IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE K. BOWSER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 50851

Electronically Filed
Jun 17 2009 04:46 p.m.
Tracie K. Lindeman

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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LEGAL ARGUMENT

I. The trial Court violated appellant's federal and state constitutional rights by admitting his statements to police where appellant had previously invoked his rights, where a waiver was not freely and voluntarily given, and where State witnesses commented on appellant's initial post-arrest silence.

Terrence Invoked His Right to Counsel and His Right to Silence

The State contends Terrence did not invoke his right to counsel, (Respondent's Answering Brief [AB], 11, and that this case parallels the facts in **Davis v. State**. (AB, 9-11). However, Terrence's invocation was far more specific than the invocation deemed ambiguous by the **Davis** Court:

> About an hour and a half into the interview, petitioner said, "*Maybe I should talk to a lawyer.*" App. 135. According to the uncontradicted testimony of one of the interviewing agents, the interview then proceeded as follows: "[We m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, [']*No, I'm not asking for a lawyer*,' and then he continued on, and said, *'No, I don't want a lawyer.*'" Id., at 136. After a short break, the agents reminded petitioner of his rights to remain silent and to counsel. The interview then continued for another hour, until petitioner said, "I think I want a lawyer before I say anything else." Id., at 137.

Davis v. United States, 512 U.S. 452, 455 (1994) (emphasis added). Unlike the appellant in **Davis**, Terrence never used the word "maybe," and Terrence did not negate his initial desire for a lawyer by reiterating twice that he did not want a lawyer at all. Terrence stated, "I'm going to make you work for it. *I'll see what my lawyer can do for me.*" (AA 2789). This statement meets the standards enunciated in **Davis**:

> Although a suspect need not "speak with the discrimination of an Oxford don," post, at 476 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect.

Davis, 512 U.S. at 459. Although the Court did not require officers to clarify the invocation of counsel, the Court noted that the officers in **Davis** had done so, another factor distinguishing the instant case:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel.

Davis, 512 U.S. at 461. Further, the State failed to distinguish Terrence's invocation from the almost identical invocation in the Montana case, **State v. Flack**, 260 Mont. 181 (1993): "I guess I'm going to have to get me a lawyer. You guys are going to have to prove it." As in **Flack**, Terrence invoked his right to silence ("I'm going to make you work for it"), and Terrence invoked his right to counsel ("I'll see what my lawyer can do for me"), and the detectives' failure to honor these invocations warrant reversal.

This Court should distinguish the cases relied upon by the State. In **State v. Lanning**, 109 Nev. 1198 (1993), this Court's ruling actually supports Terrence's position because Lanning *was not in custody* at the time she made the statement, unlike Terrence: "In Cherry, *unlike the instant case, the defendant was in custody when he expressed a desire for the assistance of counsel.* It is well-settled that a suspect in custody cannot be questioned by police after he expresses a need for the assistance of legal counsel, unless that suspect subsequently expresses that he wishes to waive the assistance of legal counsel." **State v. Lanning**, 109 Nev. 1198, 1200 (1993) (emphasis added). Thus, the State cannot rely upon the ruling in **Lanning**.

Similarly, this Court must distinguish **Harte v. State** for two reasons. First, Harte's comments were far more ambiguous than Terrence's comments:

> " I . . they . . they told me, you know, *that they thought I should talk to a lawyer or whatever*. So, I just . . .
> [DEPUTY]: Who's they?

[HARTE]: Um . . the other guy that interviewed me yesterday. Just . . all the people I've been talkin' to and whatnot.
[DEPUTY]: Okay. This is a separate case. You wanna talk to us?
[HARTE]: Sure.
[DEPUTY]: Okay.
[DEPUTY]: *You can stop at any time.*
[HARTE]: Uh huh.

Harte v. State, 116 Nev. 1054, 1063 (2000) (emphasis added). Nothing in these statements approaches the clarity and certainty of Terrence's statements. Second, this Court specifically relied upon the fact that the detectives repeatedly reminded Harte of his rights whenever he mentioned getting a lawyer, again distinguishing the instant case: "While the comments might indicate some initial confusion, Harte was immediately reminded of his rights. Moreover, Harte's subsequent comments indicate he understood that he could invoke the right to counsel and refuse to answer questions." **Harte**, 116 Nev. at 1063. As in **Davis**, in the dialogue quoted above, the detective *immediately* asks Harte, "You wanna talk to us?" and assures him, "You can stop at any time." Thus, the facts in **Harte** revealed that the defendant had a solid grasp of his constitutional rights but made the strategic decision to cooperate with detectives: "It is apparent that he chose not to invoke those rights during the interview based on his assessment of how much incriminating evidence deputies already possessed. For instance, following the above-emphasized statements, Harte told deputies that if they wished 'to get to the bottom of things,' they should state two specific facts that only Sirex would know." **Harte**, 116 Nev. at 1064. Based on Harte's apparent understanding of his rights and informed decision not to exercise these rights, this Court must distinguish the instant case where Terrence instead invoked his rights, and officers chose to ignore these invocations.

In **Brown v. State**, the Court deemed Brown's language far too ambiguous to constitute an invocation of rights under **Davis**: "the appellant asked the officers 'Is it going to piss y'all off if I ask for my -- to talk to a friend that is an attorney? I mean, I'm going to do whatever I have got to do. Don't get me wrong.'" **Brown v. State**, 668 So. 2d 102, 103 (Ala. Crim. App. 1995). However, Brown never said, "I want an attorney," or "I want to talk to an attorney," or "I will see what my attorney can do for me," and Brown only referenced a "friend" who happened to be an attorney. Brown assured officers that he would cooperate, and the Court found that evidence

revealed that he *wanted* to give his side of the story to the detectives: "They were simply making it clear to the appellant that it was not their job to establish that he was not the triggerman and that the appellant needed to tell them if he was not the triggerman." **Brown v. State**, 668 So. 2d 102, 104 (Ala. Crim. App. 1995).

