IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH SIMON JEREMIAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 67228

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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Routing Statement: This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(2) because it is a direct appeal, post-conviction appeal, or writ petition in a death penalty case.

STATEMENT OF THE ISSUE(S)

I. WHETHER THE DISTRICT COURT PLAINLY ERRED IN FOLLOWING THE AGREED STIPULATION OF THE PARTIES THAT MEMBERS OF JEREMIAS' FAMILY NOT BE PRESENT IN THE COURTROOM DURING JURY SELECTION

II. WHETHER THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION DURING THE DIRECT EXAMINATION OF CARLOS ZAPATA

III. WHETHER THE DISTRICT COURT PLAINLY ERRED IN ADMITTING THE VIDEO RECORDING OF JEREMIAS' VOLUNTARY STATEMENT

IV. WHETHER THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE MEDICAL TESTIMONY OF DR. LISA GAVIN REGARDING HER INDEPENDENT OPINION OF AUTOPSIES PERFORMED ON BOTH VICTIMS

V. WHETHER THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING TESTIMONY CONCERNING PIECES OF BLACK PLASTIC FOUND ON BOTH VICTIMS AND THROUGHOUT THE CRIME SCENE

VI. WHETHER THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY

VII. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VALID AGGRAVATOR THAT BOTH MURDERS WERE COMMITTED TO AVOID LAWFUL ARREST

VIII. WHETHER ADMISSION OF IVAN RIOS' RECORDED STATEMENTS DURING THE PENALTY PHASE CONSTITUTED PLAIN ERROR

IX. WHETHER EVIDENCE CONERNING JEREMIAS' CRIMINAL HISTORY WAS PROPERLY ADMITTED DURING THE PENALTY PHASE

X. WHETHER ADMISSION OF JEREMIAS' GUN POSSESSION RELATING TO HIS CRIMINAL HISTORY DURING THE PENALTY PHASE CONSTITUTED PLAIN ERROR

XI. WHETHER ALLEGED PROSECUTORIAL MISCONDUCT DUIRNG THE PENALTY PHASE CONSTITUTES PLAIN ERROR

XII. WHETHER THE DEATH PENALTY IS CONSTITUTIONAL

XIII. WHETHER CUMULATIVE ERROR WARRANTS REVERSAL

STATEMENT OF THE CASE

On August 5, 2009, an Indictment was filed charging Ralph Simon Jeremias as follows: Count 1: Conspiracy to Commit Robbery (Felony – NRS 199.480, 200.380); Count 2: Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060); Counts 3 and 4: Robbery with Use of a Deadly Weapon (Felony – NRS 193.165, 200.380); Counts 5 and 6: Murder with Use of a Deadly Weapon

(Felony – NRS 200.010, 200.030, 193.165). 1 ROA 1-7. On September 1, 2009, the State filed a Notice of Intent to Seek Death Penalty, alleging the following aggravating circumstances: 1 and 2) The murder was committed while the person was engaged in the commission of a robbery and the person charged killed the person murdered (NRS 200.033(4)); 3) The murder was committed to avoid or prevent a lawful arrest (NRS 200.033(5)); and 4) The Defendant will be, in the immediate proceeding, convicted of more than one offense of murder in the first or second degree (NRS 200.033(1)). 1 ROA 65-70. The State filed a Notice of Evidence to Support Intent to Seek Death Penalty on October 24, 2013. 4 ROA 708-13. The State filed an Amended Notice of Evidence to Support Intent to Seek Death Penalty on February 20, 2014. 5 ROA 990-1001. On October 10, 2014, the State filed a Second Amended Notice of Evidence to Support Intent to Seek Death Penalty. 5 ROA 924-89.

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 365-96. The State filed an Opposition on September 29, 2010. 2 ROA 408-25. Jeremias' Motion was denied on September 30, 2010. 2 ROA 430. On October 30, 2013, Jeremias filed another Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Because Nevada's Death Penalty Statute is Unconstitutional and a Motion to Strike the State's Notice of Intent to Seek Death

Penalty as Being Unconstitutionally Arbitrary and Capricious. 4 ROA 789-822, 769-788. The State filed Oppositions to both Motions on December 3, 2013. 4 ROA 835-37, 838-46. On January 31, 2014, the District Court entered an Order denying Jeremias' Motion. 5 ROA 903-05.

Jeremias' jury trial commenced on October 27, 2014. On November 6, 2014, the jury returned a verdict finding Jeremias guilty as follows: Counts 1-4: Guilty as charged; Counts 5 and 6: Guilty of First Degree Murder with Use of a Deadly Weapon. 12 ROA 2586-89.

Jeremias' penalty hearing began on November 7, 2014. On November 10, 2014, the jury returned a special verdict finding all four of the alleged aggravating circumstances. 14 ROA 3080-15 ROA 3081, 3089. The jury also found several mitigating circumstances but unanimously determined the aggravating circumstances were not outweighed by the mitigating circumstances and sentenced Jeremias to death as to both Counts 5 and 6. 15 ROA 3082-86, 3090-94.

On January 15, 2015, Jeremias was adjudicated guilty of the charged offenses and sentenced as follows: Count 1: Maximum 60 months, minimum parole eligibility of 24 months; Count 2: Maximum 156 months, minimum parole eligibility of 48 months, concurrent with Count 1; Count 3: Maximum 156 months, minimum parole eligibility of 48 months, plus a consecutive term of maximum 156 months, minimum parole eligibility of 48 months for use of a deadly weapon, concurrent with Count 2;

Count 4: Maximum 156 months, minimum parole eligibility of 48 months, plus a consecutive term of maximum 156 months, minimum parole eligibility of 48 months for use of a deadly weapon, concurrent with Count 3; Count 5: Death, plus a consecutive term of 240 months, minimum parole eligibility of 96 months for use of a deadly weapon, consecutive to Count 4; Count 6: Death, plus a consecutive term of 240 months, minimum parole eligibility of 96 months for use of a deadly weapon, with 1,842 days credit for time served. 15 ROA 3280-81. A Judgment of Conviction was filed January 15, 2015. 15 ROA 3262-64.

Jeremias filed a Notice of Appeal on January 15, 2015. 15 ROA 3257-58. Jeremias filed his Opening Brief on October 1, 2015. The State's Answering Brief follows.

STATEMENT OF THE FACTS

In June 2009, friends Paul Stephens ("Paul") and Brian Hudson ("Brian") lived together in a second-floor apartment at the Polo Club Apartments located at 4201 South Decatur in Clark County, Nevada. 8 ROA 1671-73, 1692. Both were students at UNLV and Brian worked at USAir. 8 ROA 1722. Additionally, Paul sold marijuana to a small group of friends and acquaintances from a stash they kept in their kitchen cabinet behind a bag of rice. 8 ROA 1701-02. Brian and Paul would often watch movies together on Paul's laptop while sitting in their living room. 8

ROA 1699. Paul would usually sit or lay on a couch and Brian would sit on a nearby love seat. Id. Brian also had a laptop. Id.

Around 4:00 PM on June 7, 2009, Michael Johnsen ("Johnsen"), a mutual friend of Paul and Brian, texted Brian to set up plans to meet at Polo Apartments later that day and "hang out." 8 ROA 1694-95. Brian replied at 4:11 pm that he was currently watching a movie and Johnsen said he would come by at 7:00 pm. 8 ROA 1696. However, Johnsen never received a reply back from this text, which was unusual given that the two exchanged text messages often. 8 ROA 1699-1700. Johnsen called both Paul and Brian but there was no answer. Id. Johnsen did not make it over to Polo Apartments that day. 8 ROA 1696-97.

Shortly after Brian's text, the neighbor that lived directly below the apartment Brian and Paul lived in heard several loud bangs a second or two apart, followed by the sounds of someone running up or down the stairs outside. 8 ROA 1673-74, 1676. The neighbor looked out his windows to investigate. 8 ROA 1673-76. As he looked out an east-facing window, he saw a red truck with chrome rails speed through the parking lot despite the presence of very large speed bumps. 8 ROA 1675-76. The neighbor later identified a truck belonging to Carlos Zapata ("Zapata") as the truck he saw. 8 ROA 1679-80, 9 ROA 1979. Sometime later, another neighbor, Aimee Henkel ("Henkel") was sitting outside and saw two men walking toward the apartment where Paul and Brian lived. 9 ROA 1934-35. One of the men was

Caucasian and another appeared Filipino with black shoulder-length hair, wearing a hat and standing approximately 5'7". 9 ROA 1935-37, 1945-46. As Henkel watched, the Caucasian man told the Filipino man that there was a girl outside and the Filipino man replied "is she hot?" 9 ROA 1937-38. The two men then walked by her and the Filipino man climbed the stairs leading to the apartment where Brian and Paul lived. 9 ROA 1938-39. Uncomfortable, Henkel went inside her apartment. 9 ROA 1938-39. Henkel later looked at a photographic lineup including Jeremias' picture and stated she was 90% sure he was the Filipino man she saw. 9 ROA 1946-49, 25 ROA 5399-5400. At trial, Henkel identified Jeremias as the Filipino person she saw. 9 ROA 1949-50.

The next day, Johnsen was surprised when Brian did not show up for a game of golf Brian had previously suggested. 8 RPA 1698, 1702, 1704-05. Johnsen decided to go to Brian's apartment to investigate. 8 ROA 1702-03. As Johnsen pulled into the parking lot, he saw vehicles belonging to Paul and Brian parked in their designated stalls. 8 ROA 1702-03. Johnsen knocked on the front door of the apartment but there was no answer. 8 ROA 1704-05. Johnsen again tried to call both Paul and Brian but there was no answer. Id. Johnsen then tried to open the front door and was surprised to find it unlocked as Paul and Brian always kept their front door locked. 8 ROA 1701, 1702-03. The front door led directly into the living room and Johnsen immediately saw Paul and Brian. 8 ROA 1706-07, 25 ROA 5406. Paul was

lying on a couch with blood coming from his ear and Brian was kneeling on the floor bent over with his upper body resting face down on the cushions of a love seat and had a blanket covering his head. 8 ROA 1706-07, 9 ROA 1799-1800, 25 ROA 5406. Johnsen also saw a coffee table was tipped over onto the couch where Paul's body lay and there were Ethernet cables at Paul's feet but his laptop was missing. 8 ROA 1709. Paul would normally plug the cables into his laptop and either place the laptop on his chest or the coffee table to watch movies while he rested on the couch. 8 ROA 1709. Upon discovering the dead bodies of Paul and Brian, Johnsen immediately left the apartment but noticed on his way out the doors leading to Paul's bedroom and a guest bathroom were opened and a light was on in the guest bathroom. 8 ROA 1708. Both doors were usually closed. Id.

When officers and crime scene analysts from the Las Vegas Metropolitan Police Department arrived, they began investigating the scene. There were no signs of forced entry, suggesting Paul and Brian may have known the suspect(s) and allowed them to enter. 9 ROA 1796. Officers noted the kitchen and bathroom lights were on as well as the air conditioning and the television, although the screen was black with a "DVD" symbol in the corner. 8 ROA 1737-39. Cables were coming out of the television toward the couch but there was no device connected to the other ends. Id.

Paul had a bullet entrance wound on his left cheek with a corresponding exit wound on the right side of his neck. 9 ROA 1798-99, 10 ROA 2126-27. The bullet traveled through Paul's jawbone, oral pharynx, and struck but did not penetrate his carotid artery. 10 ROA 2127-28. This wound was probably not independently fatal if treated but would have likely rendered Paul unconscious. Id. He had another bullet entrance wound on the top-right side of his head with no corresponding exit wound as the bullet traveled through the right side of his brain and the left side of his neck before lodging in the soft tissue in the back of his neck. Id., 10 ROA 2130. This second wound appeared to be a contact gunshot wound and was independently fatal and instantly incapacitating. 10 ROA 2128-29, 2131. A forensic pathologist opined the cause of Paul's death was multiple gunshot wounds and the manner of death was homicide. 10ROA 2135.

Brian likewise suffered two gunshots. One bullet entered on the back left side of his neck and traveled across his neck, penetrating his cervical spine before lodging on the right side of his neck. 9 ROA 1799-1800, 10 ROA 2134. A second bullet entered the right side of Brian's face and fractured his jaw before exiting and re-entering on the right side of his neck, entering his chest cavity and puncturing his lung before coming to rest behind Brian's sixth rib. 10 ROA 2132-35. Both gunshots were independently fatal. 10 ROA 2134-35. Brian's hands were in front of his face and the toe of Brian's right foot was on the ground as if he was preparing to stand

up or start a race. 8 ROA 1754-55. Found underneath Brian's body were a pair of sunglasses and a cell phone flipped open. 8 ROA 1758. A forensic pathologist likewise determined the cause of death to be multiple gunshot wounds and the manner of death to be homicide. 10 ROA 2135-36. The bullets recovered from both bodies were classified as "nominal .38" a class of firearm that includes 9 mm firearms. 8 ROA 1862-63, 9 ROA 1863, 1868-69. Neither victim had any defensive wounds. 10 ROA 2123-24.

Based on the nature of the wounds, officers began looking for ballistics evidence. 8 ROA 1748. Officers found a bullet core and a bullet jacket near the bodies that were likewise deemed "nominal .38". 8 ROA 1748, 9 ROA 1860-61, 25 ROA 5406. Officers also noticed a significant amount of small pieces of dark plastic with the same texture as a trash bag on the floor surrounding both victims, on top of two pillows found on the couch where Paul was lying, on the blanket covering Brian, and on top of both victims' bodies. 8 ROA 1745-47, 1755, 9 ROA 1805. A forensic examination of the plastic identified it as polyethylene common in garbage bags, sandwich bags, and grocery bags and brown hairs and reddish-brown stains were present. 10 ROA 2177-79. The pieces appeared to have been torn by a bullet. 9 ROA 1761-62, 1785, 1788, 1805-07. Officers found no cartridge casings at the scene and believed that either a revolver was used or a plastic bag was used to cover the firearm

and catch the casings. 9 ROA 1805-06. There was no other evidence of ammunition or firearms located during the search. 8 ROA 1751-52, 10 ROA 2149-50.

On June 9, 2009, Brian's parents were notified of their son's death and were told to monitor and report any financial transactions that occurred after 4:00 pm on June 7. 8 ROA 1724-25. Brian's father subsequently called Bank of America and asked them to close Brian's account. 8 ROA 1725. Bank of America informed Brian's father that Brian's card had been used after his death; this information was relayed to detectives. Id. Brian's parents subsequently traveled from out of state to collect his belongings on June 17, 2009. 8 ROA 1723-24, 1726-27. As they were moving the television located in the living room, an empty cartridge casing dropped onto the floor. 8 ROA 1727-28. Detectives were called and the cartridge case was collected as evidence. Id. The cartridge casing was later determined to be 9mm Luger. 9 ROA 1863.

Detectives learned Brian's card was used at the following times and locations on June 7: 1) Terrible Herbst's store no. 152 at 6:02 pm; 2) ARCO pay-point at 4916 Paradise Road at 6:15 pm; 3) Circle K at 1212 Tropicana at 6:21 pm; 4) Well's Fargo ATM inside BJ's Lounge and Bar at 218 East Tropicana at 6:29 pm; 5) Several locations inside M Resort starting at 7:24 pm; 6) 7-Eleven at the intersection of Seven Hills and St. Rose at 7:39 pm; 7) Hooters Hotel and Casino between 7:39 pm and 10:01 pm. 10 ROA 2153-57. Detectives pulled surveillance video regarding

each of these financial transactions. 10 ROA 2154-55. A suspect vehicle was identified as a white four-door Pontiac sedan with Nevada plates and two male suspects were seen throughout the videos. 10 ROA 2158. Detectives noted that the passenger in the vehicle was the suspect actually conducting the financial transactions and that he had a tattoo on his neck as well as a tattoo on his left arm. 10 ROA 2165, 2168, 2171.

