IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH SIMON JEREMIAS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 67228

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

APPELLANT'S REPLY BRIEF

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I. REPLY TO THE STATE'S ARGUMENT

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

Jeremias contends that his state and federal constitutional rights to due process of law, equal protection, a fair trial, and a public trial were violated by the district court's order excluding the public, including Jeremias's family, from jury selection. In response, the State argues that this issue was not preserved for appellate review and that Jeremias "explicitly agreed to the action." Answering Brief at 17. The State's response is not supported by the record. At no point did the district court canvass Jeremias personally and obtain his consent for closure of the courtroom. There was no personal waiver of his right to a public trial. Likewise, at no point was Jeremias informed by the district court of his constitutional right to have the public present during jury selection. There was no knowing and intelligent waiver of this right by Jeremias.

The State argues that defense counsel invited the error by agreeing with the State that members of Jeremias's family would not be permitted to stay in the courtroom during jury selection. Answering Brief at 21-22. The record does not support this argument. Rather, the record shows that the prosecutor informed the district court that four family members were in the courtroom and he objected to them

being in the courtroom during jury selection. 5 ROA 1060. He then stated "[b]ut defense counsel told me that they understood that they would be leaving the courtroom when the jury comes in." 5 ROA 1060. The district court then immediately stated "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 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." 5 ROA 1061. Defense counsel did not say anything during this exchange and instead addressed the issue of where an extern should sit. 5 ROA 1062. While Jeremias acknowledges that defense counsel should have objected to the closure of the courtroom during jury selection, he does not concede that his counsel induced or provoked the district court or the State into committing this constitutional violation. See Garcia v. Prudential Ins. Co. of Am., 293 P.3d 869, 872 n.4 (Nev. 2013).

The State argues the record here is insufficient to determine this issue. Answering Brief at 22. Jeremias submits that an explicit waiver, entered personally by a defendant who has been advised of his right to a public trial, should be required before closing the courtroom to the public during a critical stage of the trial. Under this standard, no additional evidence is required because there was no such waiver.

Moreover, the record here is consistent with a finding that Jeremias wanted his family to be present during jury selection, the State objected and asked the district court to remove the family members from courtroom for this stage of the trial, the district court followed its stated custom and practice of always removing the public from the courtroom during jury selection because all seats were used for potential jurors, and defense counsel acquiesced in this standard practice, seemingly unaware of the controlling legal authority which precludes courtroom closure under these circumstances. Relief is mandated on this record because Presley v. Georgia, 558 U.S. 209, 211-12 (2010), places the burden on the party seeking closure to advance an overriding interest that is likely to be prejudiced and the State failed to do so here. Id. at 214. Likewise, the record does not establish that the closure was no broader than necessary to protect that interest, and the district court did not consider reasonable alternatives to closing the proceeding or make findings adequate to support the closure. Presley, 558 U.S. at 214.

Further, if there is any question as to any factual issues concerning the denial of Jeremias's constitutional right to a public trial, and whether defense counsel agreed to this closure with knowledge of Presley, as suggested by the State at pages 22-23 of the Answering Brief, the proper remedy is to hold this appeal in abeyance and remand the case for an evidentiary hearing regarding this issue. See United States v.

Negron-Sostre, 790 F.3d 295, 300 (1st Cir. 2015); Purvis v. State, 708 S.E.2d 283, 284 (Ga. 2011) (resolving issue after noting testimony that was received following trial about refusal to admit the defendant's brother at a trial at a jailhouse); Commonwealth v. Grant, 940 N.E.2d 448, 459 (Mass. App. 2010) (issuing a limited remand on whether there was a closure during voir dire and whether the defendant waived his right to a public trial); Farrington v. People of the Virgin Island, 551 V.I. 644, 646 (V.I. 2011) (remanding case to the trial court for an evidentiary hearing on whether the public was prohibited from entering the courtroom during voir dire).

The State argues that this issue may not be considered because defense counsel did not make a contemporaneous objection to the courtroom closure issue. Answering Brief at 19. Contrary to the implicit suggestion that the courts are in agreement on this issue, there is in fact a significant division of authority. Five federal courts of appeals and the high courts of six states and the District of Columbia, have held that the failure to object to the closure of a trial does not waive the issue for appellate review and that, at a minimum, plain error analysis by an appellate court is appropriate. See United States v. Espinal-Almeida, 699 F.3d 588, 600 (1st Cir. 2012); United States v. Gomez, 705 F.3d 68, 75 (2d Cir. 2013) (reviewing issue for plain error); Walton v. Briley, 361 F.3d 431, 434 (7th Cir. 2004) (finding that the issue was not waived by defense counsel's failure to object because the mere non-objection did not indicate

that the defendant had intelligently and voluntarily relinquished a known right); Charboneau v. United States, 702 F.3d 1132, 1138 (8th Cir. 2013); United States v. Rivera, 682 F.3d 1223, 1232 (9th Cir. 2012); Barrows v. United States, 15 A.3d 673, 677 (D.C. 2011); People v. Vaughn, 821 N.W.2d 288, 302 (Mich. 2012); State v. Tapson, 41 P.3d 305, 310 (Mont. 2001); State v. Addai, 778 N.W.2d 555, 570 (N.D. 2010); State v. Bethel, 854 N.E.2d 150, 170 (Ohio 2006); State v. Bauer, 851 N.W.2d 711, 716 (S.D. 2014); State v. Wise, 288 P.3d 1113, 1120 (Wash. 2012). In contrast, two federal courts of appeals and ten state high courts have held that a defendant's inadvertent failure to object to closure of the courtroom during voir dire waives the defendant's Sixth Amendment right to a public trial. See United States v. Hitt, 473 F.3d 146, 155 (5th Cir. 2006); Johnson v. Sherry, 586 F.3d 439, 444 (6th Cir. 2009); Wright v. State, 340 So.2d 74, 79-80 (Ala. 1976); People v. Bradford, 929 P.2d 544, 570 (Cal. 1997); People v. Hassen, 351 P.3d 418, 420 n.2 (Colo. 2016) (citing rule of Stackhouse v. People, __ P.3d __ (Colo. 2015)); Robinson v. State, 976 A.2d 1072, 1082 (Md. 2009); Commonwealth v. Morganti, 4 N.E.3d 241, 247 (Mass. 2014); People v. Alvarez, 979 N.E.2d 1173, 1176 (N.Y. 2012); State v. Beachum, 342 S.E.2d 597, 598 (S.C. 1986), overruled on other grounds by State v. Gentry, 610 S.E.2d 494 (S.C. 2005); Peyronel v. State, 465 S.W.3d 650, 652-654 (Tex. Crim. App. 2015); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989); State v. Pinno, 850 N.W.2d 207,

224-226 (Wis. 2014). Jeremias urges this Court to follow the position taken by the court in Walton v. Briley, 361 F.3d at 434, by requiring an intelligent and knowing waiver on the record to foreclose appellate review of the issue. In the alternative, he asks that this Court consider this issue as a matter of plain and constitutional error.