Although this Court can distinguish Brown's invocation as more ambiguous than Terrence's, the better-reasoned portion of the **Brown** decision is actually the dissenting judge's recognition that intimidation and fear produced Brown's comments -- and that the majority should have deemed his invocation constitutionally sufficient:

> Once these fear-based qualifying statements from the interrogatee are dealt with, what he is saying is that he wanted "to talk to a friend that is an attorney." This is a real-life interrogation and a real-life request for an attorney by an intimidated suspect who is in close confinement and is surrounded by law enforcement officers.
> Because the authorities disregarded the appellant's unequivocal request for counsel and continued the questioning, the appellant's statement should have been suppressed.

Brown v. State, 668 So. 2d at 105 (Taylor, J., dissenting). Finally, the comment referenced by the State in its citation to **State v. Eastlack** comprises only a small potion of the entire conversation:

> A: I think I better talk to a lawyer first.
> Q: Okay. Does that mean you don't wanna talk to me anymore?
> A: Not about that, no. What about the burglaries?
> Q: As far as the burglary is -- does that mean you wanna talk to me again?
> A: Sure.
> Q: Okay. 'Cause you already asked for an attorney. You said you didn't want, you didn't wanna talk to me, then you asked for an attorney, but now you're asking to talk to me again, just so I, just so I'm clear in my mind.
> A: Right.
> Q: You, you do wanna talk to me?
> A: Sure.

State v. Eastlack, 180 Ariz. 243, 249 (1994). Thus, as in **Harte** and **Davis**, the detective followed up the potential invocation of rights with questions specifically designed to clarify whether the defendant *wanted* to continue the interview: "does that mean you wanna talk to me again?" and "you do wanna talk to me?" Although **Davis** does not require clarification, the clarified answers in these cases warrant distinction of the instant case. Further, the unambiguous nature of Terrence's words is best demonstrated by the fact that Det. Sullivan ceased questioning after Terrence's statement. (AA 2789).

Montejo v. Louisiana Does Not Alter the Analysis in Terrence's Case

The general rule is that after a defendant has invoked his right to remain silent, officers must cease questioning. **Michigan v. Mosley**, 423 U.S. 96, 104-05 (1975). In **Michigan v. Jackson**, 475 U.S. 625 (1986), the Supreme Court recognized a presumptive rule that police cannot start questioning a defendant after that defendant has appeared in court and requested a lawyer: "If police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." In a recent United States Supreme Court decision, however, a closely divided Court overruled **Jackson** -- but deemed the protections of **Edwards v. Arizona**, 451 U.S. 477 (1981), sufficient to protect defendants' rights:

> No reason exists to assume that a defendant like Montejo, *who has done nothing at all to express his intentions with respect to his Sixth Amendment rights*, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. *Edwards and Jackson are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.*

Montejo v. Louisiana, 129 S. Ct. 2079 (U.S. 2009), 2009 LEXIS 3973, 18-19 (emphasis added). Unlike Montejo, Terrence *did invoke* his right to counsel. Further, although **Montejo** removes the **Jackson** *presumption* of invalidity of a post-invocation waiver of the right to counsel, the rule in **Edwards** still applies, barring further interrogation in the absence of counsel unless the defendant *initiates* the subsequent communication. **Edwards v. Arizona**, 451 U.S. 477 (1981). Of course, **Montejo** also recognizes that involuntary waivers remain invalid. **Montejo**, 129 St. Ct. 2079, 2009 U.S. LEXIS 3973 at 14, *citing* **Patterson v. Illinois**, 487 U.S. 285, 292, n. 4 (1988).

Thus, the State must still scrupulously honor an accused's invocation of Fifth and Sixth Amendment rights:

> Under Edwards' prophylactic protection of the Miranda right, once such a defendant 'has invoked his right to have counsel present,' interrogation must stop. 451 U.S., at 484, 101 S. Ct. 1880, 68 L. Ed. 2d 378. And under Minnick's prophylactic protection of the Edwards right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney." 498 U.S., at 153, 111 S. Ct. 486, 112 L. Ed. 2d 489.

Montejo, 129 S. Ct. 2079, 2009 U.S. LEXIS 3973 at 27-28. Because Montejo did not invoke his right to counsel, this Court must distinguish the **Montejo** holding on its facts. Because **Montejo**

recognizes that the **Edwards/Minnick** "bright line rule" still exists, this Court must reverse these convictions: "Our cases make clear which sorts of statements trigger its protections, see Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), *and once triggered, the rule operates as a bright line.*" **Montejo**, 2009 U.S. LEXIS 3973 at 32 (emphasis added). Application of this bright line rule requires reversal: "If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, *then no interrogation should have taken place unless Montejo initiated it.*" **Montejo**, 2009 U.S. LEXIS at 33 (emphasis added). Thus, the recent **Montejo** decision does not alter the analysis in this case.

Terrence Did Not Freely and Voluntarily Waive His Rights

The State alleges that Terrence "began talking" and that he "started by talking about the car and his level of cooperation before he willingly offered to give the detectives a statement." (AB, 13). Thus, the State does not take issue with the fact that detectives spoke to Terrence for about fifteen minutes prior to the recorded interview, during which there is no record that Terrence was re-advised of his rights prior to the re-initiation of the discussion. (AA 564). The State also does not dispute that detectives reinitiated this interview after a nineteen-year old defendant with a history of learning disabilities and psychological problems had invoked his Fifth and Sixth Amendment rights. Terrence had been detained for nine hours, questioned by multiple officers, and pressured with the promise of a quick release of his mother's vehicle in exchange for his statements. This Court will not countenance the admission of confessions obtained by psychological pressure. **Steese v. State**, 114 Nev. 479, 488 (1988). Based on these facts, this Court must find that Terrence did not freely, intelligently, and voluntarily waive his constitutional rights, warranting reversal. **Steese**, 114 Nev. at 488; **Passama v. State**, 103 Nev. 212, 213 (1987); **U.S. Const. Amends. V, XIV; Nev. Const. Art 1, Sec. 8**. Because the State used Terrence's admission in Closing that he told Jamar to shoot to argue premeditation and deliberation, this Court cannot deem this error harmless. (AA 2226; 2227).

