**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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**RALPH SIMON JEREMIAS**

Appellant,

vs.

**THE STATE OF NEVADA**

Respondent.

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**Docket No. 67228**

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Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Valerie Adair, District Judge
District Court No. C256769

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# APPELLANT'S OPENING BRIEF

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## I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, pursuant to a jury verdict, and two sentences of death. 15 ROA 3262. The jury convicted Appellant Ralph Jeremias of one count of conspiracy to commit robbery, one count of burglary while in possession of a deadly weapon, two counts of robbery with use of a deadly weapon, and two counts of murder with use of a deadly weapon. 15 ROA 3262-64. The judgment of conviction was filed on January 15, 2015. 15 ROA 3262. A timely notice of appeal was filed on January 15, 2015. 15 ROA 3257. This Court has jurisdiction over this appeal pursuant to NRS 177.015 and NRS 177.055.

## II. ROUTING STATEMENT

Pursuant to NRAP 17(a)(2), this death penalty case is assigned to the Supreme Court of Nevada.

## III. STATEMENT OF THE ISSUES

A. Whether the district court violated Jeremias's right to a public trial by excluding members of the public, including his family, from jury selection.

B. Whether the district court violated Jeremias's constitutional rights to due process and a fair trial by allowing the State to examine its primary witness in repeated violation of evidentiary rules.

C. Whether the district court violated Jeremias's constitutional rights of due process, a public trial and confrontation by allowing the jury to review a video recording of his interrogation which was not presented to the jury in open court during the course of the trial.

D. Whether the district court violated Jeremias's constitutional rights of cross-examination and confrontation by allowing the testimony of a coroner who did not perform the autopsies.

E. Whether the district court abused its discretion in allowing speculation about the origin of pieces of plastic for which no reliable expert testimony was presented.

F. Whether the district court erred in instructing the jury on the presumption of innocence.

G. Whether the aggravating circumstance of murder committed to avoid arrest is invalid and not supported by the evidence.

H. Whether the district court violated Jeremias's constitutional right of confrontation and notice by allowing the State to admit the interrogation of a co-defendant who did not testify.

I. Whether the district court violated Jeremias's constitutional rights of cross-examination and confrontation by allowing testimonial hearsay evidence to be

admitted during the penalty trial.

J. Whether the district court violated Jeremias's Second Amendment rights, and his rights to due process of law, by presenting evidence of gun possession as evidence of bad character.

K. Whether the prosecutors committed misconduct during the penalty phase closing arguments.

L. Whether the death penalty is unconstitutional.

M. Whether the conviction and sentence of death are invalid under the cumulative error doctrine.

## IV. STATEMENT OF THE CASE

On August 5, 2009, the State charged Carlos Zapata, Ivan Rios, and Ralph Jeremias, by way of Indictment, with one count each of Conspiracy to Commit Robbery, and Burglary While In Possession of a Deadly Weapon; and two counts each of Robbery With Use Of A Deadly Weapon and Murder With use of a Deadly Weapon. 1 ROA 1-5. The State alleged that on June 7, 2009, the three men acted in concert and that Jeremias shot and killed Paul Stephens and Brian Hudson, and then took their property. 1 ROA 1-5. In support of the murder charges, the State alleged theories of (1) willful, deliberate and premeditated killing; (2) felony murder with robbery and burglary predicate offenses; (3) conspiracy; and (4) aiding and abetting.

1 ROA 4-5. The three defendants entered pleas of not guilty. 2 ROA 336 (Rios), 338 (Zapata), 342 (Jeremias).

On September 1, 2009, the State filed its Notice of Intent to Seek Death Penalty. 1 ROA 65. The State alleged aggravators of (1) murder committed in the commission of a robbery (Stephens); (2) murder committed in the commission of a robbery (Hudson); (3) murder committed to avoid or prevent a lawful arrest; and (4) conviction in the immediate proceeding of more than one offense of murder in the first or second degree. 1 ROA 65-68. The State did not seek the death penalty against Zapata or Rios. 1 ROA 132.

On September 17, 2010, Jeremias filed a motion to sever his trial from the trial of his co-defendants. 2 ROA 344-57. The State opposed the motion. 2 ROA 400. The district court heard argument on the motion on October 11, 2010. 2 ROA 426. The district court denied the motion. 2 ROA 429. On April 7, 2011, Jeremias filed a Joinder in Rios's motion to sever. 3 ROA 524. On May 11, 2011, the district court ordered that the trial of Rios and Jeremias be severed. 3 ROA 640-41.

The State and Zapata entered a negotiation in which Zapata agreed to testify against Rios and Jeremias and in exchange his charges were reduced to two counts of second degree murder and other lesser offenses. He was sentenced to serve two concurrent terms of 10 years to 25 years and other concurrent sentences. 10 ROA

2048-49. Rios went to trial prior to Jeremias. 13 ROA 2855. Despite Zapata's testimony against him, Rios was acquitted of the State's charges. 13 ROA 2855.

On September 17, 2010, Jeremias filed a Motion to Dismiss State's Notice of Intent To Seek Death Penalty Because Nevada's Death Penalty Statute is Unconstitutional. 2 ROA 365. See also 4 ROA 769 (motion filed October 30, 2013). The State opposed the motions. 2 ROA 408; 4 ROA 835. The district court denied the motions. 2 ROA 430; 5 ROA 893, 903.

On October 24, 2013, the State filed its Notice of Evidence To Support Intent To Seek Death Penalty. 2 ROA 708. On February 20, 2014, the State filed an Amended Notice of Evidence to Support Intent to Seek Death Penalty. 5 ROA 990. The State filed a Second Amended Notice of Evidence to Support Intent to Seek Death Penalty on October 10, 2014. 5 ROA 1017.

At calendar call, the State announced that it intended to call Dr. Gavin to testify as the coroner, Dr. Telgenhoff, had retired and had not returned the prosecutor's telephone calls. 5 ROA 1045. Jeremias objected and argued that under Crawford and its progeny, substitute testimony was not allowed. 5 ROA 1045. Jeremias offered to continue the trial so that Dr. Telgenhoff could be located. 5 ROA 1045. The district court denied the motion and declined to continue the trial. 5 ROA 1046. The objection was renewed at trial. 10 ROA 2117.

Trial began on October 27, 2014. 5 ROA 1058. Prior to jury selection, the State objected to the presence of Jeremias's family during jury selection. 5 ROA 1060. The district court informed the family members that all of the seats would be used for the potential jurors. 5 ROA 1060.

On the fourth day of trial, outside the presence of the jury, the district court held a hearing regarding redactions of a taped statement and the admission of toxicology results from the autopsy. 9 ROA 1889.

On November 4, 2014, Jeremias filed objections to the State's proposed jury instructions. 9 ROA 1911-28. Also on November 4, 2014, defense counsel filed proposed trial phase instructions. 11 ROA 2235; 14 ROA 3028-58. Jury instruction were settled on November 3 and 5, 2014. 11 ROA 2302; 12 ROA 2492; 13 ROA 2678-2737 (court's instructions). Closing arguments for the culpability phase took place on November 5, 2014. 12 ROA 2491, 2503.

The jury requested a playback of the testimony of Aimee Henkel. 13 ROA 2739. The testimony was played in court. 12 App. 2739. The jury returned its verdicts on November 6, 2014. 12 ROA 2586, 2740-43. It found Jeremias guilty of each of the charges. 12 ROA 2586-89. Special verdicts indicated that the jury unanimously found him guilty of first degree murder under theories of premeditation, felony committed in the perpetration of a burglary, and felony committed in the

perpetration of a robbery. 12 ROA 2588-89.

On November 6, 2014, Jeremias filed his proposed penalty phase jury instructions. 12 ROA 2590-2640; 13 ROA 2641-77. Jeremias submitted written objections to the State's proposed instructions. 13 ROA 2745. Jeremias objected to an instruction on the aggravator of avoiding or preventing a lawful arrest and to the instruction on hearsay evidence. 13 ROA 2749; 15 ROA 3158, 3160. The district court filed the defense proposed jury instructions which were not used at trial. 14 ROA 3028-58. Instructions to the jury were settled on November 10, 2104. 14 ROA 3059-3079; 15 ROA 3153-81.

The penalty phase began on November 7, 2014. 13 ROA 2753. The jurors returned their penalty phase verdicts on November 10, 2104. 14 ROA 3080; 15 ROA 3081-94, 3239-46. They found all three aggravators as to both victims. 14 ROA 3080; 15 ROA 3081, 3089. The jurors found the following mitigators: (1) family financial stress, (2) lack of supervision from a very early age, (3) multiple concussions as an infant, (4) ADHD related hyperactivity and impulsivity from very early childhood, (5) initial bond with parents, (6) lack of access to medication and accommodations for ADHD, (7) migratory separation, (8) multiple concussions in late adolescence and early childhood, (9) MRI results - frontal lobe trauma, (10) loss of martial arts career and community, (11) loss of structure and sense of purpose, (12)

start of downward self-destruction spiral after the loss of the martial arts, (13) depression from loss of martial arts career, (14) untreated anxiety, (15) substance abuse, (16) postconcussive symptoms - impact of multiple concussions, (17) mental health issues - untreated depression, (18) behavioral manifestations of attentional issues, and (19) under the influence of controlled substances at the time of the incident offense. 15 ROA 3082-83, 3090. The jurors unanimously found that the aggravating circumstances were not outweighed by the mitigating circumstances. 15 ROA 3085, 3093. The jurors imposed sentences of death on both counts. 15 ROA 3086, 3094.

The sentencing hearing was held on January 15, 2015. 15 ROA 3275. The district court imposed sentences for the conspiracy, burglary, and robbery convictions in addition to the death sentences imposed by the jury. 15 ROA 3280-81. The judgment of conviction was filed on January 15, 2015. 15 ROA 3262. A timely notice of appeal was filed on January 15, 2015. 15 ROA 3257. An amended judgment of conviction was filed on January 27, 2015. 15 ROA 3287.

## V. STATEMENT OF THE FACTS

On June 7, 2009, Brian Hudson and Paul Stephens were killed inside of their apartment at the Polo Apartment complex in Las Vegas, Nevada. Both men died of gunshot wounds to their heads.

Hudson was a student at UNLV and worked for US Air. 8 ROA 1722. Stephens was a part time student, did promotional marketing for events, and also made money selling drugs. 8 ROA 1698, 1701-02, 1719. Their friend, Michael Johnsen, believed that Stephens sold drugs to friends and people he knew, not to random strangers. 8 ROA 1701. He usually sold small amounts, like ounces, quarters of a pound, and eighths of a pound, but he also told police officers that it was not "a stinky-dinky operation. There was pounds coming in and out of the apartment." 8 ROA 1715. Johnsen testified that they pretty much always had marijuana, which they received from California. 8 ROA 1717. They had a connection in San Francisco. 8 ROA 1718. Stephens had been dating a girl from the Bay Area and she was having problems with her father. 8 ROA 1718. Johnsen claimed that the front door of the apartment was always locked and that they kept the drugs in the kitchen, in a cabinet, behind a bag of rice. 8 ROA 1701-02. He also believed that they had money in their apartment.

Johnsen and Hudson sent text messages to each other on the day of the homicide. 8 ROA 1694-95. Hudson sent a text message at 4:11 p.m., in which he stated that he was watching a movie. 8 ROA 1696. Johnsen did not get a response to messages after the 4:11 p.m. text, which was unusual. 8 ROA 1699-1700.

During the afternoon of June 7, 2009, Doug Tuttobene, who lived at the Polo

Apartments, heard four or five loud bangs, with a second or two between each bang. 8 ROA 1674. He thought it might have been fireworks. 8 ROA 1674. He believed that he heard the noises between 4:00 and 5:00 p.m. 8 ROA 1682. He looked out of his bedroom window to the parking lot and saw a red truck with chrome rails speeding away. 8 ROA 1676. He did not see who was inside and did not know the number of passengers in the truck. 8 ROA 1686. He identified a photograph of the truck. 8 ROA 1680. He did not ever see Jeremias. 8 ROA 1687.

The next day, on June 8, Johnsen went to the apartment as he had plans to golf with Hudson. 8 ROA 1702. He arrived shortly after noon and knocked on the door, but there was no answer. 8 ROA 1702-04. Eventually, he tried the door, found it unlocked, opened the door, saw the bodies of Hudson and Stephens, concluded that they were dead, and then immediately left the apartment. 8 ROA 1706-07. He called the police from his cell phone and then told them what he saw after they arrived. 8 ROA 1706-11.

Crime scene analysts arrived at the apartment and documented their findings. 8 ROA 1735-43. There was no sign of a forced entry into the apartment. 9 ROA 1796. Two bodies were located in the living room.[1] 8 ROA 1743. One victim was

[1]The autopsy showed that both Stephens and Hudson died from the gunshot wounds. 10 ROA 2131, 2135. Additional details from the autopsy are discussed below. The medical examiner could not tell if the wounds were created by shots from the same gun. 10 ROA 2142. A firearms examiner also could not determine

laying on the sofa. 8 ROA 1744. The other body was on the floor, with a blanket covering his upper torso. 8 ROA 1745. A description was given of the position of the bodies. 8 ROA 1754. One of the bodies was covered by a blanket and there was plastic on the body. 8 ROA 1755. There were bullet holes in the blanket. 8 ROA1756. There was a gunshot entrance wound to the left side of Stephens's left cheek and an exit wound to the right side of the cheek. 9 ROA 1798. There was also a gunshot entrance to the top right side of his head. 9 ROA 1799. After removing the blanket from Hudson's body, officers found that his face was down and his right hand was up adjacent to his face. 9 ROA 1799. There were bloodstains on the right side of the back collar of his t-shirt. 9 ROA 1800. There was one gunshot entrance wound to the back left of his face and another to the right side of his face. 9 ROA 1800. Over a defense objection based upon speculation, a detective testified that based upon the position of Stephens's body, he believed that Stephens was shot first and may not have expected any type of foul play. 9 ROA 1808-09. He did not believe there was evidence of self-defense because Stephens did not have stippling on this hands which could occur if he put his hands up over his face, which the detective believed to be a natural reaction. 9 ROA 1809.

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whether the bullet fragments were fired from the same gun. 9 ROA 1861-62. The bullet fragments were "nominal .38 caliber," which could include a 9 mm cartridge. 9 ROA 1863.

Next to the body there were two pieces of torn plastic that were the same texture as a trash bag. 8 ROA 1745. Details concerning the plastic pieces are discussed below. The scene was processed for fingerprints. 9 ROA 1764. There were cables coming from a television, but nothing was connected to the other end. 8 ROA 1739, 10 ROA 2150. Wallets belonging to the two men were not found in the apartment. 10 ROA 2150.

The analysts found a couple of bullet fragments. 8 ROA 1748; 9 ROA 1767, 1777. One was a jacket and one was a core. 8 ROA 1748-49. There was apparent blood on the fragment. 8 ROA 1750. No other guns, ammunition, or other evidence related to firearms was recovered. 8 ROA 1752; 10 ROA 2200. It was unusual for them not to find cartridge cases at the scene. 8 App. 1760. Later, the analyst learned that a cartridge case was located behind the television. 8 ROA 1752. It was allegedly found after the apartment was fully processed and turned over to the families of Hudson and Stephens. 8 ROA 1726-28; 10 ROA 2148, 2200. While two men were moving a large television, Hudson's father noticed an empty cartridge casing fall to the floor. 8 ROA 1727. He picked it up, placed it in a mug, and called a detective. 8 ROA 1728. No prints were recovered from the cartridge case. 10 ROA 2174.

Clear plastic baggies with the residue of a green leafy substance and with loose green leafy substance were recovered from the apartment. 9 ROA 1780. There was

a bag with a bark-like substance labeled mimosa hostilis. 9 ROA 1781. Also observed was a handwritten note regarding "AR-15 for sale" 9 ROA 1781, 10 ROA 2150. Other impounded items included: a gas station receipt in the name of Jason Schrader, 9 ROA 1782. To a detective's knowledge, Schrader was not ever interviewed. 9 ROA 1829. Approximately eight ounces of marijuana (213 grams) was recovered. 9 ROA 1789, 10 ROA 2149. There were a number of different bags. 9 ROA 1789. There were 284 grams of the brown bark-like substance. 9 ROA 1789.

There were no working surveillance cameras at the apartment complex. 9 ROA 1811. Detectives contacted neighbors, including Aimee Henkel, on Monday, June 8th. 9 ROA 1933, 1939. An officer talked to her and asked if she heard anything on Sunday afternoon. 9 ROA 1940. She told him she did not. 9 ROA 1940. About ten days later, on June 17, a different detective talked to her and asked her if she heard anything or saw anything out of the ordinary. 9 ROA 1940. She said that she was home in the afternoon, smoking on her patio, when she saw a younger Caucasian man and a second man who appeared to be Filipino or who had darker skin. 9 ROA 1936-37. She could not tell if the men were together as there was quite a bit of distance between them. 9 ROA 1938. She could not remember specifics about the attire or look of the Caucasian man, but later identified him as being in his early twenties, with light brown or blond hair, which was about an inch and a half long. 9 ROA 1936,

1943. She thought he was wearing a white tee and possible jean shorts. 9 ROA 1943-44. She saw the Filipino man go upstairs, but did not see where the Caucasian man went. 9 ROA 1939. Later, on June 22nd, she was shown a photo line-up, during which she stated that she was 90% sure of her identification as Jeremias as the Filipino man. 9 ROA 1947-48; 10 ROA 2220. The line-up included photos of Rios and Zapata. 11 ROA 2223. She was unable to identify anyone in the photo line-ups as the Caucasian man. 9 ROA 1948. On cross-examination, Henkel testified that she told police officers that she saw the men between 2:00 and 3:00 p.m. 9 ROA 1957. Detectives had determined that the shootings took place between 4:11 and 4:30 p.m. 10 ROA 2152. Henkel did not see any tattoos on the men, but identified Jeremias, who has a tattoo on his neck, during the photo line-up. 9 ROA 1958, 1973-74. She did not recall seeing anything in the Filipino man's hands. 9 ROA 1966.

_____A detective requested information from a financial crimes unit regarding use of credit cards. 10 ROA 2150. The parents of the victims were also contacted to see what accounts and credit cards the victims had and to see if the cards were being used. 8 ROA 1724-25; 10 ROA 2151. Exhibit 62 is a record of the usage of the two victims' credit cards. 10 ROA 2151. Ultimately, video recordings were obtained from places where the credit cards were used on the evening of June 7, 2009. 10 ROA 2153-55. A map showing the locations and times was also created. 10 ROA

2154. Several of the videos showed a white four door Pontiac. 10 ROA 2157-58. A detective used this information and ultimately determined that the car at issue was rented to Jeremias's mother and Jeremias was listed as an alternate driver. 10 ROA 2170-71. A detective identified Jeremias as the person in the videos who used the credit cards. 11 ROA 2226-27.

Detectives determined that Jeremias lived in an apartment with Rios. 10 ROA 2179-80. On June 24, 2009, detectives searched the apartment. 9 ROA 1811-12, 1835; 10 ROA 2180. Items seized included marijuana, clothing, two fedora hats, and a lock box in a closet near the dining room, which was the area where Jeremias slept. 9 ROA 1814-21; 10 ROA 2182-83. A detective believed that some of the impounded clothing was that identified in videos on the night of the shooting. 9 ROA 1836-37; 10 ROA 2186. A detective testified that a 9 mm full metal jacket cartridge was found inside of the lock box, along with a bottle of pills which did not have a label.[2] 9 ROA 1816, 1823-24. There were different types of pills. 9 ROA 1825. Some said "Roche 2" on them, while others remained unidentified. 9 ROA 1825. It was unclear as to whether DNA testing was performed on the clothing and hats which were impounded

[2]The cartridge was stamped with "Win. Luger," meaning that it was manufactured by Winchester. 9 ROA 1816, 1875. It is not uncommon to have different cartridge brands fired from the same gun. 9 ROA 1818. The detective acknowledged that millions of 9 mm Winchester cartridges are made each year. 9 ROA 1822. The 9 mm Luger cartridge case which was found at the scene was marked "FC," meaning that it was manufactured by Federal. 9 ROA 1875.

as evidence. 9 ROA 1845-46. None of the impounded clothing, including the shirt worn by Jeremias on the day of the homicide, had any evidence of blood of them. 11 ROA 2209-10. The two fedora hats also did not have blood on them. 11 ROA 2210. The clothing was not tested for gunshot reside. 11 ROA 2216. None of the fingerprint evidence from the crime scene matched Jeremias's fingerprints. 11 ROA 2211, 2215. The firearms examiner did a report concerning the comparison of the 9 mm cartridge found at the apartment shared by Jeremias and Rios and the casing found at the scene. 11 ROA 2215. Those items could not be connected and it could not be said that they were fired from the same gun. 11 ROA 2216.