After taking a photo of the suspect vehicle to a Pontiac dealership, it was identified as a 2007-2008 Pontiac GT G6. 10 ROA 2169. Detectives learned that a significant number of the 1,310 registered Pontiac GT G6 vehicles in Nevada belonged to rental car companies and they obtained lists of those who rented such vehicles during the relevant time period. 10 ROA 2169-70. After looking at photo identifications of all people associated with registered Pontiac GT G6 sedans, detectives saw that Jeremias was named as an alternative driver of a rental car fitting the description of the suspect vehicle. 10 ROA 2171. When detectives looked at Jeremias' photo, they saw he had a tattoo on his neck and fit the physical description of the person using Brian's card in the surveillance videos. 10 ROA 2171. Jeremias had the nickname "Macky" and detectives found a text from Brian to Paul telling him to call "Macky" as soon as possible and providing Jeremias' cell phone number. 10 ROA 2190, 11 ROA 2338-39.

Detectives began surveillance on Jeremias and determined his residence was 4020 South Arville apartment 235. 10 ROA 2179-80. Detectives identified Jeremias' roommate as Ivan Rios ("Rios"). 10 ROA 2180. Both were identified as the people depicted in the surveillance videos using Brian's cards. 10 ROA 2186, 2189. Jeremias was identified as the suspect actually using Brian's cards. 10 ROA 2186. Detectives arrested both Jeremias and Rios on June 24, 2009, and executed a search warrant at their residence and Jeremias' car. 10 ROA 2180-81. The residence had one bedroom identified as Rios' and Jeremias stayed in the dining room which had been converted to a bedroom with a bed, a makeshift closet, and some furniture. 10 ROA 2184-85. During the search of Jeremias' room and car, detectives located several items matching those depicted in the videos, including: a pair of flip flops, a pair of pants, a shirt, and several fedora hats. 9 ROA 1814-15, 1821, 1837-42. Detectives also found marijuana in a baggie and a 9mm Luger full metal jacket cartridge in a safe located in Jeremias' closet. 9 ROA 1814, 1815-16.

Zapata was identified as a potential suspect and friend of Jeremias and Rios and detectives spoke with him at his home located at 3323 Mendocino Forest on June 24 as well. 9 ROA 1842. When detectives asked Zapata for assistance investigating "a crime," Zapata immediately pointed to a nearby laptop and said "that is the laptop you are looking for."10 ROA 2192. The Presario laptop Zapata pointed was Paul's. 9 ROA 1844, 10 ROA 2193-94. Zapata also pointed to a baggie

containing marijuana and told detectives that was not the marijuana police were looking for because "we already smoked that up." 10 ROA 2192. Zapata also confirmed he owned the red Chevy Silverado truck with chrome rails seen at the crime scene moments after the murders and allowed detectives to search his vehicle. 8 ROA 1679-80, 9 ROA 1979, 10 ROA 2192-93. Zapata was subsequently transported and interviewed. 10 ROA 2194-95.

During Zapata's interview, he stated he was friends with Jeremias and Rios and that they were all together at Hooters Hotel and Casino at 2:00 pm on June 7 and were swimming in the hotel pool. 10 ROA 1981-83, 1990-92. While in the pool, Jeremias suggested that the three adult males commit a robbery, or a "lick," on "two white boys" who lived in Polo Apartments. 10 ROA 1992-94. Although Zapata did not know the proposed victims, Jeremias did and told Rios and Zapata they had approximately $2,000 in money and drugs. 10 ROA 1955. Jeremias also said the proposed victims kept marijuana in a kitchen cabinet. 10 ROA 2022-24. Jeremias, Rios, and Zapata all agreed to commit the robbery and left Hooters. 10 ROA 1995-96.

The three traveled in Zapata's truck to the apartment Rios and Jeremias shared at South Arville to prepare for the robbery. 10 ROA 1995-96. Jeremias instructed Rios to drive Zapata's truck with Jeremias and Zapata as passengers. 10 ROA 1997-98. Jeremias was to go into the apartment first and then text Zapata when he could

come in with a backpack and collect all of the property. Id. Zapata and Rios told Jeremias to wear a ski mask, but Jeremias responded that he did not need to wear it and it would be futile because the victims already knew who he was. 10 ROA 2025-26. Jeremias then grabbed a black 9mm semi-automatic handgun and put it in a grocery bag before the three left the South Arville apartment. 10 ROA 2016-17, 2022, 2097-98.

The three then drove over to Polo Apartments in Zapata's red truck and parked in the parking lot. 10 ROA 1998-99. Jeremias got out carrying the handgun in the black grocery bag and walked toward an apartment. 10 ROA 2000. After 10-15 minutes of Rios and Zapata waiting in the truck, Zapata asked Rios to turn down the radio. 10 ROA 1999-2000, 2015-16. Zapata then heard three or four shots before seeing Jeremias jog back to the truck without carrying anything but holding one hand on his hip like "he had something tucked down his waist," get in, and tell Rios to drive away. 10 ROA 2002, 2104-05. Rios drove out of the parking lot "like a speed racer" before Jeremias told him to stop and turn around or "it's all done for nothing." 10 ROA 2002-03. Rios refused and drove back to the South Arville apartment he shared with Jeremias. 10 ROA 2003.

Once back at the apartment, Jeremias again said they needed to go back and get the property or "it's all done for nothing." 10 ROA 2003. Zapata agreed to go back to the Polo Apartments with Jeremias while Rios stayed at South Arville. 10

ROA 2004. Jeremias and Zapata then drove Zapata's truck to Hooter's and traded it for Jeremias' rental vehicle, a white Pontiac GT G6, before returning to Polo Apartments. 10 ROA 2004-06. Zapata drove the rental car and Jeremias rode as a passenger. 10 ROA 2006. Jeremias told Zapata to park in a different place and he got out of the car while Zapata waited. 10 ROA 2006-07. After several minutes, Jeremias returned with a backpack filled with computers, drugs, and money from the apartment. 10 ROA 2008. The two then returned to the South Arville apartment and split up the property. 10 ROA 2008-09. Zapata got one laptop and two baggies containing three ounces of weed as well as $150 cash. 10 ROA 2009. Jeremias took the rest of the property. 10 ROA 2010. When Rios demanded some of the property, Jeremias told him "later" but when Rios pressed, Jeremias slapped Rios in the face and Zapata had to separate them. 10 ROA 2010.

Jeremias, Zapata, and Rios then drove around to different locations, including various gas stations and Hooters Hotel and Casino, to use various credit cards Jeremias had taken from the Polo Apartments residence. 10 ROA 2010-11.

Jeremias and Zapata had a conversation about what happened the first time Jeremias went inside the apartment. 10 ROA 2013-14. Jeremias told Zapata that he went inside the apartment and went to the bathroom. Id. While in the bathroom, Jeremias took several deep breaths, opened the door and shot one of the victims immediately. Id. Jeremias then shot the other victim. Id. Jeremias stated he shot both

victims twice and that he shot one of the victims while they were lying on a couch. Id., 10 ROA 2027-29. Jeremias said he found the laptops in plain sight and the drugs and money where he previously knew them to be. 10 ROA 2023-25.

Jeremias testified at trial and denied committing the murders but admitted that he entered the Polo Apartments residence, found Paul and Brian dead, and took various items belonging to them, including Brian's cards which he subsequently used at various locations. 11 ROA 2377-85, 2393-94. Jeremias testified he knew Paul and Brian from previous drug transactions and went to Paul's apartment on June 7 to conduct a drug transaction. 11 ROA 2356-57, 2376-77. Jeremias also admitted to previously telling detectives he "saw two people get murdered" but that he was alone when he was in their apartment. 11 ROA 2409-13, 2422-23.

ARGUMENT

I.

THE DISTRICT COURT DID NOT PLAINLY ERR IN FOLLOWING THE AGREED STIPULATION OF THE PARTIES THAT MEMBERS OF JEREMIAS' FAMILY NOT BE PRESENT IN THE COURTROOM DURING JURY SELECTION

Jeremias first contends the District Court committed structural error by asking members of the public, specifically his family, to leave the courtroom during jury selection. However, this claim is without merit as Jeremias explicitly agreed to the action and implicitly declined to build a record whereby this Court could review the matter.

The Sixth Amendment provides an accused the right to a speedy and public trial. U.S. CONST. amend. VI. The right to a public trial extends to jury voir dire proceedings. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724 (2010). This right is not absolute, however, and may be overcome by other rights or interests after a trial court has considered alternative reasonable measures. Id. at 213-15, 130 S. Ct. at 724-25. "[T[he public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the 'public' will be present in the form of those persons who did gain admission." Estes v. Texas, 381 U.S. 532, 588-89, 85 S. Ct. 1628 (1965) (Harlan, J. concurring).

The violation of a defendant's right to a public trial is considered structural error. Waller v. Georgia, 467 U.S. 39, 49, 104 S. Ct. 2210 (1984).

> It does not necessarily follow, however, that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation. . . Similarly, in the context of a denial of the right of public trial, as defined in Waller, it does not follow that every temporary instance of unjustified exclusion of the public – no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure – would require that a conviction be overturned.

Gibbons v. Savage, 555 F.3d 112, 120 (2nd Cir. 2008). Thus, although a public-trial violation is structural error, "the remedy should be appropriate to the violation" and a defendant is not entitled to a "windfall" for trivial violations. Waller, 467 U.S. at

50, 104 S. Ct. 2210. Determining whether an alleged violation is trivial requires an examination of the values underpinning the Sixth Amendment, namely: "(1) ensuring a fair trial; (2) reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions; (3) encouraging witnesses to come forward, and (4) discouraging perjury." Gibbons, 555 F.3d at 121.

In order to preserve the issue for appeal, an alleged violation of the right to a public trial must be contemporaneously objected to. See, e.g., Downs v. Lape, 657 F. 35 97, 108 (2nd Cir. 2011); State v. Pinno, 356 Wis. 2d 106, 139-44, 850 N.W.2d 207, 223-26 (2014) (collecting cases); People v. Alvarez, 20 N.Y.3d 75, 81, 979 N.E.2d 1173, 1176 (2012), cert. denied, 133 S. Ct. 1736 (2013); People v. Virgil, 51 Cal. 4th 1210, 1237, 253 P.3d 553, 577-78 (2011). Further, the structural nature of any error does not obviate a defendant's requirement to lodge a contemporaneous objection. Commonwealth v. Alebord, 467 Mass. 106, 112-13, 4 N.E.3d 248, 254-55 (2014). Likewise, the requirement that a trial court must *sua sponte* consider reasonable alternatives to closure when none are suggested by a party objecting to exclusion of the public does not obviates a defendant's obligation to object to the proposed closure in the first instance. Alvarez, 20 N.Y.3d at 81, 979 N.E.2d at 1176.

On the first day of trial, prior to the prospective jurors being present, the following record was made:

MR. STANTON: I inquired of defense counsel, there's four members, I believe, of the defendant's family in the courtroom at this point. I would object to them.

THE COURT: Are any of them witnesses? Is that what you –

MR. STANTON: There's one that could potentially be a witness from the State. She's not under service, but I'll talk to defense counsel about that during a recess. But the State would object to them being in the courtroom during jury selection process for any number of reasons of which I'll be happy to put them on the record. But defense counsel told me that they understood that they would be leaving the courtroom when the jury comes in.

THE COURT: Okay. And just so the family knows, we use every single seat for the jurors. So we would need to kick you out, anyway. At least until we get started with the jury selection and get a few people excused, because we don't have enough chairs. We bring the maximum number we can fit with the chairs. Anything else?

MR. STANTON: Not on behalf of the State, Your Honor.

THE COURT: You wanted to bring your extern in, which is fine.

MR. CANO: Yes, Your Honor.

THE COURT: We follow the rules of the COs. And if the CO – you know, I don't really get in the way of the jail too much, because I don't want to get in the way of the jail and then have an incident, frankly. So the jail doesn't want anyone who's not a licensed attorney to be at counsel table if there's a custodial defendant. So – an inmate. So I'm fine having your extern here if the extern sits like they're at that back seat or something like that. If that's fine with the jail, they can use that back table there. Lots of times –

MR. CANO: That'd be fine.

THE COURT: – paralegals and stuff will sit there. As long as we can maybe get a chair from the back.

MR. CANO: I've got a chair right here.

THE COURT: So she'll sit in the well, just at that little back table.

MR. CANO: Just at the little back table? That's fine, Your Honor.

THE COURT: Yeah. Is that okay?

MR. CANO: That's fine with us, Your Honor. Uh-huh.

5 ROA 1060-62. Jury selection then commenced without objection over the course of two days with two separate partial panels of 60 jurors each. 5 ROA 1065-8 ROA 1624.

First, review of Jeremias' claim is improper under the doctrine of invited error. Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994), held:

> The doctrine of "invited error" embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit. It has been held that for the doctrine of invited error to apply it is sufficient that the party who on appeal complains of the error has contributed to it. In most cases application of the doctrine has been based on affirmative conduct inducing the action complained of, but occasionally a failure to act has been referred to. . . . Furthermore, [t]he rule that error induced or invited by the appellant is not a proper subject of review on appeal has been applied, in both civil and criminal cases, to a large variety of trial errors, including claimed misconduct of the judge, or alleged error having to do with the jury.

Id. (quoting 5 Am. Jur. 2d Appeal and Error § 713 (1962), p. 159-60, 165) (internal quotations and citations omitted). See also, People v. Marshall, 790 P.2d 676, 687 (Cal. 1990); Pettingill v. Perkins, 272 P.2d 185, 186 (Utah 1954).

Here, not only did Jeremias fail to object, but he actually ***agreed*** with the State that members of his family would not be permitted to stay in the courtroom during jury selection. 5 ROA 1060-62. Given that multiple courts have found a failure to object precludes review of a public-trial claim, explicit acquiescence most certainly should prohibit consideration of Jeremias' argument. Jeremias should not be permitted to bury mines in the record by actively participating in the creation of the very claims he raises on appeal. As such, this claim is without merit and should be denied.

Second, this Court should also decline to review because Jeremias' explicit agreement with his family's absence during jury selection caused an insufficient record. See Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (holding that this Court cannot consider matters not properly appearing in the record); Anderson v. State, 81 Nev. 477, 482, 406 P.2d 532, 534 (1965) (stating that matters outside the record will not be considered). Here, when asking that Jeremias' family be temporarily excluded for jury selection, the State said: "[T]he State would object to them being in the courtroom during jury selection process for any number of reasons of which I'll be happy to put them on the record." 5 ROA 1060. However, based on Jeremias' agreement to the exclusion, the State never had the need or the opportunity to make those reasons clear. As such, this Court is unable to determine what those reasons were and whether such would

outweigh the Sixth Amendment right to a public trial. See Presley, 558 U.S. at 213-15, 130 S. Ct. at 724-25 (finding that a right to a public trial can be outweighed by "other rights or interests such as the defendant's right to a fair trial or the government's interests in inhibiting disclosure of sensitive information"). Likewise, as there was no objection to excluding Jeremias' family, there was no discussion of possible reasonable alternatives. Additionally, the record is void of any confirmation regarding exactly how many members of Jeremias' family were present and whether some, but not all, could be excluded. Because Jeremias' agreement precluded the need for the State to proffer its reasons to exclude an unknown number of his family members, as well as any discussion of reasonable alternatives, such an incomplete record inures to upholding the decision of the trial court. See Lee v. Ball, 121 Nev. 391, 394, 116 P.3d 64, 66 (2005).