The Court Erred in Permitting Post-Arrest Silence References

The State does not dispute that Officer Sullivan told jurors that Terrence "wouldn't really go into anything further" at the arrest scene and that he "wasn't talking" after provision of the Miranda admonition. (AA 2010, 2013). The State may not highlight the invocation of the right to silence. **Griffin v. California**, 380 U.S. 609 (1965); **U.S. Cons. Amend. V**; **Nev. Const. Art. I § 8**. Because these references suggested that Terrence was initially uncooperative and that he had an unmet duty to assist police, this Court should reverse for plain error.

II. The State committed multiple acts of prosecutorial misconduct, violating due process and fair trial protections under the federal and state Constitutions.

The prosecutor's interpretations of the order in which the shots were fired lacked any basis in the evidence. (AA 2272). Although prosecutors may make "reasonable inferences" *from the evidence*, they may not invent scenarios to fill in evidentiary gaps in the record. Most significantly, they may not spin fantasies for juries about conversations between the parties with no evidentiary foundation. (AA 12270-71). They may not put incriminating words in the mouth of the defendant to suit their theory of the case: "So Terrence Bowser is getting the car up close, and they are talking get me up closer. Here we go." (AA 2270-71). Although the Court sustained the objection, the damage was done. This story painted Terrence as the most culpable party, the one who controlled the events and committed premeditated murder. Nothing in the record justifies this egregious misconduct, and the evidence actually demonstrates that Jamar and Terrence didn't speak prior to the shooting. (AA 333). This Court should not countenance the wholesale invention of facts not in evidence to buttress the State's case. **Guy v. State**, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992); **Williams v. State**, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

Similarly, the prosecutor should not have implied that a teenager could have been behind the wheel of the decedent's car in a flagrant attempt to create a more sympathetic set of facts and inflame jurors against Terrence. (AA 2265). The prosecutor should not have chastised Terrence for failing to contact authorities and implied that he had a duty to do so. (AA 2267). This Court should not tolerate this type of misconduct:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Emerson v. State, 98 Nev. 158, 164 (1982), *citing* **Garner v. State**, 78 Nev. 366, 370, 374 P.2d 525, 528 (1962), *quoting* **Berger v. United States**, 295 U.S. 78, 88 (1935). Because of the repeated acts of misconduct, the Court should have granted a mistrial under Article I, Section 3 of the Nevada Constitution and under the Fifth and Sixth Amendments. (AA 2277-79). **Rudin v. State**, 120 Nev. 121, 86 P.3d 572, 587 (2004); **Hylton v. Eighth Judicial District Court**, 103 Nev. 418, 421, 743 P.2d 622 (1987); **Arizona v. Washington**, 434 U.S. 497, 505 (1978). The cumulative effect of these multiple instances of misconduct warrants reversal of this conviction.

This Court should find that this is a case where the State's gamesmanship seriously affected the integrity or public reputation of the judicial proceedings. **Gaxiola v. State**, 119 P.3d 1225 (2005), *citing* **Rowland**, 118 Nev. at 38. The State owed Terrence a duty to act as an "unprejudiced, impartial, and nonpartisan" public official "bent only on seeing justice done and the law vindicated in accordance with the rules of law." **State v. Rodriguez**, 31 Nev. 342, 346, 102 P. 863 (1909). Error is harmless if without reservation, the verdict would have been the same in the absence of error. **Witherow v. State**, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988). Because the State's misconduct tainted this trial and the verdict, this Court must reverse.

III. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by allowing the bailiff to perform a demonstration for the jury which generated new evidence outside appellant's presence without his knowledge and consent

The State does not dispute the fact that the bailiff improperly supplemented the evidence during jury deliberations by test-firing the gun multiple times and in different ways. (AA 2310, 2313). This prejudicial demonstration violated Terrence's rights under NRS 178.388(1) and under the Nevada and federal Constitutions. "The right to be present is rooted in the

Confrontation Clause and the Due Process Clause of the Federal Constitution. The confrontation aspect arises when the proceeding involves the presentation of evidence." **Kirksey v. State**, 112 Nev. 980, 1000 (1996).

The State contends that the bailiff "was simply doing what any one of the jurors could have done themselves," and that he repeated the demonstration in open court. (AB, 23). The State ignores the fact that the bailiff is not just another juror, but an armed and uniformed officer of the court who has escorted and guided the jury through each stage of the trial. As such, the bailiff is cloaked with the authority of the court, and is undoubtedly viewed by jurors as a type of expert not only in the general operation of the courts -- but as an expert in weapons in general, and in firearms in particular. The United States Supreme Court recognizes the special credibility jurors are likely to afford bailiffs: "[the State's position] overlooks the fact that the official character of the bailiff -- as an officer of the court as well as the State -- beyond question carries great weight with a jury which he had been shepherding for eight days and nights." **Parker v. Gladden**, 385 U.S. 363, 365 (U.S. 1966). When a bailiff has improper communications with the jury, this Court must reverse on constitutional grounds:

> We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him. . . ." As we said in Turner v. Louisiana, 379 U.S. 466, 472-473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Here there is dispute neither as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were "private talk," tending to reach the jury by "outside influence."

