ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

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 the State improperly commented on appellant's post-arrest silence.

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

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.

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

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.

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

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

VIII. The Court violated Terrence's federal and state constitutional rights by admitting irrelevant and prejudicial evidence.

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

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

XI. The sentence imposed amounts to cruel and unusual punishment and violates the Eighth Amendment.

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

STATEMENT OF THE CASE

This is a direct appeal from a Judgment filed on December 13, 2007. (Appellant's Appendix [AA] 909-911). The State filed an indictment charging Terrence Bowser with the following criminal counts: I: Conspiracy to Commit Murder; II: Murder with Use of a Deadly Weapon; III: Conspiracy to Discharge a Firearm out of a Motor Vehicle; IV: Discharge of a Firearm out of a Motor Vehicle; V: Conspiracy to Discharge a Firearm at or Into a Vehicle; and VI: Discharge of a Firearm at or into a Vehicle. (AA 001-004). Terrence appeared and entered a plea of not guilty on May 9, 2005. (AA 915). The State filed a Notice of Intent to Seek the Death Penalty on May 26, 2005, based on the single aggravating circumstance that the crime was committed at random and without motive under NRS 200.033 (9). (AA 168). On February 22, 2006, Terrence filed a motion to suppress his confession. (AA 252). The Court denied Terrence's Motion to Suppress. (AA 933). The Court also denied Terrence's Motion to Strike the State's Notice of Intent to Seek the Death Penalty. (AA 933). On October 3, 2007, the State filed a Second Amended Indictment amending the language regarding vicarious liability of coconspirators. (AA 1172).

Trial commenced on October 3, 2007, and the jury convicted Terrence of Count II, First-Degree Murder with Use of a Deadly Weapon, and all other counts, on October 11, 2007. (AA 904-05, 944, 950). The penalty phase commenced on October 12, 2007, and jurors returned verdicts on October 16, 2007, of life with eligibility for parole after forty years on Count II. (AA 953). The State filed the Judgment of Conviction on December 13, 2007. (AA 909). Terrence filed a timely Notice of Appeal on January 2, 2008. (AA 912).

STATEMENT OF FACTS

Terrence's Troubled Early Years

Terrence was the second child of single mother Ida Bowser and Howard Sanders. Sanders was a crack addict who was in and out of Terrence's life while he was a boy. (AA 2435). At the age of four, doctors diagnosed Terrence with cognitive delays, language delays, and developmental articulation disorder. (AA 2437). Terrence's grandmother took care of Terrence while Ida worked, but his grandmother neglected him and ignored him. (AA 2435-36).

Terrence always lived in high-crime, economically depressed areas of Las Vegas. (AA 2429). Terrence's father was shot to death when Terrence was eight years old. (AA 2438). After this event, Terrence became depressed, disengaged, and angry. (AA 2438). Terrence was relentlessly teased because he had a stutter, and was suicidal as early as the fourth grade. (AA 2439). Although well-meaning, Ida had her own emotional problems, and was ill-equipped to deal with

Terrence's emotional and psychological deterioration. When told about Terrence's fourth-grade suicidal ideation, Ida denied the problem and assured his teacher that he was fine. (AA 2439).

In fifth grade, Terrence drank a bottle of bleach in an attempt to take his own life. (AA 2440). He later tried to hang himself. (AA 2441). He tried to shoot himself in sixth grade. (AA 2442). Terrence was diagnosed as hyperactive and depressed, and placed on anti-anxiety and antidepressant medications. (AA 2441). School District testing revealed he had a below-average IQ of 83. (AA 2442). By eighth grade, Terrence was smoking marijuana, drinking alcohol, and becoming increasingly withdrawn and anti-social. Terrence was often plagued by night terrors, headaches, and depression, with mixed results from medications and therapy. (AA 2441-2443).

Terrence's Adolescence and Early Adulthood

Terrence stole a pair of gym shoes out of a locker at school when he was a freshman in high school, and was expelled. (AA 2444). He attended two other high schools, continued to do drugs, and was arrested for possessing a stolen vehicle during his junior year. (AA 2445). While he was on probation, Ida turned him in to his probation officer for smoking marijuana. (AA 2445). In addition to completing Job Corps and getting his GED, Terrence successfully finished drug treatment and completed his probation. (AA 2446-2447). He got a job as a skilled construction worker, but continued to drink heavily on a daily basis, and soon returned to smoking marijuana. (AA 24547). Terrence had part of a finger amputated due to a work injury and could not work for several months. (AA 2448). After returning to work, he continued to drink excessively and smoke marijuana in addition to his dependence on prescription painkillers and anti-anxiety medication. (AA 2448).

The Events of January 31, 2005

Jamar Green was one of Terrence's best friends since childhood. (AA 280). Jamar worked for the CAT bus system. (AA 282). On January 31, 2005, Terrence went to the store to pick up lunch for work the next day, and returned a call from Jamar. (AA 285). Terrence drank a bottle of hard alcohol and went to Jamar's house. (AA 286-87). The two decided to cruise around the neighborhood in Terrence's mother's car, a Lincoln sedan. Jamar brought his shotgun because he lived in a dangerous neighborhood and always carried it for self-defense. (AA 288). Terrence did not normally carry a gun and did not have one in the car that night. (AA 288). However, Terrence knew Jamar had a gun and brought shells to share with Jamar. The box of shells remained unopened. (AA 291). The two discussed what it would feel like to shoot at a car. (AA 2152).

John McCoy worked at the Rainbow Club in Henderson as an assistant casino manager. (AA 1908). He would take street routes in addition to the freeway to drive home to the northwest side. (AA 1908-09). John worked swing shifts and would return home between 11:30 p.m. and 12:30 a.m. (AA 1910).

Near Lone Mountain and Jones, Terrence and Jamar drove up next to John McCoy. Terrence does not know at what exact point Jamar fired his shotgun. (AA 299). Terrence was focused on driving and didn't see where Jamar was aiming, but believed Jamar meant only to shoot at the car next to them. (AA 300-01). Jamar didn't tell Terrence that he was going to fire at John's car. Jamar didn't say anything prior to shooting. Jamar picked up the gun and fired. (AA 333).

Just before midnight, North Las Vegas police officer David Smith was flagged down by local resident Forrest Hawman, who had just heard a gunshot near his house. (AA 1975). Smith saw a silver car coming toward him with no headlights on. (AA 1975). Smith turned around and initiated a traffic stop with lights and sirens. (AA 1977). Upon seeing the police car, Terrence panicked and sped away. (AA 336-338). Smith followed the Lincoln into a cul-de-sac on Captain Kirk drive, where the car pulled into a driveway of a house and stopped. (AA 1979). The car backed out of the driveway and stopped in the middle of the cul-de-sac at Smith's command. (AA 1979). Jamar threw the gun out the car window. Jamar and Terrence got out of the vehicle and were handcuffed by officers. (AA 338; 1984-86). Officers found a shotgun near the passenger side of the Lincoln in the cul-de-sac. (AA 1992).

When police officers arrived at the crash scene at Lone Mountain, John's car had hit the wall and rolled back downhill. (AA 1877). John was slumped in the driver's seat panting for breath. (AA 1870). The driver's window was gone. (AA 1874). Officer Cox found a handgun on the passenger side floor of John's car. (AA 1875). John usually carried his gun in the glove compartment or briefcase. (AA 1909). His partially unzipped briefcase was also on the floor. (AA 1878). The force of the impact would have been enough to move around the items in the car, so officers did not know the original location of John's gun. (AA 1878). John died of a penetrating gunshot wound to the left flank. (AA 1899). The coroner opined that only one shot was fired (AA 1903), and that some of John's injuries would have been sustained in the car crash. (AA 1905). The coroner found methamphetamine in John's system. (AA 1897).

Officer Sullivan admitted that Terrence said at the time of his arrest, "I'm going to make you work for it. I'll see what my attorney can do for me" when read his rights at the scene. (AA 2789). Sullivan ceased questioning at that time. (AA 2789). Metro homicide detective Wilson admitted he knew Terrence had invoked his Fifth Amendment rights, but decided to question

Terrence after reading his rights a second time. (AA 2798). Terrence admitted that his actions that night were stupid, and expressed hope that John was all right. Officers did not tell Terrence of John's condition during the interview. (AA 347). Ultimately, Terrence told Dr. Paglini that if he could trade his life for John's, he would. (AA 2464).

Summary of Trial Testimony

Off-duty Probation Officer Maurice Hernandez testified regarding his arrival at the accident scene and 911 call. (AA 1863-1864). Metro Officer Donald Cox testified regarding his arrival at the accident scene and conversation with John McCoy. (AA 1869). Dr. Telgenhoff testified regarding his autopsy. (AA 1882). Dawn McCoy testified regarding her husband's work and travel habits. (AA 1908-09). CSA Daniel Ford testified regarding his collection of evidence. (AA 1944). North Las Vegas police officer David Smith testified regarding his investigation of gunshot sounds heard by Forrest Hawman. (AA 1972). North Las Vegas officer Luthiger responded as Smith's backup and testified about taking Terrence into custody. (AA 1997).

Officer Sullivan testified regarding his investigation at the scene and interview with Terrence. (AA 2004). CSA Renhard testified regarding her collection of evidence. (AA 2039). Maria Dominguez testified regarding hearing the gunshots on the might of January 31, 2005, and a subsequent car crash. (AA 2080). Forrest Hawman testified regarding hearing gunshots that night and calling 911. (AA 2097). Metro analyst Ed Guenther testified regarding the fingerprint evidence. (AA 2103). Metro firearms analyst James Krylo testified regarding his analysis of the gun evidence. (AA 2111). Metro Detective Rob Wilson testified regarding his investigation and interview with Terrence. (AA 2125).

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

On August 14, 2006, the Court heard Terrence's Motion to Suppress and held an evidentiary hearing. (AA 2777). Officer Sullivan admitted that Terrence said at the time of his arrest, "I'm going to make you work for it. I'll see what my attorney can do for me" when read his Miranda rights at the scene. (AA 2789). Sullivan ceased questioning at that time. (AA 2789).

Metro Detective Wilson admitted that other detectives told him Terrence had invoked his rights to counsel and silence with the police officers who arrested him. (AA 2798). Seven hours had elapsed between the arrest and Wilson's interview. (AA 2814). Although he knew Terrence had already invoked his Fifth Amendment rights, Wilson admitted he "wanted to see if [Terrence] was willing to give us a statement as to what had happened." (AA 2800). This situation violated Terrence's federal and state constitutional rights.

First, Terrence unequivocally invoked his right to counsel by stating, "I'm going to make you work for it. I'll see what my attorney can do for me" in response to being read his Miranda rights. (AA 2789). This Court recently noted that the right to counsel must be invoked with sufficient explicitness to "be reasonably construed" as a request for counsel: "A request for counsel must be, at minimum, 'some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' The right to counsel 'must be affirmatively invoked by the suspect' and requires more than an expression of one's desire to remain silent." **Dewey v. State**, 169 P.3d 1149, 1152 (Nev. 2007) (internal citations omitted). Terrence did more than merely express his desire to remain silent. He specifically referenced an attorney, and explicitly stated his desire to see what an attorney could do for him, distinguishing **Dewey**. The Supreme Court forbids further interrogation in the absence of counsel unless the defendant initiates the subsequent communication. **Edwards v. Arizona**, 451 U.S. 477 (1981).

This Court should deem Terrence's comments sufficient to invoke the right to counsel: "You guys got me. I'm going to make you work for it. I'll see what my attorney can do for me." (AA 2789). In a case with an almost identical invocation of the right to counsel, the Montana Supreme Court found the trial court had violated the defendant's constitutional rights by refusing to suppress his initial confession: "Furthermore, *based on our determination that the statement was a product of interrogation after Flack asserted his right to counsel*, we conclude that the District Court's denial of Flack's motion to suppress violated Flack's constitutional right to the assistance of counsel under Miranda, 384 U.S. at 474, 86 S. Ct. at 1627. We hold that the District Court erred in denying Flack's motion to suppress the January 5 statement." **State v. Flack**, 260 Mont. 181, 187 (1993) (emphasis added).

Flack's invocation mirrored Terrence's invocation: "[a]fter fifty-five minutes of questioning, Johnson arrested Flack for the robbery pursuant to a valid arrest warrant. At that time, Flack stated, "*I guess I'm going to have to get me a lawyer. You guys are going to have to prove it.*" **Flack**, 260 Mont. at 183 (emphasis added). Echoing Flack's invocation, Terrence said, "*I'm going to make you work for it. I'll see what my attorney can do for me.*" (AA 2789). Because

these comments parallel the comments in **Flack**, the District Court erred in refusing to deem them an adequate invocation of the right to counsel, particularly where Flack's invocation was more ambiguous than Terrence's through the use of the future tense and the phrase, "I guess."

Although the Montana Supreme Court admitted the second confession made by Flack, the Court relied upon the fact that Flack had initiated the subsequent interview. In contrast, Terrence did not initiate the subsequent communication with Wilson; rather, Wilson decided to see if he could get Terrence to talk. (AA 2802). The fact that Terrence made incriminating statements under police interrogation after his initial invocation of the right to counsel should not undermine his invocation: "Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable. *'No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.'*" **Smith v. Illinois**, 469 U.S. 91, 98-99 (U.S. 1984) (internal citations omitted) (emphasis added). This is precisely what happened to Terrence: Sullivan ceased questioning because Terrence invoked his Fifth Amendment rights, but Wilson decided to ignore Terrence's invocation of the right to counsel and proceeded as though Terrence had never invoked this right.