Also on June 24, 2009, detectives searched Zapata's residence. 9 ROA 1842; 10 ROA 2032. Officers recovered a Compac Presario laptop computer, baggie with a green leafy substance, small digital scale, and Justice Court documents in Zapata's name. 9 ROA 1844; 10 ROA 2032. They learned that he drove a red four-wheel drive Chevy Silverado Quad Cab truck. 9 ROA 1842. The computer was identified as belonging to one of the victims. 10 ROA 2194. Zapata gave a statement to the detectives and was arrested. 10 ROA 2199.

A detective analyzed cell phone records and the cell phones recovered from Stephens and Hudson, in which they saw a text message from Hudson to Stephens on May 29, 2009, which stated "Call Macky ASAP (702)542-8896." 10 ROA 2190.

The detective was aware that Jeremias went by the nickname of Macky. 10 ROA 2190. There was no information about Rios or Zapata on the victims' phones. 10 ROA 2190.

Carlos Zapata testified for the State in exchange for an agreement on the charges against him. 9 ROA 1978. He gave detectives a statement on June 24, 2009, but was not completely truthful during his first interrogation. 10 ROA 1987.

Zapata and Jeremias had been friends since around 2006 and Zapata knew Rios through Jeremias. 10 ROA 1983. On June 7, 2009, Zapata met Jeremias and Rios in the afternoon at Hooters, and planned to go swimming and spend time at the casino. 10 ROA 1991. Zapata was with his girlfriend Angel and their infant. 10 ROA 1993. They had a room which was comped based upon Jeremias's gambling. 10 ROA 1993.

Zapata testified that the three men left Angel and the child at Hooters and went to do a robbery. 10 ROA 1993. He claimed that it was Jeremias's plan and that he told Zapata and Rios where the men lived, who they were, and how much they had in their apartment, which was at the Polo Apartments, about five minutes from the apartment where Jeremias lived with Rios. 10 ROA 1994-95. Zapata claimed that Jeremias used the term "lick" to describe the robbery and he guessed they would have $2,000 and drugs. 10 ROA 1995. In a previous trial in which Zapata testified, he claimed that they left Hooters with the intent of making a run for marijuana. 10 ROA

2056-57. He also testified in the previous trial that Jeremias had been "fronted" weed in the past and they believed there was a possibility that Stephens and Hudson would front some weed to Zapata, but they also had some money to purchase the marijuana. 10 ROA 2057-58. On recross-examination, Zapata testified that the initial plan was to get fronted some weed. 10 ROA 2106. They planned to steal weed from the drug dealers because they couldn't report it. 10 ROA 2107. Zapata was not going to go inside. 10 ROA 2107. Zapata knew that Jeremias planned to get some weed, but did not know if he was going to buy it, have it fronted, or know exactly how he was going to get it. 10 ROA 2108. Zapata thought that Jeremias could be unpredictable. 10 ROA 2107. Saying they were going to buy the marijuana was a made up story as a front for the robbery. 10 ROA 2110.

Zapata claimed that Jeremias, Rios, and he went to Rios's apartment in Zapata's red truck and that they talked about the robbery, including Jeremias's plan to have Rios drive and Zapata sit in the passenger seat.[3] 10 ROA 1995-96. The alleged plan was for Jeremias to go to the apartment and then text Zapata when everything was ready to go, and then Zapata would go up to the apartment, grab it and put it in a backpack. 10 ROA 1998. Zapata claimed that he did not know the people

[3]Zapata claimed he had Rios drive his truck, even though he knew Rios had suffered a stroke and he was physically limited and impaired. 10 ROA 2076-77. Zapata sat in the back seat of his own truck. 10 ROA 2077.

in the apartment, had never heard of them, and had not been in the apartment. 10 ROA 1998. At trial, Zapata claimed that Jeremias brought a black .9 mm pistol with a slide and a black grocery bag. 10 ROA 2001, 2019, 2022. Zapata knew there was going to be a robbery, but that was it. 10 ROA 2001, 2021. In the previous trial, Zapata testified that when Jeremias left the truck, he was not certain of what Jeremias was going to do and that there was no set plan. 10 ROA 2060. Zapata still believed there was a possibility that the men would front some marijuana to Jeremias. 10 ROA 2061. Zapata could not recall if they smoked marijuana at Rios's apartment. 10 ROA 2065. He knew that Rios took little white pills known as Rohypnol or Roofies, and saw them at Rios's apartment, but did not know if Jeremias used the drugs at that time. 10 ROA 2065

According to Zapata, the three men arrived in a parking lot of the apartment building and Jeremias got out of truck, while Zapata and Rios stayed in the truck, talked, and listened to music. 10 ROA 1998-99. Zapata told Rios to turn down the music, and soon after that they heard gunshots. 10 ROA 2000. He thought he heard three or four shots. 10 ROA 2000. Jeremias had been in the apartment for 5 or 10 minutes. 10 ROA 2001. Zapata saw Jeremias running or maybe jogging back to the truck. 10 ROA 2002. It was still daylight. 10 ROA 2002. They drove away quickly and went to Rios's apartment. 10 ROA 2002-03. Jeremias said that they needed to

go back to the apartment because it was all for nothing if they did not go back and get what they went there to get. 10 ROA 2003. Jeremias did not have any of the victims' property when he returned to the truck. 10 ROA 2004. Rios was not involved in the plan to go back. 10 ROA 2004.

Zapata next claimed that he and Jeremias went back to Hooters, picked up Jeremias's rental car and drove to the Polo Apartments to take items from the two men who were dead inside the apartment. 10 ROA 2008, 2068. Zapata said that he stayed in the car while Jeremias went to the apartment. 10 ROA 2008. Jeremias had an interaction with a woman during the second trip. 10 ROA 1989, 1999. He was gone for about five minutes and returned with a Hawaiian print backpack, a computer, drugs, and money. 10 ROA 2008. They returned to Rios's apartment, where Jeremias gave Zapata a laptop, a three ounce bag of marijuana and about $150, but did not give Rios anything at that time and instead argued, or Jeremias may have slapped Rios. 10 ROA 2008-10, 2071. They divided up the weed so Zapata could sell it. 10 ROA 2068. He had scales at his house and was selling the drug at that time. 10 ROA 2068. They got some credit cards, which they tried to use at Hooters and a couple of gas stations. 10 ROA 2010-11. They got some gas in containers for Zapata and went back to Hooters. 10 ROA 2011, 2072.

Detectives asked Zapata if Jeremias told him what happened inside the

apartment. 10 ROA 2012. He responded that Jeremias did, but he could not recall word for word what was said. 10 ROA 2012. Over objection, Zapata read from his statement:

> It's really hard just trying to get – get it out of my head. He said he walked in, he pretended like he had to go to the bathroom. They didn't even see it coming. . . . He told me he went there and went to the bathroom. He took five deep breaths, one, two, and on the fifth one he opened the door and come out and hit one right away. And then he – he said the roommate was there. They he said he hit the roommate. He shot twice each. He came out, then he said he was freaking out. He didn't know what to do. And then he did what he just did and he was asking me for his help, and he was – he was, like, what did I just do? And was just shaking and was scared. And I just said – I said what – I said what I had to do to make him – to make him calm down. You know, I just said, Relax, you just get your mind straight. You know, you did what you did, you know, and said – you know, and said, You know God will judge you now. I told him I will forgive him.

10 ROA 2013-14. Jeremias was upset. 10 ROA 2014. Zapata told the detectives that Jeremias said one of the victims was shot on the couch and the other was in the bedroom. 10 ROA 2027. In his statement to the detectives he said he did not remember where the other guy was. 10 ROA 2028. Zapata told the detectives that after the murder and robbery, it was bothering Jeremias, eating him up, it was a burden on his shoulders. 10 ROA 2033.

. . .

In his June 2009 statement to the police, Zapata told them that he was confused and was mixed up, and that different days had been mixed together.[4] 10 ROA 2073. He told them that his story did not make any sense. 10 ROA 2073. He told them that Jeremias was at Hooters for more than a few days and Zapata was there more than once. 10 ROA 2074. He also told them that he was high. 10 ROA 2074. In his statement, he told officers that he could not remember what Jeremias or Rios was wearing. 10 ROA 2074. Zapata told the police that he took Jeremias to the barbershop, but he did not testify about this detail at trial. 10 ROA 2096. He also did not tell the police that the gun was placed in a plastic bag, but instead told the detectives "no" when asked if the gun was placed in anything. 10 ROA 2098.

At the previous trial, Zapata testified that he called Adian Torres about one half

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[4]On cross-examination, Zapata stated that his family was on his mind when he gave his statement to the police. 10 ROA 2078. During the interrogation, officers told him they did not think he was being truthful with them, and they thought it was going to go another way, and they read him his Miranda rights. 10 ROA 2080. The detectives told him that they did not believe that he was being honest with them and that he did not want to be tied into the case and just wanted to be a witness. 10 ROA 2081. The detectives told him to think about his family and to take care of himself. 10 ROA 2082. Zapata said "I'm sorry, Mackie. I'm sorry." 10 ROA 2084. After that conversation with the detectives, Zapata started telling the detectives different stories. 10 ROA 2084. At the previous trial, Zapata testified that he told the police that if he was going to tell them a story, he was going to tell them a story such that he was the minor participant in the story. 10 ROA 2085. He testified on cross-examination that about half of his statement to the police was lies and he knew he was lying because he wanted to avoid responsibility for the case. 10 ROA 2088-93.

hour after the incident. 10 ROA 2078. Torres knew the two men and had bought drugs from them. 10 ROA 2078.

In November of 2010, Zapata entered into negotiations with the State and entered a guilty plea in this case. 10 ROA 2035, 2040. He entered a plea of guilty to two counts of second degree murder, robbery, and conspiracy to robbery after originally facing charges of two counts of first degree murder and other offenses and facing the possibility of two consecutive sentences of life without the possibility of parole. 10 ROA 2035, 2042. The only condition of his plea is that he tell the truth. 10 ROA 2036. If he does not tell the truth, the deal would be void and he would be prosecuted on the underlying charges. 10 ROA 2036. The punishments for second degree murder are 10 to life or 10 to 25 years. 10 ROA 2036. He was sentenced to serve concurrent terms of 10 to 25 years for the murder counts and is serving the other sentences concurrently. 10 ROA 2048-49. He testified that he had been 100% truthful at trial. 10 ROA 2037.

Jeremias testified at trial. 11 ROA 2338. He acknowledged that on June 9, 2009, he went the apartment occupied by Hudson and Stephens to either purchase marijuana or have it fronted for Zapata. 11 ROA 2377-78. When he arrived at the apartment, he found the door unlocked, went inside and saw the two bodies in the living room. 11 ROA 2379. He concluded that they were deceased. 11 ROA 2380.

He took marijuana, wallets, and two laptops from the apartment and then left without calling the police. 11 ROA 2380-81. He repeatedly denied killing the two men. 11 ROA 2381.

In June of 2009, Jeremias lived with his parents and he helped out Ivan Rios part time. 11 ROA 2341. They worked together and had been friends since 2007. Jeremias started staying with Rios after Rios had a stroke, in the early part of 2009. 11 ROA 2342. Jeremias made a small bedroom by the living room and would crash at Rios's apartment when he was in the area. 11 ROA 2343. He had a safe inside of a duffel bag at Rios's apartment in which he kept drugs. 11 ROA 2344. Jeremias was an addict and partied a lot. 11 ROA 2344. He used Xanax, pills, marijuana, and a little cocaine. 11 ROA 2344. After his plans to open a martial arts studio fell through, he got depressed and worked jobs in the night club industry. 11 ROA 2345. For a couple of years, he smoked weed, popped pills, and did club drugs. 11 ROA 2345. There was also a bullet in the safe. 11 ROA 2346. He found it at Rios's house a couple of months prior and just tossed it in a drawer or something. 11 ROA 2346. He did not remember putting it in his safe. 11 ROA 2347. He did not see any guns at Rios's house. 11 ROA 2347.

Jeremias met Zapata in 2006. 11 ROA 2347. They had mutual friends, partied together, and hung out. 11 ROA 2347. They got close and he referred to Zapata as

his "cousin" even though they were not actually related. 11 ROA 2348. They lived together for a couple of months but had stopped hanging out as much because Zapata was busy with his family and had a young son. 11 ROA 2348-51. They did not party as often but still contacted each other when they wanted to find drugs. 11 ROA 2350.

Exhibit H was a receipt for a rental car, from June 6, 2009 to June 12, 2009. 11 ROA 2351. It was in Jeremias's mother's name, but he was listed as an additional driver. 11 ROA 2351. He rented the car because he was involved in a fender-bender in his car. 11 ROA 2354. He was on Xanax at the time of the accident. 11 ROA 2354.

He met Stephens through mutual friends Jay and Adian. 11 ROA 2356. Stephens sold marijuana to Jeremias and would sometimes give him Xanax. 11 ROA 2356. He met Hudson through Stephens. 11 ROA 2356. Jeremias had been to their apartment a few times. 11 ROA 2357. He went there to buy marijuana from Stephens and sometimes Stephens would front him some with a promise that he would pay him back. 11 ROA 2357. Jeremias usually had the money to pay up front. 11 ROA 2357. They would smoke some marijuana together. 11 ROA 2358. Sometimes Hudson was there. 11 ROA 2358. They would hang out and smoke. 11 ROA 2358. They were good people and did not deserve this. 11 ROA 2358. He was aware of their selling operation. 11 ROA 2358. He had seen them with a couple of

pounds at a time. 11 ROA 2358. Stephens sometimes sold drugs in front of Jeremias. 11 ROA 2359.

Jeremias was comped a room at Hooters on June 6th for three or four days. 11 ROA 2360. He had friends, Vickie and Shay, who were coming in town from California. 11 ROA 2360. He believed that Rios and Zapata were the first to check into the room. 11 ROA 2361. They planned to meet the girls and then go to pool parties and clubs. 11 ROA 2362. They planned to use drugs as they partied. 11 ROA 2362. On Saturday they smoked some marijuana and took some Roaches (Rohypnol). 11 ROA 2363. That evening, Zapata came by and wanted to get some marijuana because he already had some buyers. 11 ROA 2364. Jeremias told him that he would try to link him up with Stephens. 11 ROA 2364. Jeremias called Stephens. 11 ROA 2364.

On Saturday afternoon, Jeremias went over Stephens's apartment with Zapata and Rios. 11 ROA 2365. Zapata drove his red truck. 11 ROA 2365. Jeremias had not received a call back from Stephens, but dropped by his apartment. 11 ROA 2366. Jeremias was not able to get the marijuana, so they went back to Hooters and hung out at the hotel. 11 ROA 2366.

The next day, Sunday, they were at Hooters and got up around noon. 11 ROA 2366. Jeremias was with Rios. 11 ROA 2366. His plan was to party with the girls.

11 ROA 2366. They smoked some marijuana, got a couple of Roaches from Rios, they walked over to the MGM to meet up with the girls. 11 ROA 2367. Jeremias received a call from Zapata, who still wanted to get some marijuana. 11 ROA 2368. Zapata came by Hooters in the early afternoon and was with Angel and their baby. 11 ROA 2368. Jeremias sent Stephens a text, but was getting tired of doing this for Zapata. 11 ROA 2370. Jeremias did not receive a response to the text. 11 ROA 2370.

Rios wanted to get a change of clothes at his apartment, so the three men went to Rios's apartment in Zapata's truck. 11 ROA 2371. Zapata wanted to go to Stephens's apartment, but Jeremias was waiting for a response from Stephens. 11 ROA 2371. They smoked some more marijuana, Rios gave Zapata some more Roaches, and Jeremias believed that he used another Roach. 11 ROA 2372. There was no discussion about a plan to commit a robbery. 11 ROA 2372. Jeremias did not see a gun at the apartment, did not place a gun in a black plastic bag, or take a Hawaiian backpack from the apartment. 11 ROA 2373. The plan was to go to Stephens's apartment to buy some marijuana for Zapata. 11 ROA 2373. Zapata already had the money to purchase the marijuana and Jeremias also had money to buy some. 11 ROA 2374. While they were at Rios's apartment, Jeremias told Zapata that he would send a text to Stephens with Zapata's number so that Stephens could text

Zapata because Jeremias did not want to run around and already had plans for that night. 11 ROA 2376. He was feeling lazy because he was relaxed from the marijuana and pills. 11 ROA 2376.

After leaving Rios's apartment, Zapata drove Jeremias to his barber. 11 ROA 2374. There were a couple of customers in front of Jeremias. 11 ROA 2374. Zapata was irritated because Angel wanted the car as it had the baby seat in the back. 11 ROA 2375. Jeremias told Zapata to leave him at the barber shop, take his truck to Angel, and return in Jeremias's white rental car. 11 ROA 2375. Stephens' apartment was close to the barber shop, so they stopped by to see if they could get some marijuana on the way back to pick up Rios and then go to Hooters. 11 ROA 2377. It was in the afternoon or early evening and was still light out. 11 ROA 2377.

When Jeremias arrived at Stephens's apartment, he called and texted Stephens. 11 ROA 2378. He knocked on the door and it popped open. 11 ROA 2378. Jeremias pushed on the door, saw Stephens on the couch and thought he was sleeping. 11 ROA 2378. As he got closer, he saw blood and was in shock. 11 ROA 2379. He then looked over and saw a person whom he assumed to be Hudson. 11 ROA 2379. The person was face down on the couch. 11 ROA 2380. Jeremias thought he might have touched the person, but Jeremias was high and had not seen anything like this before. 11 ROA 2380. He looked around, saw some marijuana on the counter, and

took it but did not know why he did so. 11 ROA 2380. He also grabbed a wallet, a Smith's bag from a counter, and the laptops. 11 ROA 2381. He does not know what he was thinking. 11 ROA 2381. He did not kill Stephens or Hudson. 11 ROA 2381. He wanted their families to know that he did not kill them. 11 ROA 2381.

Jeremias went back to the car, told Zapata that he thought those dudes were dead and that he took their stuff. 11 ROA 2382. They went back to Rios's apartment. 11 ROA 2382. Zapata saw the laptops and said he wanted one of those. 11 ROA 2382.

Jeremias did not report the fact that Stephens and Hudson may have been dead because he was there to buy marijuana and was doing drugs. 11 ROA 2382. They were good people and he took things from them. He was high and was not thinking. 11 ROA 2382. He reiterated that he did not kill them. 11 ROA 2383.

Jeremias was taken into custody by the police some months later. 11 ROA 2383. He gave a voluntary statement to the police but did not remember it well because he was smoking weed and doing some cocaine at that time. 11 ROA 2383. He was under the influence when he gave his statement. 11 ROA 2383. He told the police that he took the items from Stephens and Hudson. 11 ROA 2384.

He tried to use the credit cards that were inside of the wallets. 11 ROA 2384. He gave one laptop to Zapata and sold the other one. 11 ROA 2385. He smoked the

marijuana that he took. 11 ROA 2385. There was a couple of hundred dollars in cash, some of which he gave to Zapata. 11 ROA 2385.

The police thought Jeremias was more involved in the murders. 11 ROA 2385. He thought the police were coercing him into saying that he was involved. 11 ROA 2386. He told them the truth when he told them he found the men dead and took their stuff. 11 ROA 2386. He did not kill Stephens or Hudson. 11 ROA 2386.

On cross-examination, Jeremias testified that he did not know if Zapata was the person who killed Stephens and Hudson. 11 ROA 2387. He did not see him with a gun, but he did not know what he was doing. 11 ROA 2387. He did not tell detectives that he went to the barber shop before going to Stephens's apartment. 11 ROA 2388-89. He was at the barber shop for about an hour and Zapata was gone during that time. 11 ROA 2389. When Zapata left Jeremias at the barber shop he was driving his red truck and when he picked up Jeremias he was driving the white rental car. 11 ROA 2389.

Jeremias had weed fronted to him by Stephens. 11 ROA 2392. Jeremias was helping Stephens, but he was also profiting. 11 ROA 2393. Jeremias acknowledged that he was the person seen in the video tapes showing what he did on the evening of June 7 with the credit cards. 11 ROA 2393. He was not crying while he was making bets with the victim's money. 11 ROA 2394. He did not get any cash withdrawals

from the credit cards, but did get money from his own bank accounts. 11 ROA 2394. At the time he was making bets, he was not there, he was in a semiconscious state, and was not processing or thinking. 11 ROA 2395. He did use the credit cards. 11 ROA 2395. He later met up with the three girls and partied with them. 11 ROA 2395. He did not tell them about Stephens. 11 ROA 2395-96.

Jeremias heard Detective Long's testimony about the victim's cell phone, and was aware of his testimony that there was no phone activity between Jeremias's phone and Stephens's phone on June 7th, but did not know if the number he had for Stephens was correct because Stephens changed numbers every couple of weeks because he was dealing drugs. 11 ROA 2396. He did not tell the detectives about the changing phone numbers. 11 ROA 2397. They asked about calls but he did not tell them that the number changed. 11 ROA 2397. He was under the influence and was just trying to answer their questions. 11 ROA 2398.