Parker, 385 U.S. at 364 (internal citations omitted). This Court must recognize that not only did the bailiff have improper communications with this jury, but he also engaged in an improper demonstration of the weapon without allowing the defense any opportunity to cross-examine him regarding this experiment.

Further, the State failed to introduce any evidence regarding the length of time it would take to fire a gun more than once. (AA 2210-2124). Thus, the jury's request that the bailiff fire

repeatedly "as fast as he could" constitutes improper supplementing of the evidence in an entirely new area not addressed by the trial testimony. The Sixth Amendment does not permit the jury to develop the evidentiary record in this fashion, and courts have recognized this bedrock principle for over a century: "Jurors cannot be permitted to investigate the case outside the courtroom. They must decide the guilt or the innocence of the defendant upon the evidence introduced at the trial. It is impossible for this court to say that this outside investigation did not affect the result as to the character of the verdict rendered. For, when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears." **People v. Conkling**, 111 Cal. 616, 628 (1896).

The State's case emphasized Terrence's state of mind during the multiple shots, making the bailiff's improper supplementing of the evidence all the more significant and prejudicial. The State failed to distinguish this case from the similar facts of **Marino v. Vasquez**, 812 F.2d 499 (9th Cir. Cal. 1987), warranting reversal of these convictions. At minimum, this Court must remand this case for a complete evidentiary hearing regarding the length of the demonstration conducted in the jury room; the extent, if any, to which the bailiff spoke to jurors during the demonstration and answered questions; the training and experience of the bailiff to operate the particular firearm involved, and "such other matters as may bear on the issue of the reasonable possibility of whether they affected the verdict." **Paz v. United States**, 462 F.2d 740, 746 (5th Cir. Fla. 1972).

On de novo review of misconduct involving extrinsic evidence, this Court must find prejudice on these facts where the only issue was whether Terrence was guilty of first or second degree murder. **Meyer v. State**, 119 Nev. 554, 562 (2003). Because the bailiff's actions deprived Terrence of the right to confront and cross-examine an implicit witness against him, the Court erred in refusing a mistrial and violated Terrence's rights under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

IV. Convictions on Counts Five and Six violate federal and state protections from double jeopardy and redundant convictions.

This Court recognizes that a single, continuous, uninterrupted action by a defendant cannot be artificially segmented by the State into different crimes. Where the act of touching the victim

outside his clothes immediately preceded an act of sexual assault, this Court reversed a conviction for lewdness on the grounds that the touching comprised part of the sexual assault: ". . . Crowley never interrupted his actions. . . . Crowley's actions were not separate and distinct; they were a part of the same episode." **Crowley v. State**, 83 P.3d 282, 285 (Nev. 2004). Similarly, the discharge of a firearm from a vehicle while simultaneously firing *into* a vehicle comprises one uninterrupted action, and should constitute only one crime.

In analyzing redundancy of convictions, "the question is whether the material *or significant part of each charge* is the same even if the offenses are not the same." **Nevada v. Eighth Judicial Dist. Court of State**, 116 Nev. 127, 136, 994 P.2d 692 (2000) (emphasis added). The State can emphasize the slightly different elements and the slightly different punishments for NRS 202.287 and NRS 202.285, but the fact remains that the material and significant part of the charges – the shooting of a firearm – remain the same. If the undisputed legislative intent behind NRS 202.287 was to reduce the number of gang-related drive-by shootings, then the legislative purpose is not served by adding a charge dependent upon the particular target. For this Court to construe one action as an entirely separate felony would render meaningless the Constitution's protections from double jeopardy and Nevada's protections from redundant convictions. On these facts, the two charges merge and the Court should not have permitted dual convictions to stand. Even where the facts may constitute two offenses under **Blockburger v. U.S.**, 284 U.S. 299 (1932), "[t]he Legislature never intended to permit the State to proliferate charges as to one course of conduct by adorning it with chameleonic attire." **Albitre v. State**, 103 Nev. 281, 284, 738 P.2d 1307 (1987). By artificially segmenting a single event into separate offenses, the State violated the double jeopardy clause and this Court should reverse Counts Five and Six.

V. The Court violated Terrence's rights under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by providing misleading and prejudicial jury instructions.

The State contends that Proposed Instruction A would have undermined the instruction on jury unanimity. (AB, 27). However, the language suggesting that jurors could consider a lesser verdict only if "some" of them had reasonable doubts about first degree murder undermines the State's burden of proof beyond all reasonable doubt. Jurors may not have even considered the

lesser offense and/or acquittal due to a misapprehension that consideration of something less than first degree murder required that a certain number of jurors must agree that the State failed to prove the greater charge. Had jurors understood that they could consider a verdict less than first degree murder if *even one* juror failed to find adequate proof of first degree murder, then the outcome may have been very different. Thus, the trial court's erroneous 'transition' instruction violated Terrence's due process rights and warrants reversal. **Estelle v. McGuire**, 502 U.S. 62, 72 (1991) (erroneous instruction infecting entire trial violates Due Process).

Similarly, Instruction 15 was cumulative and unnecessary in light of the numerous other instructions provided by the Court. (AA 2189-91). Instruction 15 also created a presumption that Terrence had used a deadly weapon, and that he had calculated in a fashion consistent with first-degree murder by implying that the crime had involved the "use of a weapon calculated to produce death." (AA 843).

The State defends Instruction 21 by noting that counsel did not object to this instruction. However, this Court did not issue the decision in **Brooks v. State** until April 3, 2008, while this trial occurred in October, 2007. Thus, counsel could not have objected based on the language in **Brooks** that clarified the appropriate jury instruction for deadly weapon use liability for unarmed offenders. Further, because this Court may consider constitutional issues sua sponte, Terrence is entitled to review of all unpreserved constitutional errors. **Anderson v. State**, 118 P.3d 184, 187 (Nev. 2005).