Finally, Jeremias' claim fails on the merits. Importantly, the district court noted that, if Jeremias' were to request his family members stay in the courtroom (which he did not), that they could not be physically accommodated until at least some of the prospective jurors were excused. Such a proposed accommodation of having family members wait outside the court until seats became available throughout jury selection (which Jeremias did not avail himself of) was reasonable considering that the jury panel was already split between two groups of 60 prospective jurors. See Gibbons, 555 F.3d at 121 (finding exclusion of a defendant's

mother from the first afternoon of jury selection due to a lack of available seats to be too trivial to warrant reversal of his subsequent conviction because she was permitted to observe as soon as seats became available). This proposed accommodation was especially reasonable considering the fact that, if even one member of the public is not excluded from the proceedings, those who are not allowed in due to a lack of space are not "excluded" within the scope of the Sixth Amendment. See Estes, 381 U.S. at 588-89 (Harlan, J. concurring).[1] [2]

II.
THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION DURING THE DIRECT EXAMINATION OF CARLOS ZAPATA

Regardless of the questioner's identity, a testifying witness who cannot recall a fact they previously had knowledge of may have their recollection refreshed as to that fact. KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 9 (7th ed. 2013). Theoretically, a number of items could be used to refresh the recollection of a testifying witness, but normally a written or recorded statement is provided. See

[1] Again, inasmuch as the record lacks specificity in terms of how many members of Jeremias' family were present and how many potential jurors would have needed to have been excused in order for the District Court to physically accommodate them, such deficiency of the record is the direct result of Jeremias' explicit agreement that his family would leave the courtroom during jury selection at the State's request.

[2] The State does not, by its argument, concede that exclusion of Jeremias' family members during voir dire was improper or that such exclusion constituted structural error. Instead, it is the State's position that these contentions have no bearing on the issue because Jeremias' affirmatively waived the issue by agreeing with the State's request that his family members leave the courtroom during jury selection.

Baker v. State, 35 Md. App. 593, 371 A.2d 699 (1977). The ability and scope of refreshing a witness' recollection rests within the sound discretion of the trial judge because it can view the witness and their alleged inability to presently recall the desired fact. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233, 60 S. Ct. 811, 849 (1940).

> [W]hen the witness admits forgetfulness on the record, it has long been the practice that counsel may hand her a memorandum to inspect for the purpose of "refreshing her recollection." When she speaks from a memory thus revived, her testimony is the evidence, not the writing. This is the process of refreshing recollection at trial in the original, strict sense.

KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 9 (7th ed. 2013) (collecting cases). In order to refresh a witness' recollection with a prior statement, the requesting party must demonstrate foundationally that the witness' recollection is exhausted and identify the time, place, and person to whom the statement was given. Goings v. United States, 377 F.2d 753, 760 (1967). If a writing is used to refresh the memory of a witness, that writing must be provided to opposing counsel upon request and may be the subject of cross-examination. NRS 50.125. Alleged errors concerning the refreshing of a witness' recollection are reviewed for abuse of discretion. McLellan v. State, 124 Nev. 263, 182 P.3d 106 (2008).

Zapata testified at trial concerning the events of June 7, 2009, and said the victims were killed by Jeremias after he, Zapata, and Rios planned to rob the victims of drugs, money, and personal property. 10 ROA 1990-2012. Zapata said the three

planned the robbery while they were at Hooters and then traveled together to Rios' apartment for supplies. 10 ROA 1992-93, 1995-96. Jeremias decided Rios would drive and he would enter the victims' apartments, then text Zapata to come inside at some later point and collect the property. 10 ROA 1997-98. Although Jeremias brought a gun to the victims' apartment, it was Zapata's understanding that there would be no violence. 10 ROA 2000-01. However, after Jeremias was in the apartment for some time, Zapata heard several shots and saw Jeremias jogging back and holding his hip like "he had something tucked down his waist." 10 ROA 2002, 2115. After initially fleeing the scene, Zapata and Jeremias returned to collect the victims' property and then drove to various locations to withdraw funds from credit cards taken from the scene. 10 ROA 2006-08, 2010-11.

Although Zapata recalled these key facts without prompting, he also testified consistently that he spoke with detectives on June 24, 2009, and provided them with additional details but could not recall specifically what he said and had not reviewed his recorded statement prior to trial. See 10 ROA 1984, 1986, 2012, 2015-16, 2017-19, 2020-21, 2023-24, 2025-26, 2027-29, 2054-55. Based on Zapata's consistent testimony that his memory was exhausted and he could not remember certain specific facts he provided to detectives almost 5½ years previously, the State, over Jeremias' objection, referred Zapata to certain parts of a transcript which Zapata confirmed was of his recorded statement with detectives. 10 ROA 1984-85. After

reviewing his own previous statements, Zapata then testified his memory was refreshed as to specific details such as how long Jeremias was in the victims' apartment during the murders and where Jeremias said the victims kept their money and marijuana. 10 ROA 2015-16, 2023-24.

Similarly, from the outset of cross-examination, Zapata was provided a transcript of his June 24, 2009 recorded statement as well as a transcript of his prior testimony at Rios' trial.[3] 10 ROA 2040. Throughout cross-examination, Zapata likewise indicated an inability to recall specific statements and specific details of the

[3] To the extent Jeremias renews his request to supplement the record in this case with Zapata's testimony from Rios' trial, the State maintains such would be inappropriate and unnecessary. Supreme Court Rule 250(6)(c) makes clear that the record on appeal includes: "all papers, motions, petitions, oppositions, responses, replies, orders, opinions, and documentary evidence or exhibits *filed in the lower courts*; *transcripts of all lowers court proceedings*; all jury instructions offered, excluded or given; all verdicts or findings of fact, conclusions of law, and decisions; the lower court minutes; any notice of appeal." (emphasis added). Further, the record on appeal "shall be assembled, paginated, and indexed in the same manner as an appendix to the briefs under NRAP 30(c)." SCR 250(6)(c). NRAP 30(c), in turn, provides that "[a]ll documents included in the appendix . . . shall bear the file-stamp of the district court clerk, clearly showing the date the document was filed *in the proceeding below*." (emphasis added). Here, the transcript of Zapata's testimony in Rios' case was not filed in the proceeding below and was not included in the transcripts of the lower court proceedings outside of Zapata's testimony in Jeremias' case. Thus, it would be improper for this Court to consider facts that appear outside the record. Carson Ready Mix, Inc., 97 Nev. at 476, 635 P.2d at 277. Further, it is improper for this Court to take judicial notice of Zapata's testimony in Rios' case as the only "closeness of the relationship between the two cases," is that Zapata testified in both trials. Mack v. Estate of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2006). However, unlike in Mack, the outcome of Rios' trial held no weight in determining Jeremias' verdict and sentence. Thus, the cases are insufficiently "close" in relationship to warrant unnecessary judicial notice.

crimes. 10 ROA 2044-45, 2069-70, 2074-76, 2079-80, 2081-84, 2088-89, 2091-93, 2099. Zapata also indicated difficulty remembering specific portions of his testimony at Rios' trial during cross-examination. 10 ROA 2077-78, 2084-85. In each of these instances of deficient recollection, Zapata's memory was refreshed by referring to specific portions of his recorded statement and prior testimony and he then testified to the specific detail or prior statement. 10 ROA 2044-45, 2069-70, 2074-76, 2077-78, 2079-80, 2081-85, 2088-89, 2091-93. Neither Zapata's prior recorded statement nor his prior trial testimony were admitted.[4]

Jeremias contends that it was improper for Zapata to be referred to his prior statements by the State because such constituted inadmissible hearsay and was

[4] To the extent Jeremias notes an unrecorded bench conference was held during Zapata's direct examination and such was judicial error, this claim is without merit. A defendant's right to reported proceedings is not absolute. Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003). Further, "the mere failure to make a record of a portion of the proceedings," is not grounds for reversal and a defendant must demonstrate prejudice arising from the specific failure alleged. Id. Here, Jeremias fails to articulate any prejudice and merely notes that an unrecorded bench conference occurred during Zapata's testimony and that such deprived him of his right to a complete record. AOB p. 51, n.6. Absent any analysis as to how the unrecorded bench conference prejudiced Jeremias, the district court's failure to record that conference is not reversible error. Further, the parties were clearly aware that some of the conferences were unrecorded and made records as necessary during breaks. See, e.g., 9 ROA 1882-84 (Jeremias making a record of his objection during an unrecorded bench conference); 9 ROA 1885 (Prosecutors making a record concerning unrecorded portions of jury selection). As such, Jeremias had opportunities to make records of anything that occurred during unrecorded bench conferences. See Archanian v. State, 122 Nev. 1019, 1034-36, 145 P.3d 1008, 1019-20 (2006) (finding no reversible error when counsel was given the opportunity to place objections made during unrecorded proceedings on the record).

leading. However, Jeremias wholly ignores the clear record that Zapata's prior statements were not admitted, but instead were referred to by Zapata in an effort to refresh his recollection. When a witness refers to a prior statement to refresh his recollection, his refreshed recollection is the evidence, not the prior statement. KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 9 (7th ed. 2013) (collecting cases). Such refreshed memory does not implicate hearsay principles as in-court testimony from a refreshed recollection is independent from out-of-court statements offered for the truth of the matter asserted. See, id. (distinguishing between refreshing recollection and hearsay exceptions such as past recollection recorded); State v. Helm, 66 Nev. 286, 304-05, 209 P.2d 187, 196 (1949) (same). As the record makes clear, the State did not seek to admit Zapata's prior statements, but instead asked him to refer to those statements to refresh his recollection as to specific details relating to the events to which he testified. It is also important to note that prior to the vast majority of questions which required reference to Zapata's prior statement during his direct testimony, Zapata testified as to the general and key facts of the crimes. 10 ROA 1990-2012. Jeremias recognizes this fact but then quickly ignores it in his Opening Brief. AOB at p. 51.[5]

[5] As Zapata's in-court testimony did not implicate hearsay principles, discussion of applicable exceptions is wholly unnecessary.

Further, although Jeremias contends the prosecutor improperly used leading questions "on critical issues," he fails to point to one leading question. AOB 57-59. Instead, it appears that Jeremias' contention is the manner in which the State refreshed Zapata's memory itself implicated the prohibition against leading. However, the prohibition against leading relates specifically to "questions." See NRS 50.115(3)(a) ("Leading *questions* may not be used on the direct examination of a witness without the permission of the court."). Further, Jeremias provides absolutely no authority for the proposition that asking a witness if referring to a document would refresh their recollection unnecessarily and improperly suggests a specific answer to the subsequent follow-up question.

To the extent Jeremias relies on United States v. Shoupe, 548 F.2d 636 (1977), his reliance is misplaced as it is clearly distinguished from the instant case. In Shoupe, the government presented the testimony of a witness who was originally charged but had entered a written plea bargain in exchange for his testimony against the other defendants. Id. at 639. The cooperating co-conspirator took the stand and corroborated some of the evidence against the defendants. Id. at 639-40. "However, when the prosecutor asked [the witness] who had accompanied him into the bank and who was present in the apartment when the proceeds of the crime were distributed, [the witness] steadfastly maintained that he had neither present recollection nor past awareness of these details." Id. at 640. The prosecutor then

sought to use an officer's notes taken during an interview with the witness to impeach the witness and/or refresh his recollection. Id. There was no transcript of the prior interview as it was not recorded and the witness had not reviewed the officer's notes nor confirmed its contents. Id. Over defense objection, the prosecutor was permitted to ask a series of leading questions incorporating specific statements in the unconfirmed notes, to which the witness' consistent response was that he did not make the statements. Id. at 641-42.

Here, unlike Shoupe, Zapata did not testify he never knew the specific details sought by the State. In fact, Zapata consistently testified that he could not remember specific details or statements because some time had passed but affirmed he had previous knowledge of such. See, e.g., 10 ROA 2015-16, 2023-24. Further, Zapata's recollection was refreshed with his own prior statements, not the unadopted notes of the interviewing detectives present in Shoupe. Zapata confirmed the transcript as his recorded interview with police on June 24, 2009. 10 ROA 1984-85. The Shoupe court expressed concerns with the notes given the witness' testimony he had not seen and did not verify their accuracy. Id. at 641-42. Indeed, the witness denied the accuracy of factual assertions contained in the notes. Id. Because Zapata confirmed he had prior knowledge of facts contained in his own prior statements and because nothing other than his own prior statements were used to refresh his recollection as to those facts, Shoupe is thus so distinct from the instant case that it has no bearing.

Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074 (1965), and Robbins v. Small, 371 F.2d 793 (1967), are equally unavailing. In both of those cases, the witness invoked their privilege against self-incrimination and the government subsequently asked leading questions, reading specific statements into the record to which the witnesses continued to invoke the privilege. Douglas, 380 U.S. at 416, 85 S. Ct. at 1075; Robbins v. Small, 371 F.2d at 794. These invocations rendered the witnesses unavailable for cross-examination as they would not agree they made the prior statements. Douglas, 380 U.S. at 419, 85 S. Ct. at 1077. Here, in contrast, Zapata was available for cross-examination as he freely agreed he made all the statements used to refresh his recollection. Because Zapata was available for cross-examination and affirmed he used his own prior statements to refresh his recollection as to specific details he once had prior knowledge of, there was no abuse of discretion. See Goings v. United States, 377 F.2d 753, 760 (1965) (holding the proper foundation for refreshing a witness' recollection includes that the witness' recollection is exhausted and that the time, place, and person to whom the statement was given be identified).

III.
THE DISTRICT COURT DID NOT PLAINLY ERR IN ADMITTING THE VIDEO RECORDING OF JEREMIAS' VOLUNTARY STATEMENT

Jeremias contends the video recording of his voluntary statement should not have been admitted without publication and absent the testimony of a "sponsoring"

witness. A jury is entitled to take with them to deliberate "all papers and all other items and materials which have been received as evidence in the case." NRS 177.441. In order for a physical item to be admitted as evidence, there must be sufficient foundation to show that the item is what its proponent claims it to be. NRS 52.015. The testimony of a witness with personal knowledge can be sufficient to establish the necessary foundation for a physical item of evidence. NRS 52.025. In order to preserve appellate review, objections to alleged errors must be lodged at the trial level. Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). The "failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n.28, 138 P.3d 477, 485 n.28 (2006). Where a defendant fails to preserve an issue, this Court will review that issue only if it is patently prejudicial or constitutes plain error. See Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997), overruled in part on other grounds by Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999).

During Jeremias' direct testimony, he acknowledges he had spoken to detectives on June 24, 2009. 11 ROA 2386. During cross examination, Jeremias was presented with a transcript and he confirmed that it was of his interview, which he had reviewed previously. 11 ROA 2387-88. Jeremias was then impeached throughout the majority of cross-examination based on his prior recorded statement

transcript. See 11 ROA 2388-12 ROA 2441. Additionally, during redirect examination, Jeremias was likewise questioned about certain parts of his prior recorded statement. 12 ROA 2441-65. After Jeremias closed his case, the State sought to admit the video recording of his statement. 12 ROA 2469. Jeremias objected on the grounds that "the State had full opportunity to cross-examine Mr. Jeremias regarding his statement, as well as we had full opportunity to go over his statement in direct examination." Id. Jeremias' objection was overruled on those grounds and the recording was admitted. Id. No one sought to publish the video at that time and there was no voiced objection that the recording differed in substance from the transcript used during Jeremias' testimony or that the video was without proper foundation.

Jeremias failed to preserve the specific objection which he now raises on appeal. When the State sought to admit the video of his recorded statement, Jeremias objected on the grounds that both parties had already examined Jeremias concerning his statements. Thus, Jeremias' objection was arguing that the evidence was cumulative. See 48.035 (stating relevant evidence may be excluded if its probative value is substantially outweighed by the avoidance of needlessly presenting cumulative evidence). However, on appeal, Jeremias abandons his claim that the video was cumulative and instead complains that it was without proper foundation and was improperly admitted without contemporaneously publishing the same to the

jury. Because these arguments are made for the first time on appeal, plain error applies.

