IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WASHINGTON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 65998

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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

APPELLANT'S REPLY BRIEF

STATEMENT OF THE CASE

In Answering Brief, State began Facts section with the filing of the Amended Information on 04/07/14 – the first day of trial. Thus, State ignored all facts between 11/06/13 and 04/07/14.

ARGUMENT

I. DOUBLE JEOPARDY PRECLUDES MULTIPLE CONVICTIONS FOR ONE INCIDENT OF DISCHARGING A FIREARM AT OR INTO A STRUCTURE.

A. De novo review.

By failing to address the standard of review, State concedes de novo review is proper. See *Polk v. State*, 233 P.3d 357, 359 (Nev. 2010).

B. Double Jeopardy protections pursuant to U.S. Const. Amend V, Amend XIV, Nev. Const. Art 1, Sec.8(1), and "unit of prosecution" test.

State claims Double Jeopardy protections have nothing to do with this issue, contending this is simply a question of statutory construction.[1] RAB:10-12.

State is incorrect.

The Double Jeopardy Clause under the United States Constitution protects against: "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Jackson v. State*, 128 Nev.Adv.Op. 28, 291 P.3d 1274, 1277 (2012) *citing North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *also see* Nev. Const. Art. 1 Sec. 8. Nevada "embraces a more expansive interpretation of constitutional rights than federal law." *Wilson v. State*, 123 Nev. 587, 595 (2007).

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[1] State cites several inapplicable cases in this section: *Peck v. State*, 116 Nev. 840 (2000)(double jeopardy does not bar retrial after mistrial); *State v. Lomas*, 114 Nev. 313 (1998)(double jeopardy does not prohibit State from proceeding on DUI charges after driver's license revocation); *Gordon v. District Court*, 112 Nev. 216 (1996)(questions whether double jeopardy prohibits criminal charges after State proceeds on civil forfeiture); *Rutledge v. United States*, 517 U.S. 292 (1996)(involved convictions under different statutes).

This case involves a Double Jeopardy violation involving multiple punishments for the same offense – NRS 202.285.

But State argues Double Jeopardy only applies when two different statutes are being reviewed, citing *Jackson*. RAB:11; *Jackson* at 1278.

State misconstrues *Jackson*'s reasoning. The *Jackson* Court only had two different statutes before it to review for Double Jeopardy. Here, Court has one statute involving multiple convictions out of the same acts. Both circumstances – review of one statute or of two - involve Double Jeopardy assessments. *Swafford v. State*, 112 N.M. 3, 8 (1991). In both instances, Court reviews the statute making a statutory construction analysis to determine the legislature's intent.

When the question of a "double jeopardy violation arises from multiple 'prosecutions for *different* crimes, under *different* statutes, arising out of the same criminal episode...,'" Court looks at legislative intent and if none is listed within the statute, uses the <u>*Blockburger* elements test.</u> *Commonwealth. v. Traylor*, 472 Mass. 260, 282 (2015)(emphasis added) *citing Commonwealth v. Donovan,* 395 Mass. 20, 28 (1985); *Jackson* at 1278.

But if two or more offenses are proven *under a single statute* then Court uses the <u>unit of prosecution</u> test. *Commonwealth. v. Traylor*, 472

Mass. 260, 282-83 (2015)(emphasis added); *Cooper v. State*, 430 S.W.3d 426, 428 (Tex.Crim.App. 2014). Under the unit of prosecution test, Court looks to the language and purpose of the criminal statute to determine what unit of prosecution Legislature intended. "Under the rule of lenity, [any ambiguity or] 'the tie must go to the defendant.'" *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing United States v. Santos*, 553 U.S. 507, 514 (2008).

As *Jackson* Court noted:

> "[U]nit of prosecution" cases include *Wilson v. State*, 121 Nev. 345, 356...(2005)(construing NRS 200.710(2) to authorize one conviction for the use of a minor in a sexual performance, not multiple, per-photograph convictions); *Firestone v. State,* 120 Nev. 13, 18...(2004)(NRS 484.219(1), now NRS 484E.010, penalizes the act of leaving the scene of an accident, a single offense not dependent on the number of victims); *Ebeling v. State*, 120 Nev. 401, 404-05...(2004)(NRS 201.220(1) criminalizes the act of exposing oneself and is not a per-witness offense); and *Bedard v. State*, 118 Nev. 410, 414...(2002)(the Legislature has authorized multiple burglary convictions where several separately leased offices are broken into within a single building).

Id. at 2183-84. The *Jackson* Court did not say that the unit of prosecution test did not involve Double Jeopardy concerns.