Finally, although Instructions 13 and 14 comport with **Byford**, the defense urges this Court to embrace the rationale set forth by the Supreme Court of Tennessee when it rejected language to the effect that premeditation may be formed in an instant -- because "the deliberation necessary to establish first-degree murder *cannot be formed in an instant.*" **State v. Brown**, 836 S.W.2d 530, 543 (Tenn. 1992) (emphasis added). These instructions all but insure that a guilty verdict in a murder case will be a first-degree verdict. Because the instructions provided to Terrence's jury fail to meaningfully distinguish between first and second degree murder, and because these instructions abrogate the State's duty to prove deliberation, this Court should reject these instructions and reverse these convictions.

VI. The Court erred in denying defense challenges for cause and limiting defense voir dire and violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

The Court Improperly Denied Challenges for Cause

The State minimizes the impact of the prospective jurors' initial answers. Prospective Juror Jiran repeatedly stated his belief in "an eye for an eye." (AA 1552). He had a predisposition to impose the death penalty in murder cases. (AA 1552). Prospective Juror Balalio also had a predisposition to impose death in murder cases. (AA 1207). When asked by defense counsel if she could be fair, she answered, "Probably not." (AA 1211). The State relies on the Court's traverse of the jurors and their subsequent assurances to suggest that these challenges were properly denied. (AB, 29-32). However, these facts resemble **Thompson v. State**, where the juror at issue claimed that he "wasn't sure" if the defendant was guilty despite his initial preconceptions. The juror in **Thompson** was also subsequently equivocal about his preconceptions, but that did not change this Court's finding that the trial Court should have granted the cause challenge.

In fact, a juror's assurances *after* further voir dire questioning cannot negate the bias already revealed: "[w]e also conclude that the district court erred by looking to prospective juror number eighty-nine's final assertion--that he had not formed an opinion as to the guilt or innocence of Thompson--as the primary reason for deciding that he should not be excused for cause." **Thompson v. State**, 111 Nev. 439, 443 (1995). The trial court's improper denial of the challenges for cause cannot be deemed harmless beyond a reasonable doubt. **Chapman v. California,** 386 U.S. 18, 24 (1967). Accordingly, this federal constitutional violation requires reversal and remand of this case.

The Court Improperly Restricted Defense Voir Dire

The Court erred in preventing the defense from inquiring about individual jurors' abilities to assert themselves during the penalty phase deliberations. (AA 1272). The goal of voir dire is to enable parties to make informed decisions about whether to employ challenges against particular jurors. **State v. Williams**, 123 Ore. App. 546, 547 (1993). The peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury. The challenge is "one of the most important of the rights secured to the accused." **Pointer v. United States**, 151 U.S. 396,

408 (1894). Questions directed at the intelligent exercise of the challenge manifestly fall within the bounds of reasonable inquiry. **People v. Wells**, 149 Cal. App. 3d 721, 725 (Cal. Ct. App. 1983).

By asking whether jurors could exercise independent judgment and speak up during deliberations in the penalty phase, defense counsel was attempting to explore jurors' attitudes about the weighing of mitigating and aggravating factors – a necessary and significant inquiry for a client facing the death penalty. Other courts recognize the significance of this type of questioning of prospective jurors:

> An important purpose of voir dire examination is to afford counsel a basis for challenges for cause and to secure information for the intelligent exercise of peremptory challenges. State v. Drew, 360 So.2d 500 (La. 1978). As the Louisiana Supreme court long ago stated in State v. Hills, 241 La. 345, 129 So.2d 12 (1961): The scope of inquiry is best governed by a liberal discretion on the part of the court so that if there is any likelihood that some prejudice is in the juror's mind which will even subconsciously effect his decision, this may be uncovered. It is by examination into the attitude and inclinations of jurors before they are sworn to try a case that litigants are able to reject those persons, by use of peremptory challenges where necessary, who are deemed to be unlikely to approach a decision in a detached and objective manner.

State v. Shepard, 468 So. 2d 594, 597 (La. Ct. App. 1985). Significantly, in **Morgan v. Illinois**, 504 U.S. 719, 729 (1992), the U.S. Supreme Court reiterated the right to adequate voir dire in a capital case, holding that:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the state is disentitled to execute the sentence.

The denial or impairment of the right to conduct voir dire and exercise peremptory challenges is reversible error without a showing of prejudice. **Lewis v. United States**, 146 U.S. 370, 376 (1892). "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Id.* at 378. For the same reasons, the Court should have allowed the defense significantly more leeway during voir dire in a case where the only issue was whether Terrence committed first or second degree murder. (AA 1881).

Terrence had an absolute right to identify and excuse for cause any and all jurors who were predisposed to reject his position in the context of a capital sentencing hearing. He had a right to inquire of the panelists beyond the Court's generic 'follow the law' and general fairness questions because these questions cannot adequately unearth deep-seated or subtle prejudices:

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law... Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law... It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empanelled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized..." Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

Morgan, supra, at 734 (internal citations omitted).

As in **Morgan**, the instant trial court refused to allow voir dire beyond 'follow the law' questions, especially where the subject of penalty and mitigation was concerned. Those questions are, as a matter of law, inadequate to unearth prejudice and partiality. Thus, the instant trial court's voir dire limitations on the subject of penalty defense failed to adequately unearth juror biases as required by the Due Process Clause. By restricting voir dire into the issues at the heart of the defense case, the Court violated the due process, effective assistance of counsel, and fair trial rights in the federal and Nevada Constitutions.

VII. The evidence introduced at trial failed to prove the crimes beyond a reasonable doubt, and a conviction based on insufficient evidence violates federal and state constitutional guarantees.