Terrence's words constituted an unambiguous and unequivocal request for counsel: "I'll see what my attorney can do for me." (AA 2789). Courts have found less definite phrases adequate under the Fifth Amendment. In **United States v. de la Jara**, 973 F.2d 746, 750 (9th Cir. 1992), the defendant said, "Can I call my lawyer?" or "I should call my lawyer," and the Ninth Circuit found an invocation of the right to counsel. In **Cannady v. Dugger**, 931 F.2d 752, 755 (11th Cir. 1991), the defendant said, "I think I should call my lawyer," a phrase more ambiguous than Terrence's words, but the Court found an invocation of the right to counsel. In **Robinson v. Borg**, 918 F.2d 1387, 1393 (9th Cir. 1990), the defendant said, "I have to get me a good lawyer, man. Can I make a phone call?" and the Court found an invocation of the right to counsel. In **Smith v. Endell**, 860 F.2d 1528, 1529-31 (9th Cir. 1988), the defendant asked, "Can I talk to a lawyer?" and the Court found an invocation of the right to counsel. In **United States v. Hughes**, 921 F. Supp. 656, 657-58 (D. Ariz. 1996), the defendant asked, "Can I call a lawyer?" and the Court found an invocation of the right to counsel. In **Shedelbower v. Estelle**, 885 F.2d 570, 571, 573 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 975 (1991), the defendant said, "I think I should call

an attorney," a phrase more ambiguous than Terrence's comments, and the Court found an unequivocal request for counsel.[1]

Finally, this Court should distinguish the case relied upon by the trial Court in denying suppression because in **Kaczmarek v. State**, the defendant's Sixth Amendment right to counsel had not yet attached, and the defendant had exclusively invoked his right to counsel in an unrelated case: "[a]ccordingly, when detectives interviewed Kaczmarek, the Sixth Amendment right had not yet attached in this case and did not prohibit the State from using Kaczmarek's statement at trial." **Kaczmarek v. State**, 120 Nev. 314, 327 (2004). Further, this Court should distinguish **Kaczmarek** on its facts: "[t]he record here shows that Kaczmarek was thirty-two years old and experienced in the criminal justice system. Further, he received verbal Miranda warnings prior to his reference to counsel. This reference was so ambiguous that reasonable officers in the circumstances of Detective Wilson and his partner would have only understood that Kaczmarek 'might be invoking the right to counsel.'" **Kaczmarek**, 120 Nev. at 331.

In contrast, Terrence was nineteen years old and inexperienced in the adult criminal justice system. Although he had received Miranda warnings, his reference to an attorney was far less ambiguous than Kaczmarek's: "'He said that he wanted to talk to us. He said his attorney was coming this afternoon and *wondered if we can talk to him then.*'" **Kaczmarek**, 120 Nev. at 330. Unlike Kaczmarek, Terrence's initial invocation did not include the mixed message that he "wanted" to talk to officers but "wondered" if they could speak with him later. Unlike Kaczmarek, Terrence was not referencing an attorney retained on a different charge, but invoked his Fifth Amendment rights on the very case detectives wanted to question him about. Further, this Court found that any Fifth Amendment violation in **Kaczmarek** would have been rendered harmless due to the statement's consistency with the defendant's trial testimony. That Terrence did not testify renders the logic in **Kaczmarek** inapplicable and warrants distinction with the instant case. For these reasons, this Court should reject the trial Court's reliance on **Kaczmarek**.

Officers Failed to Honor Terrence's Invocation of His Right to Silence

The general rule is that after a defendant has invoked his right to remain silent, he cannot be questioned. **Michigan v. Mosley**, 423 U.S. 96, 104-05 (1975). In **Edwards v. Arizona** 451 U.S. 477 (1981), the U.S. Supreme Court recognized that the invocation of the right to counsel requires the cessation of interrogation. The Court subsequently affirmed the silence/counsel

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1 In contrast, in **Norman v. Ducharme**, 871 F.2d 1483 (9th Cir. 1989), *cert. denied*, 494 U.S. 1031 and 494 U.S. 1061, (1990), the Court held that when the defendant *asked* a police officer "whether he should get an attorney," the question "did not rise to the level of an unequivocal request for counsel." *Id.* at 1484, 1486.

dichotomy and made clear that **Mosley** still stands. **Arizona v. Roberson**, 486 U.S. 675 (1988). Thus, even if this Court upholds the trial Court's decision that Terrence's invocation of the right to counsel was not explicit enough, once Terrence also invoked his right to silence, Detective Wilson's initiation of re-questioning still violated Terrence's Fifth Amendment rights:

> For example, if a suspect requests counsel following Miranda warnings, all questioning must cease and the police may not question the suspect again without an attorney present unless the suspect herself initiates further communication or conversation. **If on the other hand the suspect only asserts her right to remain silent, then the police may subsequently initiate a new round of interrogation, provided that they "'scrupulously honored'" the suspect's initial exercise of her "'right to cut off questioning'" and again fully advise the suspect of her Miranda rights before resuming any further questioning.**

Dewey, 169 P.3d 1149 at 1153 (emphasis added) (internal citations omitted). Officer Sullivan admitted Terence had invoked his Fifth Amendment rights at the arrest scene. (AA 2789). Once a suspect invokes his Miranda rights, the law provides that subsequent questioning is "especially suspect":

> In adopting the "scrupulously honored" rule, the Mosley Court recognized that police questioning is especially suspect when it follows a suspect's invocation of his Miranda rights, and consequently, courts must be satisfied that any statements made in response to such questioning were the products of the suspect's free will. On the other hand, the Mosley Court recognized that Miranda allows for voluntary, knowing, and intelligent waivers of the right to silence, see Miranda, 384 U.S. at 475-76, and reasoned that a rule forbidding questioning after an assertion of Miranda rights even if the suspect voluntarily retracts that first assertion would be both irrational and contrary to Miranda's concern for "legitimate police investigative activity." Mosley, 423 U.S. at 102.

United States v. Hsu, 852 F.2d 407, 409-410 (9th Cir. Cal. 1988). In evaluating the scrupulousness with which officers honored the invocation of rights, courts analyze the following factors: the amount of time that elapsed between interrogations; the provision of fresh warnings; the scope of the second interrogation; and the zealousness of officers in pursuing questioning after the suspect has asserted the right to silence. **Hsu**, 852 F.2d 407 at 410, *citing* **Mosley**, 432 U.S. at 102.

Here, approximately seven hours elapsed between the arrest and Wilson's interview. (AA 2814). Although Miranda warnings were read a second time, Wilson admitted that he spoke for about fifteen minutes about Ida's need for the family car to be returned prior to questioning Terrence about the facts of the case. Wilson *knew* that Terrence had invoked his right to silence but decided to pressure him about his mother's car, undermining the State's claim that Wilson "scrupulously honored" Terrence's invocation of his rights. (AA 2798). This Court must conclude that the wide-ranging scope of Wilson's interrogation, the use of emotional pressure to

get Terrence to talk, and the zealousness with which Wilson pursued the admissions mandate a finding that officers failed to scrupulously honor Terrence's invocation of his right to silence.

Terrence Did Not Freely and Voluntarily Waive His Rights

Wilson admitted that he told Terrence if he cooperated with the investigation, his mother's car could be returned to her sooner. (AA 2144). Wilson also told Terrence that the prosecutors and the court would look more favorably upon him if he cooperated. (AA 2145). Significantly, the first portion of Terrence's interview where these promises were made was not taped. (AA 564). Before introducing a defendant's incriminating statement, the government must prove by a preponderance of the evidence that the accused voluntarily, knowingly, and intelligently waived his Miranda rights. **Colorado v. Connelly**, 479 U.S. 157, 169-70 (1986). To determine the validity of the waiver:

> ... [t]his court examines "the facts and circumstances of the case such as the background, conduct and experience of the defendant." Relevant considerations in determining voluntariness of a confession include the youth of the defendant, his lack of education or low intelligence, the lack of advise of constitutional rights, the length of detention, repeated and prolonged questioning, and physical punishment such as deprivation of food or sleep.

Floyd v. State, 118 Nev. 156, 171 (2002) (internal citations omitted).

Under the **Floyd** factors, Terrence did not knowingly and intelligently waive his *Miranda* rights. A valid waiver "cannot be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was ultimately obtained." **Miranda**, 384 U.S. at 475 (1966). Terrence had been detained for nine hours, under arrest for seven hours, and questioned by multiple officers when he finally told Wilson what he wanted to hear. (AA 2814). Terrence's preceding detention occurred throughout the night, during which time there is no record that Terrence was permitted to eat, drink, or sleep. Terrence was recovering from a drinking binge during which he had consumed a significant amount of hard alcohol. (AA 2815). Wilson chose to ignore Terrence's previous invocation of his rights, and started from scratch with a new tactic: promising a quick return of Ida's car in exchange for Terrence's statements. Thus, under **Floyd**, Terrence did not knowingly and intelligently waive his *Miranda* rights. The trial Court's admission of his statements to the responding officers and Wilson violated his federal and state constitutional rights.

A criminal defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary confession, even if there is ample evidence aside from the confession to support the conviction. **Jackson v. Denno**, 378 U.S. 368, 376 (1964); **U.S. Const.**

Amends. V, XIV; Nev. Const. Art 1, Sec. 8. A confession is admissible only if it is freely and voluntarily made.[2] **Steese v. State**, 114 Nev. 479, 488 (1998) (citing **Passama v. State**, 103 Nev. 212, 213 (1987)). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Id (quoting **Blackburn v. Alabama**, 378 U.S. 368, 376 (1960)).

Whether a confession is the product of "rational intellect and a free will" hinges not only on the means by which the confession was extracted, but the subjective effect that such extrication methods have on *a particular defendant*. As articulated by the United States Supreme Court:

> ...[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.

Miller v. Fenton, 474 U.S. 104 (1985) (emphasis in original). See also **Passama**, 735 P.2d at 323 (holding that "... certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive... that they must be condemned under the Due Process Clause of the Fourteenth Amendment.") (citations omitted).

This Court employs a 'totality of the circumstances' approach in analyzing the voluntariness of a confession. **Steese**, supra, (citing **Passama**, 103 Nev. At 214). The factors this Court considers include:

> the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

Id. (citing **Schneckloth v. Bustamonte**, 412 U.S. 218, 226-27 (1973)). Here, Terrence was 19 at the time of his arrest. He had been in special education classes since elementary school, had an IQ in the below normal range, and had a history of psychological and emotional problems. (AA 2439, 2441-42). Although advised of his constitutional rights, Terrence's previous invocation of these rights was ignored, rendering the second admonition essentially meaningless. He had been detained nine hours by the time he confessed, and was interrogated for over an hour. In addition, Terrence admitted he had consumed hard liquor on the night of the shooting. (AA 286). He could not remember "too much of the story" because he had consumed so much Hennessy. (AA 286). He started drinking before he arrived at Jamar's house. (AA 287). Several times during the interview, the transcriber listed Terrence's words as "unintelligible." (AA 292).

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2 The prosecution must prove the voluntariness of a confession by a preponderance of the evidence. Stringer v. State, 836 P.2d 609, 612 (Nev. 1992) (citing Sanchez v. State, 734 P.2d 726, 728 (Nev. 1987)).

Confessions obtained by physical intimidation or psychological pressure are inadmissible. **Steese**, supra, 114 Nev. at 488 (*citing* **Townsend v. Sain**, 372 U.S. 293, 307 (1963), *overruled on other grounds,* **Keeny v. Tamayo-Reyes**, 112 S.Ct. 1715, 1717 (1992)). Promises made by the police to a suspect are crucial to a determination of voluntariness. *Id.* (citing **Passama**, at 215). If promises made, implicit or explicit, trick a confessant into confessing, the confession is involuntary. **Franklin v. State**, 96 Nev. 417, 421 (1980).[3] Terrence's interrogation experience reveals all of these defects: a lengthy detention; a refusal by officers to heed the invocation of constitutional rights; repeated and prolonged questioning; and a young, hungover suspect tricked into cooperating by psychological pressures involving his mother's property. Under the factors outlined by this Court in **Steese**, Terrence's statements to the police officers and detectives were not freely and voluntarily given and the trial court's admission of those statements violated his federal and state constitutional rights. **U.S.C.A. V; XIV; Nev. Const. Art. 1, Sect. 8.**

Significantly, the State built its case on the foundation of Terrence's statements. Few pieces of evidence carry more weight, or tell a more compelling story, than a defendant's own admissions. Using a defendant's words to paint him as both a killer *and* a liar gave the prosecution an unmatched arsenal.[4] The admission of the confession was highly significant, because the State used Terrence's admission in Closing that he told Jamar to shoot to argue premeditation and deliberation. (AA 2226; 2227). Thus, the trial court's constitutionally erroneous admission of Terrence's statements amounted to harmful error. Because the State could not have obtained these convictions without Terrence's admissions, this Court must reverse and remand this case for a new trial.

The Court Erred in Permitting References to Terrence's Post-Arrest Silence

The Court also erred in denying the defense motion to exclude Terrence's comment, "I'm fucked" upon his first encounter with police officers at the arrest scene. (AA 1359). Officer Sullivan eventually testified that Terrence actually said, "You guys got me," and that he "*wouldn't really go into anything further.*" (AA 2010) (emphasis added). Sullivan later testified that he had told Officer Smith, "I basically just told him I read him his Miranda rights, *and he wasn't talking.*" (AA 2013) (emphasis added).