It was not plain error to admit the video of Jeremias' recorded statement. First, there was sufficient foundation for the admission of the video. Jeremias openly acknowledged he had provided a recorded statement to the detectives on June 24, 2009, and that the transcript he was asked to review throughout cross-examination and redirect was an accurate depiction of his recorded statement. Further, as Jeremias acknowledges, Jeremias and the State stipulated to remove various parts of the recording prior to trial in contemplation of its potential admission. AOB p. 69. At no point during pretrial or trial litigation did Jeremias claim the video was inaccurate or different than what the State purported it to be. Further, Jeremias does not contend on appeal that the video recording admitted differed in substance from the transcript he repeatedly affirmed was an accurate depiction of his interview. Because Jeremias himself acknowledged the authenticity of the transcript taken from his video recorded statement, there was sufficient foundation for the admission of the video. See Lamb v. State, 127 Nev. Adv. Rep. 3, 251 P.3d 700, 710 n.7 (2011) (finding a defendant's testimony admitting the authenticity of evidence later admitted against him was sufficient foundation).

Indeed, Jeremias' claim is very similar to one this Court rejected in Archanian. In that case, the defendant objected to the admission of a video that had been

modified from its original "four-plex" format into a single composite video. Archanian, 122 Nev. at 1028, 145 P.3d at 1016. The district court overruled the objection and this Court affirmed, finding there was sufficient foundation for admission of the composite video based on the testimony of a detective who stated the composite video substantively mirrored the original "four-plex" video. Id. at 1028-30, 145 P.3d at 1016-17. Here, similarly, Jeremias does not claim the substance of the video was inadmissible or even without sufficient foundation, but instead complains about the way in which admissible evidence was admitted.

Jeremias appears to contend the redactions of the video in which long spans of silence were eliminated somehow prejudiced him constituting plain error. Jeremias contends this prejudicial editing is apparent from viewing the video itself. However, Jeremias undermines his own argument when he acknowledges the fact that the video included a clock which would jump due to the edits. Thus, not only is Jeremias' argument that the jury would watch the video and assume it was one fluid recording without any edits or redactions purely speculative, it is actually contradicted by the evidence. Anyone watching the video could see the changes in time and recognize the video had been edited. See AOB p. 68-69.

Jeremias also contends admission of the tape precluded him from cross-examining the interviewing detectives about certain tactics and statements made during the recording. However, this argument ignores the reality that the

interviewing detective was called and subject to cross-examination at trial. Compare 10 ROA 2144 with 26 ROA 5680-81. Additionally, Jeremias can provide absolutely no authority for the proposition that a defendant's recorded statement must be admitted through the testimony of the interviewing detective. Instead, the question is whether sufficient foundation has been provided for the admission of evidence. Further, none of the detective's statements were admitted as substantive evidence against Jeremias, but instead were merely offered to provide context for his statements. See Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) (holding an out-of-court statement offered for a reason other than to prove the truth of the matter asserted is not prohibited as hearsay). Thus, as none of the detective's statements were admitted as substantive evidence against him, they cannot constitute vouching.

Finally, Jeremias contends it was error to admit the video but not require publication. However, Jeremias provides absolutely no authority to support the proposition that evidence, once admitted, requires immediate publication. Indeed, there is none, and the only requirement for a jury to consider evidence during deliberations is admission, not publication. See NRS 177.441. Here, there is no dispute the video was admitted. Therefore, it was well within the scope of NRS 177.441 that the video, as admitted evidence, was available to the jury during deliberations.

IV.
THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE MEDICAL TESTIMONY OF DR. LISA GAVIN REGARDING HER INDEPENDENT OPINION OF AUTOPSIES PERFORMED ON BOTH VICTIMS

Conclusions included in a forensic report cannot be admitted through an affidavit or the in-court testimony of an analyst who did not sign the report or personally perform or observe the related test. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311, 129 S. Ct. 2527, 2532 (2009); Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705, 2707 (2011). Generally, the accused has the right to be confronted by the analyst who authored the report unless he or she is unavailable and the accused had a prior opportunity to cross-examine the particular analyst. Bullcoming, 131 S. Ct. at 2707. However, one expert witness can testify to their own independent review of the raw data and facts contained in a report without violating the Confrontation Clause. Vega v. State, 126 Nev. Adv. Rep. 33, 236 P.3d 632, 636-38 (2010); see also, United States v. Richardson, 537 F.3d 951, 955-56 (8th Cir. 2008).

In this case, the autopsies of Brian and Paul were performed by Dr. Telgenhoff, who retired prior to Jeremias' trial. 10 ROA 2120. Dr. Lisa Gavin, a medically licensed forensic pathologist at the Clark County Coroner's Office who has been involved in over one thousand autopsies, reviewed Dr. Telgenhoff's autopsy report, photos, and other documentation related to the autopsies of Brian

and Paul and testified at trial. 10 ROA 2120-21. Dr. Gavin testified the review of such materials was typically done by other doctors in the field of pathology and forensic pathology and that, after reviewing the material related to the case, she had come to her own independent conclusions and was prepared to offer her opinion on the cause and manner of both victims' deaths. 10 ROA 2121. Specifically, Dr. Gavin testified her review of the photographs led her conclude Paul had a gunshot entrance wound on the left side of his face surrounded by stippling with a corresponding exit wound on the right side of his neck as well as a second "contact gunshot wound" on the top of the head with a corresponding bullet lodged in his neck. 10 ROA 2124-30. Dr. Gavin opined injuries caused by the first bullet would not have been independently fatal if medical attention was provided but likely rendered Paul unconscious and that the injuries associated with the second bullet to the top of Paul's head would have been fatal and instantly incapacitating. 10 ROA 2127-28, 2131.

Additionally, her independent review led Dr. Gavin to conclude Brian had a gunshot wound to the right side of his neck with a corresponding bullet found behind his sixth rib and a second gunshot entrance wound to the left back of the neck with a corresponding bullet found on the right side of his neck. 10 ROA 2132-34. Dr. Gavin opined that the injuries associated with both bullets were independently fatal. 10 ROA 2134, 2135. Dr. Gavin independently opined the cause of death as to both

victims as multiple gunshot wounds and the manner of death to be homicide. 10 ROA 2135-36. At no point was Dr. Telgenhoff's report offered as evidence and specific statements made in the report were not offered during direct examination.

Dr. Gavin's testimony did not violate Jeremias' right to confront the witnesses against him. Although Jeremias suggests courts across the country uniformly consider all documents associated with an autopsy testimonial in nature, this is hardly the case. See, e.g., United States v. Mallay, 712 F.3d 79, 99 (2nd Cir. 2013) (finding autopsy reports nontestimonial); State v. Joseph, 230 Ariz. 296, 297-98, 283 P.3d 27, 29 (2012) (explicitly declining to determine whether autopsy reports are testimonial but finding that a non-participating medical examiner can provide independent conclusions "after reviewing facts and photographs contained in the report"); People v. Edwards, 57 Cal. 4th 658, 706-07, 306 P.3d 1049, 1089 (2013) (affirming autopsy statements that record anatomical and physiological observations are not testimonial); People v. Leach, 2012 IL 111534, P122, P135, 980 N.E.2d 570, 590, 593 (2012) (collecting cases on the issue and concluding that the autopsy report in the case before it not testimonial); People v. Freycinet, 11 N.Y.3d 38, 42, 892 N.E.2d 843, 846 (2008) (finding a "contemporaneous, objective account of observable facts" as contained in an autopsy report not testimonial); State v. Maxwell, 139 Ohio St. 3d 12, 23, 9 N.E.3d 930, 949-50 (2014) (finding an autopsy report nontestimonial); Campos v. State, 256 S.W.3d 757, (Tex. Ct. App. 2008)

(finding autopsy report nontestimonial). However, what does seem to be agreed upon, even by the jurisdictions on which Jeremias' relies, is that a medical examiner can testify as to their independent opinion based on raw data such as autopsy photographs and x-rays. See, State v. Navarette, 294 P.3d 435, 443 (N.M. 2013) ("[W]e note that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause. For example, in this case, after being shown the autopsy photographs, Dr. Zumwalt expressed his own opinion about the entry and exit wounds, explaining the basis for his opinion."); Miller v. State, 2013 OK CR 11, P100 n.107, 313 P.3d 934, 970 n.107 (2013) (noting that an expert can permissibly render his independent opinion after reviewing autopsy x-rays without offending the Confrontation Clause); State v. Lui, 179 Wn. 2d 457, 496, 315 P.3d 493, 511-12 (2014) (finding no Confrontation Clause violation when a medical examiner who did not perform the autopsy but examined photographs and provided his independent opinion); State v. Kennedy, 229 W. Va. 756, 772, 735 S.E.2d 905, 921 (2012) (finding no Confrontation Clause violation when a medical examiner who did not perform the autopsy testified as to his independent opinion based on review of photographs).

The State contends that an autopsy report is not testimonial in nature and therefore, Dr. Gavin's testimony as to anything therein did not violate Bullcoming or Melendez-Diaz. Autopsy reports are the product of an official duty imposed by

law, rather than a product of criminal investigation for use at trial. NRS 259.050 describes the duties of coroners: "[w]hen a coroner or the coroner's deputy is informed that a person has been killed, has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that the death has been occasioned by unnatural means, the coroner shall make an appropriate investigation." NRS 259.050(1). The coroner does not have discretion to conduct an autopsy only when the death has been the result of a criminal act. They must conduct an autopsy anytime a death has occurred by unnatural means. In Boorman v. Nevada Memorial Cremation Society, 126 Nev. Adv. Op. 29, 236 P.3d 4, 9 (2010) this Court stated, "[a] county coroner is obligated to perform its services. . . [T]he county coroner's duty is to investigate the cause of death…". Unlike the reports held testimonial in Melendez-Diaz and Bullcoming, autopsy reports are generated regardless of any request by law enforcement and are not produced solely or even primarily for purposes of gathering evidence for a future criminal prosecution. In fact, autopsies are conducted in many cases that do not involve a subsequent prosecution. See Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 2251 (2012) (Breyer, J. concurring) ("Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial.").

Further, even if an autopsy report is testimonial, there was still no violation of Jeremias' Confrontation Clause rights in this case. Dr. Gavin testified that she was prepared to offer her independent opinion based on her review of the autopsy report as well as photographs and other documentation related to the autopsy. She then offered her independent opinion based primarily on her review of the raw data, namely the photographs taken from the autopsy. As noted in nearly all of the case law cited supra, the admission of the autopsy photographs themselves did not violate the Confrontation Clause. At no point did Dr. Gavin become a "surrogate" for Dr. Telgenhoff's conclusions but instead stated her own conclusions based on her independent review of the factual data contemporaneously recorded by photographs and notes.

Indeed, Jeremias' claim that Dr. Gavin's testimony violated his rights because her opinion as to the presence of stippling on Paul's head wound differed from Dr. Telgenhoff confirms the independent nature of her conclusions. During cross-examination, Jeremias confronted Dr. Gavin with Dr. Telgenhoff's autopsy report as well as his prior testimony at Rios' trial in which he testified the wound on the top of Paul's head appeared to be a close-range wound with no stippling. 10 ROA 2139-40. Dr. Gavin acknowledged Dr. Telgenhoff's opinion that Paul's head wound appeared to not have stippling but disagreed with this conclusion based on her independent review of the photographs. 10 ROA 2128-29, 2140. Thus, the record is

clear that Dr. Gavin was not merely parroting Dr. Telgenhoff's conclusions but instead coming to her own independent determinations based on her review of the reports and photographs.

Further, even if Dr. Gavin's testimony violated Jeremias' right to confront the witnesses against him, such error was harmless. Violations of the Confrontation Clause are generally reviewed under a harmless-error standard. Vega, 236 P.3d at 638. Here, the admission of Dr. Gavin's testimony, if error, was harmless beyond a reasonable doubt. First, a vast majority of the content of Dr. Gavin's testimony was not disputed between the parties. This was not a case where the cause and manner of death was litigated. See 8 ROA 1665-70 (defense counsel opening statement conceding the victims "were killed" in their apartment but contending Jeremias was not involved in their murders). Indeed, the very small portion of Dr. Gavin's testimony that was in dispute was the presence of stippling on Paul's head wound. However, Jeremias was able to cross-examine Dr. Gavin and admit Dr. Telgenhoff's testimony contradicting Dr. Gavin's conclusions. 10 ROA 2138-40. Thus, the jury was fully aware that another medical examiner disagreed with Dr. Gavin's opinion regarding the presence of stippling on Paul's head wound. Further, Jeremias did not contend, or present any contradictory evidence, as to the fact that the wound on Paul's face had stippling. 10 ROA 2125-26. Therefore, even if Dr. Telgenhoff testified instead of Dr. Gavin, the jury would have heard that at least one of the

bullets that entered Paul was fired at a very close distance, and the State would have been able to make the same argument that the closeness of the wounds showed that Paul knew his attacker. Finally, Zapata's testimony and the video surveillance of Jeremias using the victims' credit cards mere hours after their deaths was much more compelling than the autopsy evidence as it not only provided evidence that Paul knew his murderer, but unequivocally placed Jeremias as the lone suspect at the scene of the crime. Because the vast majority of Dr. Gavin's testimony was undisputed, and because Jeremias was able to present Dr. Telgenhoff's prior testimony which differed from Dr. Gavin's conclusion, any error was harmless.

V.
THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING TESTIMONY CONCERNING PIECES OF BLACK PLASTIC FOUND ON BOTH VICTIMS AND THROUGHOUT THE CRIME SCENE

Lay witnesses may offer opinion testimony if their opinions are "[r]ationally based on the[ir] perception." NRS 50.265(1). If, however, a witness's opinion is based on "scientific, technical or other specialized knowledge," he or she must first be qualified as an expert. NRS 50.275. While a witnesses' past work-related experience may enable them to provide certain work-related testimony, this does not render the witness an "expert" when their testimony revolves around their perceptions. See Thompson v. State, 125 Nev. 807, 814-15, 221 P.3d 708, 714 (2009) (concluding that a witness testifying as to what she perceived was not an

"expert" simply because she testified her art training helped her to remember the proportions of the defendant's face); see also, Meadow v. Civil Serv. Bd. Of Las Vegas Metro. Police Dep't, 105 Nev. 624, 625-26, 781 P.2d 772, 773 (1989) (finding a 14-year police officer's testimony that he heard grunts, groans, and screams while standing outside of a room and said "it sounded like someone was getting their butt whipped" was not speculation but rationally based on his perceptions and his experience as a police officer).

Zapata testified Jeremias put his handgun in a black grocery bag at Rios' apartment and it remained in the bag as Jeremias got out of the vehicle and walked toward the victims' apartment. 10 ROA 2000, 2097-98. Responding Crime Scene Analyst Peter Schellberg testified he saw little pieces of black plastic on the floor surrounding both victims, on top of two pillows found on the couch, on a blanket covering Brian's body, as well as on the victims' bodies. 8 ROA 1745-47. CSA Schellberg testified he has seen materials such as plastic used to muffle gunshots and catch shell casings on numerous crime scenes and that the small pieces of plastic were consistent with his experience of a bullet tearing through the plastic. 9 ROA 1761-62. In addition to his experience analyzing crime scenes, CSA Schellberg also testified he had accidentally shot through plastic himself and that the pieces of plastic at the scene of the murders were consistent with his personal experience. 9 ROA 1762. CSA Schellberg also testified he is familiar with the look of plastic that has

been ripped and that it looks different than plastic torn by a bullet and that the plastic at the scene appeared distorted in a way that would indicate melting, as if it had been abraded by "power and heat." 9 ROA 1788.