The defense acknowledged that this case was a matter of second-degree murder. (AA 1881). Terrence admitted there was a plan was to "shoot a car," but never suggested there was a plan to commit a murder, and never suggested that he and Jamar had discussed committing a murder. (AA 2152). Terrence had no knowledge of when Jamar was going to shoot, and Terrence had no knowledge of where Jamar was aiming the gun. (AA 300-01; 333). Terrence never touched the

gun. (AA 2135). Thus, the State failed to prove any conspiracy to commit murder, and the State failed to prove that Terrence committed first-degree murder. This Court should find that the State failed to present sufficient evidence to sustain this conviction:

> Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 U.S., at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson v. Virginia, 443 U.S. 307, 319 (1979). "[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." **Brown v. Farwell**, 525 F.3d 787, 794 (9th Cir. Nev. 2008). Because the evidence fails to support the conviction for a malicious and intentional killing, this Court should reverse.

VIII. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by admitting prejudicial and irrelevant evidence.

The State contends the gloves and headgear were relevant because Terrence and Jamar had "removed the license plate" of the car, making intent at issue. However, Officer Smith admitted that there was a license plate in the car. (AA 1993). Although Smith claimed the plate was not mounted outside the car, the car in fact had a license plate and there was no evidence that Terrence and Jamar had removed it or hidden it. Further, witness Dominguez was positive that the vehicle she saw had a license plate located in the normal position below the bumper, contradicting the officers' claims that the car had no mounted plate. (AA 2093).

As noted by the defense, the gloves and headgear offered no probative value because no evidence suggested they had been worn or used during the shooting. (AA 2058). Officer Smith admitted that Terrence and Jamar were not wearing these items when he apprehended them immediately after the shooting. (AA 1991). Absent a *substantial* connection between the evidence and the state's theory of the case, courts should refrain from admitting prejudicial and irrelevant evidence. **Abram v. State**, 95 Nev. 352, 355 (1979). Because the prosecutor used this

evidence to argue to jurors that this was a premeditated murder, and that Jamar and Terrence had brought these items to disguise themselves, this Court should find the admission of this evidence reversible error. (AA 2228).

IX. The Court violated Terrence's federal and state constitutional rights by refusing to strike the Notice of Intent to Seek the Death Penalty

A. Application of NRS 200.033(9) in this Case Violates Terrence's Rights to Substantive Due Process and his Rights Under the Eighth Amendment

Perhaps the single most significant fact supporting the defense position is that prosecutors could not bring themselves to tell jurors that they should actually sentence Terrence to death. (AA 2680-2688; 2714-2718). Yet, the State's decision to seek death unnecessarily and capriciously forced Terrence to defend himself before a death-qualified jury. This decision constitutes an unwarranted application of NRS 200.033(9) to a significantly less culpable defendant than the person offered a 34-year sentence by the State. (AA 620). The State relies on **Guy v. State** for the position that this case warranted the State's attempt to put Terrence to death. However, the culpability of the defendant in **Guy**, who left the decedent clinging for his life to the moving car while he drove away -- and who had participated in a robbery and a previous armed burglary -- far exceeded Terrence's involvement:

> First, because Pendleton had used deadly force during a previous burglary committed by Pendleton and appellant (the burglary of Jennifer Courtney's home on April 6, 1990), and because appellant knew that Pendleton was carrying a gun the night Evans was murdered, we conclude that appellant was aware that Pendleton would use deadly force in robbing Evans. Moreover, because of this awareness, we believe that appellant possessed a reckless disregard for human life when he participated in the robbery of Evans. Further, appellant demonstrated a reckless disregard for human life by continuing to drive the automobile while Evans clung to the door frame. Finally, appellant's reckless disregard for human life is evidence by appellant's failure to attempt to foil Pendleton's shooting of Evans and by his failure, after the shooting, to stop and render aid to Evans.

Guy v. State, 108 Nev. 770, 784 (1992). There was no history of prior violence and criminal behavior in Terrence's case, and he did not drive a car away with a human being clinging to the door.

B. The Failure to Submit the Aggravating Circumstance for Probable Cause Determination Violates the Federal and State Constitutions

Although the law permits the State to allege aggravating circumstances without subjecting them to probable cause findings, the defense position remains that this situation violates the

underlying tenets of **Apprendi v. New Jersey**, 530 U.S. 466 (2000), **Ring v. Arizona**, 122 S. Ct. 2428 (2002), the Fifth and Fourteenth Amendments, and Section 8 of the Nevada Constitution.

C. Application of NRS 200.033 (9) in this Case Impermissibly Shifts the Burden of Proof to the Defense

To overcome the State's allegation that this was a first-degree murder, Terrence would have had to speculate regarding Jamar's motives and regarding his own state of mind. Because this situation violated Terrence's constitutional right not to incriminate himself, the application of this factor created a situation where the burden of proof impermissibly shifted to the defense.

D. The State Failed to Prove the Aggravating Circumstance Beyond a Reasonable Doubt

The motive of experiencing what it felt like to shoot at a moving vehicle may be callous, reckless, and baffling – but it remains a motive and an objective nonetheless, and the State failed to prove the aggravating circumstance in this case.

E. The Process of Death-Qualifying a Jury Undermines the Presumption of Innocence and Unconstitutionally Minimizes the State's Burden of Proof

Extensive and detailed studies reveal the prejudicial impact of death-qualified jurors on the presumption of innocence and burden of proof analyses. Professors Bowers, Fleury-Steiner, and Antonio describe these impacts in their publication, "The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction" (Chapter 14 in Acker, Bohm, Lanier, "America's Experiment With Capital Punishment," Carolina Academic Press, 2nd ed., (2003)) as follows:

> Jurors appear to understand sentencing instructions poorly, especially their obligation to give effect to mitigation. Many appear to presume that death is the appropriate punishment for capital offenses without regard for mitigation. They seem to focus narrowly on a single issue to simplify decision making and to reach consensus on punishment. In explaining the decision to impose the death penalty, they invoke guilt related considerations as if the sentencing process was merely a replay of the guilt decision. These soundings were sufficiently ominous to justify a more extensive investigation of the capital sentencing process, one that would take a more systematic look into the black box of decision making.