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3 See also **Passama**, supra, at 215; **U.S. v. Tingle**, 658 F. 2d 1332, 1336-37 (9th Cir. 1981) (confession involuntary due in part to officer's promise to bring cooperation to prosecutor's attention); **U.S. v. Rogers**, 906 F. 2d 189, 191 (5th Cir. 1990) (confession involuntary partly due to assurance that defendant would not be arrested if he cooperated); **U.S. ex rel. Church v. de Robertis**, 771 F.2d 1015, 1020 (7th Cir. 1985) (dictum) (confession may be involuntary if defendant's will overborne by state's attorney's misleading promise concerning less severe charge).

4 The prosecutor used the statements to question Terrence's veracity about events during Closing. (AA 2240).

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This provision applies to the states through the Fourteenth Amendment. **Malloy v. Hogan**, 378 U.S. 1, 6 (1964). The Fifth Amendment applies before the State takes a defendant into custody and before a defendant becomes the subject of suspicion or investigation. A defendant can assert the right in any investigatory or adjudicatory proceeding. **Kastigar v. United States**, 406 U.S. 441, 444 (1972). Courts liberally construe the right against self-incrimination. **Hoffman v. United States**, 341 U.S. 479, 486 (1951). **Nev. Const. Art. I § 8** ("no person shall ... be compelled, in any criminal case, to be a witness against himself.").

This Court has held that comments on the defendant's post-arrest silence "will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence, or (2) there is overwhelming evidence of guilt." **Morris v. State**, 112 Nev. 260, 264 (1996) (internal citations omitted). Because jurors heard twice that Terrence initially invoked his Fifth Amendment rights, this Court cannot find harmless error beyond a reasonable doubt because these were more than passing references. Second, this Court cannot find overwhelming evidence of First-Degree Murder where the State had no eyewitness testimony and where the evidence is uncontroverted that Terrence was not the shooter.

"It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights as required by Miranda v. Arizona . . . ." **Angle v. State**, 113 Nev. 757, 763 (1997) (citations omitted). The United States Supreme Court recognizes the significance of these improper references:

> "When a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.... Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case."

Doyle v. Ohio, 426 U.S. 610, 619 (1976), *citing* **United States v. Hale**, 422 U.S. 171, 182-83 (1975), White, J., *concurring*. The federal constitution prohibits a prosecutor from pointing out that a defendant has exercised his or her right to remain silent. **Griffin v. California**, 380 U.S. 609, 615 (1965); **Wainwright v. Greenfield**, 474 U.S. 284, 288 (1986).

> In Doyle, the United States Supreme Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and

> after receiving Miranda warnings violates the Due Process Clause of the Fourteenth Amendment. Recently, the Supreme Court held that an error under Doyle fits within the category of constitutional violations characterized as "trial error."

McCraney v. State, 110 Nev. 250, 871 P.2d 922, 926 (1994) (internal citations omitted). The **Wainwright** Court further explained that: "[w]ith respect to post-*Miranda* warnings 'silence,' ...silence does not mean only muteness: it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." 474 U.S. at 295, n. 13.

The trial court should have sua sponte ordered a mistrial, particularly where officers made repeated references to the invocation of Terrence's Fifth Amendment rights. The language of a defendant's invocation of the right to remain silent must not be of "... such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to [respond]." **Deutscher v. State,** 95 Nev. 669, 682, 601 P.2d 407 (1979), *citing* **Knowles v. United States,** 224 F.2d 168, 170 (10th Cir. 1955). Here, the State informed jurors twice that Terrence initially refused to talk to officers. A lay person will infer that these invocations against self-incrimination constitute clear evidence of guilt.

Where defense counsel fails to object, this Court may consider plain error where the error affects the defendant's substantial rights. **NRS 178.602**. This Court may evaluate whether the error had a prejudicial impact when viewing the trial as a whole, or seriously affected the integrity or public reputation of the proceedings. **Rowland v, State**, 118 Nev. 31, 38 (2002). This Court must reverse these convictions because the repeated references to Terrence's invocation of his rights and the admission of his confession violated the due process and fair trial clauses of the federal and State Constitutions.

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

The Prosecutor Misstated the Evidence

The prosecutor engaged in a lengthy argument during Closing based entirely on facts not in evidence. The prosecutor argued that Jamar had fired the first shot into the car window, the second shot into John's flank, and the third shot into the hood of the car. (AA 2227-28). The prosecutor stated that these three shots in this order constituted evidence of premeditated murder. (AA 2228). The prosecutor argued that Terrence told Jamar to shoot a second time after the first shot hit the divider between the windows of John's car, implying that Terrence was directing each and every shot while he drove the car and that Terrence was tracking the shots. (AA 2227). The prosecutor then created a detailed scenario:

> He's just been shot at. Fight or flight, he's going to speed up. He's going to speed up his car, and Terrence Bowser is going to speed up his car to match his speed. *That jockeying for position, that moving around, that didn't happen before the shooting. That happened during the shooting*, because Terrence Bowser is making an effort to make sure that he's lined up with that car.
>
> He overshoots it a little bit. And so when the second shot goes in to Mr. McCoy's side. There's a little bit of an angle, and that's what the flashlight shows. It's not actually measuring anything. It's showing you the angle of the shot. They used it for measurements. Shoots in the car. This time hits him.
>
> This isn't happening in silence. *Jamar Green and Terrence Bowser aren't sitting not saying anything. They're talking to each other . . . So Terrence Bowser is getting the car up close, and they are talking get me up closer. Here we go.* (AA 2270-71) (emphasis added).

The defense objected that this argument assumed facts not in evidence. The Court sustained the objection. (AA 2272). However, the State continued to speculate about what might have happened, presenting this speculation as though supported by the evidentiary record: "The third shot – now he's been shot a second time." The defense objected again that this argument was not based on any facts in evidence. (AA 2272). The Court implicitly overruled the objection by allowing the prosecutor to continuing referencing the alleged order of the shots as though this information had been offered in evidence: "Makes sense why the third short is off, hitting the hood of the car." (AA 2273). The prosecutor continued to imagine what Terrence might have done: "He has the ability to do all this driving and not crash, and he's pulling up and John McCoy is most likely trying to get away." The Court overruled the defense objection to this additional instance of unfettered speculation. (AA 2275-76).

This Court has held that "factual matters outside the record are irrelevant and are not proper subjects for argument to the jury." **State v. Kassabian**, 69 Nev. 146, 153-54, 243 P.2d 264 (1952). By asking jurors to imagine Terrence in a situation never described, the prosecutor referred to facts not in evidence and attempted to sway jurors' passions and sympathies in a fashion this Court must reject. The prosecutor engaged in a lengthy story depicting Terrence as the instigator of this crime, painting Terrence as the person dictating Jamar's actions, and casting Terrence in the role of criminal mastermind. In fact, no witness could testify with certainty regarding the order of the shots, and no witness testified to a conversation between Terrence and Jamar at the time of the shooting, particularly a conversation to the effect of, "get me up closer; here we go." (AA 2270-71). In fact, Terrence's statement indicated just the opposite: Jamar never told Terrence that he was going to fire at John's car. Jamar didn't say anything at all to Terrence prior to shooting. Jamar just picked up the gun and fired. (AA 333). Thus, the

prosecutor invented imaginary dialogue to buttress the State's case for conspiracy to commit murder and premeditated murder.

Prosecutors may not undermine the defense by making inappropriate and unfair characterizations. **Riley v. State**, 107 Nev. 205, 212, 808 P.2d 551, 556 (1991). A prosecutor may not make statements unsupported by the evidence adduced at trial. **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). This Court rejects this scorched earth approach to advocacy:

> The use of these kinds of remarks, these kinds of "foul blows" and this kind of behavior on the part of a prosecuting office is in all respects a "no-win" approach to trial advocacy. "If the state has a strong case, it is not necessary, and if it was a close one, such misconduct is gross injustice to the defendant." State v. Cyty, 50 Nev. 256, 259, 256 P. 793, 794 (1927).

Yates, 103 Nev. 200, 205 (1987). Because the prosecutor argued facts not in evidence about the key moments before the shooting, and because these "facts" lack any and all evidentiary support and are directly contradicted by the record, this Court should find prejudicial misconduct and reverse these convictions.

The State Improperly Appealed to the Passions and Prejudices of Jurors

During rebuttal, the prosecutor argued that Terrence didn't know who was in the car next to him, and that "It could have been anyone. It could have been some 16 year old coming home from a party." (AA 2265). The Court sustained the defense objection to this inflammatory argument. "The determination of guilt must not be the product of fear or vengeance but rather intellectually compelled after a disinterested, impartial and fair assessment of the testimony that has been presented." **Commonwealth v. Reynolds**, 254 Pa. Super. 454, 459 (Pa. Super. Ct. 1978). "If the issue of guilt or innocence is close, if the State's case is not strong, prosecutor misconduct will probably be considered prejudicial." **Garner v. State**, 78 Nev. 366, 374, 374 P.2d 525 (1962). This inflammatory comment improperly broadened the issues before the jury and inflamed jurors' worries about what might have happened had a young person been involved. Misconduct occurs when a prosecutor asks jurors to imagine a more dangerous crime scene or a more sympathetic victim:

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. I Standards for Criminal Justice § 3-5.8(d) (2d ed. 1982).

Noel v. State, 754 P.2d 280, 282-283 (Alaska Ct. App. 1988).

The State Commented on Terrence's Pre-Arrest Silence

The prosecutor also commented on Terrence's pre-arrest silence during Closing by chastising Terrence for not calling authorities after John's car crashed: "Didn't even call 911 anonymously and say somebody's been hurt." (AA 2267). In permitting the State to reference Terrence's failure to contact the police, the Court improperly allowed the jury to infer that this failure constituted evidence of guilt. This admission violated Terrence's constitutional right to be free from self-incrimination under the Fifth Amendment to the United States Constitution. **Malloy v. Hogan**, 378 U.S. 1, 6 (1964).

The suggestion that Terrence had an obligation to contact police constitutes an impermissible reference to his pre-arrest silence. **State v. Lewis**, 130 Wn.2d 700, 705, 927 P.2d 235, 237 (1996) (detective would have violated the Fifth Amendment had he referenced the defendant's failure to contact him). Although the U.S. Supreme Court ruled that States violate neither the Fifth Amendment nor the Fourteenth Amendment by using pre-arrest silence to impeach a defendant's credibility, the Court noted that "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Id.* at 238. Here, Terrence did not testify, making the State's deliberate reference to his pre-arrest silence a violation of his Fifth Amendment rights.

This Court should adopt the sound reasoning of sister state courts, including Wisconsin and Ohio, the latter of which issued the following well-reasoned decision: "[u]se of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence." **State v. Leach**, 102 Ohio St. 3d 135, 141, 807 N.E.2d 335, 341 (2004), *citing* **State v. Easter**, 130 Wn. 2d 228, 240, 922 P.2d 1285 (1996). Other jurisdictions follow this reasoning. *See, e.g.,* **Weitzel v. State**, 384 Md. 451, 456, 863 A.2d 999, 1002 (2004).

The Court must not imply guilt and erode the accused's right to remain silent by permitting the State to highlight a defendant's pre-arrest silence. **State v. Keene**, 86 Wn. App. 589, 938 P.2d 839 (Wash. Ct. App. 1997). The Fifth Amendment guards against "the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." **Doe v. United States**, 487 U.S. 201, 210-12 (1988). This Court should afford full Fifth Amendment protection to pre-arrest statements and distinguish **Murray v. State**, 113 Nev. 11, 17 n.1, 930 P.2d 121 (1997) (prosecutor's comment on pre-arrest silence not improper) because

in **Murray**, the defendant testified, whereas Terrence did not.[5] In allowing the jury to hear that Terrence had not contacted police, the State violated Terrence's Fifth Amendment right against self-incrimination, and the Court failed to remedy this prejudice with a curative instruction. "When the State may later comment that an accused did not speak up prior to an arrest, *the accused effectively has lost the right to silence*. A 'bell once rung cannot be unrung.'" **Easter**, 130 Wn. 3d at 238, *citing* **State v. Trickel**, 16 Wash. App. 18, 30, 553 P.2d 139 (1976) (emphasis added). The State rang the bell of unconstitutional suspicion and innuendo in the Closing Argument. Terrence's only remedy for this constitutional error lies in reversal of his conviction. "As a general rule, the failure to object, assign misconduct, or request an instruction, will preclude appellate consideration. However, where the errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule does not apply." **Garner v. State**, 78 Nev. 366, 372-73, 374 P.2d 525 (1962).

The Court Erred in Denying the Defense Mistrial Request

The defense moved for a mistrial under Article I, Section 3 of the Nevada Constitution and under the Fifth and Sixth Amendments based on some of the misconduct that occurred during rebuttal. (AA 2277). The Court denied the motion. (AA 2279). "A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." **Rudin v. State**, 120 Nev. 121, 86 P.3d 572, 587 (2004). The pervasive and lengthy misstatement of the evidence by the State and the inflammation of jurors' passions and prejudices meets the "high degree" of necessity for declaration of a mistrial. **Hylton v. Eighth Judicial District Court**, 103 Nev. 418, 421, 743 P.2d 622 (1987), *quoting* **Arizona v. Washington**, 434 U.S. 497, 505 (1978).

Because the State obtained these convictions through inflaming jurors' emotions, this Court should reverse these convictions. "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." **U.S. v. Kojayan**, 8 F.3d 1315, 1323 (9th Cir. 1993). "The prosecutor's job isn't just to win, but to win fairly, staying within the rules." ***Id***. This Court has noted the particular damage caused by misconduct in rebuttal, when the defense lacks the opportunity to respond on the record. **Mahan v. State**, 104 Nev. 13, 17, 752 P.2d 208 (1988).