He told the detectives that he took some marijuana and the credit card, but did not tell them about taking anything else. 11 ROA 2398. He told the detectives that he was the only one who went to the apartment and that he went in his rental car, but he lied when he did not mention Zapata. 11 ROA 2399, 2401. He told the detectives that he probably found a pound of marijuana, or something like that. 11 ROA 2402. He said that he found the wallets on the counter, near the marijuana. 11 ROA 2403.

He lied to the detectives when he did not say anything about the computers. 11 ROA 2405. He told them that he used the credit cards at Hooters, but did not mention the other places. 11 ROA 2406. He told them that the victims had a couple of hundred dollars in their wallets. 11 ROA 2407. He believes he threw out their wallets on a street. 11 ROA 2408.

Jeremias did not take Zapata to the apartment because Stephens did not know Zapata and it would not make sense to take him. 11 ROA 2410. Jeremias told the detectives several times that Zapata did not go to the apartment with him. 11 ROA 2411-13. He later told the detectives that he took two laptops. 11 ROA 2413-15. The detectives asked if Stephens and Hudson had been shot and he responded that he did not look. 11 ROA 2416. He sold the laptop sometime between June 7 and June 24. 11 ROA 2417. Jeremias told the detectives what we wore to the apartment, stated that he did not wear gloves, and stated that his fingerprints should be found in the apartment because he had been there. 11 ROA 2420. He also stated that Zapata's fingerprints would not be there because he had not been to the apartment and had not met Stephens. 11 ROA 2420. He told the detectives that he had not ever seen Zapata with a gun. 12 ROA 2421. He also told them that he said to Zapata: "I told Carlos, Carlos, dog, I saw it. Yes, sir. . . I'm all, like, dude, I don't know. I just saw my homeboy get murdered. Like, my – my homeboy is dead." 12 ROA 2422. Jeremias

told the detectives that he did not see his friends get murdered, they were already dead. 12 ROA 2423. He told the detectives they looked dead, he knew Stephens was dead, and he nudged Hudson. 12 ROA 2425, 2439, 2441. He did more drugs after he saw them because he was trying to erase the memory of what he saw. 12 ROA 2428. He did not contact the police on other days after they were killed. 12 ROA 2427-28. He told the detectives that he did not remember what he told Rios about what happened. 12 ROA 2435. He told detectives that Rios and Zapata did not have anything to do with anything. 12 ROA 2436. He also told the detectives that he did not ever see Zapata go to the apartment. 12 ROA 2436.

On redirect examination, Jeremias explained that when he talked with detectives, his focus was on what happened after he arrived at Stephens's apartment, not what happened prior. 12 ROA 2443. The detectives did not ask about the barber shop or the rental car. 12 ROA 2443. He told the detectives that he went to the apartment alone and Zapata did not go with him. 12 ROA 2445. He told them about the laptops, but did not mention them at the very beginning because he was nervous. 12 ROA 2447. He looked at the bodies and may have nudged them, but did not inspect the bodies. 12 ROA 2449. He told Zapata that they had been murdered and dead, but Jeremias did not murder them and did not see them get murdered. 12 ROA 2450. He told Zapata that the two men were dead but did not tell him that he killed

them. 12 ROA 2452. The detectives did not believe him. 12 ROA 2452. He told the detectives he did not kill the men. 12 ROA 2453. He did not recall the exact words he used when he talked to Rios about what happened. 12 ROA 2457. He did not tell Rios that he killed the men. 12 ROA 2458. He did not think that Rios or Zapata had anything to do with the murders at the time he gave his statement to the detectives. 12 ROA 2458-59. Zapata never went to Stephens's apartment with Jeremias. 12 ROA 2460. His fear was that because he went to the apartment, the police would think he committed the murders. 12 ROA 2460. He repeatedly denied his involvement to the detectives. 12 ROA 2461. He did not kill Stephens and Hudson. 12 ROA 2461. He could not tell the detectives exactly where the injuries were because he did not examine them after realizing they were dead and because he was in shock. 12 ROA 2463. This was the first time he saw someone dead in person. 12 ROA 2464. He tried to forget what he saw by doing drugs. 12 ROA 2465.

The State did not call any witnesses during its rebuttal case but, over an objection from defense counsel, a video of Jeremias's interrogation was admitted as evidence. 12 ROA 2469. It was not played in open court, but was sent to the jury for deliberations.

As noted above, the jury found Jeremias guilty of each of the State's charges.

During the penalty phase of the trial, victim impact evidence was presented by

Karen Hudson, Don Hudson, John Roop, and Danielle Stephens. 13 ROA 2780-2818. Detective Dan Long testified regarding Exhibit 36, which included police reports and court documents concerning Jeremias's criminal history. 13 ROA 2819. Prior to the immediate convictions, Jeremias had two misdemeanor and one gross misdemeanor conviction. 13 ROA 2848. Additional details concerning arrests and charges which were not filed are discussed below.

Detective Long testified about his interrogations of Ivan Rios. 13 ROA 2834. Rios gave four interrogations, the last of which implicated Jeremias. 13 ROA 2838. Additional details are discussed below.

Mitigating evidence was presented on Jeremias's behalf by his aunt, cousins, martial arts instructor, grandmother, mother and step-father. 13 ROA 2859-60; 14 ROA 2861-94. They discussed Jeremias's childhood in the Philippines, his parents' decision to leave him with relatives at a young age after they moved to the United States for work, his transition to living here after moving in with his mother and step-father, and eventually his loss of a martial arts studio which was of great importance to him. Id.

Sharon Jones-Forrester, a clinical neuropsychologist, testified that she conducted a neuropsychological evaluation on Jeremias and collected his psychosocial history. 14 ROA 2902. Testing showed that he had average verbal

skills, low average spatial skills, low average working memory, and his reading skills were at the 10th grade level. 14 ROA 2905. Portions of his executive skills were mildly impaired and he had generally good executive skills. 14 ROA 2907. He had problems with paying attention to one thing and shifting attention to another area, which was consistent with a neurocognitive disorder. 14 ROA 2908. She interviewed Jeremias seven times and interviewed several family members and his former martial arts instructor, watched video interviews of relatives from out of the country, and reviewed an extensive number of records. 14 ROA 2911. She found that there was poor maternal health during pregnancy and there were a number of prenatal issues. 14 ROA 2912. Poor maternal health can impact fetal brain development and can impact behavior, attention, and cognitive problems once the baby is born. 14 ROA 2913. Prenatal health may have impacted Jeremias's hyperactivity and attention problems. 14 ROA 2913. The pregnancy was unplanned and resulted in Jeremias's mother being forced from her home. 14 ROA 2913. His parents had very poor financial resources and the situation was very stressful and led to depression. 14 ROA 2913. Jeremias's mother had a lymph node disease and took medication for that condition during her first three months of pregnancy. 14 ROA 2914. It was not known whether the medication was safe for prenatal development. 14 ROA 2914. There were nutritional issues in the first year of his life which were

related to poverty. 14 ROA 2915. The doctor discussed his childhood illnesses and the impact they could have had on his adult life. 14 ROA 2916. He was accidentally poisoned at 1.5 years old. 14 ROA 2917. He also had a fall into a construction site and was impaled on a rebar at age 6, fell from a second-story balcony and sustained a concussion at age 5, and had multiple concussions between 8 to 24 months from sleeping on a hammock and falling onto a tile floor. 14 ROA 2918. Multiple head injuries have a significant impact of cognitive development. 14 ROA 2918. Records consistently show that he had hyperactivity and impulsivity issues since at least age 3. 14 ROA 2918.

Jeremias's mother was asked to leave her home because of her unexpected pregnancy, but she later reunited with her family and Jeremias was raised by an extended family. 14 ROA 2920-21. When he was around 5 years old, he was separated from his mother and father as they migrated to the United States. 14 ROA 2921. This separation can create issues for a child, who experiences sadness and confusion. 14 ROA 2922. The issues continued when his parents got divorced. 14 ROA 2923. His father returned to the Phillippines, but he did not see him until he was around 7 years old. 14 ROA 2924. They started to develop a close relationship again, but then around age 9, Jeremias was sent to live with his mother and new stepfather in the United States. 14 ROA 2925. He suffered the loss of both his close

relationship with his father and his close relationship with his extended family. 14 ROA 2925. This created emotional instability because of confusion, loneliness and unpredictability. 14 ROA 2925. These circumstances can also lead to distrust and difficulty in getting close to other people. 14 ROA 2925.

Initially, Jeremias's relationship with his mother was difficult and there were adjustment issues with his stepfather. 14 ROA 2926. There were also issues adjusting to a new culture and language. 14 ROA 2927. The result was feelings of loss, abandonment, confusion, unpredictability, insecurity, distrust, stress, depression, and anxiety. 14 ROA 2929. Despite this, he developed friendships and participated in sports. 14 ROA 2930. His school performance was inconsistent. 14 ROA 2930. He was not placed on medication or given academic accommodations. 14 ROA 2931. He was diagnosed with ADHD at age 10, but his parents did not want to put him on medication. 14 ROA 2931. Martial arts was very beneficial to him and provided him with a sense of community. 14 ROA 2932. The loss of his martial arts studio was really significant and led to hopelessness and despair for Jeremias. 14 ROA 2935. At this point, he began a downward, self-destructive spiral. 14 ROA 2935. He had his first episode of significant depression after the loss of his martial arts career and the depression was never effectively treated or resolved. 14 ROA 2935. He started medication on October 17, 2014, just a few weeks prior to trial, but it takes six to

eight weeks for the medication to start to come up to efficacy. 14 ROA 2935. His anxiety was also never treated. 14 ROA 2936. Jeremias began abusing substances, including marijuana. 14 ROA 2936.

Jeremias was in a car accident in 12th grade, which resulted in a concussion. 14 ROA 2933. He had multiple blows to his head while sparring in martial arts. 14 ROA 2934. MRI findings show a relatively severe decrease in frontal fiber tracts that are consistent with repetitive head injury. 14 ROA 2934. The frontal lobe is involved in attention, reasoning, decision making, planning, problem solving and impulse control. 14 ROA 2934. Dr. Jones-Forrester consulted with Dr. Orrison who is a neuroradiologist, who confirmed that the damage was much more severe than what they would see for Jeremias's age, and was definitely consistent with multiple repetitive head injuries. 14 ROA 2934. He was still youthful in terms of brain development. 14 ROA 2939. He had some symptoms of post-concussive disorder, including exacerbation of depression and anxiety, increase in substance abuse, migraines, and mental health problems. 14 ROA 2940. He also had several family members with mental health and substance abuse problems. 14 ROA 2941.

Jeremias's brain was fragile and his use of controlled substances created a very poor prognosis as it interfered with the healing of his brain. 14 ROA 2936. He began using alcohol and marijuana in 11th grade and then started using methamphetamine

and prescription drugs. 14 ROA 2936. After he lost the martial arts studio, he began to use multiple substances at the same time, and he started using Rohypnol. 14 ROA 2937. His substance abuse also led to involvement with much more negative peers and to legal problems. 14 ROA 2937. He worked as a nightclub host, which involved more substance abuse. 14 ROA 2938.

The records showed that Jeremias adjusted well to incarceration. 14 ROA 2942. He also has excellent family and social support. 14 ROA 2943.

The use of marijuana and Rohypnol at the time of the incident had an impact. 14 ROA 2944. The use of the drugs can impact memory and impulse control, and can lead to amnesia or not being entirely aware of one's actions during the commission of the offense. 14 ROA 2944.

Norman Roitman, a clinical and forensic psychiatrist, testified about Jeremias's use of alcohol, Rohypnol, Xanax, and alcohol. 14 ROA 2957. He described the effects of the drugs, their interaction with each other, and the impact on cognitive functioning. 14 ROA 2957-64. Rohypnol is known for creating aggression, causing impulsive behavior, and causing the user not to remember anything. 14 ROA 2962-63. Dr. Roitman interviewed Jeremias about his use of controlled substances and concluded that the Rohypnol and other substances used on the day of the incident by Jeremias would have increased the chances of a total wipeout of his memory and

would have a "Rambo" effect, meaning aggressive and impulsive behavior. 14 ROA 2965.

Sherman Hatcher, a former warden with the Nevada Department of Corrections, testified about prison conditions at the Ely State Prison, classifications, and regulations applied to prisoners. 14 ROA 2972-3015.

Tami Bass, a former Parole Board member testified about procedures for obtaining parole in Nevada. 14 ROA 3016-21. Details concerning her cross-examination are discussed below.

Maribel Yanez, a mitigation specialist, testified about Jeremias's family background and records about his life. 15 ROA 3099-3115. Videos and photographs were admitted as evidence. 15 ROA 3101-04. Videos of interviews of some of Jeremias's relatives in the Phillippines were played for the jury. 15 ROA 3112.

Gordon Daniel, Jeremias's stepfather, testified about Jeremias's transition to living with him, moving to the United States, his performance in American schools, and his involvement in sports. 15 ROA 3115-24. He visits Jeremias at the jail, loves him, and does not want to lose him. 15 ROA 3124-27.

Elizabeth Daniel, Jeremias's mother, testified about his prenatal care, childhood, their five year separation while he was in the Phillippines and she was in the United States, and his move to the United States. 15 ROA 3128-39. She related

stories about her life and talked about visits at the jail with him. 15 ROA 3145.

Jeremias gave a statement in allocution. 15 ROA 3182.

As noted above, the jury returned a sentence of death.

## VI. SUMMARY OF THE ARGUMENT

Jeremias was convicted of two counts of first degree murder and was given two sentences of death by the jury. Both the culpability and penalty phases of his trial, however, are unworthy of confidence as they were plagued by numerous statutory and constitutional violations. He asks that this Court reverse the judgment and sentences of death and remand this matter for a new trial.

The constitutional violations in this case were present from the beginning of the trial. During jury selection, the district court prohibited Jeremias's family from being present in the courtroom, despite Jeremias's right to a public trial during this critical stage of the proceedings. The violations continued during the State's examination of its most critical witness, Carlos Zapata. The district court allowed the prosecutor to repeatedly ignore the rules of evidence by allowing a direct examination which consisted in large part of the witness reciting from his statement to detectives, rather than directly testifying about the events at issue. Additional violations took place during the culpability phase as the district court allowed expert testimony from a crime scene analyst and a detective about the nature of plastic pieces found at the

scene, even though neither witness was remotely qualified to give their opinion on this issue. Finally, the district court took the unprecedented action of allowing a video recording of Jeremias's interrogation by detectives to be sent to the jury for deliberations, even though the video had not been viewed in open court and was not published to the jury prior to closing arguments.

The penalty phase of the trial was also rendered unfair due to numerous constitutional violations. First, the jury was allowed to sentence Jeremias to the death penalty based upon an invalid aggravating circumstance of murder committed to avoid arrest. Next, the jury was allowed to hear testimony about Ivan Rios's interrogation by detectives, and to receive a transcript of that interrogation, even though Rios did not testify against Jeremias. The admission of this evidence was contrary to long standing authority by this Court. Also of significance was the fact that essentially the prosecutor was allowed to testify about details of another murder case, through the guise of cross-examination of Jeremias's expert witness, in a manner which erroneously allowed the jury to believe that a sentence of life without the possibility of parole would actually allow Jeremias to receive a pardon and then be released on parole.

For each of these reasons, and others set forth in this Opening Brief, the judgment and sentences of death should be vacated.

## VII. ARGUMENT

### A. The district court violated Jeremias's right to a public trial by excluding members of the public, including his family, from jury selection.

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, and a public trial were violated by a district court's order excluding the public, including Jeremias's family, from jury selection. U.S. Const. amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

The issue of whether a defendant has been denied the right to a public trial is reviewed de novo. United States v. Shyrock, 342 F.3d 948, 974 (9th Cir. 2003); Grey v. State, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008) (providing de novo review to constitutional challenges).

On the first day of trial, the prosecutor noted that four members of the defendant's family were in the courtroom. 5 ROA 1060. The prosecutor objected to them being present. 5 ROA 1060. He noted that only one family member was a potential witness, but she was not under service. 5 ROA 1060. The prosecutor told the district court that defense counsel told him that the family understood that they would be leaving the courtroom when the jury came in. 5 ROA 1060. The district court informed the family members that every single seat in the courtroom would be needed for the potential jurors, so at least until they got started with jury selection and getting a few people excused, there would not be enough chairs. 5 ROA 1061.

The district court's action of closing the courtroom to the public, including Jeremias's family, violated his right to a public trial. The right to a public trial rests upon the First, Fifth and Sixth Amendments. Presley v. Georgia, 558 U.S. 209, 211-12 (2010). These constitutional rights are applicable to the states. In re Oliver, 333 U.S. 257, 273 (1948); Press-Enterprise Co. v. Superior Court of Cal. Riverside Cty, 464 U.S. 501, 505 (1984) (applying rule to state court case). It is well settled that the right to a public trial extends to jury voir dire and selection. Presley, 558 U.S. at 213 (citing Press Enterprise and Waller v. Georgia, 467 U.S. 39, 46 (1984)). See also Stephens Media, LLC v. Eighth Judicial Dist. Court, 125 Nev. 849, 855, 221 P.3d 1240, 1245 (2009) (recognizing that the right to a public trial includes access to jury selection).

> In order to exclude the public from any stage of a criminal trial:
> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

Presley, 558 U.S. at 214 (quoting Waller, 467 U.S. at 48). See also Feazell v. State, 111 Nev. 1446, 1448, 906 P.2d 727, 729 (1995) (adopting the Waller test). "'Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.'" Presley, 558 U.S. at 214 (quoting Press Enterprise, 464 U.S. at 511). This rule is premised on the fact that "'[t]he process of juror selection is itself a matter

of importance, not simply to the adversaries but to the criminal justice system.'" Id. (quoting Press Enterprise, 464 U.S. at 505). "The public has a right to be present whether or not any party has asserted the right." Id.

A claim that every seat in the courtroom is necessary for use by potential jurors is not sufficient to defeat the right of a public trial during jury selection proceedings. The assertion to the contrary was examined by the Supreme Court in Presley:

> Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial. Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.

Presley, 558 U.S. at 215.

Here, the State, as the party seeking to close voir dire proceedings, failed to advance an overriding interest that was likely to be prejudiced and failed to establish that the closure was no broader than necessary to protect that interest. The district court did not consider reasonable alternatives to closing the proceeding, and it failed to make findings adequate to support the closure. Accordingly, every element identified in Presley as necessary for a courtroom closure was not established, and the constitutional right to a public trial was therefore violated.

When the right to a public trial is violated, the remedy is that the judgment of

conviction is vacated and the defendant is granted a new trial. Washington v. Recuenco, 548 U.S. 212, 218 & n.2 (2006) (noting that the denial of a public trial is structural error which requires automatic reversal) (citing Waller); United States v. Gonzalez-Lopez, 548 U.S. 140, 148-49 (2006) (denial of the right to a public trial is a structural defect that defies analysis by harmless-error standards); United States v. Agosto-Vega, 617 F.3d 541, 545-48 (1st Cir. 2010) (citing Presley and holding that the defendant was entitled to a new trial where the public was excluded from voir dire). Accordingly, Jeremias's conviction must be vacated and this case remanded for a new trial.

**B. The district court violated Jeremias's constitutional rights to due process and a fair trial by allowing the State to examine its primary witness in repeated violation of evidentiary rules.**

Jeremias's state and federal constitutional rights to due process of law, equal protection, confrontation, and a fair trial, were violated by a district court's decision allowing a very experienced prosecutor to repeatedly violate evidentiary rules while examining the State's primary witness. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. However, the issue of whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo.

Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Whether leading questions are allowed is a matter mostly within the discretion of the trial court. Leonard v. State, 117 Nev. 53, 70, 17 P.3d 397, 409 (2001). This Court reviews a district court's determination of whether proffered evidence fits an exception to the hearsay rule for an abuse of discretion. Fields v. State, 125 Nev. 785, 795, 220 P.3d 709, 716 (2009). The interpretation of a statute is a question of law that this Court reviews de novo. Mendoza-Lobos v. State, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009). Issues relating to the constitutionality of a statute are reviewed de novo. State v. Hughes, 261 P.3d 1067, 1069 (Nev. 2011).

Carlos Zapata was the State's primary witness against Jeremias. He was charged along with Jeremias and Rios, but entered a plea of guilty and received a reduced sentence in exchange for his agreement to testify against his two co-defendants. 10 ROA 2035. Zapata testified in Rios's trial first. Rios was acquitted, despite Zapata's testimony against him.[5] 13 ROA 2855. The jury was not informed

[5]Jeremias respectfully submits that the examination of Zapata at Rios's trial is relevant to the issue presented here as that examination involved the same prosecutor, the same witness, the same judge, and concerned the same subject matter. Jeremias submits that the district court's experience with the testimony in the Rios trial likely influenced the court's evidentiary decisions in this trial. See 8 ROA 1637-38 (discussion of whether evidence of the Rios acquittal was admissible, during which the district court expressed vehement disagreement with the Rios verdict, expressed a belief that the verdict for Rios was based upon sympathy because he suffered from a stroke, and found that the verdict had no bearing on Zapata's credibility). Jeremias requested that this testimony from the

of Rios's acquittal during the culpability phase of this trial. 5 ROA 1049.