State's claim that unit of prosecution cases only involve statutory construction and not Double Jeopardy comes from *Firestone v. State*, 120

Nev. 13, (2004), a case decided at a time Nevada's Double Jeopardy jurisprudence was in flux.

But *United State v. Planck*, 493 F.3d 501, 503 (2007) and *Brown v. State*, 535 A.2d 485, 4887-88 (Md.1988) – other cases cited by State – recognize that multiple convictions arising from the same statute and same events may give rise to Double Jeopardy claims. Other states hold the same: *State v. Adel*, 136 Wash.2d 629, 634 (1990); *Girard v. State*, 883 So.2d 717, 719 (Ala. 2003); *People v. Gardner*, 250 P.3d 1262, 1266-67 (Colo.Ct.App. 2010); *Guetzloe v. State*, 980 So.2d 1145 (Dst.Ct.App.Fl 2008); *State v. Hood*, 297 Kan. 388 (2013).

Multiple convictions under the same statute arising out of the same event are only allowed where the Legislature explicitly authorizes cumulative punishments. *Bell v. United States*, 349 U.S. 81, 83 (1955). Under rules of statutory construction, "where a statute is silent or ambiguous on a matter, the rule of lenity applies to mandate that the statute be construed in favor of the accused." *State v. Reese*, 300 Kan. 650, 653 (2014); *Traylor at 286*; *State v. Lucero,* 127 Nev. 92 (2011); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296 (Thomson/West 2012).

C. Use of the firearm is the "unit of prosecution" under NRS 202.285.

State contends the unit of prosecution is determined by the act or conduct prohibited. RAB:12. With little analysis of the words within NRS 202.285, State contends the unit of prosecution for NRS 202.285 is each discharge of a firearm –each bullet. RAB:12-13.

But Legislature did not say each shot of a firearm counted as one violation of the statute.

NRS 202.285(1) makes it a crime if "[a] person...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."

In enacting NRS 202.285, the Legislature did not say each and every shot or bullet was a separate crime. Instead, the Legislature used wording indicating a course of conduct by saying "discharges" and "at or into." The use of the word "discharges" signifies more than one pull of the same firearm and denotes a series of events rather than one – as do the words "at or into any home..." Moreover, Legislature placed NRS 202.285 within the weapons section, recognizing the unit of prosecution was the firearm.

Therefore, Legislature did not authorize multiple punishments for each shot from the same firearm as State suggests.

In *McPhearson v. State*, 933 So.2d 1114 (Ala Ct.App. 2005) - when faced with a similar question regarding the unit of prosecution of discharging a firearm at or into a structure - the Alabama Court of Appeals held the unit of prosecution was the act of discharging the firearm at or into the home and not each shot fired. In doing so, the *McPhearson* Court noted that the crime of discharging a firearm at or into a structure was not a victim specific crime but a course in conduct.

Likewise, here, the act prohibited under NRS 202.285 is the use of the firearm – "discharges a firearm at or into any house…". NRS 202.285 not a victim specific offense.

When looking at another statute that was not a victim specific offense, this court, in *Firestone,* found a defendant could only be convicted of one count of leaving the scene of the accident even though there were three victims by finding the unit of prosecution to be one accident.

But if Court finds the wording of NRS 202.285 ambiguous, Court must construe NRS 202.285 in favor of the defendant.

Finally, State cites *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 453-54 (1989) and *Church of the Holy Trinity v. United States*, 143

U.S. 457 (1892), cases discussing the Congressional intent for a standing committee on federal judgeships, to claim Matthew's interpretation of NRS 202.285 could lead to absurd results.

But State's argument fails because State does not argue that NRS 202.285 is ambiguous and does not providing any legislative history to counter Matthew's analysis.

II. PRINCIPAL OR AIDER AND ABETTER MAY NOT BE HELD LIABLE FOR ACTIONS OF UNNAMED COCONSPIRATOR WHEN STATE PRESENTED NO EVIDENCE THAT AN UNNAMED PERSON EXISTED.

State argues Matthew waived objection to the wording of the Information containing pleadings with disjunctive words and involving an "unnamed co-conspirator" by not objecting prior to trial, citing *Roseneau v. State*, 90 Nev. 161 (1974) and NRS 174.105(1)-(2). RAB 14-17.

To the contrary, *Roseneau* requires Matthew to raise this issue on direct appeal or the issue will be considered waived when/if he files a post-conviction habeas petition. Likewise, NRS 174.105(1)-(2) allows this Court to grant relief based on any and all objections Matthew makes to the Information on direct appeal, even if Matthew did not object before trial, by Court finding "cause" to decide.