Responding detective Dean O'Kelley also testified he saw little pieces of black plastic throughout the crime scene and noted the initial investigation revealed no cartridge casings. 9 ROA 1805-06. Detective O'Kelley testified he had been professionally involved in investigations where suspects attempted to conceal their identity by taking evidence with them and that he believed, based on his observations, a black bag could have been used to catch the cartridge casings. Id. A subsequent forensic examination of the plastic pieces identified them as polyethylene, common in sandwich, grocery, and garbage bags. 10 ROA 2177. Jeremias lodged objections to the testimony of CSA Schellberg and Detective O'Kelley but did not object to evidence regarding the forensic testing of the plastic pieces.

The testimony of CSA Schellberg and Detective O'Kelley was admissible. Jeremias erroneously attempts to cast this testimony as expert evidence that was improperly noticed. However, in reality, CSA Schellberg and Detective O'Kelley were testifying concerning their observations of the crime scene. Although the prior professional experiences of both witnesses assisted them in their perception of evidence in this case, such did not transform their lay opinion testimony into the type

of testimony deemed "expert" under NRS 50.275. Instead, similar to the lay testimony in Thompson, the prior professional experiences of CSA Schellberg and Detective O'Kelley merely informed their perception of the evidence. CSA Schellberg testified he had previously been involved with investigations wherein pieces of plastic similar to those found in this case were the result of bullets firing into the plastic, distinctly deforming and tearing them. Further, CSA Schellberg testified he had previously shot through a plastic bag, albeit unintentionally, and so had known experience with the type of effect a bullet has when it penetrates plastic. At no point did CSA Schellberg testify as an expert but instead testified based on his own perceptions and experiences. Likewise, Detective O'Kelley testified based on his own experience of prior investigations wherein plastic bags were used to conceal weapons and remove evidence from the crime scene. This testimony was rationally based on Detective O'Kelley's observations of the crime scene, and was not scientific, technical, or specialized. Because the testimony of CSA Schellberg and Detective O'Kelley was lay opinion under NRS 50.265, and not expert opinion under NRS 50.275, all of Jeremias' case law is irrelevant and his claim must fail.[6]

[6] The State also notes that CSA Schellberg was noticed as an expert witness. On September 19, 2011, the State filed a Notice of Expert Witnesses and noticed CSA Schellberg as "an expert in the area of the identification, documentation, collection and preservation of evidence and will give opinions related thereto." 3 ROA 533-35. Thus, although the State maintains that his testimony concerning the small pieces of black plastic constituted lay opinion, even if this Court finds the testimony was "expert," Jeremias is incorrect in claiming he did not receive notice that CSA

VI.
THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY

District court decisions in settling jury instructions are reviewed for abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). Additionally, erroneous jury instructions are reviewed for harmless error. Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

Jeremias challenges Jury Instruction 45 on the grounds it included the term "material." That instruction read, in part:

> 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.

13 ROA 2725.

In Burnside v. State, 131 Nev. Adv. Rep. 30, 352 P.3d 627, 637 (2015), the Nevada Supreme Court found that instructing the jury the State was required to prove "every material element" beyond a reasonable doubt did not encourage the jury to speculate as to which elements were "material" and which elements were not. The Court found that the instructions, as a whole, properly informed the jury as to the elements of each of the offenses and instructed that the State must show those

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Schellberg could give expert testimony concerning the identification and collection of evidence in this case and this Court should nonetheless reject this claim.

elements beyond a reasonable doubt. Id. Thus, the Court found the instruction to not erroneously reduce the burden of proof as to certain unspecified elements. Id. Nonetheless, the Court advised that future instructions should omit the word "material" as it was unnecessarily redundant. Id. The jury was instructed in this case prior to the Burnside opinion.

Here, Jeremias makes the identical claim this Court considered, and rejected, in Burnside and contends the term "material" warrants reversal. This claim is without merit. As in Burnside, the jury in this case was instructed as to the elements of each offense. See 13 ROA 2680-83, 2684, 2692, 2698, 2699, 2703, 2706, 2710, 2712, 2715. Because the use of the word "material" did not cause the jury to speculate, and because the jury was instructed as to the elements of each offense, Instruction 45 was not reversible error.

VII.
THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VALID AGGRAVATOR THAT BOTH MURDERS WERE COMMITTED TO AVOID LAWFUL ARREST

NRS 200.033(5) provides a First Degree Murder can be aggravated if it is committed, at least in part, "to avoid or prevent a lawful arrest or to effect an escape from custody." To support this aggravator, the State need not show that an arrest is "imminent," as the statute is unambiguous and does not include that qualifier. Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986). Thus, under the plain language of the statute, the killing of a witness to prevent identification in a

subsequent criminal case and thereby avoid arrest qualifies as an aggravating circumstance. Canape v. State, 109 Nev. 864, 874-75, 859 P.2d 1023, 1030 (1993). However, there must exist some connection between the murder and a motive to avoid arrest for a preceding crime for the aggravator to apply. Jimenez v. State, 105 Nev. 337, 343, 775 P.2d 694, 698 (1989). This Court will examine the actions of a defendant preceding and subsequent to the killing to determine whether the murder was motivated by a desire to avoid arrest. Witter v. State, 112 Nev. 908, 928-29, 921 P.2d 886, 900 (1996). Whether a victim or witness of a preceding crime was familiar with the defendant and, therefore, had a higher likelihood of identifying them as the culprit, is relevant but not necessary to find the aggravator. Canape, 109 Nev. at 874-75, 859 P.2d at 1030.

On September 1, 2009, the State filed a Notice of intent to Seek Death Penalty, alleging the following aggravating circumstances: 1 and 2) The murder was committed while Jeremias was engaged in the commission of a robbery and Jeremias committed the murder (NRS 200.033(4)); 3) The murder was committed to avoid or prevent a lawful arrest (NRS 200.033(5)); 4) Jeremias will be, in the immediate proceeding, convicted of more than one offense of murder in the first or second degree (NRS 200.033(1)). 1 ROA 65-70. On October 23, 2014, Jeremias filed a Motion to Strike Aggravator of Murder in the Course of a Lawful Arrest. 5 ROA 1051-57. In his Motion, Jeremias acknowledged Nevada law expressly contradicted

his argument but nevertheless contended the statutory aggravator should only be applied when an arrest is "imminent." Id.

Here, there was sufficient evidence to support this aggravating circumstance. Both Zapata and Jeremias testified that Jeremias knew Brian and Paul and that Jeremias purchased marijuana and other drugs from Paul on numerous occasions. 10 ROA 1998; 11 ROA 2356. Furthermore, Jeremias, together with Zapata and Rios, planned to rob Paul and Brian at gunpoint for drugs and money. 10 ROA 1995. The three discussed only displaying the gun as a show of force and whether Jeremias should cover his face. 10 ROA 2000, 2020-21, 2025-26. However, Jeremias remained silent as the three discussed using the weapon and declined to wear a ski mask because he did not have to and believed the victims would be able to identify him regardless. 10 ROA 2025-26. Ultimately, the plan called for Jeremias to enter the apartment with a concealed weapon under the pretense of purchasing drugs. 10 ROA 1997-98. When Jeremias got out of the truck and walked toward the apartment, he was not wearing anything on his face, but carried a black grocery bag concealing his handgun. 10 ROA 1998-2000. Once inside the apartment, Jeremias went into the bathroom, took out his weapon, took several deep breaths, and then exited the bathroom and immediately shot both victims in the head. 10 ROA 2013-14; 25 ROA 5406. When Jeremias returned to the truck, Rios panicked and drove away, despite Jeremias' insistence that they turn around "or else it's all done for nothing." 10 ROA

2002. Jeremias and Zapata subsequently returned to the apartment and Jeremias collected the victims' property. 10 ROA 2006-08. Neither Paul nor Brian had any defensive wounds and there was no indication of a struggle. 10 ROA 2123-24; 25 ROA 5406.

Based on the above, there was sufficient evidence for the jury to find the aggravating circumstance that Jeremias killed Brian and Paul to avoid arrest. The unrefuted fact that Jeremias knew both victims together with the fact that he took no precaution to hide his identity from them during the course of the crimes confirms their deaths were motivated by Jeremias' desire to remove the certainty of them identifying him. Indeed, Jeremias' own statement that he believed the victims would be able to identify him even if he took efforts to cover his face demonstrate his belief that the only way to avoid identification and lawful arrest was to eliminate Brian and Paul as witnesses. Further, Jeremias' attempt to collect the cartridge casings also demonstrate the significant planning and effort Jeremias undertook to conceal his identity from law enforcement. There was absolutely no evidence Brian or Paul were killed due to any resistance on their parts or any attempt to defend themselves as they were both shot in the head twice, execution-style. This evidence also shows that the purpose for their deaths was to avoid arrest by eliminating them as witnesses to the planned robbery because there was no other reason to kill them as they were relaxing in the living room. 25 ROA 5406.

Jeremias contends this Court should overrule the above-cited line of cases and require the imminence of a lawful arrest for the aggravating circumstance to apply. Jeremias errs. First, Jeremias' argument is refuted by the plain language of NRS 200.033(5). This Court "will not look beyond the plain language of a statute to determine its meaning when the statute is unambiguous." State Dep't of Bus. & Indus. v. Check City P'ship, 130 Nev. Adv. Rep. 90, 337 P.3d 755, 756 (2014). A statute is ambiguous only when its language is capable of two or more reasonable interpretations. Estate of Smith v. Mahoney's Silver Nugget, 127 Nev. Adv. Rep. 276, 265 P.3d 688, 690 (2011). When the statutory language is plain, courts are not permitted to search for meaning beyond the statute itself. Attorney Gen. v. Nevada Tax Comm'n, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008). Absent a clearly expressed legislative intent to the contrary, the language of a statute must ordinarily be found conclusive. Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

Here, NRS 200.033(5) provides "The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody." Even a cursory examination of the statute reveals no language requiring such an arrest be "imminent." However, adding such is precisely what Jeremias improperly proposes. It is not the job of the judiciary "to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." McKay v. Bd. Of

City Comm'rs, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987). Indeed, this Court has rejected this exact request on at least two prior occasions. Cavanaugh, 102 Nev. at 486, 729 P.2d at 486; Blake v. State, 121 Nev. 779, 793-95, 121 P.3d 567, 576-77 (2005). Because the plain language denounces any immediacy requirement, Jeremias' request that such language be read into the statute is improper and must be rejected as an invitation to usurp legislative discretion.

In an effort to avoid blatantly asking for this Court to legislate from the bench, Jeremias attempts to twist the language of NRS 200.033(5) by arguing the inclusion of the adjective "lawful" implies imminence because "until an arrest is actually imminent or underway, no one can know whether the circumstances will make it a 'lawful arrest.'" AOB 93. However, Jeremias does not provide any authority, controlling or otherwise, for the proposition that use of the word "lawful" requires imminence. Further, the term "lawful" has meaning without adding words to the statute as the lawful nature of an arrest requires probable cause that a crime has been committed. Thus, what is clear from the statutory language and the inclusion of the term "lawful" is not that Jeremias' arrest must have been imminent, but rather that Jeremias committed some criminal offense independent of the murder for which he could be lawfully arrested.[7] Thus, the plain language refutes Jeremias' contention

[7] The State notes that, by virtue of its verdict for Counts 1-4, the jury found the arrest Jeremias' sought to avoid by eliminating Brian and Paul as witnesses to be "lawful"

that imminence is implied as well as his claim that the statute as interpreted is overbroad because it could apply to any murder as killing the victim necessarily eliminates them as a witness. The statute requires the existence of a felony independent of the murder for which the defendant is attempting to avoid arrest by eliminating the victim as a witness.[8]

Jeremias next offers legislative history and contends the Nevada legislature implicitly required imminence under NRS 200.033(5) by its rejection of an aggravating circumstance when the murder was committed to prevent the testimony of a witness in a criminal proceeding. AOB 94-96. However, this argument fails for several reasons. First, when the language of a statute is unambiguous, examination of legislative history is unnecessary and improper. Check City P'ship, 337 P.3d at 756. Here, as demonstrated supra, the language of NRS 200.033(5) is unambiguous. See also, Cavanaugh, 102 Nev. at 486, 729 P.2d at 486 (finding NRS 200.033(5) is unambiguous and does not require an arrest to be imminent). Second, Jeremias merely points to the fact that, although both aggravators were initially included in the proposed bill, the witness-elimination aggravator was subsequently removed.

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in that he actually committed the burglary and robbery with a deadly weapon for which he was charged. 12 ROA 2586-89.

[8] The State also notes that the inclusion of the term "lawful" also excludes "unlawful" arrests as an aggravating circumstance, which would potentially give rise to justified self-defense or defense of others. See Batson v. State, 113 Nev. 669, 676, 941 P.2d 478, 483 (1997); State v. Smithsonian, 54 Nev. 417, 428, 19 P.2d 631, 634-34 (1993).

From this neutral fact, Jeremias concludes the legislature must have compared the two, found the avoiding-arrest aggravator to be more limited in scope and preferable to the witness-elimination aggravator and therefore adopted the former over the latter. However, this conclusion is rank speculation as nothing in the legislative history shows any comment specific to either provision, any comparison between the two, or any conclusion that one was more or less encompassing than the other. Instead, a much more likely scenario based on the legislative history is that the provisions were viewed as largely mirrored by each other and therefore unnecessarily redundant and one was removed. This is especially likely given the express comments made by a number of legislators that wished to avoid a "laundry list" type statute. See Minutes of Meeting SB 220, 1977 Leg., 59th Sess., 41-44 (March 11, 1977) (statements of Senators Close, Sheerin, Dodge). Finally, Jeremias' argument that the witness-elimination provision was broader than the avoiding-arrest aggravator is disingenuous in that Jeremias' argument requiring imminence could be applied with equal, if not greater, force to a witness-elimination provision. The term "imminent" could be improperly added to both provisions to require an immediacy not otherwise mandated by the plain language of the aggravators.

This is not to say, as Jeremias suggests, NRS 200.033(5) is without limits absent the addition of the term "imminent." As this Court found in Jimenez, the State is required to show a connection between the murder and a desire to flee from the

scene of a crime or to avoid arrest. 105 Nev. at 343, 775 P.2d at 698. Further, this Court has required an analysis of the defendant's conduct prior and subsequent to the murder to determine whether the murder was motivated by a desire to avoid arrest. Witter, 112 Nev. at 928-29, 921 P.2d at 900. In Witter, the defendant attacked and began to sexually assault a woman who was sitting in her broken-down car waiting for her husband to pick her up. Id. at 913-14, 921 P.2d at 890-91. During the attack, the victim's husband approached and ordered the defendant out of the vehicle. Id. The defendant complied but then stabbed the victim's husband, stuffed his body underneath another vehicle, and continued his sexual assault. Id. This Court held there was insufficient evidence the defendant killed the female victim's husband to avoid arrest, but instead, his subsequent actions demonstrated the murder was motivated by a desire to continue his sexual assault. Id. at 928-29, 921 P.2d at 900. These two cases demonstrate that NRS 200.033(5) is hardly a blank check to the State in any felony murder circumstance and complies with the Eighth Amendment's requirement that a death penalty scheme narrow the scope of murders.

Jeremias' reliance on People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994 (1984), is without merit. In finding an arrest must be "imminent," the Bigelow court specifically noted the California death penalty scheme included both the avoiding-arrest and the witness-elimination aggravators. 37 Cal. 3d at 752 n.13, 691 P.2d at 1006 n.13. The court continued by noting the witness-elimination aggravator

specifically stated it did not apply if the killing was committed during the commission or attempted commission of the crime to which the victim was a witness. Id. The court then held that imminence is required under the avoiding-arrest aggravator or else that aggravator would conflict with and nullify the qualifying language in the witness-elimination aggravator. Id. The Bigelow court also noted that statutory aggravators should be construed to minimize circumstances in which multiple aggravating circumstances may apply. Id. at 751, 691 P.2d at 1006. Thus, the Bigelow Court was not interpreting the avoiding-arrest aggravator in isolation, but instead analyzing it within the context of other aggravators and the death penalty scheme as a whole and did so with an eye toward avoiding contradiction.

