

1 MOT  
2 GABRIEL L. GRASSO, ESQ.  
3 State Bar Number 7358  
4 231 South 3rd Street, Suite 100  
5 Las Vegas, Nevada 89101  
6 (702) 868-8866  
7 Attorney for Defendant  
8 grassodefense.com

RECEIVED  
C.C.D.A. FILED  
FLOOR  
RECEPTION  
Oct 10 12 12:13 PM '08

6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 STATE OF NEVADA, )  
9 Plaintiff, )  
10 V. )  
11 ORENTHAL JAMES SIMPSON, )  
12 Et. Al. )  
13 ID# 2648927 )  
Defendant. )

Case No.: C237890

Dept. No.: V

14 MOTION FOR NEW TRIAL

15 THE DEFENDANT, ORENTHAL JAMES SIMPSON (SIMPSON) through  
16 undersigned counsel and pursuant to NRS §176.515 and NRS §175.381(2), moves this  
17 Court to grant a new trial in this case.

18 This motion is made and based upon all the papers and pleadings on file herein  
19 and the attached Points and Authorities as well as the oral arguments to be presented in  
20 open court.

21 DATED this 10<sup>th</sup> day of October, 2008.

22  
23 

24 Gabriel L. Grasso, P.C.  
25 Nevada Bar Number 7358  
26 231 South 3<sup>rd</sup> Street, Suite 100  
27 Las Vegas, Nevada 89101  
28 (702) 868-8866

1 **NOTICE OF HEARING**

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: THE DISTRICT ATTORNEY'S OFFICE:

4 PLEASE TAKE NOTICE that undersigned counsel will bring the Defendant's  
5 Motion for New Trial on for hearing before the above entitled court on the 30  
6 day of OCTOBER, 2008 at 8:30 a.m. or as soon thereafter as counsel can  
7 be heard.

8 DATED this 10<sup>th</sup> day of October, 2008.

9  
10   
11 GABRIEL L. GRASSO, Esq.

12 **POINTS AND AUTHORITIES**

13 **STATEMENT OF THE CASE**

- 14
- 15 1. On September 13, 2007 SIMPSON and various other individuals were
  - 16 involved in an incident at the Palace Station Hotel and Casino in Las Vegas,
  - 17 Nevada.
  - 18 2. As a result of the incident, SIMPSON was arrested and taken into custody
  - 19 on September 16, 2007.
  - 20 3. A formal Complaint was filed by the Clark County District Attorney's office
  - 21 on September 18, 2007 charging SIMPSON with what eventually became
  - 22 the 12 counts tried in this case.
  - 23 4. SIMPSON was released from custody on bond on September 18, 2007
  - 24 5. On November 8, 2007, a four day preliminary hearing was held wherein the
  - 25 Justice Court bound over the charges in the Complaint.
  - 26 6. SIMPSON was arraigned before this Court on November 28, 2007.
  - 27 7. At his arraignment, SIMPSON'S trial was set for April 7, 2008
  - 28 8. On April 7, SIMPSON'S trial was continued to September 8, 2008.



1           The court erroneously denied SIMPSON'S valid Batson challenges, improperly  
2 restricted voir dire questioning, provided instructions to the jury that contained inaccurate  
3 or incomplete statements of Nevada law, and violated SIMPSON'S Sixth Amendment  
4 Right of Confrontation by improperly restricting his cross examination of witnesses. For all  
5 these reasons SIMPSON should be granted a new trial.  
6

7       **1)     *The Court erred when it denied SIMPSON'S Batson challenges to the State's***  
8 ***use of preemptory challenges to impermissibly exclude African-American panellists***  
9 ***based on their race***

10           The State used two of its preemptory challenges to exclude African-American  
11 panelists 060209 and 060177. The removal of these panelists significantly impacted the  
12 racial diversity of the eventual jury panel, especially the exclusion of panelist 060209,  
13 who would have been the only African-American on the twelve person jury.