A defendant's failure to object to a trial court's closure of the courtroom does not affirmatively waive his right to a public trial. Under United States v. Olano, 507 U.S. 725 (1993), "waiver" of a constitutional right is the "intentional relinquishment or abandonment of a known right." Id. at 733. Inadvertent failure to object is not an intentional relinquishment of a known right and is therefore not a waiver.

A defendant in a criminal case may lose his constitutional rights either by waiver or forfeiture. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a know right." Olano, 507 U.S. at 733 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). This distinction is important because of the different legal consequences. If a right is waived, there is no legal error and there is nothing for an appellate court to review. See Olano, 507 U.S. at 733-34. In contrast, forfeiture does not extinguish an error and therefore does not necessarily foreclose appellate review, although it may subject a claim to a heightened standard of review. Id. at 744.

The record here does not support the State's argument that Jeremias made an intentional relinquishment or abandonment of a known right. Without such a showing, there is no waiver. Olano, 507 U.S. at 733 (quoting Zerbst, 304 U.S. at 464). See Illinois v. Allen, 397 U.S. 337, 343 (1970) ("courts must indulge every reasonable presumption against the loss of constitutional rights"). Jeremias was not canvassed about his rights under Presley v. Georgia to public voir dire proceedings and was not asked to waive his right to a public trial for this critical stage of the proceedings. Likewise, his counsel did not make any statements indicating that they had discussed this right with Jeremias and that he had affirmatively elected to waive this right. The right to a public trial is a fundamental right that is important to both the defendant and the public. When fundamental constitutional rights are at stake, courts must "indulge every reasonable presumption against waiver." Zerbst, 304 U.S. at 464.

Finally, the State argues that the district court's proposed accommodation of having family members wait outside the court until seats became available was reasonable because the jury panel was already split between two groups of 60 prospective jurors. Answering Brief at 23-24. The State relies upon Gibbons v. Savage, 555 F.3d 112 (2nd Cir. 2009) in support. Gibbons, however, should not be followed in its entirety. In that case, a trial court excluded members of the defendant's

family from the first day of jury selection because of the small size of the courtroom and the large number of prospective jurors. Id. at 114. The Second Circuit Court of Appeals found that the trial court violated the defendant's right to a public trial, but found that the incident was too trivial to justify overturning the conviction, even though the violation of the right to a public trial is structural error. Id. at 121. The Court reasoned that very little happened on the first day of jury selection, noting that private interviews concerning the juror's ability to serve were conducted in an adjacent room, out of view of other jurors, no prospective jurors were excused without mutual consent, no peremptory challenges were made, and there were no objections by either party to anything that occurred. Id. Here, in contrast, significant questioning of jurors took place in the courtroom on the first day of trial. 5 ROA 1077-1100; 6 ROA 1101-1320; 7 ROA 1321-1408 . This questioning was directly related to cause and peremptory challenges. See e.g., 6 ROA 1122-24 (questioning of juror which led to the first defense peremptory challenge); 6 ROA 1145-47 (death qualification of a juror who was ultimately excused for cause); 6 ROA 1147 (questioning of juror which led to the State's first peremptory challenge). In addition, the district court resolved a potential issue concerning whether certain prospective jurors had been sleeping. 6 ROA 1311. This was not a case in which jury selection took weeks or months. Rather, the jury was empaneled after only two days of jury

selection. 7 ROA 1410. The exclusion of Jeremias's family, and the public, was therefore substantial. Moreover, it must be noted that Gibbons was issued on January 28, 2009, almost a year before the Supreme Court issued its decision in Presley v. Georgia, 558 U.S. 209 (2010), and firmly establishing that courtroom congestion is not an acceptable excuse for closure of a courtroom during jury selection.

The error here is plain and cannot be deemed harmless error. Violation of the public trial right is structural error and is not subject to harmless error review. Neder v. United States, 527 U.S. 1, 8 (1999). See also Negron-Sostre, 790 F.3d at 310. The judgment must be reversed and the case remanded for a public trial.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, confrontation, and a fair trial, were violated by the district court's decision allowing a very experienced prosecutor to repeatedly violate evidentiary rules while examining the State's primary witness. The State argues in response that the district court did not abuse its discretion in allowing the prosecutor to examine the witness in this manner. Answering Brief at 24-32.

As set forth at length in the Opening Brief, at trial the State did not present a typical direct examination of Zapata, but instead carefully orchestrated the elicitation

of details included in his interrogation by detectives. Jeremias contends that this action, which was allowed by the district court over objection, violated his statutory and constitutional rights. In response, the State acknowledges that "[i]n 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." Answering Brief at 25 (citing Goings v. United States, 377 F.2d 753, 760 (8th Cir. 1967), limited on other grounds, United States v. Thompson, 708 R.2d 1294, 1303 (8th Cir. 1983)). The State failed to meet the first predicate. A careful review of Zapata's testimony, and the sequence of the questions presented by the prosecutor, reveals that the prior statements were introduced long before it was established that Zapata's recollection was exhausted. See 10 ROA 1984.

The fatal flaw in the State's argument, both at trial and on appeal, is that it confuses the relevance of Zapata's testimony about the events at issue with his testimony about what he told detectives about the events at issue. The former was relevant, but the latter was not unless admissible as a prior consistent or prior inconsistent statement. The State's examination did not focus on Zapata's memory about the facts of the case, but instead focused on his memory of what he told detectives about those facts. 10 ROA 1986-90, 2012-27. The same defect exists as to

the State's argument about what Zapata said during Rios's trial. Answering Brief at 27-28. Whatever Zapata said at Rios's trial is irrelevant on its own and gains admissibility only so far as it is used to refresh recollection about the operative facts, or is used as a prior inconsistent statement or prior consistent statement, following a proper foundation.[1] NRS 51.035; Atkins v. State, 112 Nev. 1122, 1129, 923 P.2d 1119, 1123 (1996) (quoting NRS 51.035(2)(a)), overruled on other grounds, McConnell v. State, 120 Nev. 1043, 1062-63, 102 P.3d 606, 620 (2004); Runion v. State, 116 Nev. 1041, 1052, 13 P.3d 52, 59 (2000). The State acknowledges that Zapata's prior statement and testimony at Rios's trial were not admitted as prior consistent or prior inconsistent statements, so those exceptions do not apply in this case. Answering Brief at 29. Thus the only remaining issue is whether the State may refresh a witness's recollection as to what he told detectives about the facts of the

[1]The State addresses Jeremias's request to supplement the record on appeal with the transcript of Zapata's testimony in the Rios trial. Answering Brief at 27 n.1. The State asserts that "the proceeding below" did not include proceeding involving Rios because the two cases are not sufficiently close. The State fails to cite any authority for its definitions of case and proceeding. The fact remains that Rios and Jeremias were charged in the same Indictment. 1 ROA 1-5. Although their trials were severed, the same case number exists for both defendants. 1 ROA 1. Both were charged with the same offenses, based upon the same facts. They were prosecuted by the same prosecutor and both trials were heard by the same judge. The judge's prior experiences in the Rios trial undoubtedly shaped the judge's understanding of the evidence against Jeremias in general and her understanding of Zapata's testimony in particular. Jeremias again requests this Court to supplement the record on appeal with the full record filed under the district court case number.

case before establishing that the witness could not recall those facts. The State fails to cite any authority which supports questioning in this manner.