In determining whether prosecutorial misconduct deprived a defendant of a fair trial, this Court examines "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." **Rudin**, 86 P.3d at 582. The prosecutor must seek

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5 This Court should also retreat from similar language in **Angle v. State**, 113 Nev. 757, 763 n.2, 942 P.2d 177 (1997) because Angle's pre-arrest conduct was relevant to her defense that she was not intoxicated.

justice, not convictions. **Collier**, 101 Nev. at 480. Where prosecutorial misconduct infects the trial with unfairness, the resulting conviction violates due process. **Darden v. Wainwright**, 477 U.S. 168, 181 (1986). This Court recognizes the potential for misconduct to cast doubt on the verdict: "'[t]he test is whether 'without reservation . . . the verdict would have been the same in the absence of error.' The guilty verdict must be free from doubt." **Ross v. State**, 106 Nev. 924, 928 (1990), *quoting* **Witherow v. State**, 104 Nev. 721, 724 (1988). The cumulative effect of these multiple instances of misconduct warrants reversal of this conviction.

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

State firearm expert Krylo explained the operation of shotguns to jurors, and testified that in between each shot, the user has to pull the pump back and forth to reload the next round and expel the expended shell casing. (AA 2116). Krylo testified that the trigger pull, or the force necessary to fire the gun, was between seven and a half and eight pounds, within the average range. (AA 2119). During deliberations, the jury asked for a demonstration of the shotgun. (AA 2309). The bailiff dry-fired the gun three or four times in the courtroom by sitting on a chair and aiming at a wall. (AA 2311).

After the courtroom demonstration, the defense noted that the bailiff had admitted to previously conducting a similar demonstration in the jury room, during which the bailiff showed jurors two different ways of firing the gun. (AA 2310, 2313). The bailiff admitted that jurors had asked him in the jury room to pump the gun as fast as he could and to fire it, which he did in the air. (AA 2314). Jurors asked him to repeat the demonstration while seated, which he did. (AA 2314). The defense objected to the demonstration in the jury room as an improper supplementing of the evidence by a person not trained to demonstrate firearms. (AA 2314). The Court acknowledged the impropriety of the demonstration: "It wasn't a scientific demonstration. You're right. He shouldn't have been in there demonstrating for them, but he did it. I don't know why." (AA 2315). The Court denied the defense motion for a mistrial. (AA 2316-2318).

NRS 178.388(1) states in pertinent part: "The defendant must be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence." By permitting the bailiff to conduct a demonstration in the jury room, the Court improperly permitted the jury to supplement the evidentiary record in violation of the Sixth Amendment. The rule that the jury may not develop its own evidence is based on the Sixth Amendment right of the accused: "[i]n all criminal prosecutions ... to be confronted with the witnesses against him." When this Court analyzes allegations of juror misconduct,

"where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate." **Meyer v. State**, 119 Nev. 554, 562 (2003).

The State argued, and the Court agreed, that jurors were entitled to a demonstration of the evidence. (AA 2313). However, the State failed to present any evidence in the case in chief regarding how long it would take to fire the gun more than once. (AA 2110-2124). By asking the bailiff to fire the gun quickly (AA 2314), jurors clearly sought to supplement the evidence presented at trial. They had the bailiff fire the gun in the air "as fast as he could" while standing, discussed their findings, and then had the bailiff repeat the exercise while seated. (AA 2314).

The defense noted in moving for a mistrial that Jamar fired the weapon, and that the State had presented no evidence of Jamar's physical characteristics or firearms experience. (AA 2315). Further, there was no evidence that Jamar was the same size or build as the bailiff, making the demonstration all the more unreliable and prejudicial. (AA 2315). On similar facts, the Ninth Circuit reversed a conviction where a juror improperly supplemented the evidence by conducting a firearms experiment with a non-juror:

> In a declaration to the court, juror Tracey Jones stated that during the trial, while visiting her ex-husband, she had experimented with a new handgun that he had just bought, to see if she could pull the trigger with the gun held in the relevant position. She stated that she could not pull the trigger and that her ex-husband said that it was because she was too weak. Holding the gun in the same position, her ex-husband repeatedly pulled the trigger. All the jurors subsequently performed a similar authorized experiment, using a plastic toy gun, during deliberations.
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> . . .
>
> Nor do we find merit in the State's argument that the out-of-court experiment could not have prejudiced the petitioner as any conclusions drawn from that experiment could not have differed materially from conclusions drawn from the authorized experiment performed in the jury room at the behest of the parties and the court. **The State's argument ignores the participation in the out-of-court experiment of a nonjuror, whom the defense could neither confront nor cross-examine**.

Marino v. Vasquez, 812 F.2d 499, 503 (9th Cir. Cal. 1987) (emphasis added). The defense objected to allowing the bailiff to mimic the circumstances of the shooting in an unscientific and prejudicial fashion. (AA 2315). The Court did not make a record of how long the bailiff demonstration in the jury room lasted, whether the bailiff answered any other juror questions, or whether the bailiff made additional comments or descriptions during the demonstration. As in **Marino**, the trial Court's position ignores the participation of a nonjuror whom the defense could neither confront nor cross-examine during the demonstration. As in **Marino**, the fact that the

Court permitted a courtroom re-enactment of the demonstration does not ameliorate the prejudice from the initial demonstration outside the presence of defense counsel.

"A fair and impartial jury is a cornerstone of the proper administration of justice. 'The requirement that a jury's verdict 'must be based on the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.' When a juror receives evidence from an outside source the defendant is denied the right to confront and cross-examine his accusers about that extrinsic evidence." **State v. Glover**, 159 Ariz. 291, 293 (1988), *quoting* **Turner v. Louisiana**, 379 U.S. 466, 472 (1965). The Sixth and Fourteenth Amendment guarantee the right to counsel and to confront and cross-examine the witnesses against the accused, a right the Court denied Terrence by refusing the mistrial motion.

This Court analyzes the following factors in evaluating juror misconduct: (1) how the material was introduced to the jury: here, an officer of the court conducted an unauthorized demonstration outside the presence of counsel during deliberations; (2) the length of time it was discussed by the jury and the timing of its introduction: here, the demonstration was conducted on October 11, sometime before 3:08 p.m. (AA 2309), and jurors had commenced deliberations the previous day (AA 2309). Significantly, jurors returned verdicts only an hour after the demonstration in the courtroom at 4:14 p.m. (AA 2319).

"Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). In addition, a court must consider the extrinsic influence in light of the trial as a whole and the weight of the evidence." **Meyer**, 119 Nev. at 566. In Terrence's case, the information was specific, not cumulative to any evidence adduced at trial, and involved the material issue of how long it would have taken for Jamar to fire successive shots. While the demonstration might have been admissible through Krylo with an adequate record having been made of Jamar's physical characteristics and Krylo's training and experience with this gun, this evidence would *never be admitted* without the constitutional right of confrontation and cross-examination.

"Jurors are prohibited from conducting an independent investigation and informing other jurors of the results of that investigation." **Meyer**, 119 Nev. at 572. This Court must recognize the inherent violation of Terrence's constitutional rights of confrontation and cross-examination:

> It is a fundamental rule that all evidence shall be taken in open court and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any

> evidence brought against him. It is this fundamental rule which is to govern the use of ... exhibits by the jury. They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. **They may carry out experiments within the lines of offered evidence, but if their experiments shall invade new fields and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the** jury **has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet,** answer, **or explain**."

Higgins v. L.A. Gas & Electric Co., 159 Cal. 651, 656-57, 115 P. 313 (1911) (emphasis added). The State engaged in a lengthy recitation of the shooting during Closing and Rebuttal, and placed great emphasis on Jamar's and Terrence's state of mind during the multiple shots:

> He's just been shot at . . . . Terrence Bowser is going to speed up his car to match his speed. . . . Terrence Bowser is making an effort to make sure that he's lined up with that car . . . Shoots in the car. This time hits him . . .
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> This isn't happening in silence. Jamar Green and Terrence Bowser aren't sitting not saying anything. They're talking to each other . . . So Terrence Bowser is getting the car up close, and they are talking get me up closer. Here we go. (AA 2270-71).
>
> The third shot – now he's been shot a second time . . . (AA 2272).
>
> . . . He has the ability to do all this driving and not crash, and he's pulling up and John McCoy is most likely trying to get away. (AA 2275-76).

Because the State used the timing of the shots to depict Terrence as a cold, calculated killer, the gun demonstration was particularly prejudicial. Where jurors supplement the evidence in an area not covered by any trial testimony, this Court cannot overlook the prejudice to the defense. In **Russell v. State**, this Court reversed a conviction in part because the State had failed to present evidence of the travel time between Reno and Carson City. This Court rejected the State's argument that the information was "common knowledge" and found prejudicial juror misconduct: "Appellant's case was therefore significantly harmed by his inability to cross-examine the juror, during the trial, concerning the many variables which may have affected his driving time." **Russell v. State**, 99 Nev. 265, 267 (1983). Similarly, this Court should find reversible error in the unscientific and prejudicial reenactment of a shooting in a capital murder case without affording the defense the right of confrontation.

When the presence of the defendant may benefit his case, his absence results in the denial of due process. The Court's ruling denied Terrence the opportunity to rebut the demonstrative evidence presented by the bailiff. Terrence admitted to being in the car, and admitted to being guilty of second-degree murder. Where the only contested matter was whether the State had proven first-degree murder with use of a deadly weapon, the evidence requested by the jury and

presented by the bailiff was of great significance to the defense. Had the State's firearms expert Krylo presented the evidence on the stand, Terrence's counsel would have been able to have him demonstrate different attributes of the gun; counsel could have highlighted the differences between the demonstration and the actual circumstances of the shooting, and could have noted the differences between Krylo's and Jamar's size and build. Had counsel been present at the demonstration, counsel could have disputed the results of the demonstration because they did not accurately depict Jamar's actions, and counsel could have addressed the demonstration in Closing and urged jurors to reject the evidence. Terrence's absence prejudiced his defense, and this Court must deem this error harmful and prejudicial and reverse these convictions.

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

The Double Jeopardy Clause of the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This protection applies to the states through the Fourteenth Amendment and **Benton v. Maryland**, 395 U.S. 784, 794 (1969) *rev'd on other grounds,* **Payne v. Tennessee**, 501 U.S. 808 (1991). Nevada incorporated this protection into the Nevada Constitution at Article 1, Section 8. **State v. Combs**, 116 Nev. 1178, 1179, 14 P.3d 520 (2000).

The Court improperly denied the defense motion seeking dismissal of counts Five and Six of the indictment. (AA 444) The State contended that the crime of discharging a firearm from a vehicle differed from the crime of discharging a firearm into a vehicle because the latter requires proof of an additional element. (AA 587-589). Based on this logic, every time a person fires a gun at an occupied car or structure of any kind, he is guilty of two felonies arising from a single act. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." **Larson v. State**, 102 Nev. 448, 449, 725 P.2d 1214 (1986), *quoting* **Brown v. Ohio**, 432 U.S. 161, 169 (1977). Prosecutors have done exactly that here: divided one act into two separate crimes.

To determine whether the State subjected Terrence to double jeopardy, this Court must analyze whether the same act or transaction constitutes a violation of two distinct statutory provisions.[6] This Court must determine whether Terrence committed one or two offenses

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6 NRS 202.285 provides: " 1. A person who willfully and maliciously discharges a firearm at or into any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, aircraft, vehicle, vehicle trailer, semitrailer or house trailer, railroad locomotive, car or tender: (a) If it has been abandoned, is guilty of a misdemeanor unless a greater penalty is provided in NRS 202.287. (b) If it is occupied, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less

through determining whether each provision requires proof of a fact which the other does not. **Barton v. State**, 117 Nev. 686, 692, 30 P.3d 1103 (2001). The State contends that the act of firing a gun from a vehicle while also firing it *into a vehicle* comprises two separate factual analyses. According to the State, a person who discharges a weapon at an occupied vehicle will always be guilty of not one, but two crimes, arising from only one act.

As noted above, the Double Jeopardy Clause prohibits the State from multiplying one crime into many by artificially dividing a continuing action into a series of discrete units. **Larson v. State**, 102 Nev. at 449. In **Salazar v. State**, 119 Nev. 224, 70 P.3d 749 (2003), the jury convicted of both battery with use of a deadly weapon with substantial bodily harm and mayhem with use of a deadly weapon. In overturning the conviction for battery with a deadly weapon with substantial bodily harm, this Court noted:

> The Double Jeopardy Clause of the United States Constitution protects defendants from multiple punishments for the same offense. This court utilizes the test set forth in **Blockburger v. United States**, to determine whether multiple convictions for the same act or transaction are permissible. "Under this test, 'if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offense.'" (Citations omitted).

Salazar, 119 Nev. at 227. The Court also recognized that although **Blockburger v. U.S.**, 284 U.S. 299 (1932), may permit multiple charges based upon a single incident, this Court will reverse redundant convictions:

> . . . while the State may bring multiple charges based upon a single incident, we will reverse "'redundant convictions that do not comport with legislative intent.'" When considering whether convictions are redundant, in State of Nevada v. District Court, this court stated: The issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions. . . The question is whether the material or significant part of each charges is the same even if the offenses are not the same. **Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.** (Citations omitted).