Blowers, Fleury-Steiner, Antonio, *supra*, at 8-11. The more extensive studies resulting from this initial field work revealed that these discrepancies exist on every measure which the law imposes. The subsequent studies establish the presence of: 1) Rampant premature decision-

making, rendering the penalty phase meaningless; 2) The failure of jury selection to remove large numbers of death-biased jurors, and the overall biasing effect of the selection process itself; 3) The pervasive failure to comprehend and/or follow penalty instructions; 4) The wide-spread belief that death is required; 5) Wholesale evasion of responsibility for the punishment decision; 6) The continuing influence of race on decision-making; and 7) Significant underestimation of the alternatives to death. Each problem "reflects a fundamental flaw in the system; viewed altogether the evidence of system failure is overwhelming." Bowers, Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing," 39 Crim. Law Bulletin 51, 86 (2003). Because the State subjected Terrence to a flawed and prejudicial system of death qualification, the Court should have granted the repeated defense motions to dismiss the notice of intent to seek death. The Court should have granted the defense motions to argue last and to bifurcate the penalty phase into eligibility and selection proceedings. The failure to do so warrants reversal.

X. The Court's rulings during the penalty phase violated Terrence's federal and state constitutional rights.

A. *The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by opining on the testimony of a penalty phase defense witness and biasing the jury against appellant.*

The State contends the Court permitted Dr. Paglini to give rambling, narrative answers on the stand. (AB, 42). If this were the case, then the State could have lodged an objection, and the Court could have denied or sustained the objection. Nothing in Paglini's testimony warranted the Court's undermining of Paglini's opinions, and nothing in the law justifies the Court's subjective evaluation of the credibility of a defense witness. Although the defense acknowledges that judges may ask questions to clarify testimony or expedite examination, as the State contends, they may not opine on witness credibility:

> . . . the judge cannot conduct his questioning in such manner as to convey to the jury the impression that he has formed an opinion as to the truth of the witness' statement or the verdict that should be returned. Where the parties are represented by competent counsel, the judge cannot usurp their role. **And most certainly he cannot take on the task of the prosecution.**

United States v. Pena-Garcia, 505 F.2d 964, 967 (9th Cir. 1974) (emphasis added).

B. The State Committed Misconduct during the Penalty Phase

The use of a dictionary definition constitutes misconduct:

> All definitions and statements of law applicable to an issue being resolved by the jury must first go through the medium of the trial judge. Smith v. State, 95 So.2d 525 (Fla. 1957); Corpus Christi St. and Inter-Urban Ry. Co. v. Kjellberg, 185 S.W. 430 (Tex. App. 1916). **If such definitions or statements of law are derived from a source other than either the trial court or admitted evidence, the threat arises that the jury may have a conception of the law or a definition different from that intended by the court.** Daniels v. Barker, 89 N.H. 416, 200 A. 410 (1938); Palestroni v. Jacobs, 10 N.J. Super. 266, 77 A.2d 183 (1950).

State v. Amorin, 58 Haw. 623, 630 (1978) (emphasis added).

Further, the prosecutor improperly injected personal opinion by arguing, "Curiosity, that's not an emotion. That's not like fear, anger, hate." (AA 2683). The State did not specifically respond to this argument in the Answering Brief. (AB, 44-45). However, the State contends that the portrayal of Terrence as a "random thrill killer" was permissible. (AB 45). This argument, as well as the prosecutor's subjective opinion of whether curiosity constitutes a legitimate emotion, constitute flagrant attempts to inflame jurors and disparage Terrence:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Emerson v. State, 98 Nev. 158, 164 (1982), *citing* **Garner v. State**, 78 Nev. 366, 370, 374 P.2d 525, 528 (1962), *quoting* **Berger v. United States**, 295 U.S. 78, 88 (1935).

C. The Court Erred in Permitting Inflammatory Characterizations of the Crime and Improper Victim Impact Evidence

Courts may not admit victim impact testimony in an unfettered fashion:

> Victim impact testimony is permitted at a capital penalty proceeding under NRS 175.552(3) and under federal due process standards, but it must be excluded if it renders the proceeding fundamentally unfair. The United States Supreme Court has stated that victim impact evidence during a capital penalty hearing is relevant to show each victim's "uniqueness as an individual human being." Admissibility of testimony during the

> penalty phase of a capital trial is a question within the district court's discretion, and this court reviews only for abuse of discretion.

Floyd v. State, 118 Nev. 156, 174 (2002). Victim characterizations of the crime are inadmissible:

> However, the Court left intact Booth's prohibition on "admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence" by limiting its removal of the per se bar to "evidence and argument relating to the victim and the impact of the victim's death."

Kaczmarek v. State, 120 Nev. 314, 338 (2004). Further, the reference to the Dawn's future wedding constitutes a textbook example of the prejudice inherent in "holiday" arguments, and this Court must find reversible error even in the absence of objection. **Quillen v. State**, 112 Nev. 1369 (1996).

D. The Court Erred in Admitting Irrelevant and Prejudicial Evidence

This Court should reject the use of all juvenile records in capital sentencing cases based on all the policy reasons outlined in **Roper v. Simmons**, 543 U.S. 551, 569 (U.S. 2005). This Court should also reject the use of stale and non-violent crimes committed when Terrence was fourteen, fifteen, and sixteen years old because they have absolutely no relevance to the instant case. (AA 2377, 2380). At a minimum, the Court should have deemed this evidence far more prejudicial than probative: "[T]he court's discretion to admit relevant character evidence is not unfettered. NRS 48.035(1) requires that relevant evidence be excluded 'if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.'" **Foster v. State**, 116 Nev. 1088, 1095 (2000).