Jeremias also contends that the district court abused its discretion by allowing the State to use leading questions through the most critical portion of his direct testimony, even though Zapata was not a hostile witness, in violation of NRS 50.115. The State argues in response that the prosecutor did not ask leading questions, but instead just referred Zapata to documents. Answering Brief at 30. As set forth in the Opening Brief, the prosecutor did not ask Zapata directly about the events at issue, but instead guided him through a carefully orchestrated examination based upon his prior statements to detectives. 10 ROA 1984-2027. He did so not based upon the rules of evidence or any known accepted practice, but instead obtained the exact answers he desired through extensive reliance on the script provided to the witness. The State fails to cite any authority allowing such an examination. The State also fails to address the authority cited by Jeremias in the Opening Brief as to this issue.

Jeremias contends that the prosecutor's actions rendered the trial unfair and warrant reversal of the judgment and the grant of a new trial. In response, the State attempts to distinguish this case from the opinion in United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977). Answering Brief at 30. The State notes that in Shoupe the prior statement involved notes of an interviewing detective, whereas in this case the

prior statement at issue is a transcript of Zapata's interrogation. Answering Brief at 31. The State also argues that in Shoupe, the witness stated he could not remember the facts of the case and in contrast here, Zapata "did not testify he never knew the specific details sought by the State."[2] Answering Brief at 31. These differences, however, do not alter the Shoupe court's conclusion: "[I]f a party can offer a previously given statement to substitute for a witness' testimony under the guise of 'refreshing recollect,' the whole adversary system of trial must be revised.'" Id. at 642 (quoting Goings, 377 F.2d at 760 (emphasis omitted). As in Shoupe, the district court here allowed admission of a previously given statement to substitute for Zapata's testimony under the guise of refreshing recollection.

The State next argues that because Zapata was available for cross-examination that Jeremias was not prejudiced by the State's use of his prior statements. Answering Brief at 32. The State's response misses the point. The relevant testimony should have been about what Zapata saw and heard about the events alleged in the Indictment. Instead, the State presented testimony about what Zapata said to detectives about what he saw and heard about those events. The State's improper presentation of its case, in violation of the rules of evidence, deprived Jeremias of his statutory and constitutional rights. Jeremias was left to cross-examine Zapata in response to the

[2]This admission by the State establishes Jeremias's assertion that it was not proper to present Zapata's alleged refreshed recollections.

statements, instead of direct testimony about the facts. Such an approach is prohibited, as described in Robbins v. Small, 371 F.2d 793, 795-96 (1st Cir. 1967); Velott v. Lewis 102 Pa. 326, 333 (Pa. 1883) (cited with approval in Putnam v. United States, 162 U.S. 687, 706 (1896)), and other authority cited by Jeremias in the Opening Brief, which remains unaddressed by the State in its Answering Brief.

In the Opening Brief, Jeremias argued that he was prejudiced by the improper admission of Zapata's testimony and that he should receive a new trial based upon this error. The State does not contest this assertion and thereby concedes that if questioning of Zapata is found improper that the judgment must be reversed.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, confrontation, and a public trial were violated by a district court's order allowing the State to admit an exhibit -- a video recording of Jeremias's interrogation -- which had not been presented to the jury in open court during the course of the trial. The State argues in response that the evidence was properly admitted. Answering Brief at 32-37.

The State first argues that it was appropriate for a video to be published to the jury for the first time during deliberations because the video was admitted as

evidence. Answering Brief at 33. Although the State cites to general statutes regarding the admission of evidence, such as NRS 177.441 and NRS 52.025, it fails to cite any authority holding that it is proper to allow a jury to view a video recording for the first time after the close of evidence and after closing arguments, outside the presence of the district court and parties. The State also fails to address Jeremias's contention that his right to a public trial, as guaranteed by the State and Federal Constitutions, was violated by the presentation of evidence behind closed doors and outside of the normal trial process. See State v. Wise, 288 P.3d 1113, 1115 (Wash. 2012); State v. Magnano, 326 P.3d 845, 851 (Wash. App. 2014). Likewise, the State fails to address Jeremias's argument that presentation of evidence in this manner deprived him of his rights under the Confrontation Clause of the Sixth Amendment. See Gaxiola v. State, 121 Nev. 633, 646, 119 P.3d 1225, 1231 (2005).

The State next argues that defense counsel's objection at trial was not sufficient to preserve this issue for review. Answering Brief at 33. As noted in the Opening Brief, following the defense case, during which Jeremias testified and acknowledged being interrogated by detectives, the State announced that it had rebuttal evidence and asked for admission of the video (and audio) recording of the interrogation. 12 ROA 2469. The State did not present a witness to introduce this evidence and did not play the recording before the jury and parties in open court. 12 ROA 2469. Defense

counsel objected and argued that the State had a full opportunity to cross-examine Jeremias about his interrogation. 12 ROA 2469. The district court overruled the objection. 12 ROA 2469. Jeremias acknowledges that his objection at trial differs somewhat from the issue presented here, but nonetheless notes that an objection was made. 12 ROA 2469-70. Under these circumstances, where trial counsel was not given advance notice of the State's intention to introduce evidence in this highly unusual manner, failure to cite to the precise grounds for objection is understandable. See Reed v. Ross, 468 U.S. 1, 16 (1984) ("where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). See also St. Pierre v. State, 96 Nev. 887, 892, 620 P.2d 1240, 1243 (1980) (citing Bean v. State, 86 Nev. 80, 465 P.2d 133 (1970)). In any event, this Court may consider this constitutional issue as a matter of plain error. Olano, 507 U.S. at 730-36; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

The action of allowing a jury to view a recording for the first time during deliberations appears to be unprecedented. In his Opening Brief, Jeremias argued that this improper use of evidence was highly prejudicial because his counsel was unable to cross-examine detectives about editing of the recording which removed significant time lapses; unable to cross-examine detectives about prejudicial statements they

made on the video (which also precluded his ability to offer limiting instructions about those statements); unable to observe the jurors' reactions to the video and therefore unable to respond to those reactions during closing argument; and unable to explain to the jurors issues with the video, such as the editing of time lapses, which could only be observed by viewing the video itself. In response, the State argues that the video has a clock which would jump based upon the videos and that "[a]nyone watching the video could see the changes in time and recognize the video had been edited." Answering Brief at 36. This is pure speculation. Presumably the jurors are not experienced in watching police interrogation videos and have no background in detecting subtle changes in a video. While in theory the jurors may have noticed the editing and figured out the issue for themselves, there is no reason to believe that they did so. Viewing Exhibit 145 reveals that the changes are not obvious and the jury could have easily missed the time lapses, instead concluding that Jeremias was unreasonably impatient and maniacal in his demeanor. These changes to the video are not reflected in the transcript which was admitted as an exhibit. 26 ROA 5667.

Jeremias argued in his Opening Brief that additional prejudice exists because of the State's closing and rebuttal arguments which emphasized this evidence. 15 ROA 2509, 2568-70. The State fails to address this issue in its Answering Brief.