A careful examination of Zapata's testimony on direct examination reveals that the prosecutor elicited background information from Zapata, but then asked questions about the offense by asking Zapata if he recalled his interview by detectives on June 24, 2009. 10 ROA 1984. The following exchange then took place:

> Q. [by Mr. Stanton] Mr. Zapata, if I were to ask you specific details about what you said and what questions were posed to you, do you have that transcript memorized?
>
> A. [by Zapata] I don't.
>
> Q. Would it assist you when I ask you questions about what was asked of you and what your answers were to those detectives on June 24, 2009?
>
> A. Would I know them by heart?
>
> Q. Would it assist you when I ask you questions about what was asked of you and what your answers were to those detectives on June 24, 2009?
>
> A. Yeah.
>
> Q. I'm going to direct you to a couple of sections of that transcript.

---

Rios trial, the transcript of which was filed in the same district court case as this case, be sent to this Court as a supplement to the record on appeal, but this Court denied that motion on June 22, 2015. Jeremias respectfully requests that this Court, sitting en banc, reconsider this decision and order that the transcript be filed as a supplemental record.

Mr. Cano: Your Honor, at this point in time, I mean, if he needs to refresh, you know, his recollection, I can understand him referring to it.

The Court: Right.

Mr. Cano: But there should be a question posed prior –

The Court: Maybe ask him the question first and then –

Mr. Cano – prior –

The Court: If he doesn't remember, you can direct him –

Mr. Stanton – I'm going to.

The Court: – to the transcript.

10 ROA 1985. The prosecutor then asked Zapata about whether he knew why the detectives were asking him questions and whether he remembered telling the detectives about an incident when Jeremias got out of the truck at the apartment complex. 10 App. 1986. Questions presented by the prosecutor immediately thereafter focused on not what happened at the apartment complex, but rather on what Zapata told the detectives during the interrogation about what happened at the apartment complex. 10 ROA 1986-87. Zapata acknowledge that he was not 100 percent truthful with the detectives at the beginning of the whole interview. 10 ROA 1987. The prosecutor continued to ask questions of Zapata about the interrogation, and in doing so elicited prior statements concerning the events at issue. 10 ROA

1987-90. Defense counsel objected to the examination "Your Honor, if there's a question that's posed and he doesn't remember, I'm going to object as to the form." 10 ROA 1990. The district court directed counsel to a bench conference which was not recorded.[6] 10 ROA 1990. The prosecutor then asked some questions about matters outside of the interrogation, concerning preliminary matters and the events at issue. 10 ROA 1990-2012.

Continuing on direct examination, the prosecutor asked Zapata "Everything we just talked about, the vast majority of it, you told the detectives on June 24, 2009, correct?" 10 ROA 2012. Zapata responded "Correct." 10 ROA 2012. The prosecutor then asked Zapata about specific statements he made to the detectives and asked whether he could recall word for word what he said to the detectives. 10 ROA 2012. The prosecutor asked him to refresh his recollection with the transcript and then asked him to read his verbatim answer from the interrogation about what happened inside the apartment the first time he went up. 10 ROA 2013. Defense counsel objected, but the district court overruled the objection. 10 ROA 2013. Zapata then read at length from the transcript of his answers to detectives during the interrogation. 10 ROA 2014. This process was repeated for questions about the

[6]The district court's failure to record bunch conferences violated SCR 250(5)(a) and deprived Jeremias of his right to a complete record, as is necessary for full and fair appellant review. See Daniel v. State, 119 Nev. 498, 507-08, 78 P.3d 890, 897 (2003).

length of time that Jeremias was in the apartment. 10 ROA 2016. The prosecutor continued with this type of questioning:

> Q. Now if you go to page 41, if you could read once again to yourself the highlighted section of the bottom of page 41.
>
> Mr. Cano: Your Honor, again, I'm going to object just to the form. There's no question posing in front of him. There's nothing that – to refresh his recollection about.
>
> Mr. Stanton: Well, my question was whether or not he remembered verbatim what was said in the June 24th interview. He said he doesn't. So I'm going back to specific areas of the transcript if– to see if that is reflect – refreshed his recollection and then asking him specific questions after having him refresh his recollection.
>
> The Court: Okay. Go ahead and read that quietly to yourself, and then Mr. Stanton will ask you if that refreshes your recollection as to what you told the police.

10 ROA 2016. The prosecutor then continued by asking Zapata to read the transcript of what he told officers and then asked questions concerning his prior statements. 10 ROA 2016-27. This testimony was elicited without any showing that the statements to detectives were inconsistent with Zapata's testimony at trial and often concerned topics which were not previously addressed. For example, the following exchange occurred:

> Q. Okay. Do you remember the detectives asking you about the defendant –
>
> A. Yes, I do.

Q. – and what kind of person he was?

A. Right.

Q. What did you tell the detectives?

A. I told them he was a very talented person.

Q. And at the bottom of – there's a reference to the defendant telling you something, that if there was every any problems, he gave you a piece of advice. Do you remember what that piece of advice was?

A. To always choose my family.

Q. And is that what you did when you decided to talk to the detectives about the details of what occurred?

A. That's what I decided to do.

10 ROA 2027. At one point during this process, the district court asked to see counsel at the bench, but the bench conference was not recorded. 10 ROA 2018. Later, defense counsel again objected to the prosecutor's line of questioning and argued that Zapata had already answered the question, but the district court overruled the objection and stated that the question was different. 10 ROA 2027-28. Questioning then resumed, not directly about the events themselves but instead about what Zapata told the detectives about the events. 10 ROA 2018-35.

In essence, the prosecutor was allowed, over defense objections, to use Zapata's interrogation as a script by which the prosecutor led Zapata to say exactly what the prosecutor wanted him to say, even though this technique is not allowed

under long established rules of evidence.

The Prior Statements Were Hearsay and Inadmissible

The Sixth Amendment to the United States Constitution, and Article I Section 8 of the Nevada Constitution, guarantee that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This guarantee is codified in part in NRS 51.035, which excludes hearsay testimony as evidence. "Hearsay" is defined as an out of court statement "offered in evidence to prove the matter asserted." NRS 51.035. Admission of prior statements which are consistent with trial testimony are hearsay and if they do not fall within any exception to the hearsay rule, are inadmissible. Id.

NRS 51.035 provides in relevant part:

> "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:
>
> 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> (a) Inconsistent with the declarant's testimony;
>
> (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant or recent fabrication or improper influence or motive[.]
>
> (c) One of identification of a person made soon after perceiving the person; or
>
> (d) A transcript of testimony given under oath at a trial or hearing of before a grand jury . . .

NRS 51.035(2)(a) "sets forth the prior inconsistent statement exception to the hearsay rule. It allows the admission of an out-of-court statement that would

otherwise be considered inadmissible hearsay when 'the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is inconsistent with his testimony.'" Atkins v. State, 112 Nev. 1122, 1129, 923 P.2d 1119, 1123 (1996) (quoting NRS 51.035(2)(a)), overruled on other grounds, McConnell v. State, 120 Nev. 1062-63, 102 P.3d 606, 620 (2004). See also Rugamas v. Eight Judicial Dist. Ct., 305 P.3d 887, 893 (Nev. 2013) (prior inconsistent statements are admissible as substantive evidence only if they are inconsistent with testimony and subject to cross-examination). Zapata's statements to detectives during his interrogation were not admissible as prior inconsistent statements because they were admitted with a showing that they were inconsistent with his testimony. Because the prosecutor failed to elicit direct testimony from Zapata about the crucial events at issue, where was no testimony to rebut.

Likewise, Zapata's statements to detectives were not admissible as prior consistent statements. "Prior consistent statements of a witness are generally considered to be inadmissible hearsay." Runion v. State, 116 Nev. 1041, 1052, 13 P.3d 52, 59 (2000) (citing NRS 51.035). "However, they are admissible to rehabilitate a witness charged with recent fabrication or having been subjected to improper influence." Id. (citing NRS 51.035(2)(b)).

> A prior consistent statement is not hearsay if: (1) the declarant testifies at trial; (2) the declarant is subject to cross-examination

> concerning the statement; (3) the statement is consistent with the declarant's testimony at trial; and (4) the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. See Patterson v. State, 111 Nev. 1525, 1531-32, 907 P.2d 984, 988-89 (1995).
>
> Additionally, the prior consistent statement, to be admissible, must have been made at a time when the declarant had no motive to fabricate. See Id.; see also Cheatham v. State, 104 Nev. 500, 502, 761 P.2d 419, 421 (1988).

Id. at 1052, 13 P.3d at 59-60. See also Glover v. State, 125 Nev. 691, 704, 220 P.3d 684, 692 (2009) (prior statements to police were not admissible as prior consistent statements because the defendant's testimony had not been impeached with a prior inconsistent statement and the State did not accuse him of recent fabrication or improper influence or motive). Prior consistent statements are inadmissible if they exceed the scope of testimony elicited during direct examination. Jacobs v. State, 101 Nev. 356, 358, 705 P.2d 130, 131 (1985). Here, the State failed to establish admissibility of Zapata's testimony about his prior statements because it failed to establish that the statements were consistent with his testimony at trial, the statements were not offered to rebut an express or implied charge or recent fabrication or improper influence or motive, the statements were given at a time when Zapata had a motive to fabricate, and they exceeded the scope of his direct testimony.

The prior statements did not concern one of identification of a person made soon after perceiving the person, and were therefore not admissible under NRS

51.035(2)(c). Finally, the statements to detectives were inadmissible under NRS 51.035(2)(d) because the statements were not given under oath at a trial or hearing or before a grand jury. Cf. Mulder v. State, 116 Nev. 1, 10-11, 992 P.2d 845, 851-52 (2000) (addressing examination similar to that here, but finding prior statements to be admissible because they were given under oath, before a grand jury, and were therefore admissible under NRS 51.035(2)(d)).

The State failed to establish that Zapata's statements to detectives were admissible hearsay under any of the exceptions recognized by Nevada's statutes.

The Repeated Use of Leading Questions On Critical Issues Was Improper

The prosecutor's examination was also improper as he repeatedly used leading questions to guide Zapata through the most critical portion of his direct testimony, even though Zapata was not a hostile witness.

NRS 50.115 provides:

> 1. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:
> (a) To make the interrogation and presentation effective for the ascertainment of the truth;
> (b) To avoid needless consumption of time; and
> (c) To protect witnesses from undue harassment or embarrassment.
> 2. Cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness, unless the judge in the exercise of discretion permits inquiry into additional matters as if on direct examination.
> 3. Except as provided in subsection 4:
> (a) Leading questions may not be used on the direct examination of a

witness without the permission of the court.
(b) Leading questions are permitted on cross-examination.
4. Except that the prosecution may not call the accused in a criminal case, a party is entitled to call:
(a) An adverse party; or
(b) A witness identified with an adverse party,
and interrogate by leading questions. The attorney for the adverse party may employ leading questions in cross-examining the party or witness so called only to the extent permissible if the attorney had called that person on direct examination.

The Nevada Rule is similar to Federal Rule of Evidence 611. The rule "codifies the traditional mode of dealing with leading questions. It acknowledges that they are generally undesirable on direct examination[.]" Ellis v. Chicago, 667 F.2d 606, 613 (7th Cir. 1981). "[T]here exist sound reasons for requiring a showing of hostility as a prerequisite to permitting the utilization of leading questions on direct examination except with respect to preliminary and uncontrovered matters. The vice of leading questions lies in its suggestion of an answer to a witness who, having been called by the party, is presumed to be inclined to favor the questioner. If counsel were allowed routinely to lead a witness on direction examination, the evidence elicited would all too often be that of the lawyer, not of the witness." United States v. Bryant, 461 F.2d 912, 918 (6th Cir. 1972) (citing J. Maguire, Evidence – Common Sense and Common Law 43, 44 (1947)). "The evil of leading a friendly witness is that the information conveyed in the questions may supply a false memory." United States v. Hansen, 434 F.3d 92, 105 (1st Cir. 2006) (quotation and internal citation

omitted).

The prosecutor's examination here exceeded the bounds of permissible examination. See Rowland v. State, 118 Nev. 31, 40, 39 P.3d 114, 119-120 (2002) (finding prosecutor's leading questions to be improper as he was in effect arguing the case to the jury through his questions); Winnerford v. State, 112 Nev. 520, 522-24, 915 P.2d 291, 292-93 (1996) (suggesting that there would be insufficient evidence to support an adjudication of a minor child as a delinquent based upon the testimony of the State's primary witness which was obtained through leading questions by the prosecution).

The Combined Violations Of The Rules of Evidence on Leading Questions And Prior Statements Rendered The Trial Unfair

Facts similar to those presented here were at issue in United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977). In that case, several defendant were charged together in an indictment alleging their participation in an armed robbery. Id. at 638-39. One of the defendants, Hall, negotiated his case through plea negotiations and agreed to testify against the two remaining defendants. Id. Hall was sentenced shortly before the trial of his co-defendants. Id. at 639. At trial, Hall acknowledged some incriminating details, but then claimed he did not know, due to his drug use, who was present at the bank during the robbery or at the apartment when the proceeds were distributed. Id. at 639-40. The prosecutor then attempted to impeach Hall's

credibility based upon two oral prior inconsistent statements made to an FBI agent. Id. at 640. Over objections, the trial court allowed the prosecution to use a memorandum about the statements to refresh Hall's recollection. Id. The appellate court noted that the federal rules allowed limited reference to the prior statements for the purpose of refreshing Hall's present recollection of the details of the bank robbery or for impeaching the credibility of Hall's professed failure to recollect those details, assuming that his prior statements were legally inconsistent with his testimony at trial. Id. at 641. The court explained, however, the limited use of this evidence:

> Case law supports the limited incorporation of a witness's prior sworn statements within leading questions designed to refresh his recollection of their contents. . . . However, we find no precedent sanctioning the recitation in the presence of the jury of extended unsworn remarks, attributed to a Government witness, which were allegedly recorded in an unverified document and which inculpate the defendant. Courts have condemned this practice as cloaking potentially self-serving accounts of a witness's statements with the dignity and credibility of the prosecutor's office . . . as increasing the probability that the jury will consider the statements as substantive evidence despite any limiting instruction to the contrary. . . . as placing before the jury the content of patently inadmissible past recollection recorded, . . . and as bypassing, to the prejudice of the defendant, reasonable alternative measures to accomplish the same legitimate result.

Id. at 641 (citations omitted). Critically, the court followed the view of the 8th Circuit Court of Appeals in finding that "'if a party can offer a previously given statement to substitute for a witness' testimony under the guise of 'refreshing recollect,' the whole adversary system of trial must be revised.'" Id. at 642 (quoting

Goings v. United States, 377 F.2d 753, 760 (8th Cir. 1967), limited on other grounds, United States v. Thompson, 708 F.2d 1294, 103 (8th Cir. 1983)) (emphasis omitted).

In Robbins v. Small, 371 F.2d 793 (1st Cir. 1967), the First Circuit Court of Appeals considered a similar question to that presented here and found that the prosecutor's conduct in the interrogation of a crucial witness violated the Confrontation Clause of the Sixth Amendment. In that case, the State called a prison inmate as a witness. Id. at 794. The witness had previously given a signed statement to the police which implicated the defendant. Id. At trial, the witness refused to answer the questions, but the prosecutor continued to confront him with detailed leading questions based on his statement. Id. The statement itself was not offered as evidence. Id. The First Circuit found that the testimony at issue concerning practically every essential element of the crime and the questions "clearly bore on a fundamental part of the State's case" against the defendant and "formed a crucial link in the proof." Id. (quoting Douglas v. Alabama, 380 U.S. 415, 419-20 (1965)). The federal court explained the constitutional violation created through the prosecution's use of leading questions:

> The trial court's ruling permitting the prosecutor's leading questions involved more than just an exercise of the court's discretion, as the State contends. It cut much deeper. The prosecutor, through these repeated questions, indirectly but effectively brought to the jury's attention the substance of a statement that was not in evidence and, therefore, not subject to cross-examination. This deprived the petitioner of a

> fundamental right secured by the Confrontation Clause of the Sixth Amendment – recently made applicable to the states. Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, supra.

Id. at 795. In Robbins, the witness did not admit that the statement in the prosecutor's hand was the statement made by the witness, but the effect remains the same as that here: evidence was not presented through the direct testimony of a witness with knowledge, but was instead presented through out-of-court statements without the ability of the jury to assess the witness's credibility and demeanor. The Court in Robbins further found that the prejudice caused by the prosecutor's examination was not cured by the instructions to the jury. Id. "In the instant case the error is substantial and the resulting prejudice extreme. Here the jury was subjected to the sustained impact of a series of repeated, leading questions with no cautionary admonition from the court until the very end of the trial." Id. at 796.

The type of examination which took place here has long been condemned. In Velott v. Lewis, 102 Pa. 326 (Pa. 1883), the Supreme Court of Pennsylvania explained the need for original testimony during a trial:

> There was no evidence tending to show that the witness . . . had, in the interval between the time of arbitration and trial in court, by old age or otherwise, lost his memory. He but failed to recollect what he had previously sworn to, but if this were enough to admit the notes of a former trial, we might as well abandon the original testimony altogether, and supply it with previous notes and depositions. It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always thus be led to the exact words of his former evidence. As

> we are not yet prepared for an advance of this kind, we must accept the ruling of the court below as correct.

Id. at 333. Velott was cited with approval by the United States Supreme Court in Putnam v. United States, 162 U.S. 687, 706 (1896) (finding improper use of prior testimony, admitted under the guise of refreshing recollection, to be prejudicial error). Other cases are in accord. See United States v. Lonardo, 67 F.2d 883, 884 (2nd Cir. 1933) (L. Hand, Judge) (reversing conviction based upon reliance on a co-defendant's prior sworn statement which was recanted at trial); State v. Smith, 231 S.E.2d 663, 671 (N.C. 1977) (discussing the use of a transcript of prior testimony to refresh a witness's recollection, noting that "'it is not the memorandum that is the evidence but the recollection of the witness,'" and finding that the use of a transcript as a script for the witness to recite at trial is improper) (quoting Henry v. Lee, 2 Chitty 124 (1810); and citing United States v. Riccardi, 174 F.2d 883 (3rd Cir. 1949); State v. Perelli, 5 A.2d 705 (Conn. 1939); 3 Wigmore, Evidence §§ 758. 759 (Chadbourn rev. 1970)) (emphasis omitted); State v. Merlo, 92 Ore. 678, 699 (Ore. 1919) (a party cannot use prior inconsistent statements unless the witness first gives testimony which relates to a material matter).

In Dolen v. State, 36 N.W.2d 566, 567 (Neb. 1949), the Court recited the standard rule: "'No one has ever doubted that the *former testimony* of a witness cannot be used if the witness is *still available* for the purpose of testifying at the

present trial.'" (Quoting 5 Wigmore on Evidence (3 ed.), § 1415, p. 191). It is "error where, under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence." Cox v. United States, 284 F.2d 704, 708 (8th Cir. 1960) (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940)).

The district court abused its discretion by allowing the prosecutor to question Zapata in a manner completely foreign to the rules of evidence. The combined impact of this behavior allowed the prosecutor to present a narrative not based on Zapata's direct testimony at trial, but instead through a script provided by artful use of his interrogation. There can be no question that Zapata's testimony was the most critical evidence against Jeremias and that Zapata was central to the State's case. Under these circumstances, the prejudice was so substantial that it deprived Jeremias of his constitutional rights of due process and a fair trial. The State cannot establish that these errors were mere harmless error.

### C. The district court violated Jeremias's constitutional rights of due process, a public trial and confrontation by allowing the jury to review a video recording of his interrogation which was not presented to the jury in open court during the course of the trial.

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, confrontation, and a public trial were violated by a district court's order allowing the State to admit an exhibit, which was a video recording of Jeremias's interrogation, which had not been presented to the jury in open court

during the course of the trial. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. However, the issue of whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo. Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). See also Lilly v. Virginia, 527 U.S. 116, 136-37 (1999) (alleged violations of the Sixth Amendment Confrontation Clause are reviewed de novo), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 60 (2004). Admission of evidence that involves constitutional rights is reviewed de novo. Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008).

