going to put you guys in a very large judicial time out, like magic the dog if you all don't stop

During cross-examination of cooperating witness Charles Ehrlich (hereinafter referred to as "Ehrlich") there's dialogue between the Court and trial counsel about refreshing a witnesses recollection and after the discussion at (JAA. 3373) trial counsel thanks the Court at L.11 and at L.13 the Court says,

sit down.

At L.15 the Court says,

my patience meter is going down. Thank you. There really is nothing else Mr. Galanter that I wish to hear at this very moment unless there's something new you need to pop up and tell me about. Thank you I'm done. Stop. Stop.

At (JAA. 3411) trial counsel is in the middle of cross-examining cooperating witness Ehrlich, at L.18, the Court unprompted interrupts trial counsel, counsel and the Court proceed to have a conversation in front of the jury, the Court is complaining at L.8-10, that "its too early", (The Court required all sessions to begin at 8 a.m.). The Court complained at L.18 that it wanted trial counsel to be "softer", obviously not a legal objection but a comment on the voice level that trial counsel was using at that hour of the morning.

Another example of how the Court was not allowing trial counsel to try its case and interfering with the trial process. (JAA. 3418:5), the Court says,

stop, stop, stop

Again (JAA, 3457:24), the Court interrupts trial counsel and tells him to,

stop.

During cross-examination of a cooperating witness starting, (JAA. 4098), the Court admonishes trial counsel about getting "loud" and makes a statement that if something is being taken out of context the Court does not want that to happen at L.3. The judge wasn't making a ruling, the Court was just assuming that counsel was taking something out of context because in the Court comments at L.1-2 she states she doesn't have the transcript so she just doesn't know. And then (JAA. 4090:6), the Court scolds trial counsel telling trial counsel that he needs to,

behave.

Trial counsel, getting upset with the judge at L.8 says I'm going to reserve a motion at this time, meaning to move for a mistrial outside the presence of the jury. This type of scolding should have

been done outside the presence of the jury because of the prejudicial affect it could have on the defendant's right to a fair trial.

(JAA. 4413:19).

Stop, no, no, no. Sit down.

Scolding defense counsel during an objection. At (JAA. 4523) during re-cross of a witness, defense counsel asks and was given permission to continue questioning the witness. Defense counsel (JAA. 4524:3) asks the question of the witness, the Court at L.12 interjects,

wait are you done

Defense counsel at L.13, "no, I'm not done yet"

The Court at L.14,

I'm done, I'm done

Defense counsel at L.15, "One more thing judge"

L.16,

I'm done

(JAA. 4524:17) defense counsel says if I could ask him. L.18 the Court says,

I'm done, I'm done,

I'm done. Sit down, I'm done.

At L.21, defense counsel reserves a motion for mistrial. At L.22 the Court says,

I'll reserve you a motion for the entire day.

At (JAA. 4797), during redirect examination of Michael McClinton there is an exchange between the prosecutor and defense counsel. In the middle of defense counsel speaking the Court at L.22, interrupts defense counsel and says,

I'm objecting to everything. We're done, sit down, everybody is done. We're done. Sit down.

Again scolding defense counsel in front of the jury.

The prosecution in this case tried to insinuate that because state witness Beardsley wanted to drop all charges against Simpson and didn't want to prosecute this case, that his testimony had been influenced in some way. Defense counsel on (JAA. 4861), asks Beardsley whether or not anybody has reached out to him, paid him money or tried to influence him. The prosecutor objects to it being a compound question. The Court getting frustrated that trial counsel is

rebutting the recent allegation of fabricated testimony says to trial counsel in front of the jury at (JAA. 4862:6),

> **No, no, no.... don't even, do not, no, no, no, do not say anything more.**

There was no evidence of intimidation at trial. Only questions by the prosecution. The Court not allowing the target of the accusation to testify is error, defense counsel gets scolded in front of the jury trying to rebut the prosecutions accusations. (JAA. 4978).

On day twelve of trial, counsel using proper etiquette, is objecting to the prosecutor's questioning of Tom Scotto and the basis of Mr. Scotto's knowledge. The Court scolds defense counsel for standing up and objecting and then says to trial counsel on (JAA. 4978:25),

> **I'm going to give you a continuing objection on this point, all I'm going to ask you to do....is to sit.**

Then at L.3 the court in front of the jury states,

> **I'm overruling your objection at this point , I've ruled. I'm asking you to stay in your seat. Stay in your seat**

During this exchange, unbeknownst to trial counsel, the Court's bailiff (Arthur) is standing in back of trial counsel. Sending a message to the jury that counsel could be taken into custody. And then trial counsel at L.7 says, "Judge I can assure you Arthur is not necessary".

Then the court says,

> **we don't need Arthur to stay behind you to stay in your seat, do you ...**

Then the court states,

> **because that's about where I'm getting to.**

Whether in jest or not, this should not be the conduct of a fair and impartial trial judge.

At (JAA. 5093:8), the prosecutor asks Detective Caldwell a question. In a non-responsive answer the lead detective, taking a shot at the defense witness Tom Scotto says the following:

> **not only did I take a statement from him on the 9th at the preliminary hearing, one of those days, I couldn't tell you which day it was, that Mrs. Scotto was kicked out of the preliminary hearing for tampering with some witnesses...**

At L.14-16, all defense counsel object. All defense counsel move for a mistrial and the Court in obvious frustration exclaims in front of the jury,

oh, oh, it gets better.

This Court has the advantage of not having to rely on the cold, hard, transcript to review this record, for judicial misconduct. The entire video of the trial and the District Court's actions, is part of the Joint Appellant's Appendix. The District Court's remarks and actions throughout the trial were clearly prejudicial. What has been outlined for this court is not exhaustive of every comment made by the District Court nor was it meant to be.

The highlights presented of judicial misconduct show cumulative error that was so egregious and prejudicial that the defense could not get a fair trial, therefore Simpson's case should be reversed.

CONCLUSION

For the reasons stated the judgment of conviction should be reversed and the sentences vacated.

Dated this 22 day of May, 2009.

By: _____
YALE L. GALANTER, ESQUIRE
Yale L. Galanter, P.A.
3730 N.E. 199 Terrace
Aventura, Florida 33180
Ph. (305) 576-0244
Attorney for Appellant
Admitted Pro Hac Vice

By: _____
MALCOLM P. LAVERGNE, ESQUIRE
Nevada Bar Identification no. 10121
The LaVergne Law Group
320 East Charleston Boulevard
Suite 203
Las Vegas, Nevada 89104
Ph. (702)448-7981

CERTIFICATE OF COMPLIANCE, RULE 28

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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22 day of MAY, 2009.

By: _____

MALCOLM P. LAVERGNE, ESQUIRE
Nevada Bar Identification no. 10121
The LaVergne Law Group
320 East Charleston Boulevard
Suite 203
Las Vegas, Nevada 89104
Ph. (702)448-7981

CERTIFICATE OF MAILING

I hereby certify and affirm that on the 22 day of May, 2009, I served a copy of the foregoing Appellant's Opening Brief upon the appropriate parties hereto by depositing a true and correct copy thereof in the United States Mail, postage prepaid thereon, addressed as follows:

David Roger
CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Avenue, Third Floor
Las Vegas, NV 89155

State of Nevada
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, NV 89701-4717

By: _____
ADALID COSTALES
an employee of Yale L. Galanter, P.A.