The district court's unprecedented action of admitting a critical exhibit and then allowing it to be viewed for the first time outside of the open courtroom, and after closing arguments, deprived Jeremias of his right to a public trial and his right to due process of law. The State fails to establish that these constitutional violations were harmless error. Jeremias was prejudiced substantially by the admission of this evidence and is therefore entitled to a new trial.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, cross-examination and confrontation were violated by the district court's order allowing a medical examiner to testify about autopsies performed by someone who did not testify at trial. The State argues in its Answering Brief that the district court did not err in admitting the testimony of Dr. Gavin, who did not perform the autopsies, because she conducted her own review of the data and facts contained in the autopsy reports. Answering Brief at 38. The State asserts that Dr. Gavin was not testifying about the autopsy performed by Dr. Telgenhoff, but instead testified about her own independent review of the raw data. Answering Brief at 38 (citing Vega v. State, 126 Nev. 332, 338-39, 236 P.3d 632, 636-38 (2010);

United States v. Richardson, 537 F.3d 951, 955-56 (8th Cir. 2008)). A review of the record, however, belies the State's claim.

Dr. Gavin began her testimony on direct examination by stating that she had reviewed the autopsy and documentation from the two autopsies and that this was a typical process that doctors do all the time in the field of pathology and forensic pathology. 10 ROA 2121. Based upon her review of this material, and photographs taken during Dr. Telgenhoff's autopsies, she was comfortable determining and opining about the cause and manner of death of the two men. 10 App. 2121. She then testified about procedures which took place during the autopsies for which she was not present. 10 App. 2122-35. In essence, the district court allowed Dr. Gavin's testimony to make the source and content of Dr. Telgenhoff's autopsies clear to the jury. The substance of this prohibited testimony was evident, even if the autopsy reports were not introduced and this evidence therefore violated Jeremias' constitutional rights. See Ryan v. Miller, 303 F.3d 231, 249-50 (2nd Cir. 2002); United States v. Moore, 651 F.3d 30, 69-74 (D.C. Cir. 2011).

The State next argues that autopsy reports are not testimonial. Answering Brief at 41-42. It argues that autopsy reports are the product of an official duty imposed by law, and are not the product of a criminal investigation used for trial. The State

cites to NRS 259.050(1). It fails, however, to address NRS 259.050(2), which provides:

> In all cases where it is apparent or can be reasonably inferred that the death may have been caused by a criminal act, the coroner or the coroner's deputy shall notify the district attorney of the county where the inquiry is made, and the district attorney shall make an investigation with the assistance of the coroner. If the sheriff is not ex officio the coroner, the coroner shall also notify the sheriff, and the district attorney and sheriff shall make the investigation with the assistance of the coroner.

This statute makes it abundantly clear that the coroner's office is involved in the prosecution of a criminal case. Moreover, the State fails to identify any authority holding that if an autopsy is performed based upon a statutory obligation that the constitutional limitations imposed by Crawford v. Washington, 541 U.S. 36, 50 (2004) do not apply. Rather, the State cites to a concurring opinion of Justice Breyer in Williams v. Illinois, 132 S.Ct. 2221, 2241 (2012), as supporting this theory, but the State neglects to address the fact that Justice Breyer's position in that case was not adopted by the other eight Supreme Court justices. More compelling is the actual test employed by the Supreme Court, which defines an assertion as testimonial if it is "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Melendez-Diaz v. Massachusettes, 557 U.S. 305, 311 (2009) (quoting Crawford, 541 U.S. at 52)). Testimonial statements are those which have a primary purpose of establishing or

proving past events potentially relevant to a later prosecution. Bullcoming v. New Mexico, 564 U.S. 647, 658-59 n.6 (2011) (plurality); Michigan v. Bryant, 562 U.S. 344, 358 (2011).

Here, there can be no legitimate question that Dr. Telgenhoff prepared his autopsy reports under circumstances which would lead him to believe that the statements would be available for use at a later trial and with a primary purpose of establishing or proving past events relevant to a prosecution. The autopsies were performed on two men who died near in time to each other, in the same place, and wounds from gunshots were apparent. The bodies were placed in sealed bags at the crime scene and were taken to the coroner's office. 10 ROA 2122. A crime scene analyst or investigator was present during the autopsy. 10 ROA 2136. It was abundantly clear that the autopsy reports would be used as part of a prosecution, rendering the reports testimonial in nature.

The State argues that admission of this evidence was harmless, but fails to prove beyond a reasonable doubt that the testimony did not influence the jury's verdict. As noted in the Opening Brief, the State used Dr. Gavin's testimony to argue that Jeremias was the shooter because the short distance of the shot established that the shooter knew the victims. 15 ROA 2511, 2582. Under these circumstances, the evidence was prejudicial and the State cannot establish that it was harmless error.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, and a fair trial were violated by a district court's decision to allow speculative expert witness testimony about a plastic bag. The State argues in response that the testimony by a crime scene expert and detective was lay testimony, not expert testimony. Answering Brief at 45-47. The State is wrong.

This Court recently explained, at length, the differences between lay and expert testimony:

> Our review of the district court's ruling hinges on whether the witnesses testified as lay witnesses or as expert witnesses. The scope of lay and expert witness testimony is defined by statute. A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275. The key to determining whether testimony about information gleaned from cell phone records constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? See Randolph v. Collectramatic, Inc., 590 F.2d 844, 846 (10th Cir. 1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed. R.

> Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); State v. Tierney, 150 N.H. 339, 839 A.2d 38, 46 (N.H. 2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

Burnside v. State, 352 P.3d 627, 636 (Nev. 2015).

The testimony presented here was not lay testimony. The testimony by the crime scene analyst that the pieces of plastic looked like they had been torn by a bullet, and that he could make this determination based upon their shape, size, texture and location at the scene, went far beyond the common knowledge of the average layperson and was beyond the realm of everyday experience. The testimony here was not the result of a process of reasoning familiar in everyday life. Likewise, his opinion that this was something involving high velocity and power, that had gone through a blast, was not within the realm of lay testimony.

In the Opening Brief, Jeremias argued that he was prejudiced by admission of this testimony. The State fails to argue the contrary and therefore concedes that if this Court finds admission of this testimony to be improper, reversal is mandated. See Polk v. State, 233 P.3d 357, 359-61 (Nev. 2010).

. . .