Id. at 227-28. Here, the gravamen of the crime under NRS 202.287 is that Jamar fired from a vehicle; the gravamen of the crime under NRS 202.285 is that Jamar fired into another vehicle. (*Id.*). As in **Salazar**, this Court should deem these convictions redundant because they punish a

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than 1 year and a maximum term of not more than 6 years, or by a fine of not more than $5,000, or by both fine and imprisonment. **NRS 202.287** provides: " **1.** A person who is in, on or under a structure or vehicle and who maliciously or wantonly discharges or maliciously or wantonly causes to be discharged a firearm within or from the structure or vehicle: **(a)** If the structure or vehicle is not within an area designated by city or county ordinance as a populated area for the purpose of prohibiting the discharge of weapons, is guilty of a misdemeanor. **(b)** If the structure or vehicle is within an area designated by city or county ordinance as a populated area for the purpose of prohibiting the discharge of weapons, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, or by a fine of not more than $5,000, or by both fine and imprisonment.

single act: " . . .Both arise from and punish the same illegal act-cutting Clark with a box cutter. 'The Legislature never intended to permit the State to proliferate charges as to one course of conduct by adorning it with chameleonic attire.'" **Salazar** at 228 (citations omitted). In **Wilson v. State**, this Court held the Nevada Legislature did not intend to separately punish multiple acts that occur close in time and make up one course of conduct: "We have declared convictions redundant when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather then multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment." **Wilson v. State**, 114 P.3d 285, 292-93 (Nev. 2005). The shooter in this case committed one interrupted series of actions as part of a single criminal episode, and the State proliferated charges in a fashion prohibited by this Court.

Criminal statutes must be "strictly construed and resolved in favor of the defendant." **Ebeling v. State**, 91 P.3d 599, 601 (2004). These convictions violate Terrence's protections from double jeopardy by punishing him multiple times for one act, even where the offenses are not the same. **Salazar**, 70 P.3d at 751. Further, as noted by the defense in the reply brief filed with the District Court, the legislative history of NRS 202.287 indicates that legislators contemplated a specific purpose in enacting this statute: reducing the number of gang-related drive-by shootings. (AA 596).[7] The legislature did not contemplate that the single act of shooting from a vehicle into a vehicle could result in two separate charges, and the lack of evidence of any gang-related motives renders the State's position unfounded. This Court should reverse Counts Five and Six and uphold Terrence's protections from double jeopardy and redundant convictions.

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 Court rejected proposed defense jury instruction "A," advising jurors that they must convict of second-degree murder if "any" juror had a reasonable doubt about whether Terrence committed first-degree murder. (AA 825). Instead, the Court provided Instruction 17, which advised that jurors could convict of second-degree only if "some" of them had reasonable doubts about first-degree murder. (AA 845; 2193; 2195). This court evaluates appellate claims concerning jury instructions under a harmless error standard of review. **Barnier v. State**, 67 P.3d 320, 322 (Nev. 2003). Because Instruction 17 misstated the jury's legal obligations to

7 Minutes of the Assembly Comm. on the Judiciary, 1989 Session (Nev., June 12, 1989); Minutes of the Assembly Comm. on the Judiciary, 2003 Session (Nev., April 30, 2003).

return a second degree verdict if *any* juror had a reasonable doubt about whether first-degree was committed, this Court should find error in this instruction's implicit minimizing of the State's burden of proof. Jury instructions relieving the government of the burden of proof violate a defendant's due process rights. **Francis v. Franklin**, 471 U.S. 307 (1985); **Sandstrom v. Montana**, 442 U.S. 510 (1979). To the extent Instruction 17 suggested that jurors had discretion to consider a first degree verdict in the absence of proof beyond a reasonable doubt, the instruction violated appellant's due process rights. **Brackeen v. State**, 104 Nev. 547, 552 (1988) (the State must prove each element beyond a reasonable doubt); **Apprendi v. New Jersey**, 530 U.S. 466 (2000). "The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **Carl v. State,** 100 Nev. 164, 165 (1984).

The defense also objected to Instruction 15 regarding the deduction of intent to kill as cumulative in light of Instructions 11, 12, 13, and 17, and as prejudicial because the instruction repeatedly highlighted the State's theory of the case. (AA 2189-91). The State cited **Moser v. State** as authority for the instruction. (AA 2191). The Court overruled the defense objection. (AA 2193). Jury Instruction 15 tracks this Court's language in **Moser** that "the intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of the use, and the attendant circumstances characterizing the act." **Moser v. State**, 91 Nev. 809, 812 (1975). This Court should reject this language for the reasons offered by the defense at trial. The Court provided instructions on the definition of malice, the distinction between express and implied malice, the elements of first-degree murder, and the differences between first and second-degree murder, making this instruction cumulative and unnecessary. (AA 839-845).

Further, Instruction 15 improperly instructs jurors that "a weapon calculated to produce death" *was actually used* in the crime, undermining the State's burden of proof that a deadly weapon was used by Terrence. This language also undermines the State's burden of proving the elements of premeditation, deliberation, and willfulness, because this instruction advises jurors that Terrence engaged in calculations to cause a death. (AA 843). This Court has noted that "[t]he rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence." **Haywood v. State**, 107 Nev. 285, 288 (1991). In **Moser**, this Court cited the origins of Instruction 15's language in the 1932

case, **State v. Hall**, 13 P.2d 624, 632 (Nev. 1932).[8] However, the arcane and outdated language of this instruction (originally including an entitlement of "presumption" that death was the intended result of violent assault) cannot be reconciled with current underpinnings of constitutional law in Nevada. Further, the instruction in **Hall** mentioned whether the weapon was used *"in a manner"* calculated to produce death, whereas Instruction 15 simply suggested that the weapon had been used in this fashion. (AA 843). This language was especially prejudicial because Instruction 14 advised jurors that "a cold, *calculated* judgment and decision" amounted to a "truly deliberate and premeditated" killing. (AA 842) (emphasis added). Thus, Instruction 15 undermined the presumption of innocence by informing jurors that Terrence *had used* a deadly weapon and that *he had calculated* to produce death by choosing this weapon, improperly steering jurors to a first-degree verdict.

Further, Jury Instruction 21 advised jurors only that "use" of a deadly weapon requires conduct producing a fear or harm, or a display of the weapon. (AA 849). The Instruction failed to advise jurors that to find that Terrence "used" the weapon, then jurors must find that Terrence, as an unarmed offender, had actual knowledge of Jamar's use of the gun: "the State must not only prove that Brooks is liable as a principal for the robbery and that another principal to the robbery was armed with and used a deadly weapon in the commission of the robbery, the State must also prove that Brooks had knowledge of the use of the deadly weapon." **Brooks v. State**, 180 P.3d 657, 662 (Nev. 2008). Finally, Jury Instructions 13 and 14 improperly emphasized the "instantaneous" nature of premeditation, undermining the deliberation requirement and implicitly directing jurors toward a First-Degree verdict. (AA 841-2). Although ultimately upholding similar instructions, the Arizona Supreme Court recognized that language emphasizing the "instantaneous" formation of premeditation can mislead jurors. **State v. Guerra**, 161 Ariz. 289, 294 (1989). The Court subsequently noted that this language also blurs the line between first and second degree murder:

> We conclude, as did the court of appeals, that if the only difference between first and second degree murder is the mere passage of time, and that length of time can be "as instantaneous as successive thoughts of the mind," then there is no meaningful distinction between first and second degree murder. Such an interpretation would relieve the state of its burden to prove actual reflection and would render the first degree murder statute impermissibly vague and therefore unconstitutional under the United States and Arizona Constitutions.

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8 This Court would now reject much of the language in the **Hall** instruction: "A person of sound mind and discretion may be presumed to intend all the natural, probable and usual consequences of his act; and when one person assaults another violently, with a deadly weapon, in a manner reasonably calculated to produce death, and the life of the party assaulted is actually destroyed in consequence of such assault, the jury are entitled to presume that death was intended, unless from a consideration of all the evidence, the jury entertain a reasonable doubt whether such intention did exist." **State v. Hall**, 13 P.2d 624, 632 (Nev. 1932).

State v. Thompson, 204 Ariz. 471, 478 (2003). These instructions fail to meaningfully distinguish between first and second degree murder where this Court's approved definition of "premeditation" permits a successive, instantaneous thought—no matter how fleeting—to constitute sufficient evidence for a first degree verdict. To the extent this Court deems these arguments unpreserved, this Court may address constitutional error sua sponte. **Koerner v. Grigas**, 328 F.3d 1039, 1047 (9th Cir. 2003).

When an erroneous instruction infects the entire trial, the resulting conviction violates due process. **Estelle v. McGuire**, 502 U.S. 62, 72 (1991). The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. **In re Winship**, 397 U.S. 358, 364 (1970). Because these jury instructions improperly favored the State and minimized the burden of proof, this Court must 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

In a criminal case, either side may bring a challenge for cause where facts suggest a juror may be unable to fairly adjudicate the case. **NRS 175.036.** Terrence had the right to a jury free from prejudice and bias. If a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath, then the Court must grant the challenge for cause. **Leonard v. State,** 117 Nev. 53, 17 P.3d 397, 405 (2001). Courts should excuse jurors whose beliefs diminish a defendant's chance for a fair trial. **Thompson v. State,** 111 Nev. 439, 440 (1995).

Prospective juror Jiran indicated several times that he believed in "an eye for an eye." (AA 1552). He felt that first degree murder should result in the death penalty (AA 1552), and he believed the death penalty would protect the community from killers. (AA 1551). The defense challenged for cause. (AA 1552). The Court denied the challenge. (AA 1558). The defense ultimately had to use a peremptory challenge to remove this juror. (AA 1575).

In addition, venire member Balalio indicated on her questionnaire that she felt a murderer "should go to death" or receive the death penalty. (AA 1207). When asked by defense counsel if she could be fair in light of her worries about the financial impact of the trial on her family, she answered, "Probably not," because she would be distracted by her situation at home. (AA 1211). The defense challenged for cause but the Court denied the challenge. (AA 1211, 1217).

Ultimately, the defense had to use another peremptory challenge to remove Balalio. (AA 1722). The defense exhausted all peremptory challenges. (AA 1776).

Terrence had a substantial and legitimate expectation that he would be tried by a jury selected in accordance with Nevada law and the United States Constitution, including those provisions guaranteeing appropriate disposition of challenges for cause. Terrence had the right to reserve and exercise peremptory challenges only in those situations where a challenge for cause would not properly lie. Terrence had to excuse Jiran and Balalio through peremptory challenges. This situation deprived Terrence of due process of law under the Fifth and Fourteenth Amendments. **Aki-Khuam v. Davis**, 339 F.3d 521, 529 (7th Cir. 2003).

In **United States v. Gonzalez**, 214 F.3d 1109 (9th Cir. 2000), the Ninth Circuit Court of Appeals reversed Gonzalez's conviction and remanded the case for a new trial based upon the trial court's erroneous denial of defendant's challenge for cause to a prospective juror. When repeatedly asked if she could lay aside her own traumatic experiences and serve as a fair and impartial juror, the panelist's answer each time was, "I'll try." The appellate court's reversal was based upon two factors: (1) the similarity between the juror's traumatic familial situation and defendant's alleged conduct; and (2) the persistently equivocal nature of the juror's answer of "I'll try" regarding her ability to serve fairly and impartially as a juror. The Ninth Circuit wrote:

> Despite the government's best efforts to characterize the response "I'll try" as unequivocal, we cannot agree, particularly in light of the district court's own characterization of her responses as uncertain. If a parent asks a teenager whether he will be back before curfew, that parent is highly unlikely to find "I'll try" an adequate, satisfactory, or unequivocal response. Moreover, Camacho never deviated from that initial uncertain response despite the district court's repeated questioning.

214 F.3d at 1113 fn. 5. Similarly, applying the "home by curfew" standard to the case at bar, Balalio's response of "probably not" is just as unlikely to be deemed an adequate, satisfactory or unequivocal response, particularly when coupled with her views on the death penalty. The Court forced Terrence to use peremptory challenges to excuse these potential jurors and this constitutional violation requires reversal and remand of this case.

The Court Improperly Restricted Defense Voir Dire

Defense counsel sought to ask venire member Ms. Andrade about whether she could assert her individual opinion regarding whether the State has proven the aggravating factor and whether mitigating factors outweighed the aggravator. (AA 1272). Defense counsel explained that she wanted to make sure the juror could exercise independent judgment. However, the

Court precluded this question and upheld the State's objection that the question improperly addressed penalty phase jury instructions. (AA 1272-73). Defense counsel noted that under **Mills v. Maryland**, 486 U.S. 367 (1988), states cannot impose a requirement that a jury find a potential mitigating factor unanimously before that factor may be considered in a capital sentencing decision, and that the question was of great significance in a capital case. (AA 1278).

The Court erred in restricting voir dire in this fashion. Nevada law permits each party to question prospective jurors as necessary: "The court shall conduct the initial examination of prospective jurors, and defendant or his attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. **Any supplemental examination must not be unreasonably restricted**" (emphasis added). **NRS 175.031.** This particular issue went to the heart of the defense case: that each juror must consider the mitigating factors independently, and that not all murder cases warrant the death penalty.

"The purpose of voir dire is to ascertain the existence of grounds for a challenge for cause and to enable litigants to obtain enough information to make an intelligent decision whether to exercise a peremptory challenge." **State v. Williams,** 123 Ore. App. 546, 547, 860 P.2d 860 (1993). This Court recognizes the importance of voir dire to the trial process; although noting that trial courts have discretion to determine the scope and method of voir dire, this Court reversed a conviction when the trial judge arbitrarily decided to place a time limit of thirty minutes on the amount of voir dire permitted. This Court deemed the time limit unreasonable, prejudicial to the defendant, and an abuse of the trial court's discretion. **Salazar v. State**, 107 Nev. 982, 823 P.2d 273, 274 (1991). By limiting Terrence's ability to conduct appropriate and relevant inquiry into jurors' abilities to independently and individually evaluate the evidence, the trial judge abused his discretion and violated Terrence's due process and fair trial rights and his right to effective assistance of counsel.