Here, unlike in Bigelow, Nevada's death penalty scheme does not contain a witness-elimination aggravator. Thus, there is nothing to conflict with the plain reading of the statute and insertion of "imminence" is not necessary to avoid contradicting and nullifying another statutory provision. Further, because there is no witness-elimination aggravator, there is no concern that different statutory aggravators be construed to avoid application of multiple aggravators to a wide range of murders. Because of the significant distinctions between the death penalty statutory scheme in Nevada and California, Bigelow is unpersuasive.

Finally, even if this Court finds the avoiding-arrest aggravator is invalid or not shown by sufficient evidence, it should nonetheless affirm the sentence of death

in this case. The United States Supreme Court has affirmed the constitutionality of re-weighing the aggravating and mitigating circumstances in the event one of the aggravating circumstances is found deficient. Clemons v. Mississippi, 494 U.S. 738, 744, 110 S. Ct. 1441, 1446 (1990). While the Clemons Court rejected the notion that "state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding," it found such procedures constitutionally permissible, and left to the state appellate courts the decision as to permit such review or to mandate remand for re-sentencing. Id. at 754, 110 S. Ct. at 1451. The Nevada Supreme Court has resolved the question left to it by Clemons as follows:

> A death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. If [the Nevada Supreme Court] cannot conclude beyond a reasonable doubt that the jury would have imposed death absent the erroneous aggravating circumstance, [the Nevada Supreme Court] must vacate the death sentence and remand the matter to the district court for a new penalty hearing.

Archanian, 122 Nev. at 1040, 145 P.3d at 1023. Such appellate reweighing does not involve factual findings "other than those of the jury at the original penalty hearing." *State v. Haberstroh*, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003); *Bridges v. State*, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (reweighing based on a review of the trial record only).

Here, if this Court finds the avoiding-arrest aggravator was improper or based on insufficient evidence, it should also find the remaining aggravators outweighed any mitigating circumstances and the jury would have still returned with a death sentence absent the avoiding-arrest aggravator. In addition to the challenged aggravator, the State also alleged the following as aggravating circumstances: 1 and 2) The murder was committed while Jeremias was engaged in the commission of a robbery Jeremias committed the murder; 3) Jeremias will be, in the immediate proceeding, convicted of more than one offense of murder in the first or second degree. 1 ROA 65-70. These aggravating circumstances are not challenged on appeal and were significant. Indeed, it was clear from the evidence that it was always Jeremias' plan to murder Brian and Paul in the course of the robbery, despite protestations from Rios and Zapata against violence. Further, like in Archanian, the murders were not committed by an unknown assailant, but by someone that Brian and Paul trusted and invited into their home. 122 Nev. at 1041, 145 P.3d at 1023. Further, although the jury found several mitigating circumstances, they did not outweigh the cold and callous way in which Jeremias committed a double homicide of two friends execution-style in an effort to rob them of personal property, money, and marijuana. Because any error with the avoiding-arrest aggravator was harmless beyond a reasonable doubt, this Court should affirm Jeremias' sentence of death even if it strikes the challenged aggravator.

VIII.
ADMISSION OF IVAN RIOS' RECORDED STATEMENTS DURING THE PENALTY PHASE DID NOT CONSTITUTE PLAIN ERROR

Jeremias contends the admission of Rios' recorded statement through the testimony of the interviewing detective during his penalty hearing violated Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991), and Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). Under Bruton, statements of one defendant incriminating another defendant may not be admitted in a joint trial because such would violate the Confrontation Clause. 391 U.S. at 137, 88 S. Ct. at 1628. This rule applies only in the context of a joint trial. See, e.g., Frazier v. Cupp, 394 U.S. 731, 735, 89 S. Ct. 1420, 1423 (1969) (finding Bruton applies to the unique context where a jury is "asked to perform the mental gymnastics of considering an incriminating statement against one of two defendants in a joint trial"); United States v. Mitchell, 502 F.3d 931, 965 ("However, Bruton applies only where co-defendants are tried jointly, and is inapplicable when the non-testifying co-defendant is severed out[.]") (9th Cir. 2007) (*citing* United States v. Gomez, 276 F.3d 694, 699 (5th Cir. 2002), United States v. Briscoe, 742 F.2d 842, 847 (5th Cir. 1984)); People v. Brown, 31 Cal. 4th 518, 537, 73 P.3d 1137, 1156 (2003) ("The Aranda/Bruton rule addresses the situation in which 'an out-of-court confession of one defendant . . . incriminates not only that defendant but another defendant *jointly charged*.'") (emphasis in original) (quoting People v. Fletcher, 13 Cal. 4th 451, 453, 917 P.2d 187 (1996));

Commonwealth v. McCrae, 574 Pa. 594, 614, 832 A.2d 1026, 1038 (2002). See also Dutton v. Evans, 400 U.S. 74, 85-87, 103, 91 S. Ct. 210, 218-19, 226 (1970) (plurality opinion in which eight justices agree Bruton focuses on the unique concerns of partially admissible confessions in joint trials).

As a general rule, the Confrontation Clause does not apply to capital penalty hearings. Williams v. New York, 337 U.S. 241, 242-52, 69 S. Ct. 1079 (1949); Summers v. State, 122 Nev. 1326, 148 P.3d 778 (2006). Although some jurisdictions have expanded Bruton to capital penalty hearings, such expansion has generally been within the context of joint trials. See, People v. Floyd, 1 Cal. 3d 694, 719-20, 464 P.2d 64, 80 (1970); State v. Williams, 690 S.W.2d 517, 521, 530 (Tenn. 1985). When a Confrontation Clause objection is not raised at trial, the alleged violation is reviewed for plain error. Vega, 236 P.3d at 638. Such an error will be addressed "if it was plain and affected the defendant's substantial rights." Diomampo v. State, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008).

In Jeremias' penalty hearing, Detective Dan Long testified, in part, as to a recorded interview he conducted with Rios on June 24, 2009. 13 ROA 2834-2847, 25 ROA 5413-47. Specific statements by Rios as well as a transcript of the recorded interview were admitted without objection. 13 ROA 2836-47. Specifically, Rios confirmed Zapata's testimony that Jeremias entered the victims' apartment with a loaded firearm and shot both victims. 13 ROA 2841, 2843-44. Rios also told the

detectives several times that he was afraid of Jeremias and did not want to testify against him for fear Jeremias may kill him. 13 ROA 2839, 2845-47.

First, Jeremias' claim is without merit because Bruton, like all other rights arising from the Confrontation Clause, does not apply to capital penalty hearings. Jeremias relies significantly on Lord for the proposition that Bruton applies to capital penalty hearings. Jeremias further contends the Lord rule was recognized in Summers as an exception to the holding in the latter case that the Confrontation Clause does not apply to capital penalty hearings. However, this Court's jurisprudence concerning Lord has been unclear. While the Summers Court noted its opinion in Lord held the admission of "a nontestifying codefendant's confession generally violates a defendant's right to confrontation under Bruton," it also confined Lord to its facts. 122 Nev. at 1331, 148 P.3d at 782. Further, on the same day Summers was decided, this Court issued an opinion in Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006), which significantly undermined, if not implicitly overruled, Lord. In Thomas, the preliminary hearing testimony of a non-testifying co-defendant which implicated the defendant was admitted during the eligibility phase of a capital penalty hearing. 122 Nev. at 1365-66, 148 P.3d at 730-31. The defendant contended such admission violated his right to confront the witnesses against him at his capital penalty hearing. Id. at 1367, 148 P.3d at 732. However, this Court rejected that argument, and held that "Crawford and the Confrontation

Clause do not apply during a capital penalty hearing." Id. (*citing* Summers, 122 Nev. 1333, 148 P.3d 783). Thomas is indistinguishable from Lord. In both cases, the prior statement of a non-testifying co-defendant was admitted at a severed capital penalty hearing.[9] Compare Thomas, 122 Nev. at 1365-66, 148 P.3d at 732, with Lord, 107 Nev. at 43-44, 806 P.2d at 558. To the extent Thomas found the Confrontation Clause did not bar the admission of a non-testifying co-defendant's statement implicating the defendant, it overruled Lord and this Court should clarify that the former is no longer good law.

Not only is Lord inconsistent with this Court's subsequent jurisprudence concerning Bruton, it is also inconsistent with the general Confrontation Clause holdings of this Court and the United States Supreme Court. This Court has repeatedly and unequivocally held that the Confrontation Clause does not apply to

[9] Although Jeremias may argue that Thomas is distinguishable in that the defendant had a prior opportunity to cross-examine the non-testifying co-defendant at a preliminary hearing, this argument is unpersuasive. In order to engage in any analysis as to whether there was a sufficient prior opportunity to cross-examine a non-testifying witness, it must first be determined that the Confrontation Clause ***applies***. If it does not, prior opportunities to cross-examine are rendered moot along with any analysis as to whether the non-testifying witness was truly unavailable or the statement was "testimonial." See Johnson v. State, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006) (finding determination of testimonial nature of statements irrelevant because the defendant did not enjoy a Sixth Amendment right to confront the witnesses against him at his capital penalty hearing). Therefore, the Thomas Court could not have reached the issue of prior cross-examination because it explicitly found that the Confrontation Clause does not apply and any argument based on that procedural distinction is irrelevant to harmonizing Thomas with Lord.

capital penalty hearings. See, e.g., Burnside v. State, 131 Nev. Adv. Rep. 40, 352 P.3d 627, 650 n.9; Johnson, 122 Nev. at 1353, 148 P.3d at 773; Summers, 122 Nev. at 1333, 148 P.3d at 783 ("We therefore conclude that neither the Confrontation Clause nor Crawford apply to evidence admitted at a capital penalty hearing and the decision in Crawford does not alter Nevada's death penalty jurisprudence."); Thomas, 122 Nev. at 1367, 148 P.3d at 732. These holdings have been based on United States Supreme Court jurisprudence. See Williams, 337 U.S. at 242-52, 69 S. Ct. 1079; United States v. Umana, 750 F.3d 320, 346 (4th Cir. 2014) ("Courts have long held that the right to confrontation does not apply at sentencing, even in capital cases.") (*citing* Williams, 337 U.S. 241, 69 S. Ct. 1079). Bruton, as an application of the Confrontation Clause, should be equally absent from capital penalty hearings.

Nevada statutory authority likewise supports the proposition that the Confrontation Clause, in all of its manifestations, does not apply to penalty hearings. NRS 175.552(3) provides:

> During the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced. The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself,

> only if it has been disclosed to the defendant before the commencement of the penalty hearing.

Here, Jeremias does not allege any constitutional violation, either State or federal, with the "securing" of Rios' statement (i.e. that Rios' statement was involuntary or taken in violation of Miranda). Thus, NRS 175.552(3) allows for the admission of Rios' statement as well as any evidence Jeremias would seek to introduce to impeach the same.

The widely known and accepted proposition that the Confrontation Clause does not apply to capital penalty hearings is premised on the policy that factfinders determining a sentence should have before them as much information as possible related to the offense as well as the offender. See, e.g., Williams, 337 U.S. at 247, 69 S. Ct. at 1083 ("A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."); Umana, 750 F.3d at 347 ("We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.") (quoting Gregg v. Georgia, 428 U.S. 153, 204, 96 S. Ct. 2909 (1976)). This indisputably important policy interest applies equally to hearsay evidence, whether from a non-testifying co-defendant or from some other source.

Although Jeremias may contend the incriminating statements of a non-testifying co-defendant are inherently more unreliable than hearsay from other sources and, therefore, Bruton's application to capital penalty hearings is appropriate despite the exclusion of the Confrontation Clause in all other respects, this claim is without merit. First, as provided under NRS 175.552(3), Jeremias is statutorily permitted to admit evidence to refute any hearsay evidence presented at his penalty hearing. Further, defendants in Jeremias' position would likewise be free to argue, and the jury would be well aware, that the statements made by a non-testifying co-defendant were made within the context of a pending criminal investigation. The jury would then be free to give whatever weight they wished to the statements, fully aware of the potential that the non-testifying co-defendant was attempting to reduce their own culpability by making incriminating statements against the defendant. Most importantly, the jury would have more evidence, not less, on which to base their sentencing decision, which is the goal of any sentencing proceeding.

Even if this Court finds that Bruton can apply to a penalty hearing, it should nonetheless properly limit the application of Bruton to coincide with the expressed policy concerns present in that case. In Bruton, two defendants, Bruton and Evans, were jointly tried and convicted of armed postal robbery. 391 U.S. at 124, 88 S. Ct. at 1621. Evans provided a postal inspector with an oral confession that he and Bruton committed the robbery. Id. This confession was provided in full to the jury at the

joint trial along with an instruction that they were only to consider the confession as it related to Evans' guilt. Id. at 125 n.2, 88 S. Ct. at 1622 n.2. The Eighth Circuit Court of Appeals affirmed Bruton's conviction, but the United States Supreme Court reversed. The Bruton Court articulated the unique concerns arising in the context of the admission of a non-testifying co-defendant's statements incriminating both himself as well as the other defendant in a joint trial. Specifically, the Court stated:

> In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A. . . [W]here the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . It was against such threats to a fair trial that the Confrontation Clause was directed.

Id. at 131, 135-36, 88 S. Ct. at 1625, 1628. Ultimately, the Court concluded that, "in the context of a joint trial we cannot accept limiting instructions as an adequate substitution for petitioner's constitutional right of cross-examination." Id. at 137, 88 S. Ct. at 1628. The Court later found the joint nature of the trial in Bruton to be key to its decision in that case. See Dutton, 400 U.S. at 85-87, 103, 91 S. Ct. at 218-19, 226 (plurality opinion in which eight justices agree Bruton focuses on the unique concerns of partially admissible confessions in joint trials); Frazier, 394 U.S. at 735,

89 S. Ct. at 1423. The majority of federal and state courts that have considered the issue are likewise in agreement that Bruton applies exclusively to the unique prospect of joint trials. Mitchell, 502 F.3d at 965; Gomez, 276 F.3d at 699, Briscoe, 742 F.2d at 847; Brown, 31 Cal. 4th at 537, 73 P.3d at 1156; McCrae, 574 Pa. at 614, 832 A.2d at 1038; Williams, 690 S.W.2d at 521, 530. This Court has repeatedly and consistently stated the Bruton rule as prohibiting the admission of a non-testifying co-defendant's statement which incriminates the defendant at a joint trial. See, e.g., Rimer v. State, 131 Nev. Adv. Rep. 36, 351 P.3d 697, 711 (2015); Byford v. State, 116 Nev. 215, 229, 994 P.2d 700, 710 (2000); Ewish v. State, 110 Nev. 221, 871 P.2d 306 (1994) (noting the procedure of separate jury panels arose out of an effort to avoid Bruton issues at joint trials).