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, and the presumption of innocence were violated because of the district court's decisions concerning jury instructions. The instruction on the presumption of innocence was unconstitutional because it required the State to prove only the "material elements" of the offenses, and then left the jury to speculate as to which elements were material and which were not. The State argues that this issue is controlled by Burnside, 352 P.3d at 637. In that case, this Court found that use of the instruction did not warrant reversal, though it instructed the district courts not to use this instruction in future cases. This Court concluded as follows in denying relief in Burnside:

> An Oklahoma court has considered an instruction similar to the one used in this case. In Phillips v. State, the defendant complained that an instruction advising the jury that "the State is required to prove beyond a reasonable doubt 'the material allegations of the Information', and that the defendant is presumed innocent of the crime charged against him and innocent of 'each and every material element constituting such offense' [was] reversible error" because "the instruction allowed the jury to deduce [that] the presumption of innocence did not apply to every element of the offense, but only to the elements it deemed material." 989 P.2d 1017, 1037-38 (Okla. Crim. App. 1999). The court acknowledged that the "material allegations" language might be confusing. Id. at 1038. But the court rejected the defendant's characterization of the instruction in light of other instructions that set forth the specific elements of the charged offense and made clear that the presumption of innocence carried through all elements of the

> offense. Id. Therefore, according to the court, any error in the instruction was harmless. Id. We agree with the Oklahoma court.
>
> Here, the district court instructed the jury on the elements of each of the offenses charged and that the State had the burden to prove those elements. No other instruction or any argument by the parties suggested that the State's burden on any element or offense was less than beyond a reasonable doubt. Absent an instruction advising that it could do so, we are not convinced that the phrase "material element" caused the jury to speculate that it could choose which of the elements should be proven beyond a reasonable doubt and which ones need not be. Taking the instructions as a whole, they sufficiently conveyed to the jury that the State had the burden of proving beyond a reasonable doubt each element of the charged offenses and the phrase "material element" did not signal to the jury that the State carried a lesser burden of proof on any element or charged offense. Although the phrase "material element" is unnecessary because the State must prove all elements of an offense beyond a reasonable doubt, see Watson v. State, 867 P.2d 400, 402 (Nev. 1994); State v. Reynolds, 51 P.3d 684, 686 (Or. Ct. App. 2002) ("In a sense, the term 'material element' in its legal usage is something of a redundancy. If an allegation is truly an 'element' of a crime, by definition, it is 'material.' But the point of the legislature's use of the term seems clear enough: A 'material element' is one that the state must prove to establish the crime charged."), and therefore should be omitted from future instructions, we conclude that the instruction is not so misleading or confusing as to warrant reversal.

Burnside, 352 P.3d at 637-38.

In addressing this issue, this Court relied extensively upon an opinion by an Oklahoma court in Phillips v. State, 989 P.2d 1017, 1037-38 (Okla. Crim. App. 1999). In that case, the court acknowledged that the "material allegations" of its instruction might be confusing, but the court found the error harmless in light of other instructions that set forth the specific elements of the charged offense and made clear

the presumption of innocence carried through to all elements of the offense. Burnside, 352 P.3d at 638 (citing Phillips). This Court agreed with the Oklahoma court and noted that the district court here instructed the jury on the elements of each of the offenses and instructed the jury that the state had the burden to prove those elements. Id. Nonetheless, this Court recognized that all elements of a crime are material and that the term therefore should be omitted from future instructions. Id.

There is a very significant difference between the instructions given in Phillips and the instructions given here. In Phillips, in Instruction No. 2, the Oklahoma trial court "set forth the elements of the offense of first degree murder malice." 989 P.2d at 1038. Based upon this instruction, and the entirety of the rest of the instructions, the prosecution's burden to prove every element of the offense charged beyond a reasonable doubt was established. Id. The specific language of Instruction No. 2 was provided by the federal district court in habeas corpus proceedings concerning Phillips' conviction:

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

Phillips v. Sirmons, 2008 U.S. District Lexis 29277 at 47 (E.D. Okl. 2008), reversed and remanded on other grounds, Phillips v. Workman, 604 F.3d 1202 (10th Cir. 2010). Here, in contrast, there was no simple instruction which specified the elements of the offenses and informed the jury of the state's obligation to prove these elements beyond a reasonable doubt. At trial, Jeremias made this specific objection and noted that there was no instruction defining which elements were material. In Burnside, this Court did not address this important distinction. This Court should reconsider and overrule Burnside as to this issue.

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

prosecution has the burden to prove "each and every element" of the offense beyond a reasonable doubt).

The instruction given here failed to meet the mandate imposed by the Supreme Court as to application of the reasonable doubt standard to each element of the offenses. Jeremias's judgment of conviction should therefore be reversed and this case should be remanded for a new trial in which the jury is properly instructed.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment were violated by use of an invalid aggravator of murder committed to avoid arrest. The State argues in response that the aggravator is valid and that there is sufficient evidence to support the verdict. Answering Brief at 50.

The State argues that this Court has previously adopted an interpretation of NRS 200.033(5) which does not require an arrest to be imminent and that allows a finding of the aggravator to prevent identification in a subsequent criminal case. Answering Brief at 50-51 (citing Cavanagh v. State, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986); Canape v. State, 109 Nev. 864, 874-75, 859 P.2d 1023, 1030 (1993)). Jeremias acknowledged such in his Opening Brief, but urged this Court to adopt a more limited interpretation of the aggravator so as to satisfy both the

constitutional requirement that aggravators narrow the class of persons convicted of first degree murder who are eligible for the death penalty, and to address the vagueness issues presented by a broad interpretation of the statute.

The United States Supreme Court requires constitutionally narrowed aggravators so that "capital punishment [cannot] be imposed in any murder case." Godfrey v. Georgia, 446 U.S. 420, 422–23 (1980). For example, in Godfrey a plurality of the Court rejected Georgia's "wantonly vile" aggravator, because a "person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Id. at 428–29. The Court has long held that states must carefully define their death aggravators to avoid violating the Eighth and Fourteenth Amendments and that undefined aggravators are subject to vagueness challenges. Lewis v. Jeffers, 497 U.S. 764, 774 (1990). Those challenges "characteristically assert that the . . . challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia." Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988). A "narrowing construction" is required to "channel the sentencer's discretion by clear and objective standards." Jeffers, 497 U.S. at 774 (internal quotation marks omitted). Without narrowly defined aggravators, the sentencer cannot make "a principled

distinction between those who deserve the death penalty and those who do not." Id. at 776.

The State cites to Jimenez v. State, 105 Nev. 337, 343, 775 P.2d 694, 698 (1989), in support of its interpretation of the aggravator. Answering Brief at 51. Jimenez, however, supports Jeremias's argument. In Jimenez, the defendant was convicted of killing a bartender and a customer at Gabe's Bar, where the defendant had been a customer earlier in the evening. Id. at 338, 775 P.2d at 694. The two men were found dead inside of the bar and $350 was missing. Id. The jury found the aggravator under NRS 200.035, upon finding that the murder was committed by the defendant to prevent lawful arrest or escape from custody. Id. at 343, 775 P.2d at 698. This Court, however, found the aggravator invalid as there was "no evidence that these deeds were done with regard to arrest or escape of any kind." Id. The facts here are essentially the same as those in Jimenez. In both cases there was a robbery and two people were killed, one of whom at least knew the defendant and could potentially identify the defendant to the police, which would assist with a theoretical future arrest and prosecution. As in Jimenez, the aggravator here should be found invalid.

The State argues that in the event that this Court finds this aggravator to be invalid, that this Court should reweigh the aggravators and mitigators and affirm the

sentence of death. Answering Brief at 59-60. Jeremias recognizes that this Court has conducted reweighing in prior cases, but urges this Court to follow other courts which hold that appellate reweighing is not an appropriate remedy for a sentencer's consideration of an invalid aggravating circumstance. See Gillett v. State, 148 So.3d 260, 267-269 (Miss. 2014) (declining to reweigh, despite Clemons, and noting the inconsistency between reweighing by an appellate court and the right to a jury determination of the penalty of death, but not addressing Ring); State v. Sandoval, 788 N.W.2d 172, 214-215 (Neb. 2010) (explaining that in Nebraska, the appellate court can conduct harmless error analysis, but lacks the statutory authority to reweigh the aggravators and mitigators, thus requiring a remand to the trial court for resentencing).