14           In Batson, the Supreme Court recognized that a "criminal defendant has a right to  
15 be tried by a jury whose members are selected pursuant to non-discriminatory criteria."  
16 Batson v. Kentucky, 476 U.S. 79, 87 (1986). If the State uses its preemptories to exclude  
17 African-Americans from the jury in a discriminatory manner, then they have violated the  
18 defendant's rights under the Equal Protection Clause of the 14<sup>th</sup> Amendment. Id at 86.

19           Under Batson, if the defendant makes a prima facie showing that the preemptory  
20 challenge was exercised on the basis of race, then the prosecution must put forth a race  
21 neutral reason for striking the juror. Id, see also Miller-El v. Dretke, 545 U.S. 231 (2005).

22           In the case at hand, the Court properly instructed the State to put forth a race  
23 neutral reason for the use of its preemptory challenges after the defense made a prima  
24 facie showing of discriminatory intent. However, the Court improperly ruled that the  
25 State's reasons were sufficiently persuasive to rebut the defendant's prima facie showing.  
26 Purkett v. Elem, 514 US 765, 768 (1995).

27           Because SIMPSON was denied his right to a jury selected in accordance with the  
28 Equal Protection Clause, he should be granted a new trial.

1 **2) The Court erred by restricting voir dire questioning regarding defendant**  
2 **SIMPSON'S previous cases in California**

3 During Voir Dire questioning the Court impermissibly restricted defense counsel  
4 from asking jurors in depth questions regarding their opinions of SIMPSON'S prior cases.  
5 The purpose of jury voir dire is to "discover whether a juror will consider and decide the  
6 facts impartially and conscientiously apply the law as charged by the court." Johnson v.  
7 State, 122 Nev. 1344 (2006). Furthermore, under NRS §175.031, any supplemental  
8 inquiry by the defendant or his attorney "must not be unreasonably restricted."

9 Although the court allowed defense counsel to question potential jurors on their  
10 general opinion of SIMPSON'S California criminal and civil cases, the Court restricted the  
11 questioning to whether or not the potential juror could set aside their feelings. However,  
12 even if a juror said that they could set aside their feelings, the veracity of this statement  
13 should have been subject to inquiry by the defense.

14 As the Supreme Court said in McDonough v. Greenwood, "the bias of a juror will  
15 rarely be admitted by the juror himself, partly because the juror may be unaware of it."  
16 McDonough v. Greenwood, 464 U.S. 548 (1983) *citing* Smith v. Phillips, 455 U.S. 209,  
17 221-224 (1982). Further examination of the jurors who expressed that they believed Mr.  
18 Simpson was guilty of unrelated offenses was necessary to determine whether they were  
19 concealing a bias, or whether the amount of attention that they have paid to SIMPSON'S  
20 past cases was so great that it rendered impartiality impossible.

21 Furthermore, the Supreme Court of Nevada has recognized the importance of voir  
22 dire examination in Oliver v. State, in which the court stated that counsel should be  
23 granted "considerable latitude" in determining disqualification or fairness of juror. Oliver v.  
24 State, 85 Nev. 418, 422 (1969).

25 Persuasively, the 9<sup>th</sup> Circuit Court of Appeals has echoed the United States  
26 Supreme Court by recognizing that bias may be actual or implied, and the principal  
27 purpose of voir dire is to probe each prospective juror's state of mind to expose possible  
28 biases, enabling the trial judge to determine actual bias and allow counsel to assess

1 suspected bias or prejudice. Scott v. Lawrence, 36 F.3d 871, 874 (9<sup>th</sup> Cir. 1994) cited in  
2 U.S. v. Zavaldroga, 156 F.3d 1241 (9<sup>th</sup> Cir. 1998). The 9<sup>th</sup> Circuit goes even further in  
3 stating that both actual or implied bias may be grounds for reversal. United States v.  
4 Martinez- Martinez, 369 F.3d 1076, 1081 (9<sup>th</sup> Cir. 2004).

5 In this case, five of the final twelve jurors stated that they disagreed with the  
6 acquittal verdict in SIMPSON'S 1995 criminal case. However, defense counsel was  
7 prohibited from inquiring as to how they reached this opinion. Because the right to a non-  
8 biased jury is a right afforded by the 6<sup>th</sup> Amendment of the Constitution, these  
9 impermissible and prejudicial restrictions on SIMPSON'S right to examine potential jurors  
10 constitutes reversible error. Fields v. Brown, 503 F.3d 755, 767 (9<sup>th</sup> Cir. 2007). As a  
11 result the verdict should be set aside and a new trial granted.