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.

This Court must reverse a conviction when the state fails to present evidence to prove an element of the offense beyond a reasonable doubt. **In re Winship**, 397 U.S. 358 (1970); **Martinez v. State**, 114 Nev. 746, 961 P.2d 752 (1998). This Court has jurisdiction to determine whether the State presented evidence sufficient to sustain the conviction. **State v. Van Winkle,** 6 Nev. 340, 350 (1871). "The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." **Carl v. State,** 100 Nev. 164, 165, 678 P.2d 669 (1984); **Oriegel-Candido v. State,** 114 Nev. 378, 382, 956 P.2d 1378 (1998). Here, the State failed to produce evidence sufficient to convict Terrence of the crimes charged.

The defense acknowledged that this was a matter of second-degree murder. (AA 1881). Det. Wilson admitted that Terrence eventually told him that the plan was to "shoot a car." (AA 2152). This brief admission is not sufficient to prove the existence of a conspiracy to commit murder. In fact, Terrence had no intention of committing a murder. Terrence did not normally carry a gun. Only Jamar carried a gun that night. (AA 288). Although Terrence brought shotgun shells to share with Jamar, the box remained unopened. (AA 291). Terrence's prints were found on the unopened box of shells. (AA 2109).The two discussed only what it would feel like to shoot at a car, not what it would feel like to shoot a person. (AA 2152).

When Terrence pulled up next to John's car, Terrence had no knowledge of the exact moment at which Jamar fired his shotgun. (AA 299). Terrence was focused on driving and didn't see where Jamar was aiming, but believed Jamar meant only to shoot at the car next to them. (AA 300-01). Jamar didn't tell Terrence when he intended to fire at John's car. Jamar didn't say anything to Terrence prior to shooting. Jamar picked up the gun and fired. (AA 333). Gunshot residue tests were positive for Jamar, and negative for Terrence. (AA 2135).

The evidence reveals that Terrence went on a drunken joyride with his friend after talking only about shooting up a car, and that Terrence had no prior knowledge and no control of Jamar's actions when the shooting occurred. The State failed to prove any conspiracy to commit murder, and the State failed to prove that Terrence committed first-degree murder. Where the evidence is not sufficient to justify a rational jury in finding guilt beyond a reasonable doubt, this Court will not uphold a jury's verdict. **Myatt v. State**, 101 Nev. 761, 765 (1985).

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

The defense moved to exclude evidence of gloves and headgear found in Terrence's car on grounds of irrelevance and prejudice. (AA 748). The Court denied the motion. Jurors heard multiple references to the items. The prosecutor referenced the black gloves and headgear in opening statement. (AA 1846). CSA Renhard testified about finding latex gloves, fabric gloves, a bandana, a do-rag, and a ski mask in the Lincoln. (AA 2054). Renhard admitted that she recovered no fabric impressions or latex glove marks on the weapon or the cartridge cases in the car, suggesting that gloves had not been worn when the gun and cartridges were handled. (AA 2058). In fact, the gloves had construction dust residue on them, consistent with the defense

position that they had been used solely for Terrence's job as a construction worker. (AA 2077). Renhard also admitted that it was cold in Las Vegas in late January, supporting the defense position that Terrence used the head coverings and ski mask to stay warm when working on outdoor construction sites. (AA 2067). Officers admitted that Terrence's construction hat and a tool belt were also in the car. (AA 2070). Significantly, when Officer Smith saw Terrence and Jamar driving toward him immediately after the shooting, neither wore masks or covered their faces although they were leaving a crime scene. (AA 1991).

Thus, the Court's admission of these items constituted reversible error. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." **NRS 48.015**. Because the State presented no evidence that these items were used in the crime nor intended to be used in the crime, they were completely irrelevant. In contrast, this Court found testimony about baby booties knitted by the victim relevant because "[t]estimony about the booties served to connect the booties found at Castillo's apartment with the crime scene." **Castillo v. State**, 114 Nev. 271, 277 (1998). Testimony about the gloves and headgear offered no similar connection in the instant case.

Further, even if they were relevant, **NRS 48.035** provides that "[a]though relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." Because similar items are often used in premeditated murders to dispose of bodies or to hide the perpetrators' identities in robberies, the admission of gloves and a ski mask greatly prejudiced Terrence, as did the State's references to the ski mask as a "balaclava," a head covering associated with terrorists. (AA 2054). In fact, the prosecutor used this evidence to argue to jurors in closing that this was a premeditated murder, and that Jamar and Terrence had brought these items to disguise themselves, making their admission particularly prejudicial. (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

The State filed a Notice of Intent to Seek the Death Penalty on May 26, 2005, based on the single aggravating circumstance that the crime was committed at random and without motive under **NRS 200.033 (9).** (AA 168). On August 30, 2005, the State filed a Notice of Evidence in Support of the aggravating circumstance. (AA 233). On May 9, 2006, the defense moved to strike the Notice on the grounds that Terrence did not commit the shooting, and that the Notice failed to comply with NRS 200.033 (9). (AA 348-353). The Court denied the defense motion.

(AA 933). The defense filed a second motion to strike the notice on Eighth Amendment grounds when co-defendant Jamar Green and the State stipulated to a sentence of 34 years to life. (AA 620). Finally, the defense renewed the motion to strike the Notice of Intent to Seek the Death Penalty on the grounds that the State had failed to prove the aggravator of randomness and lack of motive at the close of trial. (AA 2338-39).

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

"A state authorizing capital punishment has a constitutional duty to tailor its law to avoid the arbitrary and capricious infliction of the death penalty." **Godfrey v. Georgia**, 446 U.S. 420, 428 (1980). The State's decision to seek the death penalty against Terrence constitutes an arbitrary and capricious exercise of power. Although the jury did not sentence Terrence to death, Terrence suffered great prejudice as a result of being tried by a death-qualified jury. (*See* Sec. E, *infra*). Terrence was not committing any underlying felony when the shooting took place. Terrence did not own the weapon used, and did not touch the weapon at any time during the incident. Terrence had no control over the timing of the shot; Terrence had no control over where Jamar aimed the weapon; and Terrence had no control over Jamar. Significantly, the State reached a plea agreement under which Jamar received a minimum of thirty-four years to life in prison, six years less than Terrence's ultimate sentence. (AA 607). Yet, the State insisted on seeking death for Terrence, a decision so grossly disproportionate to Terrence's involvement in the crime and so utterly capricious that the trial Court should have granted the defense's repeated motions to strike the death notice. (AA 348, 620, 2338). In fact, prosecutors *never asked jurors to sentence Terrence to death.* Unlike the majority of capital cases, the prosecutors never submitted to jurors that this case *deserved* the ultimate penalty, but instead argued that "all four" options should be considered. (AA 2680-2688; AA 2714-2718). Where even the prosecutors who tried the case failed to ask for the death sentence, this Court must conclude that this District Attorneys' Office acted in an arbitrary and capricious fashion in prosecuting this case as a capital crime.

To satisfy the Eighth Amendment, a capital sentencing scheme "...must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." **Zant v. Stephens**, 462 U.S. 862, 877 (1983). Statutory aggravating factors "must provide a principled basis" for distinguishing "those who deserve capital punishment from those who do not." **Arave v. Creech**, 507 U.S. 463, 474 (1993). The State's application of the single aggravator to these facts violated Terrence's rights against cruel and unusual punishment and his right to substantive

due process. Application of NRS 200.033(9) to this case fails to narrow the application of the death penalty and fails to rationally support increased culpability for Terrence relative to Jamar. Where the State agreed to sentence the shooter to a minimum of thirty-four years in prison, the decision to seek death against the driver cannot withstand constitutional scrutiny.

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

Nev. Const. Art I, Sect. 8, requires that "no person shall be tried for a capital... crime... except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney..." Codifying this, **NRS 172.155** and **171.206** require a probable cause finding by a grand jury or magistrate before an Indictment or Information may issue. The Fifth Amendment to the United States Constitution requires indictment by a grand jury or the filing of an information *before* a person can be tried for a capital offense. Thus, state and federal law require presentment of criminal charges for a probable cause determination before an accused can be held to answer for a criminal offense.

In **Ring v. Arizona**, 122 S. Ct. 2428 (2002), the U.S. Supreme Court declared that aggravating circumstances are "essential elements" of a capital offense. In **Apprendi v. New Jersey**, the United States Supreme Court held that due process requires that any fact, other than a prior conviction, that increases the maximum penalty must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).[9] "Every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to punishment." **Blakely v. Washington**, 542 U.S. 296, 304-305 (2004). The core holding of the **Blakely** and **Apprendi** decisions is that any fact that subjects a defendant to heightened punishment is an element of the offense for which the defendant has been convicted. **Blakely**, 542 U.S. at 306; **Apprendi**, 530 U.S. at 495. Accordingly, the aggravating circumstance alleged against Terrence was an element of the First Degree Murder charge. The prosecution's refusal to charge the aggravator as part of the Indictment does not alter its character as an element of the First Degree Murder charge. As **Ring** made clear, aggravating circumstances are elements of a capital offense. Thus, under **Nev. Const. Art. I, Sect. 8**, and **NRS 171.206**, they must be submitted for a probable cause determination.

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9 The Court has since reaffirmed **Apprendi**, applying it to facts subjecting a defendant to the death penalty, **Ring v. Arizona**, 536 U.S. 584, 602, 609 (2002); facts permitting a sentence in excess of the "standard range" under Washington's Sentencing Reform Act, **Blakely v. Washington**, 542 U.S. 296, 304-305 (2004); facts triggering a sentence range elevation under the then-mandatory Federal Sentencing Guidelines, **United States v. Booker**, 543 U.S. 220, 243-244 (2005); and judge-determined facts exposing a defendant to a sentence in excess of the statutory maximum under California's determinate sentencing scheme, **Cunningham v. California**, 127 S. Ct. 856 (2007).

Interpreting the Indictment Clause of the Fifth Amendment, the federal counterpart to **Nev. Const. Art. I, Sect. 8**, federal courts have uniformly agreed that **Ring** compels submission of aggravating circumstances for probable cause determinations.[10] This Court has construed Nevada's constitutional provisions to mirror their federal counterparts.[11] In particular, Nevada's statutory and constitutional requirements mirror the Fifth Amendment Indictment Clause in two legally significant ways: (1) both require that probable cause be found before an indictment or information may issue; and (2) both have been strictly interpreted by their respective reviewing judiciaries to limit the permissible offenses/theories in an indictment/information.[12] Thus, the post-**Ring** federal cases are dispositive of the instant matter. And those cases uniformly make clear that, under **Ring**, aggravating circumstances must be submitted for a probable cause determination.[13]

The failure to present the aggravator for a probable cause determination violated Terrence's due process rights. As set forth above, **Nev. Const. Art. 1, Sect. 8** and **NRS 171.206** require that all criminal offenses be subject to a probable cause determination by a magistrate [or grand jury]. Pursuant to **Ring**, this includes aggravating circumstances. Thus, Terrence enjoyed a state-created liberty interest in having the elements of his capital charge submitted for probable cause determination. The prosecution's failure to submit the aggravators for such a determination amounted to an arbitrary denial of this liberty interest. The arbitrary denial of Terrence's state-created liberty interest violated his Due Process rights, as secured by federal

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10 See, e.g., **U.S. v. Robinson**, 367 F.3d 278, 284 (5th Cir. 2004) ("Ring's Sixth Amendment holding applies with equal force in the context of a Fifth Amendment Indictment Clause challenge, even though the Supreme court has yet to hold as much in a capital case. As a result, the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so in this case is constitutional error."); **U.S. v. Allen**, 406 F.3d 940 (2005) ("...the Fifth Amendment requires at least one statutory aggravating factor and the mens rea requirement to be found by the grand jury and charged in the indictment."); **U.S. v. Higgs**, 353 F. 3d 281, 298 (4th Cir. 2003) ("...aggravating factors which the government intends to rely upon to render a defendant death-eligible... are the functional equivalent of elements of the capital offenses and must be charged in the indictment..."); **U.S. v. Jackson**, 327 F. 3d 273, 287 (4th Cir. 2003) ("... the existence of at least one aggravating factor must be alleged in the indictment and that aggravating factor must be found by the jury as a required element for exposing the defendant to the death penalty."); **U.S. v. Robinson**, 367 F.3d 281, 199 (5th Cir. 2004); **U.S. v. Quinones**, 313 F.3d 49, 53 n.1 (2nd Cir. 2002); **U.S. v. Pennington**, 2003 U.S. Dist. LEXIS 24478 (D. Ky. 2003) ("If an essential element is not expressly included in the indictment, the grand jury's role of determining probable cause is circumvented as to that omitted element.").

11 See, e.g., **Jennings v. State**, 116 Nev. 488, 490 (2000) (citation omitted) ("The Sixth Amendment and Article I, Section 8, of the Nevada Constitution both guarantee a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense,").

12 Accordingly, like the U.S. Supreme Court in **Stirone** and **Russell**, this Court has held:

> To put a man on trial without giving him, *in the information, a statement of the acts constituting the offense* in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended and to let him know these facts, for the first time when his trial is in progress, is to deprive him of the protection the statute was designed to give him and deny him due process of law in violation of... the Constitution.

Jennings v. State, supra, 116 Nev. at 490 (citing **Alford v. State**, 111 Nev. 1409, 1415 (1995) (internal citations omitted).