Jeremias submits that appellate reweighing is not valid under the Sixth and Eight Amendments, and that Clemons v. Mississippi, 494 U.S. 738, 741 (1990), is inconsistent with modern authority, including Ring v. Arizona, 536 U.S. 584 (2002). Federal courts have also noted the existence of this controversy. See Baston v. Bagley, 420 F.3d 632, 636-637 (6th Cir. 2005) (upholding reweighing in pre-Ring case, in reliance on Clemons); id. at 639-41 & n. 1 (Merritt, J., dissenting) (citing Schriro v. Summerlin, 542 U.S. 348 (2004), in noting that Ring does not apply in its case because it is not retroactive to Baston's case, but concluding it is "very likely

that Ring has overruled Clemons"); Lambert v. McBride, 365 F.3d 557, 561-563 (7th Cir. 2004) (providing discussion of retroactivity of Ring and noting the procedures in the case would be seriously questioned by Ring, but finding that the new law did not apply to the petitioner). Others have also recognized that Clemons is of doubtful validity under Ring. See Sam Kamin and Justin Marceau, *The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing*, 13 U. Pa. J. Const. L. 529, 581 n.2 (2011) ("Clemons v. Mississippi holds that such reweighing was consistent with the Court's Sixth Amendment jurisprudence as it existed in 1990 . . . However, it seems beyond peradventure that such a process violates the Court's post-Ring understanding of the Sixth Amendment); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091, 1130-1135 (2003) ("the validity of Clemons's holding and reasoning are highly suspect in light of Ring").

In Walton v. Arizona, 497 U.S. 639 (1990), the United States Supreme Court upheld a system in which the trial court rather than a jury found aggravating factors that were required for death eligibility, but in Ring it recognized "that Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both." 536 U.S. at 609. For exactly the same reasons, Clemons and Ring "are irreconcilable," and the Supreme Court's "Sixth Amendment jurisprudence cannot be

home to both." The analysis in Walton relied substantially and explicitly on Clemons in upholding the Arizona scheme. Walton, 497 U.S. at 647-649. Indeed, the entire discussion of the Sixth Amendment issue in Walton repeats the analysis in Clemons, including its rejection of the argument that the Sixth Amendment requires jury findings of factors necessary for death eligibility; its approval of Hildwin v. Florida, 490 U.S. 638 (1989), and other Florida cases, upholding judicial sentencing without jury findings of aggravating factors; and its reliance on Cabana v. Bullock, 474 U.S. 376 (1986), holding that an appellate court, rather than a jury, could make the findings necessary for death eligibility under Enmund v. Florida, 458 U.S. 782 (1982). Walton, 497 U.S. at 647-49.

In Ring, the Supreme Court overruled Walton and found that its reliance on the decisions in Hildwin, Cabana, and Enmund, could not be reconciled with Apprendi. Ring, 536 U.S. at 598-99. As explained in Ring, the fundamental defect with the Walton analysis was its reliance on the distinction between elements of an offense and sentencing factors. The Court then reasoned that the distinction drawn between elements of an offense and sentencing factors in the Arizona capital sentencing scheme, relied upon in Apprendi to distinguish Walton, was "untenable," because "Apprendi repeatedly instructs in that context that the characterization of a fact or

circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." 536 U.S. at 604.

The Clemons decision was based on the same distinction between sentencing factors and elements of the offense that the Court rejected in Apprendi, Ring, and subsequent cases. See Cunningham v. California, 549 U.S. 270, 275, 281-284 (2007); United States v. Booker, 543 U.S. 220, 231-233 (2005); Blakely v. Washington, 542 U.S. 296, 304-305 (2004).

If the parts of the Walton analysis that the Supreme Court rejected in Ring are removed from the Clemons decision, there is nothing left; and the conclusion that Walton cannot survive Apprendi compels the same conclusion with respect to Clemons. Under Ring, a trial judge cannot find factors necessary to capital eligibility, and appellate judges certainly cannot do so in either case, the constitutional violation is that "the wrong entity judged the defendant guilty." Rose v. Clark, 478 U.S. 570, 578 (1986).

The Supreme Court's most recent opinion addressing Ring affirms Jeremias's contention that Clemons must be overruled insofar as it allows judges to determine a defendant's eligibility for the death penalty by reweighing evidence upon the finding of an invalid aggravating circumstance. In Hurst v. Florida, 136 S.Ct. 616 (2016), the Court found Florida's death penalty scheme to be invalid under Ring. Id.

at 619. Florida's scheme provided that a penalty phase jury would recommend whether a defendant should receive a death sentence and then a judge would hold a separate hearing, weigh the aggravating and mitigating circumstances, and determine whether the defendant should be sentenced to life imprisonment or death. Id. at 619-20. The Florida Supreme Court had found its death penalty process to be valid, based in part upon the Court's holding in Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam) that the Sixth Amendment "'does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" Hurst 136 S.Ct. at 620-21 (citing Hildwin, 490 U.S. at 640). In Hurst the Supreme Court found Florida's death penalty scheme to be contrary to Apprendi and Ring, and in doing so expressly overruled Hildwin and Spaziano v. Florida, 468 U.S. 447, 457-465 (1984). Hurst, 136 S.Ct. at 623. Clemons relied extensively upon Hildwin and Spaziano. See Clemons, 494 U.S. at 745-46. Now that those two cases have been overruled in Hurst, it is appropriate for this Court to reconsider its reliance on Clemons.

Allowing appellate judges to make death-eligibility findings is even worse than allowing trial judges to make this decision. Unlike the trial court, which has at least seen the trial and has a basis for evaluating the power of the testimony, an appellate court sees only a cold record; and it sentences a defendant to death without ever looking him in the eye, without considering his demeanor, as a jury must, see Allen

v. Woodford, 395 F.3d 979, 1014 (9th Cir. 2005), and without hearing "the sound of his voice." See McGautha v. California, 402 U.S. 183, 220 (1971); see also Bejarano v. State, 146 P.3d 265, 276 (Nev. 2006) (upholding death sentence by reweighing and finding, on cold record, that mitigating evidence "not particularly compelling"). In every sense, an appellate court that reweighs eligibility factors is replacing the jury's "highly subjective" and "moral judgment of the defendant's desert" by "decreeing death" itself. See Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7 (1985). Even in the absence of this Court's declared incapacity in non-capital cases to act as an "appellate sentencing body," State v. Sims, 107 Nev. 438, 440, 814 P.2d 63, 64 (1991), these circumstances cannot produce a reliable sentence under the Eighth Amendment, much less one that is consistent with the right to jury trial on all elements of capital-eligibility under the Sixth Amendment. In any event, judgments as to the relative competence of judges or juries as factfinders are irrelevant, see Ring, 536 U.S. at 607: the only relevant consideration is that this Court is not a jury, and it therefore cannot constitutionally find any element of a criminal offense. See Ring, 536 U.S. at 612 (Scalia, J., concurring) (noting that "decline [in belief in trial by jury] is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed.").