Following the defense case-in-chief, in which Jeremias testified on his own behalf, the State announced that it had rebuttal evidence and asked for admission of State's Exhibit 145 into evidence. 12 ROA 2469. The State did not present a witness for foundation, discussion and publication of this evidence, but instead asked for admission of the video and audio recording. 12 ROA 2469. Defense counsel objected and noted that the State had a full opportunity to cross-examine Jeremias regarding his statement and had the full opportunity to go over his statement in direct examination. 12 ROA 2469. The district court overruled the objection. 12 ROA

2469. No other evidence was presented and the presentation of evidence was concluded. 12 ROA 2469-70. Thus, the video recording was admitted as an exhibit, but was not played for the jury in open court and was instead viewed for the first time during deliberations.

The district court violated both Jeremias's statutory and constitutional rights by admitting a copy of a redacted video of his interrogation by detectives, without requiring presentation of the video through a witness, in open court, during the trial and instead allowing the jury to view the video for the first time during deliberations.[7] Jury exposure to facts not in evidence deprives a defendant of the constitutional rights of confrontation, cross-examination and assistance of counsel. Eslaminia v. White, 136 F.3d 1234, 1237 (9th Cir. 1998).

NRS 175.221 provides:

> 1. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute.
> 2. The admissibility of evidence and the competency and privileges of witnesses shall be governed by:
> (a) The general provisions of Title 4 of NRS;
> (b) The specific provisions of any other applicable statute; and
> (c) Where no statute applies, the principles of the common law as they

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[7]In a motion filed contemporaneously with this brief, Jeremias asks that this Court order transmission of State's Exhibit 145, which is the video recording at issue. Viewing of the actual video is necessary for resolution of this appeal as it shows editing and demeanor, which are not apparent from a transcript. The recording must be viewed to give proper review of this issue on appeal. See Pantano v. State, 122 Nev. 782, 792, 138 P.3d 477, 483 (2006).

> may be interpreted by the courts of the State of Nevada in the light of reason and experience.

NRS 175.441 provides that "[u]pon retiring for deliberation, the jury may take with them: (1) All papers and all other items and materials which have been received as evidence the case. . ." See also Bailey v. State, 101 Nev. 33, 34, 692 P.2d 1293, 1294 (1985) ("It is fundamental that a jury may only consider exhibits received as evidence in the case.").

The Sixth Amendment to the United States Constitution guarantees a defendant the right to a public trial.

> A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. And openness allows the public to see, firsthand, justice done in its communities. The right to a public trial is so important, in fact, that its violation is an error deemed structural: the error affects the framework within which the trial proceeds. We cannot lightly abandon the values of a public trial.

State v. Wise, 288 P.3d 1113, 1115 (Wash. 2012). The purposes of the public trial right are served by offering an audio recording as evidence and playing it for the jury in open court. State v. Magnano, 326 P.3d 845, 851 (2014) (Wash. App. 2014). The

Confrontation Clause of the Sixth Amendment mandates that extrajudicial testimonial statements by a witness are barred unless the declarant has an opportunity to defend or explain the statement on cross-examination. Glaxiola v. State, 121 Nev. 633, 646, 119 P.3d 1225, 1231 (2005).

The district court here abused its discretion, and violated Jeremias's constitutional rights, by taking the seemingly unprecedented action of allowing critical evidence against Jeremias to be presented to the jury for the first time during deliberations. The district court failed to publish this evidence in open court, thus depriving Jeremias of his right to a fair trial. By viewing the video recording for the first time after instructions and closing argument, Jeremias's counsel were unable to observe the jury as they watched the video, and therefore unable to respond to any reactions during closing arguments.

Defense counsel were also unable to explain issues with the video recording which could only be known by watching the video itself. For example, the beginning of the video recording shows Jeremias repeatedly knocking at the door and asking for the detectives. See Exhibit 145. He did so, over and over again, in a seemingly maniacal fashion, which paints him in a very negative light. See Exhibit 145. This extreme impatience, however, does not reflect reality. The video recording was edited in such a fashion, especially in the beginning, so as to omit long periods in

which Jeremias waited alone in the room. Careful review of the counters shows that the actual full recording was approximately 2 hours 11 minutes, while the redacted version was only 1 hour 40 minutes. While some of the editing was for substantive reasons stipulated to by the parties, much of the editing was done to remove the lengthy time Jeremias waited for the detectives. For example, at approx 1:35 on the video, the time jumps from 11:21 to 11:33; at approximately 3:13 of the video, the time jumps from 11:37 to 11:43; and at 6:08 of the video, the time jumps from 11:46 to 11:52. See Exhibit 145. These edits are not reflected by the transcript admitted as the court's exhibit.[8] 26 ROA 5667.

Further prejudice was caused by the presentation of this evidence in this manner because Jeremias was unable to cross-examine detectives about their statements made during the interrogations. At approximately 13:07 of the video, the detective vouches for his witness and tells Jeremias that he does not believe him and the other detective does not believe him. At approximately 13:10 and 13:12 of the video, the detective gives his opinion that Jeremias is going to come across as a cold-blooded killer. The detective also opines that he does not believe Jeremias's story. At 13:14 of the video, the detective opines that Jeremias's story sounds stupid and

[8]A transcript of the recording was admitted as Court's Exhibit 7. 26 ROA 5667. The original copy has yellow highlights which show redacted portions of the video recording. The black and white copy which appears in the Record on Appeal sent to this Court does not show the yellow highlights of the original.

dumb. At 13:28 of the video, the detectives say that they are 100% certain he did this. See Exhibit 145. Had counsel been provided the opportunity to cross-examine the detectives, they could have elicited testimony that these statements were made as part of the interrogation technique used by the detectives and counsel could have emphasized that it was the jury's decisions on these matters which was of importance, not the opinions of the detectives.

The video of the interrogation was referenced by the State during its first closing arguments. See 15 ROA 2509 (urging jury to watch the video and to use it to shows lies and contradictions in his testimony). The State began its rebuttal argument by stating

> State's Exhibit 145. This is the audio and video recording of the defendant in this courtroom on June 24, 2009. If you want the answer to the verdict in this case, one great place to start is to watch this. Because this will depict several things, pieces of evidence beyond what was examined of the defendant by my cross-examination and his lawyer's direct examination.
>
> One of the things that you're going to find when you review State's 145, and that is compelling, it's one hour and 40 minutes, you will not see what you saw on that stand. You won't see one tear shed at all. You will hear the defendant call the victims fools. You'll see for yourself.

15 ROA 2568-69. The prosecutor continued with his argument concerning the inculpatory nature of the video recording for another two pages of the transcript. 15 ROA 2569-70.

Admission of the video recording without a sponsoring witness and without publication to the jury deprived Jeremias of his rights to due process and a fair trial, and deprived his counsel of the opportunity to address this important evidence in a meaningful manner to the jury. The prejudice was substantial and warrants the grant of a new trial. The State cannot establish beyond a reasonable doubt that this was mere harmless error.

### D. The district court violated Jeremias's constitutional rights of cross-examination and confrontation by allowing the testimony of a coroner who did not perform the autopsies.

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, cross-examination and confrontation were violated by a district court's order allowing a medical examiner to testify about an autopsy performed by a witness who did not testify at trial. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court generally reviews claims of evidentiary error for an abuse of discretion. Holmes v. State, 306 P.3d 415, 418 (Nev. 2013). Where a Crawford violation occurs, harmless error review is appropriate. Polk v. State, 233 P.3d 357, 358-59 (Nev. 2010). Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999). Confrontation Clause violations are subject to harmless error analysis. United States

v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004). That is, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 23-24 (1967)

Over a defense objection, Dr. Lisa Gavin testified about the autopsy which was performed by Dr. Telgenhoff. 10 ROA 2117, 2120-22. She did not observe any defensive wounds in the photographs. 10 ROA 2123. As to Mr. Stephens, Gavin identified an entrance and exit wound from a gunshot to his face. 10 ROA 2124. She also identified stippling on a photograph of the face. 10 ROA 2125. The shot went through his jawbone. 10 ROA 2128. She did not believe this shot was fatal. 10 ROA 2128. There was another shot to the top of his head. 10 ROA 2128. The photograph of the wound indicated that the muzzle of the gun was held against the skull. 10 ROA 2130. The wound ended in the back of the neck. 10 ROA 2130. This wound was fatal. 10 ROA 2131.

As to Mr. Hudson, Dr. Gavin testified about the autopsy which was performed by Dr. Telgenhoff. 10 ROA 2131. There were two wounds identified and reported in the autopsy report. 10 ROA 2132. One wound was a graze wound to the right side of the chin. 10 ROA 2132. It also involved another wound on the right side of the neck, which went into the body and hit the lung. 10 ROA 2132-34. This wound was fatal. 10 ROA 2134. A second gunshot created a wound at the back of the neck

which traveled across the spine to his right side, by his ribs. 10 ROA 2134. This wound was also fatal. 10 ROA 2135. Projectiles were recovered from the autopsies. 10 ROA 2135.

On cross-examination, Dr. Gavin acknowledged that she did not perform either autopsy and she never saw the bodies. 10 ROA 2136. She was shown some pictures of the autopsy. 10 ROA 2136. Dr. Telgenhoff would have determined which photographs to take, along with the crime scene analyst or investigator who is present. 10 ROA 2136. Dr. Gavin did not remove the bullets from the body and did not examine the bullets themselves. 10 ROA 2137. Measurement of angles could have been done during the autopsy, but was not. 10 ROA 2138. On cross-examination, counsel attempted to ask Dr. Gavin about Dr. Tengenhoff's testimony about the autopsy, on the issue of stippling and the head wound, but the State objected because those materials were not before the jury. 10 ROA 2138. An off-the-record conference was conducted at the bench. 10 ROA 2139. Dr. Gavin testified that it was not unusual to see close-range wounds with no stippling. 10 ROA 2139. She was provided with the testimony that Dr. Telgenhoff made in the previous matter, and had a copy with her, but she did not review it. 10 ROA 2139. She did not agree with his opinion that it was maybe confusing because it looked like a close-range wound with no stippling. 10 ROA 2140. There was no way to determine which shots

occurred first. 10 ROA 2140. In response to juror questions, she testified that she could not tell if the wounds were created by shots from the same gun. 10 ROA 2142.

Absent narrow exceptions inapplicable here, the Confrontation Clause forbids the prosecution in a criminal case from introducing an out-of-court "testimonial" statement unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 68 (2004). In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the United States Supreme Court held that formalized forensic analysis reports fall within the "core class of testimonial statements" described in Crawford. Melendez-Diaz, 557 U.S. at 310 (internal quotation marks and citation omitted). This holding was reaffirmed in Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). The Supreme Court, however, recognized a narrow exception for DNA reports presented during a bench trial, in a fractured opinion in Williams v. Illinois, 132 S.Ct. 2221 (2012). There is no autopsy exception under this line of cases, nor should there be. Autopsy reports are created as part of a homicide investigation and are testimonial.

This Court has not directly addressed this issue, but in Polk v. State, 233 P.3d 357, 359 (Nev. 2010), found that an expert's testimony about a forensic examination conducted by another person violated Crawford and Melendez-Diaz. Several other state courts have addressed the autopsy issue directly and have found that autopsy

reports prepared during a homicide investigation are testimonial in nature and therefore subject to a Crawford analysis. See State v. Navarette, 294 P.3d 435, 440-42 (N.M. 2013) (autopsy reports prepared during homicide investigations are testimonial because "[i]t is axiomatic" that medical examiners create such reports "with the understanding that they may be used in a criminal prosecution."); Miller v. State, 313 P.3d 934 (Ok. Crim App. 2013) ("[A] medical examiner's autopsy report in the case of a violent or suspicious death is indeed testimonial for Sixth Amendment confrontation purposes."); State v. Lui, 315 P.3d 493, 510-11 (Wash. 2014) (error to admit toxicology report and statements from the autopsy report through a witness who did not conduct original analysis); State v. Kennedy, 735 S.E.2d 905, 916-17 (W.Va. 2012) (autopsy reports conducted during "death investigations" are "under all circumstances testimonial"); State v. Blevins, 744 S.E.2d 245, 264-66 (W.Va. 2013) (same). Jeremias urges this Court to follow these courts by directly holding that autopsy reports are testimonial and a defendant has the right to cross-examine the medical examiner who prepares the report.

The district court violated Jeremias's constitutional rights by allowing a substitute medical examiner to testify at trial without any showing that the medical examiner who performed the autopsy was unavailable. Jeremias was prejudiced by the State's failure to produce Dr. Telgenhoff and its decision to instead present the

testimony of a substitute examiner. In particular, as noted above, Dr. Telgenhoff saw the bodies directly and reviewed actual evidence instead of photographs. Dr. Gavin, in contrast, did not perform the autopsies and based her opinions on photographs and reports. Despite her second-hand information, she opined to the jury that shots were fired at a close- range and there was stippling, but Dr. Telgenhoff was far less certain in his conclusion. 10 ROA 2138-40. Moreover, the State relied upon Dr. Gavin and her conclusion that the gunshot wound was 6 to 12 inches from Stephens's face in arguing that Jeremias was the person who killed the two men because this evidence showed the Stephens knew the perpetrator and was comfortable enough to let the person get close enough to shoot him in the face at a short distance, without a chance to react. 15 ROA 2511. The autopsy was also referenced during the State's rebuttal argument. 15 ROA 2582. Under these circumstances, the evidence was prejudicial and the State cannot establish that it was harmless error.

**E. The district court abused its discretion in allowing speculation about the origin of pieces of plastic for which no reliable expert testimony was presented.**

Jeremias's state and federal constitutional rights to due process of law, equal protection, and a fair trial were violated by a district court's decision to allow speculative expert witness testimony about a plastic bag. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court reviews a district court's decision to allow expert testimony for an abuse of discretion. Perez v. State, 313 P.3d 862, 866 (Nev. 2013).

Prior to trial, the parties and district court addressed the admissibility of testimony about pieces of plastic found at the crime scene. 8 ROA 1639. Defense counsel noted that in the Rios trial officers presented "expert" testimony about the plastic even though the testimony was based on speculation and was not based upon any testing. 8 ROA 1639-40. Defense counsel argued that the testimony should not be allowed. 8 ROA 1640-41. The prosecutor stated that he anticipated testimony from Senior Crime Scene Analyst Pete Schellberg and Detective O'Kelley and that they had personal experience in seeing similar evidence of the same type and size. 8 ROA 1641. The district court stated that it was inclined to allow the testimony, but instructed defense counsel to make a contemporaneous objection. 8 ROA 1642. The evidence was referenced by the State during opening statements. 8 ROA 1656.

Schellberg testified that plastic was found on a pillow, on the body of the decedents, and in the living room. 8 ROA 1745-47, 1756, 1759. Pieces of plastic were collected as evidence. 8 ROA 1767; 9 ROA 1770. The analyst gave his opinion, over an objection to speculation and foundation, that the black plastic looked

. . .

as though it had been torn by a bullet. 9 ROA 1761. Specifically, the analyst testified that:

> To me, when I saw these on the scene, and this is one of the first things I saw on the scene, this immediately looked to me that it's something that was torn by a bullet. And we had – and I've had a number of cases in the past where people have used pillows and – and other like devices to try to muffle a weapon that they're firing. I've also had other cases where people were trying to use some kind of material over the weapon to catch the cartirdge cases or to keep – to keep gunshot residue off of them. I mean, there are a lot of reasons that people try to do this. But at all of these scenes, even – I've even had cases where an individual killed a woman . . .

9 ROA 1961-62. At this point there was an objection and the district court warned the witness not to speculate and asked what it was about looking at these fragments that suggested to him that they had been torn in that way by a bullet. 9 ROA 1762. The witness continued:

> It's just simply the shape, their size, their – their texture, and their location at the scene is typical from all of these other cases that I was just talking to you about. It's – it's just something through my experience that I – this is something that I've seen again and again and again.
>
> I've also – I've also shot through a piece of plastic myself, not even meaning to, and I've seen this thing. now, we're not talking a test. We're just talking when I've been out shooting I've been out shooting I've – I've done this myself and seen it.
>
> So when I saw it, when I went in there, that was the first thing I thought of that – that – and with its shape, the – the – it's evident to me that this is something that's high velocity and power has gone through the blast. Like this isn't taking a knife and cutting through it.

9 ROA 1762. On cross-examination, the analyst testified that the plastic appeared to

be from a garbage bag or something like that. 9 ROA 1784. He could not say the size of the bag, whether it was tied or untied, or any other information. 9 ROA 1784. The analyst did not conduct forensic testing on the plastic pieces. 9 ROA 1787. Jurors asked question about the plastic pieces. 9 ROA 1788. In response, the analyst testified that the pieces were distorted in a way that indicated melting to the analyst. 9 ROA 1788. They were abraded, which indicated power and heat to the analyst. 9 ROA 1788.

A detective testified that he did not know the size of the bag that the pieces came from, did not know if it was tied or untied, and did not know if the bag was sucked in or blown out when the gun was fired. 9 ROA 1828. Over an objection, a detective testified that because no cartridge casings were found at the scene, there was either a possibility that a revolver was used or there was a potential, based upon the plastic found at the scene, that a bag was used to capture the cartridge cases as they were expended from the gun. 8 ROA 1805. He opined that gas would escape from the act of firing the gun inside the bag, so it would probably only work one or two times without creating a hole. 9 ROA 1807. Later, another detective testified that a request for forensic testing was made for the pieces of plastic found at the scene. 10 ROA 2177. The detective acknowledged that they were strange and they had not seen that before. 10 ROA 2177. He claimed that there were urban myths about it and had

heard stories about people putting bags over their hands when they fire a firearm to catch casings. 10 ROA 2177. Defense counsel objected based upon speculation and the objection was sustained. 10 ROA 2178. Upon questioning from the State, the detective testified that based on his experience as a detective, he has heard of people who commit crimes getting ideas from TV and movies. 10 ROA 2178. He was familiar with the idea that there have been TV shows and movies that portray individuals using a plastic bag over a firearm in order to catch cartridge cases. 10 ROA 2178.

Analysis of the plastic showed that it was a polyethylene film, which is common in can liners, grocery sacks and sandwich bags. 10 ROA 2178. Fiber, brown hairs and reddish brown stains were observed on the little pieces of plastic. 10 ROA 2178. Usually when a forensics person uses the term "reddish brown stains," they are referring to blood. 10 ROA 2179. The pieces of plastic were not sent to the DNA lab or checked for fingerprints. 11 ROA 2208. A detective believed that the pieces of plastic would have gunshot residue because they were inside a scene where a gun had been fired. 11 ROA 2208. A firearms expert did not conduct any microscopic comparisons on the pieces of plastic bag. 9 ROA 1878. He noted that a plastic bag could possibly cause a gun to jam. 9 ROA 1879.

Jeremias respectfully submits that the district court abused its discretion by

allowing the crime scene analyst and detectives to present speculation about the plastic bag fragments found at the scene. The district court should have held a hearing to determine the admissibility of the evidence, outside the presence of the jury, and should have ruled that the evidence was invalid because there was an inadequate foundation for the testimony.

There are "three overarching requirements for admissibility of expert witness testimony pursuant to NRS 50.275[:] (1) qualification, (2) assistance, and (3) limited scope requirements." Higgs v. State, 222 P.3d 648, 658 (Nev. 2010) (citing Hallmark v. Eldridge, 124 Nev. 492, 499-502, 189 P.3d 646, 650 (2008)). Factors to be considered under each requirement are not exhaustive and may not be applicable in every case. Id.

"Among the factors the court may have considered in determining [a witness's] qualifications were whether she had formal schooling, proper licensure, employment experience, and practical experience and specialized training." Higgs, 222 P.3d at 659 (citing Hallmark, 124 Nev. at 498-500, 189 P.3d at 650-51). Expert witness testimony "'will assist the trier of fact only when it is relevant and the product of reliable methodology.'" Id. (quoting Hallmark, 124 Nev. at 499-500, 189 P.3d at 651. The district court should consider whether the proffered opinion is

> "(1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally

> accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization."

Higgs, 222 P.3d at 660 (quoting Hallmark, 124 Nev. at 499-502, 189 P.3d at 651-52).

In this case, the State, as the proponent of the evidence, failed to establish that its witnesses had formal schooling, proper licensure, employment experience, practical experience, or specialized training which qualified them to given an opinion on the nature of the plastic pieces. Moreover, the State failed to establish that the opinions about the plastic pieces were within a recognized field of expertise. While some type of expertise might exist for materials testing, such as forensics material engineering, the State failed to produce any evidence that such an expertise does in fact exist. As to the second prong, the State's witnesses acknowledged that they did not perform any testing regarding the pieces of plastic at issue here, which supported the State's theory that they were created by placing a gun in a plastic bag and firing the gun. Likewise, the State did not produce evidence that such testing has been performed in circumstances similar to those presented here. The State failed to present any evidence that its theory has been the subject of publications and subject to peer review. The State also failed to establish that its theory has been generally accepted in the scientific community. Finally, there was no support for an assertion that the testimony here was based on particularized facts, rather than assumption,

conjecture, or generalization. Although the officers stated that they have seen similar evidence in other cases, they failed to identify those cases, failed to establish that their opinions in those alleged other cases were verified through actual testing and analysis, and otherwise failed to establish the criteria set forth in Higgs and Hallmark. It is therefore not surprising that the State failed to identify either the analyst or the detective as an expert in analyzing the plastic pieces at issue. See 3 ROA 535 (expert witness notice); 3 ROA 566 (Analyst Schellberg's Statement of Qualifications, showing no experience relevant to forensic testing of plastic materials); 5 ROA 913 (State's supplemental notice of witness, which does not list a detective as an expert on forensic testing of plastic materials); 5 ROA 924 (same).