13 Although this Court previously held that a probable cause finding is not necessary for the State to allege aggravating circumstances and seek a death sentence, the defense urges reconsideration of **Floyd v. State**, 118 Nev. 156, 166 (2002).

and state constitutional law, as well as Nevada statutory law. **Hicks v. Oklahoma**, 447 U.S. 343 (1980) (the arbitrary denial of a state-created liberty interest violates due process protections).

Further, the failure to present the aggravators to the Grand Jury for a probable cause determination also violated Terrence's Equal Protection rights. The Fourteenth Amendment to the U.S. Constitution (made applicable to the states via the Fifth Amendment) guarantees all criminal defendants equal protection of the law. Accordingly, a State cannot subject some criminal offenses, but not others, to probable cause determinations. All crimes – and all elements thereof -- must be subject to the same probable cause determination. To do otherwise would be to treat one class of defendants differently from another for no apparent reason, in direct contravention of the Equal Protection Clause.

While the Equal Protection Clause permits the states some discretion in enacting laws which affect some groups of citizens differently than others, a statute is unconstitutional if the "classification rests on grounds wholly irrelevant to the achievement of the State's objective." **McGowan v. Maryland**, 366 U.S. 420, 425-26 (1961). The burden is on the State to show some rational reason why those facing the death penalty should be treated differently than other criminal defendants.[14] A classification is permissible only if it is "reasonable, not arbitrary, and rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." **Riley v. Nevada Supreme Court, et. al.**, 763 F. Supp. 446, 454-55 (D. Nev.1991) (*quoting* **Royster Guano Co. V. Virginia**, 253 U.S. 412 (1920)).

There is no reason why capital litigants should not enjoy the same right to a probable cause hearing as other criminal litigants. The government has no rational basis for circumventing the probable cause requirement(s) in death penalty cases. Alleging relevant aggravating circumstances before a grand jury or magistrate would not work any hardship on the government. Nearly all of the aggravating circumstances outlined in **NRS 200.033** emanate from the underlying offense itself. Thus, they are based on information readily available to prosecutors at the onset of the case. Only two aggravators do not relate to the facts of the underlying crime, and those two aggravators[15] pertain to an accused's criminal history, something local prosecutors regularly ascertain prior to a defendant's justice court arraignment.

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14 The "rational basis" standard of review applies inasmuch as death penalty defendants do not currently qualify as a suspect class. **Riley v. Nevada Supreme Court et. al.**, 763 F. Supp. 446, 455 (D. Nev. 1991).

15 **NRS 200.033(1)** and **NRS 200.033(2)**.

Accordingly, presenting aggravators for a probable cause determination would not halt the wheels of justice.

At the same time, the current Nevada procedure does not expedite the adjudication of death cases. Instead, in the absence of a probable cause finding, defendants must file motions to strike aggravating circumstances and/or death notices in District Court, without any statutorily or judicially proscribed standards of review. This process permits the State to seek death against the person who did not wield the weapon, did not touch the weapon, and did not shoot the weapon, while the State simultaneously agreed to allow *the shooter* to serve thirty-four years minimum in prison. This situation violated Terrence's Equal Protection rights.[16]

The constitutional infirmity in failing to submit an offense element – in this case, the aggravator -- for a probable cause determination is not cured by a petit jury's finding(s).[17] **Russell v. U.S.**, 369 U.S. 749 (1962) (reversing convictions based on charging documents exceeded finding of grand jury). This policy is "effectuated by preventing the prosecution from modifying the theory and evidence upon which the indictment is based." **U.S. v. Silverman**, 430 F.2d 106, 110 (2nd Cir. 1970). The failure to obtain probable cause review of the single aggravating circumstance amounted to constitutionally harmful error.

Despite the fact that the jury ultimately gave Terrence the lesser sentence of forty years to life, the bell had been rung. The death qualification jury selection process informed the jury that the instant homicide had been singled out for prosecution as a death penalty case. As outlined below in Section E, death qualification has an insidious effect on the trial process and, ultimately, the trial outcome. Terrence suffered the injustice of having to argue his case to a jury that was more likely to convict of a more severe charge and impose a more severe penalty.

To the extent that this Court finds that the instant death penalty prosecution abrogated Terrence's [state] constitutionally secured right to pre-trial review of the aggravators by a neutral magistrate, this Court must also find that such error is structural and, hence, reversible per se. Again, "...deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error...[as] neither this nor any other court

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16 See **Riley**, supra, 763 F. Supp. at 455 (issuing injunction precluding enforcement of portion of **SCR 250** which mandated shorter appellate briefing schedule for capital litigants than other criminal appellants, given likelihood that such amounts to unjustifiable disparate treatment of capital litigants and, thus, a violation of capital litigants' Equal Protection rights.).

17 **Stirone v. U.S.**, 361 U.S. 212, 315-19 (1960) (interpreting Fifth Amendment indictment clause to require reversal of conviction based on theory not found by grand jury, concluding that "deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error...[as] neither this nor any other court can know that the grand jury would have been willing to charge [the newly-alleged] conduct.").

can know that the grand jury would have been willing to charge [the newly-alleged] conduct." **Stirone v. U.S.**, supra, 361 U.S. at 315-19 (1960) (interpreting Federal Indictment Clause).

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

The evidence revealed that Jamar and Terrence wondered what it would be like to "shoot a car," and that Jamar brought the gun and committed the actual shooting. Only Jamar knows his motive for shooting John's car, and the application of this aggravator to Terrence violated the Eighth and Fourteenth Amendments to the U.S. Constitution where Terrence was not the shooter and was not privy to Jamar's thought processes at the time of the shooting. To defend against this aggravator, Terrence would have had to take the stand and testify regarding what he knew of Jamar's motives for the killing, and regarding his own state of mind at the time of the killing. In the alternative, Terrence would have had to call Jamar as a witness to present direct evidence of Jamar's mental processes. "It is a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt and that the defendant is not obligated to take the stand or produce any evidence whatsoever." **Barron v. State**, 105 Nev. 767, 778 (1989). Because this aggravator requires the defense to present evidence of motive and objective, NRS 200.033(9) violates the Fifth Amendment to the United States Constitution. To the extent this Court deems this argument not specifically preserved, this Court should review for plain error. "[T]his court may address plain error sua sponte." **Patterson v. State,** 111 Nev. 1525, 1530, 907 P.2d 984 (1995) (citations omitted).

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

The defense renewed the motion to strike the Notice of Intent to Seek the Death Penalty on the grounds that the State had failed to prove the aggravator of randomness and lack of motive at the close of trial. The Court denied the motion. (AA 2338-40). The evidence indicated that Jamar and Terrence formulated a motive: to shoot at a vehicle. Although the motive may be deemed reckless and difficult to understand, the fact remains that the shooting itself was not entirely without motive. **Geary v. State**, 112 Nev. 1434, 1446 (1996). Jury Instruction 11 defined "motive" as an emotion that leads one to act. (AA 883). The same instruction defined "random" as "lacking a specific pattern, purpose, or objective." (AA 883). While curiosity regarding what it might be like to shoot at a car may not be an understandable or common motive for firing a weapon, it is, nevertheless, a motive under the law, and the State failed to prove beyond a reasonable doubt that Jamar lacked motive and objective.

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

In **Witherspoon v. Illinois**, 391 U.S. 510 (1968), the defense introduced social science studies supporting the position that death-qualified juries are uncommonly and unconstitutionally predisposed to convict. While the Court rejected the defense position, the Court acknowledged a willingness to revisit the issue at a later date. **Witherspoon**, supra, at 517-18 (emphasis added). In **Lockhart v. McCree**, 476 U.S. 162 (1986), the defense presented substantial research supporting the identical claim advanced in **Weatherspoon**. The Court, however, refused to craft constitutional rules on the grounds that social science studies are inherently speculative. **Lockhart** at 171. In **McClesky v. Kemp**, 481 U.S. 279 (1987), defense attorneys introduced additional studies concluding that the race of all parties involved (the jurors, the defendant, the victim, and even the prosecuting and defending attorneys) has significant impact on every stage of the capital decision-making process, from the initial question of which defendants prosecutors seek to put to death to which defendants ultimately receive death. While the **McClesky** decision acknowledged the improper role of race-based decision-making in the judicial process, the Court again found the data had little application to the individual facts of the case before it. **McCleskey**, supra, at 319. In response, social scientists turned their attention to capital jurors who had served on real capital cases in Florida, California, and Oregon. Professors Bowers, Fleury-Steiner, and Antonio[18] described this initial round of post-**Lockhart**/**McCleskey** field work and found that jurors had great difficulties in following court instructions in decision-making.

The more "extensive investigation of the capital sentencing process" which these early studies justified came in the form of the Capital Jury Project ("CJP"). The CJP was created in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (Grant NSF SES-90913252). Professor William J. Bowers served as the CJP's founder, director, and principal investigator since its inception. Dr. Bowers has written numerous articles and texts on capital punishment and on jury decision-making in capital cases.[19] Professor Bowers described the CJP as a series of in-depth interviews with jurors who

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18 "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).

19 Two of his texts, Executions in America (1974) and Legal Homicide: Death as Punishment in America, 1964-1982 (1984), have been cited with approval in more than half a dozen U.S. Supreme Court decisions, including the Court's landmark decision in **Woodson v. North Carolina**, 428 U.S. 280 (1976) (plurality opinion). Articles he has written, based on the data collected by CJP researchers, have played a substantial role in such Supreme Court decisions as **Simmons v. South Carolina**, 512 U.S. 154 (1994), which decried as unconstitutional a capital juror's decision to sentence a capital defendant to die because the juror harbored false beliefs with respect to whether and/or when a life-sentenced inmate would be eligible for parole.

served in capital trials. The interviews focus on the influences on jurors during the trial process, and the present sample includes 120 jurors from 354 capital trials in 14 states. The results reveal profound discrepancies between what the Constitution requires of capital jurors and how actual jurors sitting on real capital trials throughout the nation actually make their decisions.

Most critical to the instant case are the findings relating to the effect(s) of the capital jury selection process on the determination of guilt or innocence. The studies reveal that the death-qualification process produces the worst possible group of jurors precisely when a criminal defendant should have a right to the most qualified jurors. The studies demonstrate that the process of death selection, itself, negatively impacts the capital trial in several ways. First, a process in which a criminal trial begins by questioning potential jurors extensively about their attitudes towards the penalty results in large numbers of jurors believing both that the defendant must be guilty, and that they are going to be asked to sentence him to death. Whether intended or not, many jurors believe that the subtext of voir dire is that the trial is not about whether the defendant committed the underlying crime, but rather what punishment he should receive. Moreover, many jurors believe that if selected, it is understood that they will find the defendant guilty and that they will sentence him to death because they witnessed the removal of all potential jurors who express opposition to capital punishment.[20]

Second, in addition to biasing a fair number of jurors who actually serve on the capital trial toward both a guilty verdict and a death sentence, death qualifying voir dire results in the least representative jury any criminal defendant ever faces. The recent CJP research establishes that people who support the death penalty generally hold a number of other anti-defense views about the criminal justice system. For example, the results reveal that these jurors believe that if a defendant does not testify, the failure to do so is proof of guilt. Death-qualified jurors tend to give less deference to the presumption of innocence. They distrust defense lawyers and view defense theories with a great deal of skepticism. On the other hand, they are extremely receptive to the prosecution and believe State witnesses are credible. Death-qualified jurors manifest suspicion of defense experts, are generally less representative of the community as a whole, and are least likely to give a criminal defendant the benefit of the doubt. [21]

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20 See, e.g., Haney, "On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process" (1984) 8 Law and Human Behavior 121; Haney "Examining Death Qualification: Further Analysis of the Process Effect" (1984) 8 Law and Human Behavior 133; Haney, Hurtado, Vega, "Modern Death Qualification: New Data on its Biasing Effects" (1994) 18 Law and Human Behavior 619.

21 Cowan, Thompson, Ellsworth, "The Effects of Death Qualification on Jurors' Predisposition To Convict and on the Quality of Deliberation," (1984) 8 Law and Human Behavior 53; Fitzgerald, Ellsworth, "Due Process vs. Crime Control: Death Qualification and Jury Attitudes," (1984) 8 Law and Human Behavior 31.

By having to defend against a capital murder charge, Terrence had to proffer his defense to a jury that was less receptive to the presumption of innocence and less receptive to his second-degree murder claim; less receptive to his decision not to testify; and more likely to convict of the more severe offense. The defense tried to minimize the impact of these prejudices by moving to argue last at the penalty phase (AA 671), and by moving to bifurcate the penalty phase into separate eligibility and selection proceedings. (AA 657). The Court denied both motions, precluding the defense from minimizing the prejudice of death-qualifying voir dire. The studies outlined above demonstrate conclusively that, had the instant matter been properly tried as a non-death penalty case, Terrence's chances of receiving the conviction for which he argued – and which was borne out by the facts – would have increased exponentially. Thus, Terrence is entitled to a new, non-capital First Degree Murder trial.

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.*

During the penalty phase, counsel made a record that the Court had inappropriately opined on and undermined Dr. Paglini's testimony while he was on the stand. (AA 2511). The State had objected that Paglini's testimony was narrative, and that Paglini had referred to some of Terrence's hearsay statements. (AA 2465). The Court did not rule, but said in front of jurors, "All I hear him talking about is what somebody said, but what is the analysis? What is his opinion?" (AA 2465). When counsel answered that Paglini was addressing all of the mitigation factors, including Terrence's remorse, the Court said, "Well, I haven't heard what the opinion is. That's my point. I haven't heard an opinion. I heard him talking about what people said, but I haven't heard any opinions or questions." (AA 2466). The Court reiterated that the prosecutor had "made some good points." (AA 2466). Counsel made a motion for a mistrial based on the Court's improper conduct. (AA 2513). The Court denied the motion. (AA 2513).