The aggravator here is invalid and the appropriate remedy is reversal of the sentence of death and remand for a new penalty trial.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty hearing, confrontation, cross-examination, and right to be free from cruel and unusual punishment were violated by admission of testimony and evidence concerning an interrogation of Ivan Rios, even though Rios did not testify and no notice was provided of the State's intent to admit this evidence. The State argues in response that Bruton v. United States, 391 U.S. 123 (1968) does not apply in a capital penalty trial and that Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991), was implicitly overruled in Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). Answering Brief at 62-64. Neither argument has merit.

The State asserts that the Bruton rule only applies at a joint trial. Answering Brief at 62. The principle of Bruton is that the confession or statement of a co-defendant cannot be admitted during trial of a defendant if the statement implicates the defendant, unless the co-defendant testifies and is subject to cross-examination, even if the jury is instructed not to consider the statement against the defendant. Bruton, 391 U.S. 126. Bruton was not unique in this ruling and was consistent with

the Supreme Court's prior decision in Douglas v. Alabama, 380 U.S. 415 (1965). In Douglas, an alleged accomplice, who had been convicted for the offense for which the defendant was standing trial, was called as a witness by the prosecution in the defendant's trial. Id. at 416. The accomplice planned to appeal his conviction and invoked his privilege against self-incrimination while on the stand. Id. Over objection, the trial court allowed the prosecutor to read from a confession signed by the accomplice and the defendant was found guilty. Id. at 416-17. Ultimately, the Supreme Court reversed the conviction, finding that the defendant's inability to cross-examination the accomplice as to the confession "plainly denied him the right of cross-examination secured by the Confrontation Clause." Id. at 419.

> "The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Douglas, 380 U.S. at 418-19 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)). The principle stated in Bruton and Douglas is not limited to joint trials.

Evidence of a co-defendant's unsworn, extra-judicial statement to law enforcement officers, at a time when he had every reason to minimize his own involvement in an offense and to maximize allegations against a defendant, is much

different than the typical hearsay admitted at a capital penalty trial.[3] The need for a jury to assess the credibility of a co-defendant who makes a 'confession,' in which he exculpates himself and places full blame on his alleged accomplices is just as compelling at the penalty phase of a capital trial as it is during the culpability phase of that trial. This Court recognized this principle in Lord and should continue to recognize this principle here.

By its very nature, the confession of a co-defendant in which he denies guilt for himself and inculpates the defendant is unreliable:

> As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Lee v. Illinois, 476 U.S. 530, 545 (1986). See also Lilly v. Virginia, 527 U.S. 116, 131 (1999) (plurality) (noting that the Court had "over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confession sthat incriminate defendants.'") (quoting Lee, 476 U.S. at 541 and citing Bruton, 391 U.S. at 136 (such statements are "inevitably suspect")).[4]

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[3]Jeremias also challenges admission of this evidence under the Confrontation Clause and Crawford v. Washington, as set forth in the issue below.

[4]It is worth noting that the State prosecuted Rios for the offenses at issue here, and thereby obviously found his statement to detectives to be unbelievable. It is hypocritical of the State to argue that Rios was not credible while prosecuting Rios,

The State argues that Rios's statements should be admissible because at that time the evidence was admitted during Jeremias's penalty phase trial, Rios was no longer a defendant in the case, as he had been previously acquitted. Answering Brief at 70. The inherent unreliability of the statement, however, must be judged by the factors at issue at the time that Rios gave the statement, not the time that it was admitted as evidence. When Rios gave his statement to detectives he was being questioned as to his involvement in a double homicide – a time when he had every motivation to lie about his own conduct and to focus blame on someone else. The fact that Rios was later acquitted does not remove the taint of the original self-serving motivation for the statement.

The State claims that Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991) was implicitly overruled in Thomas v. State, 122 Nev. 1361, 148 P.3d 727 (2006). Answering Brief at 64. Thomas did not overrule Lord. As set forth in the Opening Brief, in Lord, this Court reversed a sentence of death based upon the district court's admission of testimony from a detective, who read to the jury a transcript of a co-defendant's confession. It found that "the need for cross-examination to test the fundamental *reliability* of co-defendants' often suspect statements is no less great in the penalty phase than in the guilt phase." Id. at 44, 806 P.2d at 558 (emphasis in

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but to then argue that he was credible while prosecuting Jeremias.

original). The State asserts that Thomas "significantly undermined, if not implicitly overruled, Lord" Answering Brief at 64. The State notes that in Thomas this Court held that admission of preliminary hearing testimony of a non-testifying co-defendant, which implicated the defendant, did not violate the right of confrontation when admitted during the penalty phase of a capital trial. Answering Brief at 64 (citing Thomas, 122 Nev. 1365-67, 148 P.3d at 732). That State argues that Thomas is indistinguishable from Lord and it therefore "overruled Lord and this Court should clarify that the former is no longer good law." Answering Brief at 64. The State is wrong. Thomas did not overrule Lord. In fact, Thomas did not mention Lord. Moreover, although the State claims that Thomas is indistinguishable from Lord, it fails to acknowledge a critical difference in the two cases. In Lord, some of the co-defendant's statements at issue were made at a preliminary hearing, under oath, where the defendant's attorney had the right of cross-examination. Thomas, 122 Nev. at 1365, 148 P.3d at 730. Here, the statement was an unsworn statement given to a detective, where the ability for Jeremias's counsel to cross-examine the witness was obviously not present. Although Thomas briefly mentions that an officer testified about the co-defendant's statements during questioning, there is no indication that these statements were different than his preliminary hearing testimony and that the opportunity to question the witness during the preliminary hearing somehow did not

exist. The fact remains that in Summers v. State, 122 Nev. 1326, 1331, 148 P.3d 778, 782 (2006), which was issued the same day as Thomas, this Court explicitly referenced Lord and did not overrule that important case, but rather limited it to its facts. The facts of Lord are essentially identical to those presented here and the same result must follow. See Lord, 107 Nev. at 43-44, 806 P.2d at 557-58.

The State next claims that Lord is distinguishable because the evidence in that case was admitted to alleviate any lingering doubt the jurors may have had concerning their verdict of guilty, and Rios's statement here was offered as relevant character evidence and to impeach mitigating evidence. Answering Brief at 71. This argument is without merit. The jury was not given a limiting instruction and may very well have considered Rios's testimony to alleviate any lingering guilt, especially in light of credibility issues undermining the veracity of Zapata's testimony. The State presented Rios's statements concerning details of the offense which was relevant both to removing any lingering doubt as to guilt as well as establishing the aggravating circumstances alleged by the State and found by the jury. 15 ROA 3192. Lord remains indistinguishable from the facts of this case.