Here, State alleged Matthew committed crimes with Moten and an "unnamed coconspirator" in all counts: Ct.1: conspiracy to commit murder; Ct.-2: murder with use of a deadly weapon; Cts. 3-5-6: attempt murder with use of a deadly weapon; Cts.4-7: battery with use of a deadly weapon, and Cts. 8-9-10-11-12-13-14-15-16-17: discharging a firearm. (IV:690-701). All counts, except for Ct. 1, included disjunctive theories of criminal liability: (1) direct participant, and/or (2) aiding and abetting Moten and/or "unnamed coconspirator;" and/or (3) vicariously liable by conspiracy with Moten and an "unnamed coconspirator" or "pursuant to a conspiracy."[2]

Here, Court has "cause" to review the pleading because Matthew cited several cases disapproving of the alternative/disjunctive pleading of criminal liability in his Opening Brief: *Goldberg v. State*, 351 So.2d 332 (Fla. 1977), *Battle v. State,* 365 So.2d 1035 (Fla. 3d DCA 1978); *State v. Giardino*, 363 So.2d 201 (Fla. 3d DCA 1978). The rational against this type of pleading is that it can amount to guilt by association and the wording is too vague.

State conceded error by not addressing cases Matthew cited. *Polk v. State*, 233 P.3d 357, 359 (Nev. 2010).

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[2] Matthew incorrectly listed the second and third theories in his Opening Brief. OB:32.

Instead, State argues NRS 173.075(2) allows for disjunctive pleadings like those in this case, citing *State v. Kirkpatrick*, 94 Nev. 628 (1978), *Holmes v. State*, 114 Nev. 1357 (1998); *Bolden v. State,* 121 Nev. 908 (2005) *citing Phillips v. State*, 121 Nev. 959, 597 (2005) *overruled on other grounds by Cortinas v. State,* 124 Nev. 1013, 1016 (2008). RAB:15-16.

NRS 173.075(1) says that an Information: "must be a plain, concise and definite written statement of the essential facts constituting the offense charge..." NRS 173.075(2) states: "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." Thus, if disjunctive pleadings are not plain, concise, or definite then they run afoul of NRS 173.075. Here, the disjunctive pleadings are deceptive, not plain, not concise, and certainly not definite, allowing jury to return a guilty verdict based on guilt by association.

Cases cited by State - *Kirkpatrick* and *Holmes* - allowed the State to pled alternative/disjunctive statutory criminal theories involving the elements of a crime – robbery or murder. That is not Matthew's objection.

Matthew objected to the alternative/disjunctive criminal liabilities, as listed under NRS 195.020, a problem similar to what occurred in *Bolden* – except there were no "unknown co-conspirators" in *Bolden.*

Specificity and definite language is required when State pleads the criminal liability theory of aiding and abetting. *Ike v. State*, 107 Nev. 916 (1991). It is unclear how any aiding and abetting theory may pass due process muster when an "unknown coconspirator" is pled and State does not specifically state what actions Matthew did to aid the "unknown coconspirator." Id. at 919-20. The reason for this is not just notice but also to ensure that a defendant is not convicted based on mere presence at the scene of the crime no matter how reprehensible the defendant's conduct is after the crime. *Id. citing Skinner v. Sheriff*, 93 Nev. 340 (1977).

Furthermore, when State pleads conspiracy liability with the defendant conspiring with an "unknown" person, State must present some evidence at trial that an "unknown" person actually existed. *O'Conner v. State,* 590 So.2d 1018, 1021 (Fla. App. 5 Dist. 1991); *People of Illinois v. Harmison*, 124 Ill. App. 3rd 236 (1984).

But State claims it does not. RAB:15-16. State believes it can always plead a conspiracy theory with an "unknown person" and never needs to present any evidence of such. State indirectly admits it presented no evidence of an "unknown person" at trial by only discussing a portion of the preliminary hearing to suggest there may have been an "unknown" person. RAB:15-16. State further argues that to require it to do so would overrule

longstanding precedence – without citing the longstanding precedence that could be overruled. RAB:16.

State further argues cases regarding insufficiency of evidence under the pleadings, such as *O'Conner* and *Harmison* have no relevancy in this issue. Again, State is incorrect because these cases show the reasoning for limiting pleadings involving "unknown" co-defendants and requiring State to prove that an "unknown" person existed when one is pled.

Finally, State contends the "unknown coconspirator" language was surplusage. RAB:16-17. All counts contained the words "unknown coconspirator." But State claims because it pled criminal liability theories in the alternative, the Court may simply strike this language and still affirm Matthew's conviction.

If State is contending the pleading of the "unknown coconspirator" was in error, then Cortinas is instructive on this argument. *Cortinas* used a harmless error analysis when confronted with a general verdict that rested on a legally invalid theory and a valid theory. *Cortinas* at 1026-27.