The Court should have sustained the defense objection to the State's presentation of evidence during the penalty rebuttal phase that Jamar Green had no juvenile criminal history. (AA 2649). The State claims the information was relevant to explain Jamar Green's 34-year minimum sentence and that the defense "opened the door" by admitting evidence of Jamar's sentence. (AA 2650; AB, 48). However, the defense referenced Jamar's sentence as relevant only to the relative culpability of the two individuals who committed this crime in the penalty phase of a capital trial. The State's decision to offer Jamar the stipulated sentence had little to do with his alleged

lack of a juvenile history, and whether Jamar had a juvenile history was entirely irrelevant to the issue of Terrence's punishment.

Finally, Exhibit 100 was cumulative and unnecessary in light of the other photos shown the jury, and the only purpose in admitting this photo was to inflame jurors' passions and sympathies. **Emil v. State**, 105 Nev. 858, 866 (1989); **Sipsas v. State**, 102 Nev. 119, 124 n.6 (1986).

E. The Court Erred in Excluding Relevant Mitigation Evidence

Courts should grant capital defendants substantial deference in how they present mitigation evidence because death is different:

> Although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases, the plurality opinion in Woodson, after reviewing the historical repudiation of mandatory sentencing in capital cases, 428 U.S., at 289-298, concluded that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id., at 304. That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. Id., at 305. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

Lockett v. Ohio, 438 U.S. 586, 603-604 (1978). Because the documentary footage offered insight into the family history, the community culture, and the social connections of a capital defendant, the Court should have permitted the defense to present the full mitigation case.

XI. The sentence imposed amounts to cruel and unusual punishment.

The American Psychological Association found in a scientific study that the human frontal lobes are not fully developed until the mid-20s, reducing impulse control and reasoning and limiting the ability to recognize long-term consequences. (AA 2456-57). Statistically, the Justice Department has found that the likelihood that an individual will commit a violent crime decreases with increasing age. (AA 2459). However, Terrence will serve forty years to life in prison for a crime committed as a teenager, while the more culpable person will serve six years less.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This provision "guarantees individuals the

right not to be subjected to excessive sanctions." **Roper v. Simmons**, 543 U.S. 551, 560 (2005). "The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* (internal quotation marks and citation omitted). In reviewing sentences for proportionality, the State suggests this Court must automatically uphold any sentence within statutory limits. (AB, 51). In fact, the Supreme Court of Arizona noted that evolving jurisprudence in this area of the law instead provides that lower courts should examine the facts and circumstances of individual cases in evaluating proportionality. "Subsequent guidance from the Supreme Court suggests that, in assessing the constitutionality of a sentence, the reviewing court should examine the crime, and, if the sentence imposed is so severe that it appears grossly disproportionate to the offense, the court must carefully examine the facts of the case and the circumstances of the offender to see whether the sentence is cruel and unusual." **State v. Davis**, 206 Ariz. 377, 384 (2003).

Because the facts and circumstances of the instant case warrant similar review, this Court should decline the state's invitation to rubber-stamp any sentence within statutory limits. As Justice Rose noted in his dissent in **Sims v. State**:

> Those who oppose appellate review of sentences might argue that the legislature has provided broad parameters defining the range of sentences that trial courts may impose, and that these parameters sufficiently keep sentences in proportion. However, as evinced by this case, that theory does not work. The legislature has made the parameters broad so that trial courts can make sentences proportionally sound by taking into account both (1) the crime committed, and (2) extraneous facts about the perpetrator. It has also provided mandatory enhancement terms for some crimes n1 and minimum sentences for others. While latitude affords trial courts the ability to impose appropriate sentences, it also permits them to impose a sentence that results in an injustice in an individual case. Sentences can be disproportionate in light of punishments imposed for comparable crimes in this jurisdiction, or in light of the degree of danger the offender poses to society. We often observe two sentences which vary dramatically, even though the two defendants' crimes and backgrounds are similar.

Sims v. State, 107 Nev. 438, 443 (1991) (Rose, J., dissenting).

Finally, this Court should also consider the counsel of Chief Justice Rose's concurrence in **Santana v. State**: "Although Santana's punishment is within the statutory limit, this does not mean that his sentence is automatically just and not excessive. I urge this court in the future to reconsider its refusal to review criminal sentences for excessiveness and to provide criminal

defendants with the opportunity to have the most important aspect of their criminal cases examined on appeal." **Santana v. State**, 148 P.3d 741, 746 (2006) (Rose, C.J., concurring). This Court should not end the inquiry, as the State urges, by concluding that any proportionality review is foreclosed where the sentence falls within statutory limits. The law entitles criminal defendants to meaningful review of their sentences in the context of all facts and circumstances of the case.

XII. Cumulative error warrants reversal of this conviction under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

Although multiple discrete errors may not warrant reversal when reviewed individually, the cumulative effect of these errors on the trial as a whole warrants relief. **Daniel v. State**, 119 Nev. 498, 78 P.3d 890 (2003). A cumulative-error analysis "aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and . . . analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." **U.S. v. Rivera**, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc). Courts analyze cumulative error by conducting the same inquiry as for individual error: whether the defendant's substantial rights were affected. **U.S. v. Kartman**, 417 F.2d 893, 894, 898 (9th Cir. 1969). The combination of errors in this case warrants reversal even if this Court finds any individual errors harmless.

CONCLUSION

Based on the foregoing argument, this Court must reverse these convictions and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

DATED this 17th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of June, 2009. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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