Recently there has been significant attention on the issue of junk science leading to wrongful convictions. See Glossip v. Gross, 135 S.Ct. 2726, 2758 (2015) (Breyer, J., dissenting) (citing studies). Once considered standard tests, such as microscopic hair analysis, are now considered flawed by the FBI. Id. A conviction which is based upon unreliable scientific evidence violates Due Process. Han Tak Lee v. Glunt, 667 F.3d 397, 407 (3rd Cir. 2012) (noting flaws in fire science). See also United States v. Scheffer, 523 U.S. 303, 309 (1998) ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of

unreliable evidence is a principal objective of many evidentiary rules."). Admission of "expert" testimony concerning forensics should be viewed in light of the recent experiences with showing that once accepted methodologies were flawed.

Here, the "expert" testimony was important because there were no fingerprints, DNA comparisons, blood on clothing, or other physical evidence tying Jeremias to the shootings. This testimony was used to corroborate Zapata's testimony and make him appear more credible. As this trial was in essence a contest between the credibility of Zapata versus the credibility of Jeremias, this evidence was especially significant. Under these circumstances, the testimony was highly prejudicial and reversal is mandated.

**F. The district court erred in instructing the jury on the presumption of innocence.**

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, and the presumption of innocence were violated because of the district court's decisions concerning jury instructions. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. Funderburk v. State, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009) (citing Brooks v. State, 124 Nev. 203, 206, 180 P.3d 657, 658-59 (2008)). Judicial error occurs when the court reaches an incorrect result in the

intentional exercise of judicial function, that is, when a judge renders an incorrect decision in deciding a judicial question. In re Humboldt River System, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961). Jury instructions that tend to confuse or mislead the jury are erroneous. Culverson v. State, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990). Jury instructions should be clear and unambiguous. Id. See also Roland v. State, 96 Nev. 300, 302, 608 P.2d 500 (1980) ("Instructions . . . must be given clearly, simply and concisely, in order to avoid misleading the jury."). Whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo. Id. (citing Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007)). Whether jury instructions omit or misstate elements of a statutory crime, or adequately cover a defendant's proffered defense, are questions of law reviewed de novo. United States v. Stapleton, 293 F.3d 1111, 1114 (9th Cir. 2002).

The district court abused its discretion in denying Jeremias's objection to the presumption of innocence and reasonable doubt instruction. In Instruction No. 45, the jury was instructed as follows:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt *every material element* of the crime charged and that the Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition

> as they can say feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

13 ROA 2725 (emphasis added). Jeremias objected to the instruction because there was no instruction defining which elements are material and that without such an instruction, the jurors would speculate as to which were material and which were not. 9 ROA 1923. He also proffered an instruction which did not include this defect. 11 ROA 2272. The district court overruled his objection and gave the State's proposed instruction. 11 ROA 2313.

The portion of the instruction at issue here is the first paragraph and not the second paragraph. Jeremias recognizes that NRS 175.211 mandates the second paragraph of the instruction and recognizes that this Court has repeatedly affirmed the constitutionality of the second paragraph of this instruction. See e.g. Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991).

Recently, in Burnside v. State, 352 P.3d 627, 637 (Nev. 2015), this Court addressed the first paragraph of the instruction:

> Here, the district court instructed the jury on the elements of each of the offenses charged and that the State had the burden to prove those elements. No other instruction or any argument by the parties suggested that the State's burden on any element or offense was less than beyond

> a reasonable doubt. Absent an instruction advising that it could do so, we are not convinced that the phrase "material element" caused the jury to speculate that it could choose which of the elements should be proven beyond a reasonable doubt and which ones need not be. Taking the instructions as a whole, they sufficiently conveyed to the jury that the State had the burden of proving beyond a reasonable doubt each element of the charged offenses and the phrase "material element" did not signal to the jury that the State carried a lesser burden of proof on any element or charged offense. Although the phrase "material element" is unnecessary because the State must prove all elements of an offense beyond a reasonable doubt, see Watson v. State, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994); State v. Reynolds, 51 P.3d 684, 686 (Or. Ct. App. 2002) ("In a sense, the term 'material element' in its legal usage is something of a redundancy. If an allegation is truly an 'element' of a crime, by definition, it is 'material.' But the point of the legislature's use of the term seems clear enough: A 'material element' is one that the state must prove to establish the crime charged."), and therefore should be omitted from future instructions, we conclude that the instruction is not so misleading or confusing as to warrant reversal.

Id. at 638. In addressing this issue, this Court relied extensively upon an opinion by an Oklahoma court in Phillips v. State, 989 P.2d 1017, 1037-38 (Okla. Crim. App. 1999). In that case, the court acknowledged that the "material allegations" of its instruction might be confusing, but the court found the error harmless in light of other instructions that set forth the specific elements of the charged offense and made clear the presumption of innocence carried through to all elements of the offense. Id. at 637-38 (citing Phillips). This Court agreed with the Oklahoma court and noted that the district court here instructed the jury on the elements of each of the offenses and instructed the jury that the State had the burden to prove those elements. Id. at 637.

Nonetheless, this Court recognized that all elements of a crime are material and that the term therefore should be omitted from future instructions. Id. at 638.

There is a very significant difference between the instructions given in Phillips and the instructions given here. In Phillips, in Instruction No. 2, the Oklahoma trial court "set forth the elements of the offense of first degree murder malice." Id. at 1038. Based upon this instruction, and the entirety of the rest of the instructions, the prosecution's burden to prove every element of the offense charged beyond a reasonable doubt was established. Id. The specific language of Instruction No. 2 was provided by the federal district court in habeas corpus proceedings concerning Phillips' conviction:

> NO. 2
>
> No person may be convicted of MURDER FIRST DEGREE unless the State proves beyond a reasonable doubt each element of the crime. These elements are: First, the death of a human; Second, the death was unlawful; Third, the death was caused by the Defendant; Fourth, the death was caused with malice aforethought.
> . . . .

Phillips v. Sirmons, 2008 U.S. District Lexis 29277 at 47 (E.D. Okl. 2008), reversed and remanded on other grounds, Phillips v. Workman, 604 F.3d 1202 (10th Cir. 2010). Here, in contrast, there was no simple instruction which specified the elements of the offenses and informed the jury of the State's obligation to prove these elements beyond a reasonable doubt. At trial, Jeremias made this specific objection

and noted that there was no instruction defining which elements were material. 9 ROA 1923. This Court's opinion in Burnside does not address this important distinction.

The Sixth and Fourteenth Amendments guarantee a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364 (1970); Apprendi v. New Jersey, 530 U.S. 466, 477 (2000). It is error to give an erroneous instruction on the reasonable doubt burden of proof and the presumption of innocence. Sullivan v. Louisiana, 508 U.S. 275, 276-82 (1993). The verdict "cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." Cabana v. Bullock, 474 U.S. 376, 384-85 (1986). See also Commonwealth v. Bishop, 372 A.2d 794, 795 (Pa. 1977) (reversing judgment based upon trial court's refusal to instruct the jury that the prosecution has the burden to prove "each and every element" of the offense beyond a reasonable doubt).

The instruction given here failed to meet the mandate imposed by the United States Supreme Court as to application of the reasonable doubt standard to each element of the offenses.

A defective reasonable doubt instruction, which relieves the prosecution of its

burden of proof, constitutes structural error which compels reversal of the judgment. Sullivan, 508 U.S. at 278. The judgment of conviction must be reversed. In the alternative, the State cannot establish that this constitutional error was harmless beyond a reasonable doubt.

### G. The aggravating circumstance of murder committed to avoid arrest is invalid and not supported by the evidence.

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment were violated by use of an invalid aggravator of murder committed to avoid arrest. U.S. Const. amend. V, VI,VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

NRS 177.055(2) requires this Court to review every death sentence and, in part, to consider whether the evidence supports the finding of an aggravator or aggravators. The question of whether a statute is constitutional is a question of law, that is reviewed de novo. Collins v. State, 125 Nev. 60, 62, 203 P.3d 90, 91 (2009). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." Id. When an issue involves a question of law, this Court applies de novo review. Hoagland v. State, 240 P.3d 1043, 1045 (Nev. 2010).

The aggravating circumstance that the "murder was committed to avoid or prevent a lawful arrest," NRS 200.033(5), is facially unconstitutional and also invalid

as applied to Jeremias's case.

According to the "common-sense core of meaning" of the term, see Tuilaepa v. California, 512 U.S. 967, 973 (1994), this aggravator applies to a killing that occurs in the course of an impending or on going arrest. Since 1986, however, this Court has broadened this aggravating circumstance to apply it to cases such as this one, in which no "lawful arrest" is contemplated. See Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986); Evans v. State, 112 Nev. 1172, 1196, 926 P.2d 265, 280-81 (1996). Jeremias respectfully submits that this Court's previous interpretation of this aggravating circumstance is wrong and a violation of the Fifth, Eighth and Fourteenth Amendments.

The relevant facts here are uncontested. This is not a case in which Jeremias had a pending allegation and is accused of killing witnesses who would provide evidence against him or otherwise assist police in arresting him based upon those pending charges. This is also not a case in which Jeremias was in custody and killed someone while trying to escape. Rather, the State's allegation here is that Jeremias wanted to rob two people, and because those two people knew him and could likely identify him to police after the robbery, he killed them. The aggravator should not apply, however, to every murder in which the defendant knows the victim as such an aggravator fails to perform the narrowing function demanded by the Eighth

Amendment.

There is no legislative history supporting the broad interpretation of the aggravator. Inclusion of current offense witness-elimination was not anticipated to be within the scope of the aggravator. In fact, as shown below, all indications were that the factor would not be applied to witness-elimination as the Nevada Legislature had refused to adopt a witness killing aggravating factor when it adopted the avoiding lawful arrest factor. In addition, the legislature's decisions to restrict the factor to cases in which an actual arrest is imminent or ongoing is an eminently reasonable one, and should therefore be adopted under the constitutional rule of lenity and the rule of strict construction of penal statutes. All normative principles of statutory construction militate in favor of adopting a limited construction of the statute. In short, contrary to the decision in Cavanaugh, the statute should not be be applied to alleged elimination of a witness to the current offense.

Interpreting the avoiding lawful arrest aggravator to cover witness elimination ignores a basic constitutional rule of construction of penal statutes. Under the federal due process clause, the rule of lenity requires the court to adopt the reasonable construction of a statute that is most favorable to the defendant and to strictly construe penal statutes against imposition of criminal liability. See Busic v. United States, 446 U.S. 398, 406-07 (1980); United States v. Carr, 513 F.3d 1164, 1168 (9th

Cir. 2008). This Court's prior construction of the statutory factor entirely disregards the constitutional rule of lenity and, indeed, ignores all normative principles of statutory construction.

NRS 200.033(5) provides for an aggravator if "[t]he murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody." Restricting the factor to cases in which an arrest is impending or ongoing is a reasonable construction of the statutory language. The statute refers to an offense intended "to avoid or prevent a lawful arrest." The use of the term "lawful arrest" makes the witness-elimination interpretation impossible: until an arrest is actually imminent or underway, no one can know whether the circumstances will make it a "lawful arrest." The witness-elimination interpretation reads the word "lawful" out of the statute, in violation of the cardinal rule of statutory construction that every word in a statute must be given meaning. See Orr Ditch & Water Co. v. J. Ct., 64 Nev. 138, 153, 178 P.2d 558, 565 (1947).

Consistent with the plain meaning of the phrase "lawful arrest," the Supreme Court of California has held that "the special circumstance of avoiding arrest should be limited to cases in which the arrest is imminent." People v. Bigelow, 691 P.2d 994, 1006-07 (Cal. 1984). See also People v. Coleman, 768 P.2d 32, 50 (Cal. 1989) (holding that "avoid arrest" aggravator did not apply because the state failed to

present evidence of imminent arrest).

In Ex parte Johnson, 399 So. 2d 873, 874 (Ala. 1979), the Alabama Supreme Court recognized the ambiguity in the identical language in its avoiding arrest aggravating factor:

> One interpretation of this provision would enable it to be applied in all felony case in which death has ensued, for it could be said that one of the purposes of inflicting any death would be to prevent identification by the victim. The language of the provision, grouped as it is with other specific circumstances of aggravation, cannot have been intended by the legislature to have such an expansive application. The requirement of strict construction of criminal statutes also augurs for a more restricted interpretation . . . Undoubtedly the legislature, by adopting the provision in question, placed special emphasis upon the protection of persons effecting lawful arrests or who would be endangered during escapes from lawful custody, and thus sought to deter such conduct by applying the extreme sanction to it.

The fact that the courts disagree over the meaning of identical statutory language indicates that the language is ambiguous. See Guaranty Financial Services, Inc. v. Ryan, 928 F.2d 994, 1003 n. 3 (11th Cir. 1991) ("That the various courts that have already decided this question are split supports our conclusion that the statute is ambiguous."). Any such "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Liparota v. United States, 471 U.S. 419, 427 (1985).

In addition, the Nevada legislature was presented with a clear opportunity to enact a witness-elimination aggravating factor when it adopted the original death

penalty statute following Gregg v. Georgia, 428 U.S. 153, 155 (1976). The legislature considered enacting into law a witness-elimination aggravator modeled after the same one in California, which provided for the imposition of the death penalty for a murder of "[a] witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding," in one of the competing death penalty bills in the 1977 Nevada Legislature, 59th Sess., Senate Judiciary Committee, Minutes of Meeting (February 23, 1977), Ex. B-6 (witness killing factor included in SB 220); cf. id., Ex. B-9 (avoiding arrest factor in Florida Senate, identical to language ultimately adopted as Nev. Rev. Stat. § 200.033(5)); id., Ex. C (referring to factor in AB 403, § 1, ultimately adopted as Nev. Rev. Stat. § 200.033(5), as "escape from custody."); id., Ex. C, unpaginated document "S.B. 220 – significant differences or omissions" (noting "aggravating circumstances in S.B. 220 but not A.B. 403 . . . . murder of a witness to a crime"). In the end, however, the legislature did not include the murder of witnesses to a crime among the aggravators that could make a person eligible for a death sentence. The failure to adopt the witness-elimination aggravating factor is a potent indication that the aggravating factors the legislature did adopt did not include a factor equivalent to the one it did not adopt. See Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("[f]ew principles of statutory construction are more compelling

than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."); Gulf Oil Corp. v. Copp Paving Comp., Inc., 419 U.S. 186, 200 (1974) (explaining that the deletion by the conference committee of a certain provision in a bill "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

This Court has never conducted a statutory construction analysis of the avoiding lawful arrest aggravating factor, and has not followed the normative rules of statutory construction or the constitutional rule of lenity. Given that the aggravating circumstances are part of the Nevada system for narrowing the scope of the death penalty, in order to comply with the Eighth Amendment, this Court's refusal to apply rules of statutory construction to capital cases that it applies to all other cases is illogical. At minimum, it violates the due process guarantee of the federal constitution because a reasonable construction that would exclude the defendant's case is available, but this Court refused to adopt it under the rule of lenity.

Finally, this Court's applications of the factor have left it unconstitutionally vague as applied. Assuming arguendo that the factor can properly be applied to witness elimination, in order to avoid unconstitutional vagueness, and to provide the narrowing required by the Eighth Amendment, the fact that a victim knew the perpetrator, or was a witness to a felony preceding the murder, cannot by itself

support a finding of the aggravator. See, e.g., Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996) ("Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator."); Davis v. State, 604 So. 2d 794, 798 (Fla. 1992) ("We have long held that in order to find this aggravating factor . . . the state must show that the sole or dominant motive for the murder was the elimination of the witness."); Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992) ("We have repeatedly held that the avoiding arrest aggravating factor is not applicable unless the evidence proves that the only or dominant motive for the killing was to eliminate a witness."); Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985) ("The victim's recognition of appellant as a customer speaks to the question of whether he killed her to prevent a lawful arrest. The state does not without more establish this fact by proving that the victim knew her assailant, even for a number of years."); State v. Goodman, 257 S.E.2d 569, 586 (N.C. 1979) ("In a broad sense every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest . . . . It is not accurate to say . . . that in every case this 'purpose' motivates the killing . . . .the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official."); see also Bruno v. State, 574 So. 2d 76, 81-82 (Fla. 1991) (holding that aggravator did not apply where defendant knew victim, killed him, and stole his

stereo and equipment, explaining that "[s]tanding alone, the fact that the victim could identify the murderer does not prove beyond a reasonable doubt that the elimination of a witness was a dominant motive for the killing"); Doyle v. State, 460 So. 2d 353, 358 (Fla. 1984) (holding that aggravator did not apply where defendant committed sexual battery and killed neighbor, rejecting the trial judge's inference that the defendant knew the victim and killed her to avoid arrest and a 5-year suspended sentence which would be imposed if he were convicted of another crime); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984) (holding that avoid arrest aggravator did not apply where defendant, who knew victim, went into victim's shop, robbed it, and killed victim, rejecting finding that because defendant and victim knew one another, he eliminated the only witness to the robbery).

The failure to require actual evidence of a specific intent to kill in order to avoid detection, coupled with the pattern of decisions upholding the avoiding lawful arrest aggravator essentially whenever it is alleged along with a felony murder aggravator,[9] leaves the statute fatally overbroad as applied to Jeremias's case. If

[9]See Domingues v. State, 112 Nev. 683, 700, 917 P.2d 1364, 1377 (1996) ("there is no reason other than the prevention of lawful arrest to explain the murder. Domingues must have been concerned that Jonathan would be able to identify him. Therefore, prevention of lawful arrest was properly submitted to the jury as an aggravating circumstance"); Williams v. State, 113 Nev. 1008, 1011, 945 P.2d 438, 440 (1997) (upholding aggravator where defendant went to victim's home, killed two people, and took items); Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107 (1998)(upholding aggravator where defendant and two others went

Cavanaugh and Evans were correct, every defendant who committed murder would be subject to this aggravator because every murder necessarily eliminates the victim as a witness. The Eighth Amendment mandates a narrower reading. See Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance 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.").

Jeremias respectfully submits that the aggravator alleged under NRS 200.033(5) is invalid, unconstitutional, and unsupported by the evidence adduced at trial. He requests that this Court find the aggravator invalid and remand this case for a new penalty trial. Nevada is a weighing state. The invalidity of this aggravator requires that the death sentence be vacated. Jeremias respectfully submits that his Court lacks the authority under Ring v. Arizona, 536 U.S. 584 (2002), to make the factual determination of death eligibility which is necessary in the reweighing process. But see Archanian v. State, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006). In the alternative, given the nature of this case, and the substantial number

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into victim's home and hit her while she was sleeping in spite of fact that there was no evidence that she could, identify them or that they had requisite state of mind); Bollinger v. State, 111 Nev. 1110, 1113, 1117, 901 P.2d 671, 673, 676 (1995) (upholding aggravator without analysis of motive to dispose of witness where defendant robbed couple in motor home, beat them to death, and set fire to their bodies).

of mitigating factors found by the jury, the State cannot demonstrate beyond a reasonable doubt that the error in finding this aggravator was harmless.

## H. The district court violated Jeremias's constitutional right of confrontation and notice by allowing the State to admit the interrogation of a co-defendant who did not testify.

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty hearing, confrontation, cross-examination, and right to be free from cruel and unusual punishment were violated by admission of testimony and evidence concerning an interrogation of Ivan Rios, even though Rios did not testify and no notice was provided of the State's intent to admit this evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court may review an issue under the plain error doctrine if there is an error, that was plain, that affected the defendant's substantial rights, and that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725, 730-36 (1993). A claim that there was been a Bruton violation is reviewed de novo. United States v. Mitchell, 502 F.3d 931, 956 (9th Cir. 2007). "[W]hether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo." Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (quotation omitted). Constitutional error

is harmless only when the State establishes beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 23-24 (1967). Pursuant to NRS 177.055(2), this Court reviews every death sentence and considers, among other things, whether the verdict was rendered under the influence of passion, prejudice, or any other arbitrary factor.