12  
13 **3) *Defendant SIMPSON was denied his right to have the jury instructed on his***  
14 ***theory of the case***

15 While NRS §175.161 affords the Court broad discretion to settle jury instructions,  
16 the defense has the right to have the jury instructed on its theory of the case. Crawford v.  
17 State, 121 P.3d 582, 585-6 (2005). Additionally, the court must allow instructions if denial  
18 of those instructions is arbitrary or capricious or if it exceeds the bounds of law or reason.  
19 Jackson v. State, 117 Nev. 116, 120 (2001). In this case, when SIMPSON presented his  
20 instruction on the central theory of his defense, the Court denied his request and failed to  
21 read the requested instruction to the jury. Based upon this denial, SIMPSON is entitled to  
22 a new trial.

23  
24 **4) *The Court erred by allowing a jury instruction that denied a good faith claim***  
25 ***of right defense to robbery***

26 Under Nevada law robbery is a general intent crime. Litteral v. State, 97 Nev. 503  
27 (1981). Most recently, the Supreme Court of Nevada has defined general intent as the  
28 "intent to do that which the law prohibits." Bolden v. State, 124P.3d 191, 201 (2005).

1 However, that intent can be negated if the actor was operating under a reasonable  
2 mistake of fact. Winnerford H. v. State, 112 Nev. 520, 526 (1996), NRS §194.010(4).

3 The jury in the instant case was instructed that "a good faith belief of a right or  
4 claim to the property taken is not a defense to the crime of robbery." Jury Instruction #20.  
5 Although it is true that Nevada law does not recognize the claim of right defense to  
6 robbery, it is not an accurate statement of law that a good faith belief of claim to the  
7 property cannot form the basis of a defense. In this case, SIMPSON'S good faith belief  
8 that he was reclaiming his own property serves to negate the general intent element of  
9 the offense. If the jury found that SIMPSON intended to reclaim his own property, and  
10 that in doing so he did not believe what he was doing was wrong, he could not have the  
11 intent to "do that which the law prohibits." Bolden, 124 P.3d 191 at 201.

12 Therefore, SIMPSON'S good faith belief in a claim or right to the goods could  
13 serve to negate the general intent requirement of the robbery offense. By including the  
14 instruction that this belief is not a defense to the crime of robbery, the jury was provided  
15 with an inaccurate statement of the law, which prejudiced their ability to effectively  
16 determine whether defendant SIMPSON possessed the requisite mens rea to commit  
17 robbery. Based upon this jury instruction error, SIMPSON is entitled to a new trial.

18  
19 **5) *Defendant SIMPSON had a right to jury instruction on the lesser included***  
20 ***offenses of larceny and second degree kidnapping***

21 The jury instructions further prejudiced SIMPSON because the court did not  
22 instruct the jury on the lesser included offenses of larceny (for robbery) and second  
23 degree kidnapping. Under Nevada law the defendant is entitled to jury instruction on a  
24 lesser included offense, if there is any evidence (however slight) that the defendant could  
25 be convicted of that offense. Rosas v. State, 147 P. 3d 1101, 1106 (2006). The law does  
26 not require that the defendant present a defense or evidence consistent with the lesser  
27 included offense in order to obtain a lesser included offense instruction. Id. At 1109. It is  
28 "beyond dispute that the defendant is entitled to an instruction on a lesser included

1 offense if the evidence would permit a jury rationally to find him guilty of the lesser  
2 offense and acquit him of the greater. Rosas v. State, 147 P.3d 1101, 1106, citing Keeble  
3 v. United States, 412 U.S. 205, 208, 93 S.Ct. 1993, 36 (1973).