Here, Jeremias was not tried jointly with Rios. In fact, at the time Rios' statement was admitted in Jeremias' penalty hearing, Rios was not even a defendant, let alone co-defendant in the case, as he had been previously acquitted. Rios' complete removal from the criminal prosecution at the time his statements were admitted against Jeremias eliminates the principal concern at the heart of Bruton. The jury was not required to perform any "mental gymnastics" by considering Rios' statement as to the guilt or appropriate penalty of one defendant while simultaneously excluding the same evidence as it related to another defendant. Jeremias was the only defendant for which the jury was considering a penalty and

the evidence was admitted solely against him, not any other codefendants. Because the admission of Rios' statement was ***not*** the admission of a co-defendant's statement at a joint trial, Bruton was not violated.[10]

Finally, even if this Court finds that Bruton applies to penalty hearings and applies even in the context of severed trials, this case is distinguishable from Lord such that admission of Rios' statement did not constitute plain error. In Lord, the Court noted that the non-testifying co-defendant's statement was admitted "to alleviate any lingering doubt the jury may have had concerning their verdict of guilt." 107 Nev. at 31, 806 P.2d at 558. Here, however, Rios' statement was not admitted to remove any lingering doubt of Jeremias' guilt but instead was offered as relevant character evidence of Jeremias as well as to impeach certain mitigating evidence offered. See 15 ROA 3191-92 (arguing Rios' statement includes no mention of drug use by Jeremias prior to the murders); 15 ROA 3203-05 (noting Rios' statements he was afraid of Jeremias and did not want to testify against him for fear Jeremias would kill him). Further, Jeremias admitted evidence that Rios had been tried and acquitted for the same offenses he was convicted of and relied on that

[10] To the extent Lord can be read to implicitly stand for the proposition that Bruton applies to penalty hearings even when the co-defendant has been severed, such an interpretation is without merit. Bruton, both by its terms and by subsequent United States Supreme Court case law, only applies to joint trials based on the unique concerns as expressed in that case. To extend Bruton beyond the very basis of its decision would cause the principle to lose its logical moorings.

fact in closing argument to ask for a merciful sentence. See 13 ROA 2850; 15 ROA 3217-18. Given that Rios' acquittal was admitted during Jeremias' penalty phase, the context of that acquittal, including Rios' voluntary statement, was relevant. More importantly, such motives for admitting Rios' statement are distinct from those present in Lord.

Additionally, any error did not affect Jeremias' substantial rights. In finding the Bruton violation prejudicial in Lord, the Court noted the non-testifying co-defendant's confession "was central in cementing the State's circumstantial case in the minds of the jurors." 107 Nev. at 44, 806 P.2d at 558. Here, in contrast, Rios' statement largely mirrored Zapata's in-court testimony. This is especially true regarding those parts of Rios' statements that incriminated Jeremias and form the entirety of Jeremias' Bruton claim. The parts of Rios's statement in which he describes his fear of Jeremias due to Jeremias' violent character did not violate Bruton, even under the most expansive reading of that case. Because the parts of Rios' statement that incriminated Jeremias were repeated by Zapata's live testimony and because other parts of Rios' statement of which Jeremias complains would have been admissible under Bruton and Lord, any prejudice to Jeremias as a result of alleged Bruton error was *de minimis*.

To the extent Jeremias contends admission of Rios' statement also violated SCR 250(4)(f) because there was insufficient notice, this claim is without merit. SCR 250(4)(f) requires:

> The state must file with the district court a notice of evidence in aggravation no later than 15 days before trial is to commence. The notice must summarize the evidence which the state intends to introduce at the penalty phase of trial, if a first-degree murder conviction is returned, and identify the witnesses, documents, or other means by which the evidence will be introduced. Absent a showing of good cause, the district court shall not admit evidence not summarized in the notice. If the court determines that good cause has been shown to admit evidence not previously summarized in the notice, it must permit the defense to have a reasonable continuance to prepare to meet the evidence.

An examination of whether there is good cause to justify an unnoticed or untimely noticed witness or piece of evidence includes a determination of whether the defendant suffered any prejudice. Nunnery v. State, 127 Nev. Adv. Rep. 69, 263 P.3d 235, 246-47 (2011). Further, if there is no objection under SCR 250(4)(f) at trial, any issue raised on appeal is reviewed for plain error. McConnell v. State, 120 Nev. 1043, 1071-72, 102 P.3d 606, 626 (2004).

Here, the State filed a Notice of Evidence to Support Intent to Seek Death Penalty on October 24, 2013, an Amended Notice of Evidence to Support Intent to Seek Death Penalty on February 20, 2014, and a Second Amended Notice of Evidence to Support Intent to Seek Death Penalty on October 10, 2014. 4 ROA 708-13; 5 ROA 924-89, 990-1001. Further, as noted supra, there was no objection to the

admission of Rios' statements either through the testimony of Detective Long or through the admitted transcript. 13 ROA 2836-47. Therefore plain error applies.

There was no plain error affecting Jeremias' substantial rights. Jeremias was informed and given notice that Zapata's testimony would be offered at his penalty hearing and, to the extent Rios' statement mirrored Zapata's testimony, Jeremias cannot demonstrate his substantial rights were affected. Further, as Jeremias cannot demonstrate prejudice under the "good cause" standard articulated in SCR 250(4)(f) because he did not indicate he was surprised by admission of Rios' statement by lodging an objection, he cannot demonstrate prejudice under the plain error standard. While lack of prejudice alone is not sufficient to show good cause under SCR 250(4)(f), Jeremias' lack of objection also clearly prejudiced the record as the State was unable to make a record of any potential factors related to good cause. See Nunnery, 263 P.3d at 246-47 (listing several factors to consider to determine good cause under SCR 250(4)(f) including: the reason for any delay and whether the State acted in good faith). Because Jeremias' was not prejudiced and his substantial rights were not affected, he cannot show that any error in the notice was plain.

IX.
EVIDENCE CONERNING JEREMIAS' CRIMINAL HISTORY WAS PROPERLY ADMITTED DURING THE PENALTY PHASE

Jeremias' criminal history was properly admitted during the penalty hearing through exhibits and the testimony of Detective Long. The Sixth Amendment right

of confrontation is a trial right and has no application to a penalty hearing or sentencing. Summers, 122 Nev. at 1333, 148 P.2d at 783; see also, Sheriff v. Witzenburg, 122 Nev. 1056, 1060, 145 P.3d 1002, 1004-05 (2006) (noting the Sixth Amendment is a "trial right"). In Summers, this Court undertook significant analysis as to whether the Confrontation Clause applied to a capital penalty hearing. 122 Nev. at 1331-34, 148 P.3d at 782-84. This Court relied on Williams for the proposition that admission of hearsay in a capital penalty hearing did not violate the Due Process clause of the Fourteenth Amendment and found the United States Supreme Court's decision in Crawford did not overrule Williams. Id. The Summers Court also noted that "[n]o federal circuit courts of appeals have extended Crawford to a capital penalty hearing, and the weight of authority is that Crawford does not apply to a noncapital sentencing proceeding." Id. at 1332, 148 P.3d at 782. The Court also found that NRS 175.552(3) allows for the admission of hearsay in a capital penalty hearings and concluded: "[a]bsent controlling authority overruling Williams and extending the proscriptions of the Confrontation Clause and Crawford to capital penalty hearings in Nevada, we are not persuaded to depart from our prior jurisprudence and extend to capital defendants confrontation rights under Crawford." Id. at 1333, 148 P.3d at 783. The decision in Summers has remained good law for the last near decade. See, e.g., Burnside, 352 P.3d at 627 n.9.

During the penalty hearing, Detective Long testified as to Jeremias' criminal history. 13 ROA 2818-33. In addition to Detective Long's testimony, the State offered Exhibit 36, which contained police reports relating to Jeremias' prior criminal activity. 13 ROA 2818-19. Specifically, evidence was admitted that Jeremias' was stopped by police officers near a public park on July 1, 2006, and found in possession of approximately one ounce of marijuana, some prescription pills, and two unregistered handguns: a .44 Magnum Hawes and a .45 Sig Sauer GSR. 13 ROA 2820-21. Thereafter, on August 19, 2006, Jeremias was again stopped as he was driving the wrong way into oncoming traffic and found in the possession of a Ruger semi-automatic P950 handgun with the serial number removed, as well as some prescription pills in the name of another person. 13 ROA 2821-24. That case was subsequently negotiated to a misdemeanor and, while Jeremias was under a court order to "stay out of trouble" he was arrested on September 1, 2006, for forging money orders to purchase approximately $6,000 worth of clothing. 13 ROA 2825-27. Thereafter, on January 15, 2007, an undercover detective received information that Jeremias was selling Ecstasy from his house and was armed with a shotgun and an AK-47. 13 ROA 2828-31. After conducting three different controlled buys with Jeremias at three different residences, a search of all three was conducted and the following was located: 76 Ecstasy pills, $1,300, a shotgun, a .22 handgun, an AK-47 assault rifle, and a Colt .38. Id. Jeremias was charged with trafficking a controlled

substance in that case and ultimately pleaded guilty to a wobbler offense and was placed on probation. 13 ROA 2830-31. While on probation, Jeremias was found in possession of drug paraphernalia and/or drugs on two separate occasions. 13 ROA 2831-33. Jeremias was also on probation at the time of the instant murders. Id.

The admission of Jeremias' criminal history did not violate the Confrontation Clause. As this Court held in Summers, the Confrontation Clause has no application at capital penalty hearings. 122 Nev. at 1333, 148 P.3d at 782-83. Although Jeremias provides a few non-binding cases that, at best, marginally support his proposition, the basis of this Court's decision in Summers has remained unchanged. Specifically, there has been no controlling authority in the intervening ten years since Summers that has overruled Williams. Additionally, Jeremias points to no federal circuit courts of appeal that have adopted his argument and applied confrontation rights to capital penalty hearings. Finally, the weight of authority still remains that hearsay is admissible at penalty hearings, capital and noncapital alike. See, e.g., Muhammad v. Secretary, Florida Dept. of Corrections, 733 F.3d 1065, 1077 (11th Cir. 2013); United States v. Yeung, 672 F.3d 594, 606 (9th Cir. 2012) (affirming United States v. Littlesun, 444 F.3d 1196, 1199 (9th Cir. 2006)) abrogated, in part, on other grounds, by Robers v. United States, 134 S. Ct. 1854 (2014); Szabo v. Walls, 313 F.3d 392 (7th Cir. 2002); United States v. Fields, 483 F.3d 313 (5th Cir. 2007); Petric v. State, 157 So. 3d 176 (Ala. Crim. App. 2013); State v. McGill, 213 Ariz. 147, 140

P.3d 930 (2006); State v. Shackleford, 155 Idaho 454, 314 P.3d 136, 142-44 (2013); People v. Banks, 237 Ill. 2d 154, 203, 934 N.E.2d 435 (2010); State v. Berget, 826 N.W.2d 1, 21 (S.D. 2013); State v. Stephenson, 195 S.W.3d 574 (Tenn. 2006). Because the basis justifying this Court's decision in Summers has not been eroded in the last ten years and, if anything, has grown more firm in the intervening time, this Court should reject Jeremias' request to overrule Summers out of hand.

Further, it is worth noting that the vast majority of the cases on which Jeremias relies for support hold only that the Confrontation Clause applies to the "eligibility phase" of capital penalty hearings. See United States v. Jordan, 357 F. Supp. 2d 889, 902-05 (E.D. Va. 2005) (finding the Confrontation Clause applies to the eligibility phase but not to the "selection phase"); United States v. Johnson, 378 F. Supp. 2d 1051, 1061-62 (N.D. Iowa 2003) (same); State v. McGill, 213 Ariz. 147, 158-59, 140 P.3d 930, 942 (2006) (same); State v. Bell, 359 N.C. 1, 34-37, 603 S.E.2d 93, 115-16 (2004) (finding admission of out-of-court statement to establish a statutory aggravator violated the Confrontation Clause). Although Summers was not a unanimous decision, one thing all members of that Court agreed on was that the Confrontation Clause does not apply to the "selection phase" of a capital penalty hearing. 122 Nev. at 1333, 148 P.3d at 783 (noting uniform agreement among the majority and dissenting opinions that the Confrontation Clause does not apply to the "selection phase"); see also 122 Nev. at 1340, 148 P.3d at 787-88 ("I see no basis in

either Ring or Crawford to extend the Sixth Amendment confrontation right to the selection phase of a capital penalty hearing.") (J. Douglas, dissenting). Further, Summers noted that, if the Confrontation Clause applied to the "eligibility phase" but not the "selection phase" of a capital penalty hearing, unbifurcated penalty hearings, such as the one conducted in this case, would "remain constitutionally viable." Thus, to the extent the vast bulk of Jeremias' non-binding authority stands for the proposition that the Confrontation Clause applies to the "eligibility phase" of capital penalty hearings, adopting such a rule would not condemn the result or the procedure in this case one iota.[11]

X.
ADMISSION OF JEREMIAS' GUN POSSESSION RELATING TO HIS CRIMINAL HISTORY DURING THE PENALTY PHASE DID NOT CONSTITUTE PLAIN ERROR

Jeremias next contends that evidence of his prior possession of guns was unconstitutionally admitted during his penalty hearing, constituting plain error warranting reversal. This Court generally reviews the admission of testimony during

[11] The State also notes that Jeremias likewise relied significantly on hearsay evidence to present alleged mitigating circumstances. See 14 ROA 2863, 2868, 2910-35, 3112-13. This hearsay evidence was admitted without objection. In light of the fact that both parties relied extensively on out-of-court statements, it cannot be suggested that the rule announced in Summers exclusively benefits either party in a criminal proceeding to the detriment of the opposing party. Instead, the policy behind Summers is the same articulated in Williams: to provide the relevant factfinder with as much information as possible to inform their decision regarding the penalty to be imposed.

the penalty phase of a capital trial for an abuse of discretion. Floyd v. State, 118 Nev. 156, 174, 42 P.3d 249, 261 (2002), abrogated on other grounds by, Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008). NRS 175.552(3) provides that "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." Thus, the sentencing jury is entitled to consider all relevant aspects of a defendant's criminal background, and details of prior crimes are relevant and admissible at penalty hearings. Emil v. State, 105 Nev. 858, 864, 784 P.2d 956, 960 (1989). Furthermore, testimony by police officers regarding their investigations of a defendant's other crimes is admissible at a capital penalty hearing so long as the evidence is not "impalpable or highly suspect." Homick v. State, 108 Nev. 127, 138, 825 P.2d 600, 607 (1992). In addition, admission of such evidence is left to the sound discretion of the district court. Id. A defendant's character and his record are "relevant factors to be considered by a jury in imposing a penalty for a capital crime . . ." Allen, 99 Nev. at 488, 665 P.2d 238; see also Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976). However, when an objection is not lodged at trial, this Court reviews for plain error. Burnside, 352 P.3d at 647 (reviewing the admission of evidence not objected to at the penalty hearing for plain error).

During the penalty hearing, evidence was admitted that Jeremias was found in possession of two unregistered handguns on July 1, 2006, a handgun with the serial number removed on August 19, 2006, and a shotgun, a .22 handgun, an AK-47 assault rifle, and a Colt .38 handgun on January 25, 2007. 13 ROA 2820-31. Additionally, evidence was admitted that Jeremias was found in possession of controlled substances on each of these three incidents. Id. Jeremias was charged with criminal offenses arising out of all three incidents, and was specifically charged with gun-related offenses stemming out of two of the incidents. See 25 ROA 25 ROA 5452, 5462; 26 ROA 5530. There was no objection to admission of evidence related to Jeremias' prior gun ownership.

Jeremias' argument arises from a false premise based on his reliance on District of Columbia v. Heller, 554 U.S. 570, 628, 128 S. Ct. 2783, 2818-19 (2008). In Heller, the United States Supreme Court held a law that universally prohibited the possession of handguns violated the Second Amendment. However, Jeremias' reliance on this decision is misplaced as this case provides no support for the proposition that gun ownership cannot be admitted as relevant evidence at a criminal trial. Jeremias' argument is as illogical as contending admission of a defendant's confession violates their right to freedom of speech. See Wisconsin v. Mitchell, 508 U.S. 476, 489, 113 S. Ct. 2194, 2201 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime

or to prove motive or intent."). That a law cannot prohibit the possession of handguns does not preclude the admission of relevant evidence of gun ownership. Jeremias does not contend the evidence was irrelevant in his penalty hearing, but instead relies solely on his claim that admission violated his Second Amendment rights. As such, his argument must fail.