During the penalty trial Detective Long testified that he had contact with Ivan Rios. 13 ROA 2834. Rios gave three statements to detectives, was told that he was under arrest, and then gave a fourth statement of which implicated Jeremias. 13 ROA 2834-38. A transcript of the fourth interrogation was admitted, without objection, as Exhibit 34. 13 ROA 2838; 25 ROA 5413-47. Rios told the detectives that he was really scared of Jeremias. 13 ROA 2839. He claimed that Jeremias told him to drive the truck, and he had no idea that Jeremias was going to kill the men. 13 ROA 2839. Rios claimed he heard the gunshots and when Jeremias came out, Rios asked "What the fuck did you do?," to which Jeremias said "Let's go." 13 ROA 2840. Jeremias wanted to return to the apartment, but Rios refused to participate. 13 ROA 2840. A detailed recitation of Rios's statements to the detectives during the interrogation was provided to the jury. 13 ROA 2840. Rios repeatedly implicated Jeremias in the two murders, while minimizing his own involvement. 13 ROA 2840-47. He told detectives that Jeremias did not have any remorse and claimed to be scared of

Jeremias. 13 ROA 2845-46. He did not want to testify against Jeremias because he thought Jeremias would kill him. 13 ROA 2847. The detective did not believe that Rios ever testified in court and his statements were therefore not subject to cross-examination. 13 ROA 2850. Rios was acquitted. 13 ROA 2850.

On redirect examination, Long testified that Rios was given the opportunity to enter into negotiations if he wanted to testify against Jeremias, but Rios did not want to do so. 13 ROA 2851. Rios went to trial in 2010. 13 ROA 2851. His defense was that several months prior to the incident here, he overdosed on heroin which created some memory problems. 13 ROA 2852. He did not testify in his trial. 13 ROA 2852. Long thought that Rios was very intelligent, composed, and that he feigned a mental handicap but he had a good answer when he was cornered. 13 ROA 2853. Rios did not say anything in his statement that inculpated himself in the robbery, even though Zapata had said they all agreed to the robbery. 13 ROA 2854. There was no showing that Rios was unavailable for trial or that he was ever subject to cross-examination regarding his statements to the detectives. Nonetheless, the testimony and exhibit were admitted against Jeremias during the penalty phase of the trial.

In has long been the law in this state that Bruton v. United States, 391 U.S. 123 (1968), which prohibits introduction of a statement by a co-defendant who does not testify but who implicates a defendant, applies to a capital penalty trial. In Lord v.

State, 107 Nev. 28, 42, 806 P.2d 548, 557 (1991), this Court reversed a sentence of death based upon the district court's admission of testimony from a detective, who read to the jury a transcript of a co-defendant's confession. In doing so, it cited cases from other jurisdictions which also applied Bruton to capital penalty trials. Id. at 42-43, 806 P.2d at 557-58 (citing Walton v. State, 481 So.2d 1197, 1200 (Fla. 1986); State v. Williams, 690 S.W.2d 517 (Tenn. 1985); People v. Aranda, 407 P.2d 265 (Cal. 1965)). In Lord, this Court found that "the need for cross-examination to test the fundamental *reliability* of co-defendants' often suspect statements is no less great in the penalty phase than in the guilt phase." Id. at 44, 806 P.2d at 558 (emphasis in original).

The rule established in Lord, which holds that Bruton applies to penalty phase evidence in a capital case, was recognized by this Court in Summers v. State, 122 Nev. 1326, 1331, 148 P.3d 778, 782 (2006).[10] In that case, this Court held that Confrontation Clause in general does not apply to the penalty phase of a capital trial,

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[10]In Summers, this Court held that Crawford v. Washington, 541 U.S. 36 (2004), does not apply to a capital penalty trial. While Jeremias disagrees with this holding, and raises an issue concerning its application in this case elsewhere in this brief, Summers does not preclude relief here because it recognized the Lord/Bruton exception in Summers. Crawford, however, provides additional support for Jeremias's claim that introduction of Rios's prior statements against him, which were made out of court and without the availability of cross-examination, violated Jeremias's constitutional rights of confrontation and cross-examination.

but it did not overrule Lord and instead recognized that the Bruton question was more narrow than the broad Confrontation Clause issue.

Despite the existence of Lord, and its long-standing and clearly articulated holding that Bruton applies during a capital penalty trial, the State presented the testimony of Detective Long about an interrogation of co-defendant Rios and his repeated statements implicating Jeremias. A transcript of the interrogation was also admitted as evidence. It was plain error to allow the presentation of this testimony and admission of this exhibit.

An additional issue exists concerning the admission of Rios's prior unsworn statements. The State failed to provide notice that it intended to introduce statements made by Rios during his interrogation during the penalty phase. Although the State filed an extensive Second Amended Notice of Evidence to Support Intent to Seek Death Penalty, 5 ROA 1017-29, it made no mention of its intent to present evidence that Rios was afraid of Jeremias, Rios's opinion of Jeremias's violent character and lack of remorse, or Rios's claims about the events at issue, which were relevant to each of the aggravating circumstances. Although there was no objection to the admission of this testimony and evidence based upon the State's failure to provide notice of its intention to present the evidence, its admission was plain error as a clear violation of "SCR 250(4)(f), which requires the State to file, no later than 15 days

before trial, a notice of evidence in aggravation 'summarizing the evidence which the state intends to introduce at the penalty phase of trial . . . and identifying the witnesses, documents, or other means by which the evidence will be introduced.'"[11] McConnell v. State, 120 Nev. 1043, 1071, 102 P.3d 606, 626 (2004). See also Mason v. State, 118 Nev. 554, 561-62, 51 P.3d 525 (2002) (finding that SCR 250(4)(f) applies to any evidence which the State intends to introduce at the penalty phase of trial and rejecting the State's 'substantial compliance' argument). "Consistent with the constitutional requirements of due process, defendant should be notified of any and all evidence to be presented during the penalty hearing." Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991), modification on other grounds recognized by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000). It was plain error to allow the State to admit this evidence without providing notice of its intent to do so.

In Lord, this Court found that in that case the State's purpose of introducing the confession of the co-defendant was to alleviate any lingering doubt the jury may have had concerning their verdict of guilt and that the confession was central in cementing the State's circumstantial case in the minds of the jury. Lord, at 44, 806 P.2d at 558. Based upon this purpose, this Court found the error in admitting the

[11]Prior to trial, Jeremias filed a Motion for Discovery of Potential Penalty Hearing Evidence. 2 ROA 248-55. The State responded by declaring that it would comply with SCR 250(4)(f). 2 ROA 281.

evidence to be prejudicial. Id. This Court reversed the death sentence and remanded for a new trial based upon the error and the defendant's lack of prior violent crimes. Id. This same rationale applies here.

Additional prejudice exists because of the State's extensive use of Rios's statements during closing arguments. Specifically, the State relied on Rios's statement and the fact that it does not mention drug usage by Jeremias, as alleged to be a mitigating circumstance in arguing that the mitigator had not been established. 15 ROA 3191-92. The State also relied on Rios's testimony concerning details of the offense and Jeremias's memory of details, all of which is relevant to the aggravating circumstances alleged by the State and found by the jury. 15 ROA 3192. Significantly, the State argued extensively that Jeremias was a violent person based upon Rios's statements that he was scared of Jeremias and his assertion that Jeremias had a violent character. 15 ROA 3203-04. Rios claims he was scared of Jeremias and slept with his door locked because he was afraid that Jeremias might grab a gun and shoot him. 15 ROA 3204-05. The State also referenced Rios's claim that Jeremias had no remorse. 15 ROA 3204. Rios stated that he did not want to testify in court because Jeremias would kill him. 15 ROA 3205. The State used this statement to argue the following:

> Answer, "I don't want to do it to his face. He'll kill me." Ivan Rios, who knows the defendant, who interacts with him, who hangs out

> with him, this is the description that he's giving you of who the defendant is, how he felt about the crime that he committed, what his character is. Read his statement.

15 ROA 3205.

Admission of the testimony and exhibit, coupled with the State's extensive reliance upon Rios's unsworn testimony warrants reversal of the death sentence and remand for a new trial.

## I. The district court violated Jeremias's constitutional rights of cross-examination and confrontation by allowing testimonial hearsay evidence to be admitted during the penalty trial.

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, confrontation, and cross-examination were violated by a district court's admission of testimonial hearsay evidence during the penalty phase of the trial. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"Questions concerning the admissibility of evidence during the penalty phase of a capital murder trial are generally left to the trial judge's discretion." Emil v. State, 105 Nev. 858, 864, 784 P.2d 956, 960 (1989). The district court's construction or interpretation of the rules of evidence is a question of law subject to de novo review. United States v. Sioux, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004). Whether particular evidence falls within the scope of a rule of evidence is also reviewed de

novo. United States v. Lillard, 354 F.3d 850, 853 (9th Cir. 2003). "[W]hether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo." Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (quotation omitted). Constitutional error is harmless only when the State establishes beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 23-24 (1967). Pursuant to NRS 177.055(2)(c), this Court reviews the record on appeal to determine whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor.

In addition to the testimonial hearsay evidence admitted concerning Rios's interrogation, other hearsay testimonial evidence was admitted against Jeremias during the penalty phase of the trial. Of greatest significance was the testimony of Detective Long and the admission of Exhibit 36, which was a compilation of police reports and related documents concerning Jeremias's criminal history. 13 ROA 2819; 25 ROA 5450. Specifically, the testimonial hearsay evidence informed the jury that on July 1, 2006, Jeremias was arrested after driving his car across a park. 13 ROA 2820; 25 ROA 5451 (declaration of arrest). After police stopped the car, they recovered unknown pills, about an ounce of marijuana and two firearms: a .44 Magnum Hawes firearm and a .45 caliber Sig Sauer GSR semiautomatic handgun.

13 ROA 2820. The guns were not registered. 12 ROA 2821. He was arrested for three misdemeanor offenses. 13 ROA 2821. The charges were dismissed as part of a negotiation with another case. 13 ROA 2826.

On August 19, 2006, Jeremias was stopped for a traffic violation. 13 ROA 2822; 25 ROA 5454 (arrest report). Officers found a silver briefcase in the car, learned that it belonged to Jeremias's Uncle Randy, called Randy, and learned there was a gun in the briefcase. 13 ROA 2822. Randy said the gun belonged to another person who worked with Randy at a bailbonds company. 13 ROA 2823. The gun was impounded. 13 ROA 2823. It was a Ruger semiautomatic P950, 9 mm handgun and the serial number had been removed. 13 ROA 2823. A prescription bottle, in the name of Lerna Gonzalez, was also found, which included 44 pills. 13 ROA 2823. He was arrested for possession of a firearm with an altered serial number and possession of dangerous drugs. 13 ROA 2824. The case was negotiated to a misdemeanor offense and he received a six-month suspended sentence, a fine, and was ordered to stay out of trouble. 13 ROA 2825.

A report was made on September 1, 2006, concerning an allegation for which no charges were filed. 13 ROA 2826, 2848; 25 ROA 5468 (voluntary statement).

. . .

The allegation concerned money orders that were allegedly forged which were used for the purchase of $6,003.25 worth of product from Mr. Blow, who sold clothing. 13 ROA 2827.

On October 7, 2006, there was a domestic violence call to 1527 Evening Spirit in Las Vegas. 13 ROA 2827; 25 ROA 5471 (declaration of arrest). A vehicle parked in the area belonged to Jeremias. 13 ROA 2827. The officers learned that he had an outstanding warrant based upon the possession of a firearm charge and he was arrested. 13 ROA 2828.

On January 25, 2007, detectives were conducting an investigation with a confidential informant concerning an allegation that a man was selling Ecstasy from a house on Gunther Circle. 13 ROA 2828; 25 ROA 5481 (presentence investigation report, reciting offense synopsis); 26 ROA 5535 (declaration of arrest). The informant made a purchase at that location. 13 ROA 2829. A purchase was also made at the house on Castle View, where Jeremias lived with his mother. 13 ROA 2829. Another purchase was made at Zapata's house. 13 ROA 2829. The informant said there were guns at Gunther Circle and Zapata's house. 13 ROA 2829. Search warrants were obtained on all of the addresses and officers found 61 pills of MDNA, 15 pills of MDNA, $1,300 in cash, a shotgun, a .22 handgun, an AK47 assault rifle, and a Colt .38 semiautomatic handgun. 13 ROA 2829. Jeremias was arrested and

told detectives that he sold about 200 Ecstasy pills a week, for a total income of about $2,000 a week. 13 ROA 2829. Jeremias was arrested for trafficking in a controlled substance. 13 ROA 2830. The case was negotiated to a conviction for attempted possession of a controlled substance. 13 ROA 2830. The judge treated the offense as a gross misdemeanor and Jeremias was sentenced to probation. 13 ROA 2831. He was on probation at the time of the murders in this case. 13 ROA 2831. A probation violation report associated with this offense included an assertion that "Due to concerns of gang involvement, Mr. Jeremias is being supervised by the Division's Risk Control Gang Unit." 25 ROA 5497.

Jeremias also had a citation on September 10, 2007, for possession of drug paraphernalia, and was arrested on February 18, 2008, for a warrant on the possession of an unregistered firearm case. 13 ROA 2831; 26 ROA 5555 (arrest report).

On December 16, 2008, Jeremias had an interaction with the North Las Vegas Police Department. 13 ROA 2831; 26 ROA 5560 (police report). He was pulled over for an expired registration and was found to have 3.5 grams of marijuana, which he was chewing. 13 ROA 2832. He was charged with various traffic offenses, possession of one ounce or less of marijuana and destruction of evidence. 13 ROA 1832.

The Sixth Amendment right of confrontation applies to capital penalty trials.

The use of hearsay evidence must therefore not be permitted to obtain a sentence of death against a capital defendant. Jeremias recognizes that in Summers v. State, 122 Nev. 1326, 1327, 148 P.3d 778, 779 (2006), this Court held to the contrary in finding that Crawford v. Washington, 541 U.S. 36 (2004), does not apply to evidence admitted during a capital penalty trial. See also Burnside v. State, 352 P.3d 627, 654 n. 9 (Nev. 2015) (affirming Summers). Jeremias respectfully urges this Court to overrule Summers.

The Sixth Amendment limits the admission of testimonial hearsay statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 68-69. The language of the Sixth Amendment clearly states that confrontation is required "in all criminal prosecutions." In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the United States Supreme Court clarified that defendants facing sentencing proceedings are entitled to constitutional protections and that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584 (2002) applied the rationale of Apprendi to capital cases and the finding of death eligibility, including the finding of aggravators.

Several courts considering this issue have found that the right of confrontation

applies to the eligibility phase of a capital trial. See United States v. Jordan, 357 F.Supp.2d 889, 902-03 (E.D.Va. 2005) (a federal district court judge found that the government could not introduce a witness's grand jury testimony and other statements during the eligibility phase of the capital proceeding); United States v. Johnson, 378 F.Supp.2d 1051, 1061 (N.D. Iowa 2003) (the "constitutional safeguards" of the Confrontation Clause should apply to the eligibility phase just as they apply to the trial phase). In United States v. Mills, 446 F.Supp.2d 1115, 1135 (C.D. Cal. 2006), a California federal district court went one step further by finding that the Confrontation Clause applies to both the eligibility and selection phases of a capital trial. This decision was followed in United States v. Concepcion Sablan, 555 F.Supp.2d 1205, 1221 (D.Colo. 2007). See also United States v. Stitt, 760 F.Supp.2d 570, 581 (E.D. Va. 2010) (applying the Confrontation Clause to both the eligibility and selection portions of the penalty phase and declining to bifurcate as it would be necessary if there were different evidentiary standards).

A significant number of other state courts have also recognized that the Confrontation Clause applies during the penalty portion of a capital trial. See State v. McGill, 140 P.3d 930, 942 (Ariz. 2006) (the Confrontation Clause applied to hearsay evidence used to establish an aggravating factor but not other aspects of a capital penalty trial); Rogers v. State, 948 So.2d 655, 663-65 (Fla. 2006) (finding

Crawford violation in a capital penalty phase based upon admission of statements to a police officer and deposition testimony without a showing of the witness's unavailability); Pitchford v. State, 45 So.3d 216, 251-52 & n. 100 (Miss. 2010) (deciding the issue based upon the Mississippi constitution); State v. Bell, 603 S.E.2d 93, 115-16 (N.C. 2004) (admission of a police officer's testimony to establish an aggravator violated Crawford); Russeau v. State, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005) (Confrontation Clause violated based upon admission of jail disciplinary records). See also State v. Berget, 826 N.W.2d 1, 20 & n.11 (S.D. 2013) (finding that the Confrontation Clause does not apply to the selection phase of a capital penalty trial, but specifically declining to endorse this rule for the eligibility phase); Pepson & Sharifi, *Two Wrongs Don't Make A Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 Akron L. Rev. 1 (2010). Jeremias submits that these courts are correct in finding that the Confrontation Clause applies during a capital penalty trial.

Jeremias objected to the admission of hearsay evidence, in violation of Crawford, while acknowledging that this issue was governed by this Court's decision in Summers. 13 ROA 2746-48. The district court overruled the objection. 15 ROA 3157-58. The jury was instructed, over a defense objection, that it could consider hearsay evidence during the penalty trial. 14 ROA 3063; 15 ROA 3157-58. The

prosecutor relied on this evidence during closing arguments. 15 ROA 3199-3202.

The hearsay evidence that was introduced during the penalty trial was significant both in volume and in impact. Jeremias was unable to cross-examine his accusers as to these allegations. Jeremias urges this Court to overrule Summers by finding that this evidence was improperly introduced and to remand this matter for a new penalty trial.

**J. The district court violated Jeremias's Second Amendment rights, and his rights to due process of law, by presenting evidence of gun possession as evidence of bad character.**

Jeremias's state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty trial, right to be free from cruel and unusual punishment, and rights under the Second Amendment were violated by a district court's admission of evidence concerning Jeremias's possession of firearms which were unrelated to the instant case. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"Questions concerning the admissibility of evidence during the penalty phase of a capital murder trial are generally left to the trial judge's discretion." Emil v. State, 105 Nev. 858, 864, 784 P.2d 956, 960 (1989). Pursuant to NRS 177.055(2)(c), this Court reviews the record on appeal to determine whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor.

Although Jeremias did not object to this testimony at trial, this issue may be considered as a matter of plain and constitutional error. United States v. Olano, 507 U.S. 725, 730-36 (1993); Chapman v. California, 386 U.S. 18, 23-24 (1967).

That State presented testimony through Detective Dan Long and an Exhibit, Number 36, which included police reports and court documents, which informed the jury that Jeremias had been in the possession of guns on several prior occasions. 13 ROA 2819. Specifically, on July 1, 2006, Jeremias was arrested after driving his car across a park. 13 ROA 2820. After police stopped the car, they recovered two firearms: a .44 Magnum Hawes firearm and a .45 caliber Sig Sauer GSR semiautomatic handgun. 13 ROA 2820. The guns were not registered. 12 ROA 2821. He was arrested for three misdemeanor offenses. 13 ROA 2821. The charges were dismissed as part of a negotiation with another case. 13 ROA 2826. On August 19, 2006, Jeremias was stopped for a traffic violation. 13 ROA 2822. Officers found a silver briefcase in the car, learned that it belonged to Jeremias's Uncle Randy, called Randy, and learned there was a gun in the briefcase. 13 ROA 2822. Randy said the gun belonged to another person who worked with Randy at a bailbonds company. 13 ROA 2823. The gun was impounded. 13 ROA 2823. It was a Ruger semiautomatic P950, 9 mm handgun and the serial number had been removed. 13 ROA 2823. He was arrested for possession of a firearm with an altered serial number.

13 ROA 2824. The case was negotiated to a misdemeanor offense and he received a six-month suspended sentence, a fine, and was ordered to stay out of trouble. 13 ROA 2825. On January 25, 2007, detectives were conducting an investigation concerning allegations that drugs were being sold at various locations. 13 ROA 2828-29. Search warrants were obtained on all of the addresses and officers found a shotgun, a .22 handgun, an AK47 assault rifle, and a Colt .38 semiautomatic handgun. 13 ROA 2829. Although Jeremias's counsel did not object to the admission of this testimony and evidence, its admission was improper.

In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court held that the Second and Ninth Amendments protect an individual's right to possess a firearm and other weapons. This right is not limited to possession in connection with militia services, but extends to possession for traditional lawful purposes. The State's introduction of evidence of weapon ownership, use or possession that was unrelated to the specific allegations of offenses charged in the Information, violates the Second, Ninth and Fourteenth Amendments. Even before Heller was issued, the courts have long recognized that "[t]he introduction of testimony concerning dangerous weapons found among the belongings of a person charged with a crime, no part of which depends upon the use or ownership of the weapon, has consistently been regarded as prejudicial error requiring a new trial." United States v. Reid, 410 F.2d 1223, 1227

(7th Cir. 1969) (citing Thomas v. United States, 376 F.2d 564, 567 (5th Cir. 1967); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967); Brubaker v. United States, 183 F.2d 894, 898 (6th Cir. 1950)). "Ordinarily the admission into evidence of weapons, or pictures of weapons, which are not directly related to the crime, and to which proper objection is made, is prejudicial to the defendant and in many cases has been held to be reversible error." United States v. Peltier, 585 F.2d 314, 327 (8th Cir. 1978). Jeremias recognizes that a similar issue was raised in Burnside v. State, 352 P.3d 627, 647 (Nev. 2015). In that case, this Court found a photograph of the defendant holding an assault rifle to be of dubious relevance, but found the error to be harmless. Id. at 647. This Court found that the defendant failed to raise the constitutional issue below and did not demonstrate plain error. Id. (citing NRS 178.602; Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006)). Jeremias raises this issue here so as to give this Court the opportunity to reconsider its decision in Burnside and to preserve this issue for federal review. He also notes that while the evidence in Burnside concerned evidence of a single firearm, the evidence in this case concerned more than one gun and was therefore more prejudicial, yet still irrelevant.