Here, the error is not harmless because there were no eyewitnesses identifying Matthew as a shooter or placing him at the scene. And the evidence was insufficient to convict. See Issue III.

III. EVIDENCE WAS INSUFFICIENT TO CONVICT.

A. Theories of liability.

One theory of liability State alleged was that Matthew conspired with and acted with an "unknown co-conspirator" in committing crimes, making him liable for both his action and actions of "unknown co-conspirator." Now, State seems to admit it provided insufficient evidence that Matthew acted with an "unknown co-conspirator" as addressed in Issue II. RAB:20, n.3. But in closing, State addressed the "unknown co-conspirator," indicating that "maybe there was a third person." IX:1901.

Because the jury was not required to be unanimous on the theory of liability, jury may have found Matthew guilty based on aiding and abetting the "unknown" person despite State's confession that there was insufficient evidence. see Issue II.

But State suggests it provided sufficient evidence – though not direct evidence – that Matthew acted himself and/or aided and abetted Moten. RAB:18-26. State uses an after-the-fact evidence analysis to reach this conclusion.

B. Conspiracy to commit murder.

State argues that it provided sufficient evidence to show a conspiracy between Matthew and Moten (and not with an unknown coconspirator) based

on evidence that they were together after the crime occurred in an area near the crime scene, in a car one witness observed driving near the crime scene, and firearms were found inside the car. RAB:20. State does not identify any acts that both did prior to the murder. Based on after-the-fact evidence, State contends the jury was free to conclude a before-the-crime agreement.

A conspiracy is an agreement among two or more persons to commit an unlawful act and "mere association is insufficient to support a charge of conspiracy." *Sanders v. State*, 110 Nev. 434, 436 (1994). The agreement must be formed prior to the act otherwise Matthew may only be an accessory after the fact. NRS 195.030. The agreement must be more than mere presence and acquiesce. "[M]ere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy." *Doyle v. State*, 112 Nev. 879, 894 (1996) *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004) *quoting State v. Arredondo,* 155 Ariz. 314, 317 (1987).

Based on the above, State failed to present sufficient evidence to prove an agreement amounting to a conspiracy.

C. No evidence of specific intent to kill and no malice aforethought and no willfulness, no deliberation, no premeditation – State did not prove murder with a deadly weapon.

First degree murder requires willfulness, deliberation, and premeditation. NRS 200.030(1). All other murders are second degree. NRS 200.030(2). Malice may be express or implied.[3] NRS 200.020. A murder without malice and deliberation is manslaughter. NRS 200.040.

State begins by inaccurately citing *Finger v. State*, 117 Nev. 548, 573 (2001), quoting *Davis v. United States*, 160 U.S. 469, 485 (1985) to hold that the use of a firearm to kill another is presumed malicious thereby showing malice - specific intent. RAB:21.

Finger is the leading Nevada case on insanity and when quoting *Davis*, the *Finger* Court was discussing insanity when saying:

> Although the killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears, yet, "in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time

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[3] "1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. 2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020.

> obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." *Com. v. Rogers*, 7 Metc. (Mass.) [500] 501 [1844].

Finger at 573 citing *Davis* at 484-85. Thus, State's quote and assertion is wrong.

But it is of no surprise that State would misinterpret the above quote because State's entire argument for the sufficiency of the evidence on specific intent to kill for murder and attempt murder it that the use of a firearm shows specific intent without considering any other facts. RAB:23

State continues on the same theme by citing *Moser v. State*, 91 Nev. 809, 812 (1975) and *Keys v. State*, 104 Nev. 736 (1970). But the defendants in both both *Moser* and *Keys* pointed the firearm directly at the victim while in close range to the victim. Here, there is no evidence that anyone pointed a firearm directly at the three victims. *Moser* and *Keys* support the theory that discharging a firearm at close range directly at a person shows specific intent to kill or cause great bodily harm. *State v. Apodaca*, 50,113 (La. App. 2 Cir. 9/30/15). But that did not happen here.

Likewise, the defendants in other cases cited by State brought a firearm to the scene, pointed the firearm directly at the victim, and shot in close range or stabbed victim with a knife. See *Quanbengboune v. State*, 125 Nev. 763, 775 (2009); *United States v. Blue Thunder*, 604 F.2d 550, 554 (8th Cir. 1979);

United States v. Brooks, 449 F.2d 1007 (D.C. Cir. 1971); *United States v. Sutton*, 426 F.2d 1202 (D.C.Cir. 1969); *Belton v. United States*, 382 F.2d 150 (D.C. Cir. 1967). Thus, all are distinguishable from the facts in the case at bar.