Further, evidence of Jeremias' gun possession was relevant as it directly related to his criminal history. As stated supra, Jeremias was charged with criminal offenses arising out of all three prior instances of which he complains. Importantly, Jeremias' prior criminal charges included gun-related offenses on two of the three occasions he raises on appeal. See 25 ROA 25 ROA 5452, 5462; 26 ROA 5530. As Jeremias' gun ownership directly related to his criminal history and specifically to his history of committing gun-related criminal offenses, admission of such evidence was relevant and highly probative at Jeremias' penalty hearing. See Emil, 105 Nev. at 864, 784 P.2d at 960.

XI.
ALLEGED PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE DOES NOT CONSTITUTE PLAIN ERROR

Jeremias contends the following prosecutorial misconduct occurred and establishes plain error warranting reversal: 1) improper cross-examination of Tami Bass concerning the likelihood of Jeremias' release from prison; 2) improper argument about the value of Brian's life. To determine whether prosecutorial

misconduct occurred, the Court "must determine whether the prosecutor's conduct was improper," and then, "must determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188 196 P.3d 465, 476 (2008). In determining whether reversal is appropriate, "the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the result a denial of due process." Hernandez v. State, 118 Nev. 513, 50 P.3d 1100, 1108 (2002) (*citing* Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986)). The statement should be considered in context and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comment standing alone." Id. (*citing* United States v. Young, 470 U.S. 1, 11 S. Ct 1038 (1985)). Comments that are harmless beyond a reasonable doubt do not warrant a reversal of a defendant's conviction. Witter, 112 Nev. at 923, 921 P.2d at 897; Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (1988). "If the prosecutor's reasoning is faulty, such faulty reasoning is subject to the ultimate consideration and determination by the jury." Green v. State, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965).

"Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." United States v. Young, 470 U.S. 1, 11-12, 105 S. Ct. 1038, 1044 (1985). The comments must be viewed in context of the trial to determine if the proceeding was prejudiced so as to preclude a fair trial. Id. Thus, an exceptionally

strict standard governs courts in granting reversals of verdicts based upon prosecutorial misconduct.

Further, the Nevada Supreme Court has consistently held that "failure to object during trial generally precludes appellate consideration of an issue." Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). In Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991), this Court held that it is not required to address the merits of allegations of improper closing arguments when an objection was not raised at trial. This Court held that:

> As a general rule, to entitle a defendant to have improper remarks of counsel considered on appeal, objections must be made to them at the time, and the court must be required to rule upon the objection, to admonish counsel, and instruct the jury. First, we note that defense counsel failed to object to any of the preceding comments. Therefore, we are not required to address the merits of appellant's belatedly raised contentions on this issue.

Id. at 208, 808 P.2d at 559 (citations and internal quotations omitted). Where Defendant did not object, his challenge to the prosecutor's remarks is subject to plain error review. United States v. Olano, 507 U.S. 725, 733-35, 113 S. Ct. 1770, 1777-78 (1993). Plain error exists only in exceptional circumstances when a substantial right of a defendant is affected. Olano, 507 U.S. at 733-35.

A. The prosecutor's cross-examination of Bass was proper.

Bass testified during Jeremias' penalty hearing that she was a former member of the Nevada State Board of Parole from 1999 to 2007. 14 ROA 3016. During her

direct testimony, Bass stated defendants who were sentenced to life without the possibility of parole and/or death never appeared before the Board and that they could not be released on parole. 14 ROA 3019. She also testified that she could not recall a case where someone convicted of murdering two people was released on parole and that it was "unlikely" someone in Jeremias' position would be paroled even if sentenced to life with the possibility of parole, but acknowledged it was possible. 14 ROA 3020-21. During cross-examination, and without objection, Bass was confronted with the facts of Melvin Geary, a man who was initially sentenced to life without the possibility of parole for murder before that sentence was commuted and he was released on parole by the Nevada Parole Board. 14 ROA 3023-24. While on parole, Geary murdered another person and was ultimately sentenced, again, to life without the possibility of parole. Id. After being confronted with these facts, Bass acknowledged that even with conscientious members of a Parole Board, some people are mistakenly released from custody, that the workload for the Board was increasing, and the quality of review of individual cases by the Board depended on the quality of the individual members of that Board. 14 ROA 3024. During redirect, Bass testified that someone who was not viewed as a danger to the community would not be paroled or "receive the opportunities that Mr. Gary [sic] did." 14 ROA 3025. The jury was instructed: "Life imprisonment without the

possibility of parole means exactly what it says, that the defendant shall not be eligible for parole." 14 ROA 3062.

The State's cross-examination of Bass was entirely proper given her testimony on direct examination. Although Jeremias relies on Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996), and Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985), this reliance is misplaced. First, Geary, presented "unique circumstances" wherein, regardless of whatever sentence the jury chose to impose, the defendant could not, by statute, be granted parole. 112 Nev. at 1441, 930 P.2d at 724. On at least three occasions, this Court has noted the unique factual circumstances present in Geary in denying claims similar to Jeremias'. See Nika v. State, 124 Nev. 1272, 1294, 198 P.3d 839, 854 (2008) (noting the unique circumstances present in Geary and finding other cases distinguishable on grounds defendant could qualify for parole, defendant had not had prior sentence commuted, and prosecutor did not emphasize defendant's future dangerousness); Leonard v. State, 117 Nev. 53, 80, 17 P.3d 397, 414 (2001) (noting Geary presented "an atypical factual scenario" and distinguishing case based on fact that defendant could have received parole and did not have a prior commutation); Sonner v. State, 114 Nev. 321, 325-26, 955 P.2d 673, 676 (1998) (same).

Here, unlike in Geary, Jeremias could have been paroled had he been sentenced to life with the possibility of parole or a definite term of 50 years, with

eligibility for parole after 20 years. See 15 ROA 3086. Additionally, Jeremias had not had a prior sentence commuted and he points to nowhere in the prosecutor's closing arguments where his future dangerousness was emphasized. Further, as clearly demonstrated by its progeny, Geary is a jury instruction case, not a prosecutorial misconduct case. The holding of Geary was that a jury instruction was unconstitutionally misleading in the unique circumstances of that case. However, the jury instruction present in Geary was not provided in this case. In fact, in contrast to the executive clemency instruction presented in Geary, here, the jury was instructed that "[l]ife imprisonment without the possibility of parole means exactly what it says, that the defendant shall not be eligible for parole[.]" 14 ROA 3062; see also, 14 ROA 3061. Because the unique circumstances present in Geary do not exist here, that case is inapplicable and the prosecutor's cross-examination was proper.

Further, Jones, is of no assistance to Jeremias' argument. In Jones, like in Geary, a jury instruction concerning the possibility of executive clemency for a sentence of life without the possibility of parole was challenged. 101 Nev. at 579-80, 707 P.2d at 1132-33. The defendant in Jones took specific issue with the fact that the jury was instructed that a sentence of life without the possibility of parole could be commuted but was not instructed that a sentence of death could likewise be commuted. Id. Relying on California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446 (1983), the Jones Court found the instruction proper. Id. However, the Jones Court

then held that prosecutorial argument "elaborat[ing]" on the instruction was improper and misled the jury by implicitly suggesting a sentence of death could not be commuted. Id. at 580-81, 707 P.2d at 1133-34. The Court found "the jury may not be misled into believing that commutation of a death sentence is impossible" and held the prosecutor's comments misled the jury into believing that commutation of life sentences was possible but commutation of death sentences was not. Id.

Here, unlike in Jones, there was no jury instruction concerning clemency. See, 14 ROA 3059-79. Indeed, the jury was instructed that a sentence of life without the possibility of parole means exactly what it says and that it was to presume a sentence of death would be carried out. 14 ROA 3062. Further, there was no evidence or argument concerning the possibility that a sentence of life without the possibility of parole could be commuted in this case. Although Jeremias contends the purpose of Bass' cross-examination concerning Geary was to suggest the possibility of Jeremias' ultimate sentence being commuted, this claim is belied by the record. As demonstrated by the questions the State asked following a brief summation of Geary's criminal cases, the State's intent was to demonstrate that mistakes can occur during the parole review process and that the likelihood of the efficient and competent review of applications for parole was contingent on the quality of the individual members of the Parole Board. See 14 ROA 3024. Finally, and perhaps most distinguishable from Jones, there was absolutely no suggestion that the

possibility of commutation of a sentence of life without the possibility of parole differed in any way with commutation of a death sentence. Because Jones is distinguishable from this case, it provides no support for Jeremias' argument and the cross-examination of Bass did not constitute plain error affecting Jeremias' substantial rights.

B. The prosecutor's rebuttal closing argument was proper.

Jeremias also contends the prosecutor committed misconduct rising to the level of plain error in his rebuttal closing argument. During Jeremias' penalty closing, defense made the following statement.

> So I'm going to talk to you about the ultimate question. Do you choose life or do you choose death? Because that's what this case boils down to. Choosing life or choosing death. The sentencing courts do that every day in this country in every courtroom across the country. It's common for the courts to do sentencing. And when they do sentencing, it's a difficult task in and of itself. They take into consideration what he did, who he hurt, the good he's done in his life, the bad he's done in life – in his life before they make that decision. And that in and of itself is a difficult one for the courts to make.

15 ROA 3223. Thereafter, the prosecutor made the following argument:

> The number of bodies. I respectfully submit that the decision of punishment in a capital murder case should not be determined by the number of people that are killed. One could kill a lot of people by placing an explosive device, not knowing how many people may be injured or killed compared to someone who commits such a premeditated deliberate execution and here designs to kill more than one person.
>
> 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. Jeremias did not object to this argument.

Jeremias relies, in large part, on Jones, and contends the prosecutor's argument asked the jury to weigh his life against those of the victims. However, Jeremias' reliance on Jones is once again misplaced. In Jones, the prosecutor asked the jury to be fair to the victim during his closing guilt phase argument. 101 Nev. at 577, 707 P.2d at 1131. The defendant contemporaneously objected and the comment was ordered stricken. Id. On appeal, the Nevada Supreme Court found the comment did not deny the defendant to a fair trial and affirmed his conviction. Id. at 578, 707 P.2d at 1131. In reaching this conclusion, the Jones Court cited to Mears v. State, 83 Nev. 3, 422 P.2d 230 (1967). The Mears Court, in turn, found a prosecutor's argument an improper emotional appeal but not plain error affecting the defendant's substantial rights. 83 Nev. at 12, 422 P.2d at 235.

Here, unlike Jones, the challenged argument was made during the penalty portion. Such a distinction makes a difference given the jury was not considering the guilt of Jeremias at the time the challenged argument was made, but instead determining the appropriate penalty. See Floyd v. State, 118 Nev. 156, 174, 42 P.3d

249, 261 (2002) (holding victim impact evidence admissible and proper to comment upon); Williams, 337 U.S. at 247, 69 S. Ct. at 1083 (distinguishing between the role of a factfinder in determining guilt as compared to determining an appropriate sentence). As Jeremias himself contended in his closing argument, the jury was expected to take into consideration what Jeremias had done, the people he hurt, as well as the good and bad he had done in his life. 15 ROA 3223. The prosecutor's argument was not asking the jury to place value on Brian's life with their sentence or to weigh the value of Jeremias' life against those of his victims, but instead simply articulated the fact Jeremias had been convicted of murdering ***two*** distinct people in a premediated and deliberate fashion, all to eliminate them as witnesses in any related criminal proceedings and avoid being revoked on his gross misdemeanor probation term. see, Burnside, 352 P.3d at 649-50 (finding arguments challenged as asking the jury to put value to the victim's life with their verdict, in context, to be merely pointing out "the senseless nature of the murder, highlight[ing] the damage Hardwick's murder inflicted on his family, and entreat[ing] the jury to impose a death sentence[]"). The State was simply asking the jury to consider the effect both deaths independently had in reaching their sentence.

Additionally, unlike Jones, and similar to Mears, there was no contemporaneous objection to the prosecutor's argument. Even if Jeremias had objected and this Court found the challenged comment improper, there is nothing to

support Jeremias' contention that the comment was more egregious or prejudicial to Jeremias than the comment found to be harmless error in Jones. Similarly, even if this Court found the comment at issue to be improper, it does not even rise to the level of misconduct the Court rejected as plain error in Mears. Because the prosecutor's comment was not error, let alone plain error, this claim does not warrant reversal of Jeremias' sentence.

XII.
THE DEATH PENALTY IS CONSTITUTIONAL

Jeremias contends that Nevada law impermissibly permits the broad imposition of the death penalty for virtually all first-degree murders. This claim is without merit. The United States Supreme Court has held that a sentencing process, to be constitutional, must "'genuinely narrow the class of persons eligible for the death penalty.'" Arave v. Creech, 507 U.S. 463, 474 (1993) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). The sentencing scheme must direct and limit the jury's discretion to minimize the risk of arbitrary and capricious action and must provide a principled basis for it to distinguish defendants who deserve capital punishment from those who do not. Id. at 470, 474. This Court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of people eligible for the death penalty. See Thomas, 122 Nev. at 1373, 148 P.3d at 736-37; Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); Gallego, 117 Nev. at 370, 23 P.3d at 242; Leonard, 117 Nev. at 82-83, 17 P.3d at 415-16;

Middleton v. State, 114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998); Bolin v. State, 114 Nev. 503, 520, 960 P.2d 784, 801 (1998) (NRS 200.033(4) sufficiently narrowing); Cavanaugh, 102 Nev. 478, 486, 729 P.2d 481 (NRS 200.033(5) sufficiently narrowing). Further, this Court has held that the death penalty does not violate the prohibition against cruel and unusual punishment found in either the United States Constitution or the Nevada Constitution. See Bishop v. State, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979).

Jeremias nonetheless contends Nevada's death penalty scheme is unconstitutional because the per capita death penalty rate in this state is higher than the national average and because only one death row inmate has had their sentence commuted since 1973. However, Jeremias assumes without argument or citation to authority that a higher per capita rate of death row inmates is exclusively due to the Nevada death penalty statutory scheme. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding claims unsupported by analysis or legal citations will not be considered). Similarly, although Jeremias points to an alleged result (that only one death row inmate has had their sentence commuted since 1973), he provides absolutely no analysis to show that the clemency proceedings in this state violate due process, nor does he acknowledge the simple fact that clemency proceedings are not required as a component of a death penalty scheme. Ohio Adult Parole Authority v. Woodward,

523 U.S. 272, 285, 118 S. Ct. 1244, 1252 (1998). Because Jeremias' broad accusations are based on entirely unsupported assumptions and are contradicted by this Court's long-standing precedent that the death penalty is constitutional, his arguments are without merit.

XIII.
CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

This Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994). In addressing a claim of cumulative error, the relevant factors to consider are: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

Here, cumulative error does not warrant relief. First, the issue of guilt was not close given the strong circumstantial evidence and Zapata's testimony that Jeremias shot both victims in the course of a planned armed robbery. Further, although the gravity of Jeremias' crime was as significant as possible, the quantity and character of any error was minimal and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).[12]

[12] NRS 177.055(2) also requires an independent review of the sufficiency of the evidence to support the aggravators as well as a determination that the sentence of

CONCLUSION

Based on the foregoing, the State respectfully requests that Jeremias' conviction and sentence be AFFIRMED.

Dated this 28th day of April, 2016.

Respectfully submitted,

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death was not the result of passion or prejudice. The sufficiency of the evidence supporting the aggravators has already been addressed supra, and there is no evidence in the record that the sentence imposed was the result of passion or prejudice.

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital brief complies with the formatting requirements of NRAP 32(a)(4), 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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the type-volume limitations of NRAP 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 24,228 words and 2,001 lines of text.
3. **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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 28, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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