4 Defendant SIMPSON was entitled to a lesser included offense instruction of  
5 larceny. In general, a lesser offense is included in a greater offense when all of the  
6 elements of the lesser offense are included in the elements of the greater offense. Barton  
7 v. State, 117 Nev. 686, 690 (2001). Larceny is the taking of property owned by another  
8 person. NRS §205.220. Robbery is the forcible taking of property from the person of  
9 another. NRS §205.270. Under Nevada case law, larceny is a combination of the crime  
10 of assault with that of larceny. State v. Fouquette, 67 Nev. 505, 527 (1950). Depending  
11 on the circumstances of the case, Nevada has recognized larceny as a lesser included  
12 offense of robbery. See Jefferson v. State, 108 Nev. 953 (1992), Lisby v. State, 82 Nev.  
13 183, 187 (1966). SIMPSON was entitled to a jury instruction on the lesser included  
14 offense of larceny.

15 In addition, the court erred by not instructing the jury on the lesser included  
16 offense of second degree kidnapping. As previously stated, a lesser offense is included in  
17 a greater offense when all the elements of the lesser offense are included in the greater  
18 offense. Barton v. State, 117 Nev. 686, 690. Statutorily, second degree kidnapping is the  
19 same as first degree kidnapping, but for the requirement that the person is kidnapped  
20 with the intent to commit robbery, sexual assault, or extortion. NRS §200.310. In this  
21 case, if the jury found that the defendant did kidnap Fromong and Beardsley by using  
22 Riccio to lure them to the Palace Station, but did not find that this luring was done with the  
23 intent to commit robbery, then the jury could reasonably have found the defendant guilty  
24 of second degree kidnapping instead of first. Based upon this jury instruction error,  
25 SIMPSON is entitled to a new trial.



1 **6) There was insufficient evidence to support SIMPSON'S conviction for the**  
2 **kidnapping counts**

3 Pursuant to NRS §175.381(2) the court has the discretion to set aside the jury  
4 verdict and acquit the defendant of criminal counts that were supported by insufficient  
5 evidence. Evidence is considered sufficient for conviction when, "after viewing the  
6 evidence in the light most favorable to the prosecution, any rational trier of fact could  
7 have found the essential element of the crime beyond a reasonable doubt." Diamampo v.  
8 State, 185 P.3d 1031, 1043 (2008)(quoting Mejia v. State, 121 Nev. 487, 492 (2006))  
9 (quoting Koza v. State, 100 Nev. 245, 250 (1984)).

10 In this case, there is insufficient evidence to support the defendant's conviction for  
11 first degree kidnapping under the law as provided by the court in the jury instructions.  
12 Jury Instruction # 21 states:

13 In order for you to find the defendant guilty of both first  
14 degree kidnapping and an associated offense of robbery, you must  
15 also find beyond a reasonable doubt either:

16 (1) That any movement of the victim was not incidental to  
17 the robbery;

18 (2) That any incidental movement of the victim substantially  
19 increased the risk of the harm to the victim over and above that  
20 necessarily present in the robbery;

21 (3) The movement or restraint had an independent purpose  
22 or significance.

23 This jury instruction is consistent with Nevada law, in that a defendant cannot be guilty of  
24 kidnapping and the underlying charge of robbery if the movement that constitutes  
25 kidnapping is merely incidental to the robbery. See Mendoza v. State, 130 P.3d 176, 178  
26 (2006); Pascua v. State, 145 P.3d 1031, 1033 (2006). In this case, no reasonable trier of  
27 fact could find that the kidnapping was not incidental to the robbery based on the  
28 prosecution's evidence. As a result, the court must set aside the guilty verdict and acquit

1 the defendant for kidnapping Counts 5 and 6. NRS 175.381. State v. Rhodig, 101 Nev.  
2 608, 707.