State uses the exact same argument to contend it presented sufficient evidence of willfulness, deliberation, and premeditation. RAB:24-26. State goes so far to say that it does not have to prove these three elements independently and that they are to be read together, citing *Powell v. State*, 108 Nev. 700 (1992), *vacated on other grounds by Powell v. Nevada*, 511 U.S. 79 (1994) and *Briano v. State*, 94 Nev. 422 (1978). RAB:24.

To the contrary, jury must decide and jury instructions for first degree murder must define willfulness, deliberation, and premeditation as individual elements that the State must prove beyond a reasonable doubt. *Byford v. State*, 116 Nev. 215, 233-37 (2000). Thus, court instructed jury on each element independently. See IV:725.

Moreover, use of the firearm is also an element of the crime which enhances the penalty and thus more is needed to prove intent.

Bottom line: State claims it proved first degree murder with a deadly weapon because it proved a firearm was used by Matthew and/or Moten. RAB:24. Not enough.

D. No evidence of attempt murder with use of a deadly weapon.

State uses the same arguments for attempt murder with a deadly weapon that it used for murder with a deadly weapon. RAB:25-26.

Matthew incorporates the same arguments as in Section C.

E. No evidence Matthew discharged a firearm into an occupied apartment.

Here, State seems to retreat from its prior belief that it did not need to prove Matthew acted with Moten and allows for consideration of an "unknown coconspirator." RAB:27.

State begins by misconstruing the definition of malicious under NRS 202.285. State uses *Ewish v. State*, 110 Nev. 221, 228 n.4 (1994) to claim a person acts maliciously if they intentionally commit a prohibited act. RAB:27. Not so – Ewish tells us acting intentionally and acting maliciously are two different elements under NRS 193.0175.

While *Ewish* addressed malicious destruction of property, NRS 202.830, in this case, Matthew was charged with a violation of NRS 202.285 which also uses malicious as a separate term from acting willfully.

Again, State claims it proved its case because two firearms were used and 13 shots fired. But State is wrong. A firearm and a person discharging a firearm are two elements of the crime, along with elements that the person's

actions were willful and malicious. Thus, State needed to prove more than the simple fact that a firearm was discharged or the other elements would be meaningless.

State further claims it did not need to prove that the defendant knew the apartment was occupied but prove only that it was occupied. RAB:28. State claims it was up to the jury to determine if the apartment was occupied and they could do that.

But because discharging a weapon into an abandoned apartment is a misdemeanor and it is a felony to discharge a weapon into an occupied apartment, State must prove beyond a reasonable doubt that a defendant knew or had reason to know the apartment was occupied because the penalty is based on that. State did not prove this element because it was dark, no one could see in or out, and there was little evidence to show it was not vacant.

Although LeRoy said the television was left on, he also said: "I just hit the ground, because it's dark in the house so I can't see nothing." VII:1383;1388. Ashley confirmed that it was too dark to see anything in the apartment when the shooting began. VIII:1434-44. Thus, no one from the outside could see any lights inside the apartment because LeRoy and Ashley said it was too dark inside to see anything and it would look much like a vacant apartment.

IV. PREJUDICIAL ERROR REGARDING JURY INSTRUCTIONS.

A. Court allowed jury to know charges were felonies.

State argues no error occurred in court allowing jury to know the category of the crimes as felonies. State does not address the fact that Jury Instruction 13 informed the jury not to consider the subject of punishment. IV:711. Whether a crime is a felony or a misdemeanor is irrelevant for the jury to know and prejudicial because the jury is not to consider punishment. NRS 48.025.

B. Lack of motive jury instruction.

State presented no motive for the crimes.

The difference between the proposed jury instruction on motive (III:686) and the given instruction (III:686) is substantial. The defense proposed jury instruction directed jury that the absence of a motive may allow for a finding of reasonable doubt as to guilt whereas the given instruction did not.

The language within the proposed instruction which the court rejected included:

> Presence of motive may tend to establish guilt. Absence of motive may be sufficient to leave you with a reasonable doubt as to the guilt of the defendant. You will therefore give its presence or absence at the case may be, the weight you find it to be entitled. III:686.

See People v. Estep, 42 Ca.App.4th 733, 738 (1996)(finding the presence of a motive is a circumstance that may establish guilt or lack of guilt). This instruction is based on CALJIC 2.51. See Brown v. Borg, WL 255933 unpublished (9th Cir. 1991).

Because NRS 48.045(2) allows State to introduce evidence to show motive – even though motive is not an element of the crime – Matthew should have been allowed to have jury consider absence of a motive as evidence he was not guilty rather than just as a circumstance as Jury Instruction #4 suggested. IV:702. Jury Instruction #4 told jury that "motive is what prompts a person to act" and the proposed/rejected instruction would have informed jury what to do upon finding a lack of motive.