"A trial judge must be extremely careful of his actions and utterances due to the profound effect they can have upon the members of the jury." **Hernandez v. State**, 87 Nev. 553, 558, 490 P.2d 1245 (1971), *citing* **Peterson v. Silver Peak**, 37 Nev. 117, 140 P. 519 (1914). During the penalty phase, the trial Court improperly opined that he had yet to hear an opinion from a defense expert witness, and that the prosecutor had made "some good points" regarding the witness's testimony. This conduct prejudiced the jury against a key defense witness, called undue attention to the area of testimony addressed by the judge, and suggested to the jury that

the judge found the testimony lacking in validity. These errors violated Terrence's right to a fair trial under the Sixth Amendment and his rights to due process under the Fifth and Fourteenth Amendments and the Nevada Constitution.

"A trial judge has the right to examine witnesses for the purpose of establishing the truth or clarifying testimony, but in doing so he must not become an advocate for either party, nor conduct himself in such a manner as to give the jury an impression of his feelings." **Azbill v. State**, 88 Nev. 240, 249, 495 P.2d 1064, 1070 (1972), *vacated on other grounds,* **Azbill v. State**, 92 Nev. 664, 556 P.2d 1264 (1976). This Court has warned trial judges about the importance of appearing unbiased before jurors:

> Firmly embedded in our tradition of even-handed justice -- and indeed its very cornerstone -- is the concept that the trial judge must, at all times, be and remain impartial. **So deeply ingrained is this tradition that it is now well settled that the trial judge must not only be totally indifferent as between the parties, but he must also give the appearance of being so.**

Kinna v. State, 84 Nev. 642, 647, 447 P.2d 32 (1968) (emphasis added). Even in cases where substantial evidence of guilt exists, judicial misconduct that so interferes with the right to a fair trial warrants reversal. **Kinna**, 84 Nev. at 647. By opining on the testimony offered by a defense witness, the trial judge suggested to jurors that the testimony was not deserving of their attention and consideration:

> The average juror is a layman; the average layman looks with 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 ofttimes formed upon circumstances meager and insignificant in their 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 the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.**

Peterson v. Pittsburg Silver Peak Gold Mining Co., 37 Nev. 117, 121-22, 140 P. 519 (1914) (emphasis added). Where prejudice occurred that prevented Terrence from receiving a fair trial, the Court should have granted a mistrial and ordered a new penalty phase. **Rudin v. State**, 120 Nev. 121, 86 P.3d 572, 587 (2004).

B. The State Committed Misconduct during the Penalty Phase

The State in the penalty phase Closing Argument improperly minimized the State's burden of proof by arguing, "Aggravating, to make worse or more severe." (AA 2680). The Court sustained the objection to this dictionary definition of a legal term already defined within the jury instructions. By arguing that jurors simply needed to find that the aggravating factor "made things worse or more severe," the prosecutor shirked the State's burden of proof beyond a reasonable doubt. This Court requires that jurors follow the guidance of **NRS 175.211**. This

Court has repeatedly cautioned the prosecutors of this state to refrain from explaining, elaborating, or offering analogies beyond the statutory definition. **Evans v. State**, 117 Nev. 609, 631, 28 P.3d 498, 514 (2001). When jurors in deliberations make improper references to dictionary definitions, they create reversible error which the State must prove harmless beyond a reasonable doubt. **U.S. v. Kupau**, 781 F.2d 470, 744 (9th Cir.), cert. denied, 479 U.S. 823, 107 S. Ct. 93, 93 L. Ed. 2d 45 (1986). Similarly, this Court should not permit the State to undermine statutory definitions by offering definitions inconsistent with the State's burden of proof.

The prosecutor also told jurors in closing that the killing occurred as a result of "curiosity," which the prosecutor claimed is not an emotion that leads one to act: "Curiosity, that's not an emotion. That's not like fear, anger, hate." (AA 2683). The Court overruled the defense objection to this arguing of facts not in evidence and injection of personal opinion. The prosecutor resumed this improper argument after the Court's ruling: "It has to be an emotion that's easily understood, obvious, easily apparent. This isn't an apparent motive and it's not apparent in this case." (AA 2683).

It is up to jurors, and not prosecutors, to decide whether the State has proven the aggravating factor beyond a reasonable doubt, and the prosecutor's characterization of "curiosity" as something less than an "emotion that leads one to act" was not based on evidence presented in the case and is not supported by the law of Nevada. A prosecutor may not make statements unsupported by the evidence adduced at trial, and by opining that curiosity cannot be deemed an "emotion," the prosecutor improperly undermined the State's burden of proof and injected personal opinions into the trial. **Guy v. State**, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992).

Finally, the State argued in Rebuttal, "Random thrill kills. A random thrill kill." (AA 2718). The Court sustained the defense objection. (AA 2718). The defense moved for a mistrial and a new penalty hearing on the grounds that the State had improperly tried to use a dictionary definition, to which the Court had sustained the defense objection (AA 2719), and based on the inflammatory and prejudicial use of the phrase "thrill kill." (AA 2720). The Court denied the motion. (AA 2722). The prosecutor described Terrence as a "thrill killer" solely to portray him as a predator and to inflame jurors. "It is prosecutorial misconduct to disparage the defendant himself." **State v. Griese**, 565 N.W.2d 419, 427 (Minn. 1997). Statements designed to belittle a defendant constitute misconduct. **State v. Duncan**, 608 N.W.2d 551, 556 (Minn. Ct. App. 2000). This Court has noted, "[d]isparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct." **McGuire v. State**, 100 Nev. 153, 157-158, 677 P.2d 1060

(1984). The evidence did not support these inflammatory and prejudicial comments, and the Court erred in refusing a mistrial on these grounds.

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

The defense moved to bar cumulative victim impact evidence. (AA 729). The defense also objected to Kimberly Graham's testimony referencing Terrence's culpability, citing **Payne v Tennessee**. (AA 2392). Although the Court granted the motion to exclude references to Terrence's guilt from the written exhibit, jurors had still heard Graham's testimony: "So many things have changed because of this horrible night that Terrence Bowser and Jamar Green had nothing to do – had nothing to do than act out a joke. Our lives will never the same, and our sadness and hurt will never be gone." (AA 2391). This Court has acknowledged the inflammatory nature of this type of evidence and noted that while the law permits testimony regarding the impact of the victim's death, characterizations of the crime are impermissible. **Kaczmarek v. State**, 120 Nev. 314, 338 (2004). In addition, Dawn McCoy testified that her daughter "wants to know who is going to walk her down the aisle when she gets married." (AA 2408). This Court has noted the inappropriateness of this type of testimony:

> This court has repeatedly held that so-called "holiday" arguments are inappropriate, although they rarely warrant reversal by themselves. Such remarks "have no purpose other than to arouse the jurors' emotions." Williams v. State, 103 Nev. at 109, 734 P.2d at 702. "Holiday" arguments are generally made to arouse jurors' passions by referring to the victim and a holiday--such as the victim will never celebrate Christmas again with his children.

Quillen v. State, 112 Nev. 1369, 1382 (1996). References to John's daughter's wedding constitutes precisely the same type of inflammatory and emotional evidence.

D. The Court Erred in Admitting Irrelevant and Prejudicial Evidence

The defense moved to exclude all juvenile records on the grounds that the State had not proven the convictions by clear and convincing evidence. (AA 2344). The Court partially sustained the objection but admitted evidence of Terrence's juvenile charges for grand larceny, possession of a stolen vehicle, and possession of a controlled substance. (AA 2376-2377). Terrence was fourteen, fifteen, and sixteen when he faced these charges. (AA 2377, 2380). The admission of these records was inflammatory and prejudicial, and this Court should reject the use of all juvenile records in capital sentencing cases for the same reasons the United States Supreme Court relied upon in **Roper v. Simmons**: "First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of

maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" **Roper v. Simmons**, 543 U.S. 551, 569 (U.S. 2005). The Court reasoned that, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." **Roper**, 543 U.S. at 573. The same logic applies to the admission of juvenile records at capital sentencings, where adult defendants are penalized by the State's use of the ill-considered and impetuous actions of children. Alternatively, other Courts narrow the scope of admissible juvenile records by their temporal proximity to the crime charged and by their relevance:

> However, criminal conduct by the defendant while he was a juvenile may be relevant to the character and moral quality issues in a capital sentencing hearing if the time of the conduct is not too remote from the first degree murder *and if the nature of the conduct bears significantly on the accused's propensity to commit serious crimes.*

State v. Jackson, 608 So. 2d 949, 956 (La. 1992) (emphasis added). Here, the minor offenses Terrence faced as a juvenile contained no violent conduct and had no relevance to the murder charge.[22] To the extent this Court deems this argument unpreserved, this Court should review for plain error. **Rowland**, 118 Nev. at 38.

The defense also objected to the State's presentation of evidence during the penalty rebuttal phase that Jamar Green had no juvenile criminal history. (AA 2649). The State claimed the information was relevant to explain Jamar Green's 34-year minimum sentence. (AA 2650). In fact, whether Jamar had a juvenile history was entirely irrelevant to Terrence's punishment, and the State's sole purpose was to inflame jurors against Terrence by contrasting his juvenile history with Jamar's lack of juvenile history.

Finally, the defense moved to exclude some of John's family photos as cumulative. (AA 2351). The Court granted the motion in part, but the defense maintained the objection to Exhibit 100 on grounds of prejudice and inflammation. (AA 2354; AA 2869). The law requires that not only must photographs be relevant, but that a proper foundation must be laid for their admission. Nev. Rev. Stat. 48.015; Nev. Rev. Stat. 52.015; *see also*, **Ricci v. State**, 91 Nev. 373 (1975). Exhibit 100 (AA 2869) depicts John watching his daughter's dance recital and was

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22 Although this Court recently rejected the defense's position on this issue, this Court partially relied on the fact that the selection phase had been bifurcated from the eligibility phase of a capital sentencing, distinguishing the instant case: "*Because this evidence was admitted only during the selection phase of his hearing, there are no concerns that it may have improperly influenced the jury's weighing of aggravating and mitigating circumstances.* We conclude that the district court did not abuse its discretion in admitting these records, and Johnson's contention in this respect is without merit." **Johnson v. State**, 148 P.3d 767, 774 (Nev. 2006) (emphasis added).

inflammatory and unnecessary because jurors saw numerous other family photos. The State may not use photographs to essentially and primarily inflame and agitate the jury. **Emil v. State**, 105 Nev. 858, 866 (1989); **Sipsas v. State**, 102 Nev. 119, 124 n.6 (1986). The admission of the photograph infected the trial and deprived appellant of his rights to due process and a fundamentally fair hearing. **Spears**, 343 F.3d at 1229; U.S. CONST. AMEND. V; U.S. CONST. AMEND. VI; U.S. CONST. AMEND XIV.

E. The Court Erred in Excluding Relevant Mitigation Evidence

The Court excluded footage of a documentary specifically addressing the history of Terrence's family and their move from the South to Las Vegas. (AA 2588). In **Byford**, this Court recognized that it is unconstitutional to prevent a sentencing jury from considering any mitigating evidence proffered by the defendant. **Byford v. State**, 116 Nev. 215 (2000); **Lockett v. Ohio**, 438 U.S. 586, 602-08 (1978). The evidence merely provided context and background and constituted appropriate mitigation evidence.

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

The Court sentenced Terrence to life in prison with a minimum mandatory sentence of 20 years before parole eligibility on Count II with an equal and consecutive term on the weapon enhancement. (AA 909-911). Article 1, §6 of the Nevada Constitution states: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted, nor shall witnesses be unreasonably detained." *See also* Const. Amend. VIII. The U.S. Supreme Court evaluates punishment by the "evolving standards of decency that mark the progress of a maturing society." **Trop v. Dulles**, 356 U.S. 86, 101 (1958) (plurality opinion). In **Schmidt v. State**, 94 Nev. 665, 668, (1978), this Court stated that a statute is presumed valid.[23] A sentence is unconstitutional "if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends the fundamental notions of human dignity..."[24] *Id.* Condemning a man with a history of emotional and psychological challenges to spend the rest of his natural life in prison for actions committed as a reckless and foolish nineteen-year old shocks the conscience. This Court should strike the sentence imposed as cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and Article I, Section 6 of the Nevada Constitution.

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23 The Legislature retains the power to define crimes and determine punishments, and this Court does not encroach upon that domain lightly. **Sheriff v. Williams**, 96 Nev. 22, 604 P.2d 800 (1980).

24 While a trial judge has wide discretion in imposing a prison term, this Court may disturb the sentence upon a finding that the lower court abused its discretion. **State v. Sala**, 63 Nev. 270, 169 P.2d 524 (1946).

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

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. **Big Pond v. State**, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). In evaluating cumulative error, this Court must consider whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." ***Id***. Even where the State may have presented enough evidence to convict in an otherwise fair trial, where one cannot say without reservation that the verdict would have been the same in the absence of cumulative error, then this Court must grant a new trial. **Witherow v. State**, 104 Nev. 721, 725, 765 P.2d 1153 (1988). Viewed as a whole, these errors warrant reversal of these convictions.

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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By: _____
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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 27th day of February, 2009.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By _____
AUDREY M. CONWAY, #5611
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Appellant's Opening Brief to the attorney of record listed below on this 27th day of February, 2009.

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