3  
4 **7) District court violated SIMPSON'S Sixth Amendment right to confront**  
5 **witnesses when it prohibited defense counsel from conducting full and complete**  
6 **cross examination**

7 According to the Constitution of the United States, in all criminal prosecutions, the  
8 accused enjoys the right to confront all witnesses against him. U.S.C. Const.Amend. 6.  
9 Cross examination is the cornerstone of this constitutional right and may be a defendant's  
10 only recourse to refute the evidence against him. When a witness gives testimony that is  
11 false or evasive, the Confrontation Clause can be satisfied by giving the defense a full  
12 and fair opportunity to probe and expose these infirmities through cross-examination.  
13 Pantaro v State, 138 P. 3d 477 (Nev. 2006)

14 Although trial judges retain wide latitude to restrict cross-examination in order to  
15 prevent confusion or prejudice, as well as to prevent the presentation of cumulative  
16 evidence, when addressing discovery violations a trial court must be cognizant that  
17 defendants have the constitutional right to discredit their accuser, and this right can be  
18 but limitedly circumscribed. Sampson v State, 122 P .3d 1255 (Nev. 2005). A defendant  
19 has the right to demonstrate any existence of possible bias or prejudice of a witness in  
20 support of the theory of his case, including the right to introduce evidence challenging a  
21 witness's credibility. Cox v State, 721 P. 2d 358 (Nev. 1986). Although specific instances  
22 of conduct for the purpose of attacking the credibility of a witness may not be proven by  
23 extrinsic evidence, if relevant to truthfulness of the witness, specific instances of conduct  
24 may be inquired into on cross examination of the witness himself. NRS §50.085.

25 In Giles v US, the Supreme Court reaffirmed that the Sixth Amendment's  
26 Confrontation Clause gives defendants the right to cross examine witnesses who testify  
27 against them. 128 S.Ct. 2678 (2008), *citing* Crawford v Washington, 541 U.S. 36, 53-54,  
28 124 S.Ct. 1354, 158 L. ed. 177 (2004). Additionally, the Ninth Circuit Court of Appeals

1 recently determined in Slovik v Yates that a criminal defendant may prove a violation of  
2 the Confrontation Clause by showing that he was prohibited from engaging in relevant  
3 and permissible cross-examination. No. 06-55867 C.A. (9<sup>th</sup> Oct. 2008). In Slovik,  
4 petitioner was prevented from confronting a witness against him who made  
5 misrepresentations about himself on the stand. Id. When the defense tried to probe  
6 further into the specifics surrounding the misrepresentations, the District court interrupted  
7 the cross examination and dismissed the information as collateral. Id. On appeal, the  
8 Ninth Circuit determined that prohibiting the petitioner from soliciting testimony from the  
9 witness during cross examination was not harmless error and if allowed, might have  
10 significantly affected the jury's impression of the witnesses credibility. Id. The prohibited  
11 inquiry was intended to expose the witness as a liar. Because this line of questioning was  
12 relevant to the credibility of the witness, the lower court's decision was reversed and  
13 remanded.

14 In this case, the credibility of the State's witnesses was critical to the prosecution's  
15 case. By preventing the defense from conducting a complete cross examination of these  
16 witnesses, the court deprived SIMPSON of his Sixth Amendment right to confront the  
17 witnesses against him.

18  
19 Defendant SIMPSON requests this court consider the above listed arguments and  
20 grant a new trial in this case.

21 DATED this 10<sup>th</sup> day of October, 2008.

22  
23  
24 

25 Gabriel L. Grasso, P.C.  
26 Nevada Bar Number 7358  
27 231 South 3<sup>rd</sup> Street, Suite 100  
28 Las Vegas, Nevada 89101  
(702) 868-8866

1 ROC  
2 GABRIEL L. GRASSO, ESQ.  
3 State Bar Number 7358  
4 231 South Third Street, Suite 100  
5 Las Vegas, Nevada 89101  
6 (702) 868-8866  
7 Attorney for Defendant  
8 Grassodefense.com

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 ~  
9 STATE OF NEVADA, )

10 Plaintiff, )

Case No.: C237890

Dept. No.: V

11 ORENTAL JAMES SIMPSON, et al. )  
12 ID# 2648927 )

13 Defendant. )  
14 \_\_\_\_\_ )

15  
16 RECEIPT OF COPY

17 RECEIPT OF COPY of the defendant's MOTION FOR NEW TRIAL is hereby  
18 acknowledged this 10 day of Oct, 2008.

19  
20 David Roger, District Attorney

21 BY: DR  
22  
23  
24  
25  
26  
27  
28