Thus, court's decision to reject the defense proposed instruction and only give the State's instruction was arbitrary and capricious.

V. PROSECUTORIAL MISCONDUCT IN CLOSING.

At IX:1877-83, the prosecutor argued that specific intent to kill was shown by the "trajectory" of the bullets, multiple bullets flying through the apartment. But by making this argument and by making the argument that the use of the firearm without provocation was sufficient to prove malice (IX:1877-78), prosecutors indirectly used the crime of discharging a firearm

much as one would under the felony murder rule, allowing the jury to conclude that if Matthew or Moten or an "unknown coconspirator" fired a gun into the apartment then that act alone showed specific intent – just as in the felony murder rule.

Discharging a firearm at close range directly at a person shows specific intent to kill or cause great bodily harm. *State v. Apodaca*, 50,113 (La. App. 2 Cir. 9/30/15). Cases cited by the State contain facts similar to *Apodaco*: *Dearman v. State,* 93 Nev. 364, 365 (1977)(defendant shot the victim seven times with a .45 caliber automatic pistol at close range); *Valdez v. State*, 124 Nev. 1172 (2008)(defendant threatened to kill one person and then stabbed that person and another with a knife).

State is unable to find any cases that say firing a weapon at a window with the drapes closed and the apartment dark so that no one can see inside or out shows specific intent to kill. It simply is not the same as firing a weapon directly at a person. Thus, the prosecutor gave legally incorrect argument when saying: "And here it is clear by the nature of this offense, the number of shots fired, that the killing was wrongful and had no legal cause or adequate provocation." IX:1878. Likewise, saying, "the intent…is clear, and it was to kill, each time they pulled that trigger of either firearm" was legally incorrect. IX:1878.

State argues that *Rose v. State*, 255 P.3d 291 (Nev. 2011) is inapplicable because this is not a merger issue. The *Rose* Court held "that assaultive-type felonies that involve a threat of immediate violent injury merge with a charged homicide for purposes of second-degree felony murder and therefore cannot be used as the basis for a second-degree felony-murder conviction." *Id.* at 293.

Although not charged with felony second degree murder as was the defendant in *Rose,* here, prosecutor treated it as a merger type of crime in closing argument by contending if the jury found someone fired the gun into the window then there was specific intent. While the prosecutor may argue that intent to kill may be inferred from the circumstances as noted in Jury Instruction #28, here, he specifically compared the use of the firearm to show specific intent. Thus, if the jury found Matthew guilty of the firearm charges, they could automatically find specific intent.

Even on appeal, State continues to argue jury may find intent to kill solely from a defendant's use of a firearm without acknowledging intent must be determined from an evaluation of all the circumstances of the incident – not one. RAB:35.

This error is plain because the prosecutor's argument is contrary to the law and the error is harmful because evidence of specific intent to kill was not overwhelming.

VI. VIOLATION OF THE FOURTH AMENDMENT OCCURRED WHEN POLICE SEARCHED THE CAR A SECOND TIME.

Failure to object to a Fourth Amendment issue at or prior to trial is not fatal. *Somee v. State*, 124 Nev. 434, 443 (2008). Court may consider constitutional issues at any time and reverse and remand for an evidentiary hearing to better clarify facts. *Somee.*

State contends the search never ended and thus continued to be pursuant to a valid warrant. But Matthew argues the search ended, as evidenced by the CSI employees leaving and the police officer waiting for the tow, and therefore a new search warrant was needed for the second search.

There is no issue of timeliness as the State suggests, this is an issue of whether the search was completed. RAB:37.

State also contends it could pull the car apart to look for the firearm and did not need a search warrant under the automobile exception to the search warrant, citing *United States v. Ross*, 456 U.S. 798, 825 (1982). RAB:38, n8. But the automobile exception is based on the inherent mobility of a car. *Carroll v. United States*, 267 U.S. 132, 153 (1925). This car was

not on the street but parked in the police garage thereby making the automobile exception inapplicable.

State also argues that *Bolin v. State,* 114 Nev. 503 (1998) allows police to conduct more than one search during a three day time period. *Bolin* involved a blood draw from the defendant pursuant to a warrant that gave police 10 days to execute. The first time they drew blood they used the wrong test kit. Police contacted the DA for approval for the second blood draw.