**K. The prosecutors committed misconduct during the penalty phase closing arguments.**

Jeremias's state and federal constitutional rights to due process of law, equal

protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unsual punishment were violated because of prosecutorial misconduct. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"When considering claims of prosecutorial misconduct, this court engages in a two step analysis. First, [this court] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [this court] must determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (citing United States v. Harlow, 444 F.3d 1255, 1265 (10th Cir. 2006)). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of a constitutional dimension, then we apply the Chapman v. California, 386 U.S. 18, 24 (1967), standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict." Id. (citing Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); Harlow, 44 F.3d at 1265).

"Determining whether a particular instance of prosecutorial misconduct is

constitutional error depends on the nature of the misconduct." Valdez, 124 Nev. at 1189, 196 P.3d at 477 (footnote omitted). "For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." Id. (citing Chapman, 386 U.S. at 21, 24; Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000)). "Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986) and Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

"Harmless-error review applies, however, only if the defendant preserved the error for appellate review." Valdez, 124 Nev. at 1190, 196 P.3d at 477 (citing United States v. Olano, 507 U.S. 725, 731 (1993)). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this 'allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.'" Id. (quoting Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002)). "When an error has not been preserved, this court employs plain-error review." Id. (citing Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or

her substantial rights, by causing actual prejudice or a miscarriage of justice. Id. (internal quotation omitted) (citing Green, 119 Nev. at 545, 80 P.3d at 95 and Olano, 507 U.S. at 734).

**1. The prosecutor presented misleading questions which erroneously allowed the jurors to believe that Jeremias could be released from custody even if he were sentenced to a term of life without the possibility of parole.**

During the penalty trial, Jeremias presented the testimony of Tami Bass, a former Parole Board member. She testified about procedures for obtaining parole in Nevada. 14 ROA 3016-21. She also testified that the parole board could not release someone sentenced to a term of life without the possibility of parole or to the death penalty. 14 ROA 3020. Moreover, she could not recall a case in which a person was convicted of two counts of first degree murder and the person received parole. 14 ROA 3020-21. On cross-examination, the prosecutor asked if Bass was familiar with the case of Melvin Geary. 14 ROA 3023. She was not, but the prosecutor used the cross-examination to give a narrative about the facts of that case:

> Q: Does the name Melvin [Geary] ring a bell to you, Ms. Bass?
>
> A. Not right now. I've been out there dozing off, and I'm telling you right now I don't know. That doesn't ring a bell to me right now.
>
> Q. Melvin [Geary] doesn't ring a bell to you at all?
>
> A. It doesn't.

Q. He was an inmate sentenced in the State of Nevada for life without prison for a stabbing death murder.

A. Life without parole you mean?

Q. Yes, sir. [sic].

A. Okay.

Q. And he was [inaudible] life with, and the warden of the prison testified before the Parole Commission in 2000 that he was a model inmate.

A. Okay.

Q. And he was released from custody.

A. Okay.

Q. And do you know what Mr. [Geary] did when he was released from prison?

A. I don't.

Q. He stabbed another man to death.

A. Okay.

Q. He was convicted of that and sentenced to life without.

A. Okay.

Q. You would agree with me that even in the State of Nevada with conscientious members of the board like yourself that mistakes do happen?

A. Absolutely.

Q. And you said that the increase of both prisoners, inmates, and the burden to the parole commissioners themselves increase their workload.

A. Absolutely.

Q. And you would agree with me that the quality of protection that the public demands from parole commissioners depends upon the quality of the individuals appointed by the governor to that position?

A. Absolutely.

14 ROA 3023-24. Defense counsel did not object to this testimony, but Jeremias contends on appeal that its admission was plain error and the questions presented by the prosecutor constituted misconduct.

The prosecutors testimony about the Geary case, presented under the guise of questions to a witness who knew nothing the case, was highly misleading and acted to undermine the instructions given by the district court on the meaning of a sentence of life without the possibility of parole.

Melvin Geary was first convicted of first degree murder in the early 1970s. Geary v. State, 91 Nev. 784, 787, 544 P.2d 417, 419 (1975) (Geary I). He was sentenced to serve a sentence of life without the possibility of parole. Id. In 1980, as was permitted under the law at the time of his offense, the Nevada Board of Pardons commuted his sentence to a term of life with the possibility of parole. Geary v. State, 110 Nev. 261, 269, 871 P.2d 927, 932 (1994) (Geary II). Subsequently, in

1986, the Nevada Parole Board granted his request for parole and he was released from custody. Id. In 1993, Geary was again charged with first degree murder, based upon the death of his roommate during an intoxicated fight. Id. at 262-63, 871 P.2d at 928. Geary was sentenced to the death penalty for the second murder based upon the aggravators of prior murder, murder committed while on parole, and random and without apparent motive. Geary II, at 264, 871 P.2d at 929. His conviction and sentenced were affirmed in Geary II, but rehearing was granted, his sentence was vacated, and the penalty portion of his case was remanded in Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996) (Geary III). Especially relevant to this case was this Court's holding in Geary III that the defendant's constitutional rights were violated because the jury instruction regarding the possibility of commuting a sentence of life without, to life with the possibility of parole was misleading. Id. at 1440, 930 P.2d at 723. The instruction at issue in Geary provided the following:

> Although under certain circumstances and conditions the State Board of Pardons Commissioners has the power to modify sentences, you are instructed that you may not speculate as to whether the sentence you impose may be changed at a later date.

Id. (emphasis omitted). This Court found that under the circumstances of Geary's case the instruction was misleading because, at the time Geary was convicted, NRS 213.1099(4) precluded release on parole of a person who received a life sentence if the person had repetitive criminal conduct; repetitive violence or aggression, criminal

conduct related to the use of alcohol or drugs; or failure in parole. Id. at 1441, 930 P.2d at 724. In support of its finding that the instruction was misleading, this Court cited to Simmons v. South Carolina, 512 U.S. 154 (1994), which held that when the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant will not be eligible for parole. Id. This Court also noted that the fact that Geary had previously been sentenced to life without the possibility of parole, but was in fact granted parole was misleading and likely led the jury to speculate that a sentence of death was the only way to prevent Geary's eventual release from prison. Id. at 1442, 930 P.2d at 725. This Court concluded that these facts "warranted informing the jury that even if the Pardons Board commuted Geary's sentence from one without the possibility of parole to one with the possibility of parole, Geary could not, in fact, be released on parole." Id. Although trial counsel in Geary did not preserve this issue, this Court found the error to warrant reversal:

> In light of the fact that extensive mitigating evidence was presented at the penalty hearing and Geary's sentence had, once before, been commuted to a term of life with parole, the jury may have believed that the possibility of commutation or parole was indeed great. Consequently, the jury was free to erroneously speculate that Geary was likely to be released on parole even if it sentenced him to a term of life without the possibility of parole. Thus, the jury was presented with a "false choice," and, operating under this "grievous misperception," rendered a sentence which cannot be said to be constitutionally reliable.

Id. at 1444, 930 P.2d at 726.[12]

Geary III is significant for its holding that a jury may not be misled as to the possibility that a defendant will be paroled even if given a sentence of life without the possibility of parole. The Geary opinions are also significant, however, because of the extensive cross-examination of Jeremias's expert witness about Geary's cases. What is most significant is the misleading nature of the examination, which likely caused the jurors to believe that if they gave Jeremias a sentence of life without the possibility of parole, that he too could receive a commutation of his sentence, a subsequent parole, and would have the same opportunity to commit another murder, just as Geary had done. In fact, none of this would have been possible because in 1995, the State Legislature passed NRS 213.085(1), which revoked the power of the Pardons Board to commute a sentence of life without the possibility of parole. See Miller v. Warden, 112 Nev. 930, 921 P.2d 882 (1996). This statute became effective on July 1, 1995, which was long after Geary received his initial commutation, but long before the offenses at issue in this case were committed. Although a pre-1995 sentence of life without the possibility of parole did not necessarily mean that the

[12]Upon additional petitions for rehearing by Geary and the State, this Court issued a fourth opinion and clarified two issues from its prior opinions which are not directly relevant to the issue presented here. Geary v. State, 114 Nev. 100, 952 P.2d 431 (1998) (Geary IV). On remand, Geary was again given a death sentence. Geary v. State, 115 Nev. 79, 977 P.2d 344 (1999) (Geary V).

defendant would never be paroled, see Miller, 112 Nev. at 935, 921 P.2d at 885 (noting that since 1974, the Pardons Board on twenty-seven occasions commuted a sentence of life without to a sentence of life with), that situation changed entirely with the enactment of NRS 213.085(1). See Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004) (Under NRS 213.085, "for offenses committed on or after July 1, 1995, the Pardons Board cannot commute either a death sentence or a prison term of life without the possibility of parole to a sentence allowing parole.") (citation omitted). Unfortunately, the jury here was not informed of this critical change in the law and was not informed that the actions which took place in the Melvin Geary cases could never happen here.

Inflammatory and misleading closing arguments by the prosecution are improper. Darden v. Wainwright, 477 U.S. 168, 180-81 (1986). This Court has previously found that a prosecutor's misleading statements about the commutation process warrants reversal of a sentence of death, even if the jury instructions are proper. Jones v. State, 101 Nev. 573, 579-81, 707 P.2d 1128, 1132-33 (1985) (citing California v. Ramos, 463 U.S. 992 (1983), Caldwell v. Mississippi, 472 U.S. 320 (1985) and other authority). In Jones, this Court found that "the prosecutor's misstatement of the powers of the pardons board may have convinced the jury that the only way to keep Jones off the street was to kill him." Id. at 582, 707 P.2dat 1134.

Here, the prosecutor's misstatements of the powers of the pardons board, which were made under the guise of cross-examination of a witness, may have convinced the jury that the only way to keep Jeremias off the street was to kill him. The misconduct was exacerbated by the erroneous admission of Rios's interrogation, in which he repeatedly declared his fear of Jeremias and in which he portrayed Jeremias as a very violent person. The combined impact of this testimony was that the jury was allowed to believe that Jeremias was a person so violent that his good friend was afraid for his life and that if he did not receive sentences of death he could receive a pardon, receive a parole, and be released to the streets. The prosecutor's actions warrant a finding under NRS 177.055(2) that the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and the sentence of death should be reversed.

**2. The prosecutor erroneously argued that Hudson's life had value only if Jeremias received the death penalty**

During the rebuttal closing argument, the prosecutor argued the following:

> And more importantly, ladies and gentlemen, is this. If you were to take Brian Hudson away from the formula of this case, and you had Paul Stephens. Based upon what you've heard of the defendant and the execution of Paul Stephens, the contact gunshot wound to his head, what's your punishment for Paul based upon the defendant's record, why he killed Paul, to avoid a gross misdemeanor sentence.
>
> Then ask yourself if life without is appropriate, what's the punishment for Brian? Because whatever you give short of death won't be a day longer in prison. And his life is virtually meaningless by a

verdict like that.

15 ROA 3231.

Although defense counsel did not object to this argument, it was flagrantly improper and should be considered by this Court as plain and constitutional error.

Inflammatory and misleading closing arguments by the prosecution are improper. Darden v. Wainwright, 477 U.S. 168, 180-81 (1986). The prosecutor's "role is to vindicate the public's interest in punishing crime, not te exact revenge on behalf of an individual victim." Drayden v. White, 232 F.3d 704, 712-13 (9th Cir. 2000).

The argument here was improper. See State v. Muhammad, 678 A.2d 164, 179 (N.J. 1996) ("Victim impact testimony may not be used . . . as a means of weighing the worth of the defendant against the worth of the victim."); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (en banc) (finding ineffective assistance of counsel because of the failure to object to prosecutor's arguments: "Whose life is more important to you? Whose life has more value? The Defendant's or [the victim's]?"). It was improper for the prosecutor to suggest that the value of Hudson's life was determined by whether the sentence of death was imposed and improper to argue that a sentence of less than death meant that his life was of less value. Lesko v Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991) (appeals to vengeance are improper, as is any

suggestion that mercy should not play a role in the sentencing decision); Duvall v. Reynolds, 139 F.3d 768, 795 (10th Cir. 1998) (finding improper an argument that the defendant should be treated with the mercy that he showed to the victim); Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) (same). But see Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438 444-45 (1997); Burnside v. State, 352 P.3d 627,649 (Nev. 2015) (finding that the challenged comments, considered in context, were not improper). Likewise, it was misconduct for the prosecutor to argue and imply that the only way to dispense justice was to return a death verdict. This argument was contrary to the jurors' obligation to make a "reasoned moral response to the defendant's background, character and crime." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

An argument similar to that presented here was found to be misconduct in Jones v. State, 101 Nev. 573, 577, 707 P.2d 1128, 1131 (1985). In that case, the prosecutor pleaded to the jury to be fair to the victim. Id. (citing Mears v. State, 83 Nev. 3, 422 P.2d 230 (1967)). Other courts are in accord. See Commonwealth v. Johnson, 107 A.3d 52, 75-81 (Pa. 2014) (recognizing that it was misconduct for a prosecutor to state "the one question I would like you to think about when hearing all the testimony in the sentencing hearing is does any of that evidence outweigh the life of Officer Grove?," but finding reversal not warranted because of the trial court's

prompt and strong admonition to the jurors that it was a violation of their oath to weigh the value of one life against another life); Hall v. Catoe, 601 S.E.2d 335, 339 (S.C. 2004) (reversing death sentence upon finding counsel ineffective for failing to object to prosecutor's argument: "I am talking about values, because a jury verdict is a statement of values . . . What are the lives of these two girls worth? Are they worth the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps.").

It is well established that misconduct by a prosecuting attorney during closing arguments may be grounds for reversal. See Berger v. United States, 295 U.S. 78, 88 (1935). The prosecutors represent a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice. Berger, 295 U.S. at 88. A prosecutor may "prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. A prosecutor should not use arguments to inflame the passions or prejudices of the jury. Viereck v. United States, 318 U.S. 236, 247-48 (1943). Prosecutorial misconduct may constitute a violation of the Due Process Clause of the Fourteenth Amendment if the prosecutor's comments "so infected the

trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Waingwright, 477 U.S. 168, 181 (1986). See also Donnelly v. DeChristoforo, 416 U.S. 637 (1984). The argument was also an improper use of victim impact evidence. Payne v. Tennessee, 501 U.S. 808, 827 (1991); Hall, 601 S.E.2d at 341.

Finally, the argument here is improper because it is contrary to the death penalty scheme which has been carefully developed by the legislature and courts. A jury is not tasked with placing value on a victim's life by imposing a sentence. Were this the standard it is difficult to imagine a first degree murder case which would not call for the death penalty. The rationale urged upon the jury by the prosecutor would create arbitrariness, confusion, and inconsistency in the imposition of a capital sentence: a result which cannot be tolerated. Beck v. Alabama, 447 U.S. 625, 643 (1980). Our system does not require the defendant's execution as a means of placing value on a victim's death. Rather, there is a need for individualized consideration under the Eighth Amendment. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality); Penry v. Lynaugh, 492 U.S. 302, 319 (1989). "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

The arguments here was persuasive and took place moments before the jury entered deliberations. See 15 ROA 3233. The argument was especially prejudicial because it took place during the rebuttal argument, so Jeremias was not given the opportunity to present a contrary argument.[13] Reversal of the death sentence is warranted under these circumstances.

## L. The death penalty is unconstitutional.

Jeremias's state and federal constitutional rights to due process of law, equal protection, and right to be free from cruel and unusual punishment were violated because the death penalty is unconstitutional. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

### 1. Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson v. North Carolina, 428 U.S. 280, 296 (1976). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); Arave v. Creech, 507 U.S. 463, 474 (1993); Zant v. Stephens, 462 U.S. 862, 877 (1983); McConnell v. State, 121 Nev.

[13]Jeremias filed a Motion to Allow The Defense To Argue Last In Penalty Phase. 4 ROA 728. The State opposed the motion. 4 ROA 851. The district court denied the motion. 5 ROA 893, 903.

25, 30, 107 P.3d 1287, 1289 (2005). Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually any and all first-degree murderers. As a result, in 2001, Nevada had the second most persons on death row per capita in the nation. James S. Liebman, A Broken System: Error Rates in Capital Cases, 1973-1995 (2000); U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 2001. Liebman found that from 1973 through 1995, the national average of death sentences per 100,000 population, in states that have the death penalty, was 3.90. Liebman, at App. E-11. The states with the highest rate for the death penalty for this period were as follows: Nevada -- 10.91 death sentences per 100,000 population; Arizona – 7.82; Alabama – 7.75; Florida – 7.74; Oklahoma – 7.06; Mississippi – 6.47; Wyoming – 6.44; Georgia – 5.44; Texas – 4.55. Id. Nevada's death penalty rate was nearly three times the national average and nearly 40% higher than the next highest state for this 12-year period. Such a high death penalty rate in Nevada is due to the fact that neither statutes defining eligibility for the death penalty nor the case law interpreting these statutes narrows the class of persons eligible for the death penalty.

The arbitrariness and unusual application of the death penalty is reflected by Justice Breyer's dissening opinion in Glossip v. Gross, 135 S.Ct. 2726 (2015). Of particular relevance here is the fact that between 2004 and 2009, only 35 counties

throughout the United States imposed five or more death sentences, and between 2010 and June 22, 2015, only 15 counties in this country imposed five or more death sentences. Id. at 2761, 2779, 2780. The fact that Jeremias has the misfortune to live in Clark County, which was one of the very few counties identified by Justice Breyer as still imposing the death penalty for both of these time periods, demonstrates the arbitrariness of the sentence imposed in this case.

Jeremias recognizes that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See Leonard v. State, 117 Nev. 53, 83, 17 P.3d 397, 416 (2001) and cases cited therein. Nonetheless, this Court has never explained the rationale for its decision and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

**2. The death penalty is cruel and unusual punishment.**

Jeremias's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the death penalty is cruel and unusual punishment under the Eighth and Fourteenth Amendments. See Glossip v. Gross, 132 S.Ct. 2726, 1755-81 (2015) (Breyer J., dissenting). He recognizes that this Court has found the death penalty to be

constitutional, but urges this Court to overrule its prior decisions and presents this issue to preserve it for federal review.

**3. Executive clemency is unavailable.**

Jeremias's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that every one of the 38 states that has the death penalty also has clemency procedures. Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 294 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2006 (December 2007 NCJ 220219). Jeremias is informed and believes and on that basis alleges that since the reinstatement of the death penalty, only a

single death sentence in Nevada has been commuted and in that case, it was commuted only because the defendant was mentally retarded and the Supreme Court found that the mentally retarded could no longer be executed. It cannot have been the legislature's intent to create clemency proceedings in which the Board merely rubber-stamps capital sentences. The fact that Nevada's clemency procedure is not exercised on behalf of death-sentenced inmates means, in practical effect, that it does not exist.

"'Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.'" Harbison v. Bell,556 U.S. 180, 192 (2009) (quoting Herrera v. Collins, 506 U.S. 390, 411-12 (1993)). "Far from regarding clemency as a matter of mercy alone, [the Court has] called it the fail safe in our criminal justice system." Id. (internal quotations omitted). The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring that Jeremias's death sentence be vacated.

## M. The conviction and sentence of death are invalid under the cumulative error doctrine.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their

cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this appeal requires reversal of the judgement. Jeremias incorporates each and every factual allegation contained in this appeal as if fully set forth herein. The cumulative effect of these errors demonstrates that the trial deprived Jeremias of fundamental fairness and resulted in a constitutionally unreliable verdict. Whether or not any individual error requires the vacation of the judgment, the totality of these multiple errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Jeremias. He requests that this Court vacate his judgement and/or sentences and remand for a new trial.

## VIII. CONCLUSION

Jeremias respectfully requests that this Court vacate his judgment of conviction and sentences of death. This case should be remanded for a new trial which is not plagued by the numerous statutory and constitutional violations which occurred during this trial.

DATED this 1st day of October, 2015.

Respectfully submitted,

***/s/ JONELL THOMAS***

By:_____

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect Office 11 in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(B)(I). The relevant portions of the brief are 36,290 words.

4. Finally, 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)(1), 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 sanction

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

DATED this 1st day of October, 2015.

***/s/ JONELL THOMAS***

_____

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## CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 1st day of October, 2015, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

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