Here, police did not contact the DA and it appears the search was completed and the officer merely waiting for the tow truck driver. Here, the second search involved the dismantling of the car after the first search and the return had been completed. Thus, the facts are not the same as those in *Bolin.*

State complains that Matthew's cases citing the "reasonable continuation doctrine" are non-controlling and contradict his argument. RAB:40-41. As noted in the Opening Brief, *State v. Hai Kim Nguyen*, 419 N.J. Super 413, 426 (2011), *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) and *U.S. v. Keszthelyi*, 308 F.3rd 557, 569 (6th Cir. 2002), hold that a subsequent search is allowed if: (1) the entry is a continuation of the initial search rather than a new and separate search and (2) decision to re-

search the area must be reasonable under the totality of the circumstances. *Id. at 569, Hai Kim Nguyen* at 427.

In *Keszthelyi,* the Court found the second search the next day not a reasonable continuation of the first thereby supporting Matthew's argument. The general rule is that once a search warrant is executed, the authority under the warrant expires and further government intrusion must cease because a search warrant only authorizes one search. *U.S. v. Gagnon*, 635 F.2d 766, 769 (10th Cir. 1980). "[A] warrant may be executed only once, and thus where police unsuccessfully searched [the] premises for a gun and departed but then returned an hour later and searched further because in the interim an informant told the police of the precise location of the gun, the second search could not be justified as an additional search under the authority of the warrant." *Keszthelyi*, at 569 *citing* Wayne R. LaFave, 2 *Search & Seizure: A Treatise on the Fourth Amendment* § 4.10(d) (3d Ed.1996).

In *Kim Nguyen* the police searched the car twice on the street, the *Kaplan* Court found both searches consensual, and the in *United States v. Gagnon*, 635 F.2d 766, 769 (10th Cir. 1980), court found exigent circumstances.

Here, the car was not on the street but in a police garage waiting to be towed, Matthew did not consent to the police dismantling the car, and there

were no exigent circumstances. Dismantling a car without a warrant exceeds the scope of a search of a car incident to an arrest. *Bell v. State*, 181 N.E.2d 481 (Ct.ofApp. Ind. 2004).

The second search was based on new information police received and thus not information the magistrate was privy to when signing the warrant. Therefore, there was no probable cause determination on the second search allowing for the dismantling of the car. *See State v. Buckman,* 259 Neb. 924, 936-39 (2000)(police obtained a second warrant after receiving additional information and then re-searched the car days later).

As noted in the Opening Brief, here, METRO obtained a search warrant to search the Dodge. CSA Cromwell and Taylor completed the search and left for lunch while Detective Rogers waited for the tow truck to take the car to the tow yard. Thus, the search was complete, the return filled out, paperwork done, and the probable cause for the search dissipated.

However, Rogers then went into the Dodge and dismantled the dash around the steering wheel and found a gun. The CSA's were recalled to the garage and conducted another search. Thus, at this point, State needed a new search warrant based on the new information Rogers received which led him to believe a firearm was hidden inside the dash board.

Furthermore, the search by Rogers was more intrusive than the prior search because he pulled down the dash board, basically breaking it open. Thus, a second search warrant was needed.

Although not objected to at trial, constitutional issues may be reviewed for plain error for the first time on appeal.

VII. VIOLATION OF RIGHT OF CONFRONTATION.

Sixth Amendment "prohibits the introduction of testimonial statements made by a non-testifying witness unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Ohio v. Clark, _US_, 153 S.Ct. 2173,* 2179 (2015) *citing Crawford v. Washington*, 541 U.S. 36, 54 (2004). Witnesses include those "who bear testimony;" testimony is defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ohio citing Crawford at 51.*

A violation of the Right of Confrontation occurs if the evidence presented was testimonial. Statements qualify as testimonial if the primary purpose of the conversation or statement was to "create an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 U.S. 344, 369, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). For a statement to be testimonial, the "primary purpose" of the statement must be to "establish or prove past events

potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (finding victim's oral statements in response to questions from 911 operator not testimonial and in a separate case finding victim's written affidavit given to the police was testimonial).

Anya Lester testified that all her analysis and conclusions were:

- Verified by second independent firearm and tool mark examiner. IX:1798.
- Technically reviewed by third qualified firearms examiner to verify compliance with policies and procedures that data in file supported her conclusions. IX:1799.
- Administratively reviewed by manager IX:1799-80.

Thus, Anya testified that opinions of three non-testifying experts were the same as her conclusions about the bullets, fragments, and shell casings came from the guns found in the car Matthew was driving.

Although the actual documents and reports from the three other examiners were not introduced, the content of their reports was testified to by Lester when she discussed their verification and review.

But State claims that because Anya Lester did not specifically quote statements from the other three examiners, the right of confrontation was not violated. RAB:44. State also takes a literal approach to Matthew's argument, claiming Matthew is unable to cite to where in the record Anya specifically

said the opinion of the three non-testifying experts was the same as her opinion. RAB:44. Matthew cited to the record at IX:1798-80.

State can only raise the - there are no specific quotes - challenge by ignoring *Vega v. State, 236 P.3d, 632,* 638 (Nev. 2010). In Nevada, expert testimony regarding content of a non-testifying expert's report is the equivalent of a testimonial statement. *Id.* Here, while not directly quoting the other three experts, Anya told the jury they came to the same conclusion because they verified her results and the jury saw that she was there testifying to her results.

The reason the State introduced this evidence was not to explain the procedures Anya used in reaching her opinion but to bolster her credibility by presenting testimony that three other experts agreed with Anya. State has not cited the record to claim it needed to introduce this evidence on redirect to counter a question asked on cross-examination because there were none. IX:1795-98.

There was no way Matthew could cross-examine the opinions of the three non-testifying experts. A defendant's constitutional right to confrontation is violated "when the district court erroneously admit[s] the testimonial statements from an unavailable expert witness without the witness previously being subjected to cross-examination." *Vega* at 634.

Although not objected to at trial, Court may review this constitutional issue raised for the first time on appeal because it is plain error. This Court holds that expert testimony regarding the content of a testimonial statement in a written report is the equivalent of a testimonial statement. *Vega.* at 638.

State does not admit error and does not entertain a harmless error analysis.

State's denial of error is understandable because State is unable to claim the error was harmless. Lester's testimony and the opinions of her un-testifying partners regarding the comparison of the bullets, fragments, and casings to the firearms found was pivotal to State's argument that Matthew and Moten used the firearms found in the car to shoot into the apartment. Lester and her un-testifying experts provided testimony akin to that of an eye witness by placing the guns – and thus Matthew and Moten – at the crime scene.

VIII. PREJUDICIAL ERROR OCCURRED IN THE PENALTY PHASE WHEN STATE PRESENTED PICTURES OF MATTHEW COLLECTED BY POLICE DURING FIELD INTERVIEWS AND DISCUSSED THE FIELD INTERVIEWS.

State is incorrect when arguing issues regarding violations of due process and the Fourth Amendment occurring at a sentencing/penalty hearing

may not be raised for the first time on appeal because constitutional error is subject to plain error evaluation. *Somee*; NRS 178.602. The constitutional guarantee of due process operates during the critical stages of a criminal case, including sentencing. *Gardner v. Florida* 430 U.S. 439 (1977).

Field interviews are stops of persons that the police make that are less likely to be based on reasonable suspicion or probable cause - for if they were then the police would have made an arrest. In some of the instances in the field interviews of Matthew, it is likely that he was a juvenile. In most of the field interviews he was asked about gang affiliation. Police frequently use field interviews as an investigative tool to collect information.

The error in introducing evidence from field interviews is plain error based on *Somee* and NRS 175.551(3) prohibiting the introduction of evidence "which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada..."

But State claims *Somee* does not apply because the *Somee* Court only addressed the guilt phase. However, NRS 175.551(3) indicates the same standards apply in the penalty phase. Thus, prior to admitting evidence obtained from field interviews, State should have obtained a ruling from the court on admissibility of the information obtained from field interviews – much the same as State does with other bad acts.

Clearly evidence and pictures taken during field interviews and while a defendant is in prison is prejudicial and meant to taint the jury's mind to obtain a harsh sentence. But State claims all evidence is allowed to be introduced to show Matthew's character – even if it was obtained in an unconstitutional manner – despite the requirements of NRS 175.551(3). RAB:48-50.

Although in *Rhyme v. State*, 118 Nev. 1 (2002) Court did not find the introduction of one tattoo prejudicial, the amount of tattoos introduced in this case was excessive thereby making the evidence more prejudicial than probative. NRS 48.035.

State relies on *Bollinger v. State*, 111 Nev. 1110, 1116 (1995) to argue the pictures of Matthew's tattoos were admissible. In *Bollinger*, this Court upheld district court's decision allowing the jury to view defendant's tattoo that he obtained after killing and burning the victims. In contrast, here, State presented no evidence that Matthew obtained tattoos after killing the victim and the jury saw numerous photographs of numerous tattoos. X:2108-22.

IX. EVEN IF COURT DOES NOT FIND ANY ONE SINGLE ERROR ENOUGH TO WARRANT REVERSAL, COURT MAY CONSIDER CUMULATIVE ERROR.

Here, as in *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008), crime of murder and attempt murder with a deadly weapon is grave and the evidence

is not overwhelming due to the lack of specific intent and this being a case of circumstantial evidence. There were no eyewitnesses placing Matthew at the scene. The quality and character of the errors are substantial and significant. Matthew will not be eligible for parole until he is almost 80 years old.

CONCLUSION

Reversal warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of October, 2015.

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CERTIFICATE OF SERVICE

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