The State also claims that Jeremias was not prejudiced by Rios's unsworn, extrajudicial statement because Zapata testified at trial. Answering Brief at 72. Rios's statements, however, were not identical to Zapata's testimony and included many

details which were not testified to by Zapata. Most critically, Rios, in seeking to exonerate himself to the detectives, claimed that Jeremias was a violent person and that he was afraid that Jeremias would kill him. 15 ROA 3203-05. Zapata did not make these claims. Jeremias was denied the opportunity to confront these allegations through cross-examination and unable to challenge Rios's unsworn statements. Although the State asserts that these statements would be admissible under Lord, it fails to provide any supporting authority for that assertion. The fact remains that this was powerful evidence, presented without the benefit of cross-examination, based upon unsworn, extrajudicial statements of a person with an extreme motive to lie. The State relied extensively upon this evidence during its closing argument and should not not now claim that the evidence was unnecessary or unimportant. 15 ROA 3205.

As for the notice issue, the State argues that there was good cause to justify an unnoticed or untimely noticed witness and that Jeremias was not prejudiced by the lack of notice. Answering Brief at 73. This is not a case involving an untimely notice of witnesses and evidence. Rather, in this case the State failed entirely to give notice that it intended to introduce evidence of Rios's statements and testimony through Detective Long. There was no mention of this evidence in the Notice filed by the State on October 24, 2013. 4 ROA 708-13. There was no mention of the State's Amended Notice, which was filed on February 20, 2014. 5 ROA 990-1001. On

October 10, 2014, shortly before trial, the State filed a Second Amended Notice of Evidence To Support Intent To Seek Death Penalty. 5 App. 1017-1029. There was again no notice that the State intended to introduce Rios's unsworn statement to detectives. Contrary to the State's suggestion, this was not a case of an untimely notice. Rather, in this case no notice at all was provided as to this crucial evidence.

This Court permits introduction of evidence which is unnoticed in a Notice of Evidence In Aggravation only upon a showing of good cause and a lack of prejudice to the defendant. Nunnery v. State, 127 Nev. 749, 764-65, 263 P.3d 235, 246-47 (2011). Here, the State failed to make any showing of good cause. The State had access to Rios's unsworn statement long before trial and the evidence was within the State's control. The State failed to provide an excuse for the omission and failed to give reasons why the proper notice was not given. It is also relevant that the prosecutor who failed to give notice here is the same prosecutor who failed to give timely notice in Nunnery. A pattern of misconduct may be considered in determining the egregiousness of the error. See Brecht v. Abrahamson, 507 U.S. 619, 638 n9 (1993). The State also failed to show a lack of prejudice to Jeremias. As noted above and in the Opening Brief, admission of Rios's unsworn statements was in violation of Lord, 107 Nev. at 42, 806 P.2d at 557. Had notice of the State's intent to introduce these statements been provided, defense counsel could have conducted research on

the admission of a co-defendant's statements during a penalty trial and could have objected under Lord to the admission of this evidence. Jeremias could have also investigated and presented evidence pursuant to NRS 175.552(3), to refute Rios's unsworn allegations.

This Court recognizes that the due process of the United States Constitution requires the State to give prior notice of the evidence it intends to introduce during a capital penalty trial. Mason v. State, 118 Nev. 554, 562, 51 P.3d 521, 525-26 (2002); Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 723-25 (1991). The State failed to meet this constitutional obligation.

Jeremias's substantial rights were violated by the admission of Rios's unsworn, extrajudicial statements to detectives. This evidence was highly prejudicial and was relied upon extensively by the State during closing arguments. The proper remedy is to reverse Jeremias's death sentence and remand the case for a new penalty trial.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, confrontation, and cross-examination were violated by the district court's admission of testimonial hearsay evidence during the penalty phase of the trial, including the evidence of Rios's statements to detectives, Detective

Long's testimony about Jeremias's alleged criminal history, and Exhibit 36 which was offered in support of the detective's testimony. In response, the State asserts that "[t]he Sixth Amendment right of confrontation is a trial right and has no application to a penalty hearing or sentencing." Answering Brief at 74-75 (citing Summers, 122 Nev. at 1333, 148 P.2d at 783). Jeremias submits that Summers is contrary to Crawford, 541 U.S. 36, and must be overruled.

In the Opening Brief, Jeremias provided case authority supporting his assertion that under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Ring v. Arizona, 536 U.S. 584 (2002), Crawford must apply to the eligibility phase of a capital penalty trial and should apply to the selection phase, at least in cases which are not bifurcated. The State argues that authority cited in Summers supports its claim that there is no right to confrontation during the penalty phase of a trial. Answering Brief at 75. It urges this Court to follow Williams v. New York, 337 U.S. 241, 242-52 (1949), by allowing hearsay evidence at capital penalty trials. Answering Brief at 65, 77.

Summers should be overruled as to this issue. The United States Supreme Court has repeatedly recognized that rights once thought of as applying to the culpability phase of a trial also apply to the penalty phase of a capital trial. See Ring, 536 U.S. 584 (right to jury trial and right to have elements proven beyond a reasonable doubt); Simmons v. South Carolina, 512 U.S. 154, 169 (1994) (need for

accurate jury instructions); Turner v. Murray, 476 U.S. 28, 33 (1986) (right to question jurors regarding possible bias); Morgan v. Illinois, 504 U.S. 719, 728-29 (1992) (same) Bullington v. Missouri, 451 U.S. 430 (1981) (protection against double jeopardy); Estelle v. Smith, 451 U.S. 454, 461-63 (1981) (right against self-incrimination). The right of confrontation is just as important as these other rights. The Confrontation Clause "ensure[s] reliability of evidence" by allowing the defendant to challenge the State's evidence "in the crucible of cross-examination," Crawford, 541 U.S. at 61, which the Court has described as "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970) (internal quotation marks omitted). It allows defendants to probe whether evidence or testimony is fabricated, exaggerated, mistaken, or confused. When the death penalty is at issue, this truth finding function is especially critical because there is a need for "a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). The Confrontation Clause is a fundamental rule, Pointer v. Texas, 380 U.S. 400, 403 (1965), which must be applied to death penalty proceedings.

Some states, such as Texas and Louisiana, see Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988), determine death eligibility in the guilt phase. Others, like Nevada, place this determination in the penalty phase. The Sixth Amendment

protections afforded should not disappear based upon the use of one scheme over another. The eligibility determination, and the selection determination in cases where the penalty phase is not bifurcated, must be based upon evidence against an accused which is admitted in accord with the constitution. Williams, 337 U.S. 241, is not to the contrary. First, Williams was issued prior to Furman v. Georgia, 408 U.S. 238 (1972), and the modern era of the death penalty. Williams concerned only selection of the death penalty under a statute which allowed capital punishment in all cases of first degree murder. Williams, 337 U.S. at 242 n.2. The case did not concern the situation where the State offered evidence to establish a new finding of fact which was necessary to establish eligibility for the death penalty. See Specht v. Patterson, 386 U.S. 605, 606-08 (1967). Second, the Confrontation Clause applies, by its terms, to "all criminal prosecutions," U.S. Const. amend. VI, and a capital penalty trial is certainly part of a criminal prosecution. "Because the death penalty is unique 'both in its severity and its finality,'" the United States Supreme Court has repeatedly "recognized an acute need for reliability in capital sentencing proceedings." Monge v. California, 524 U.S. 721, 732 (1998) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.)); Caldwell v. Mississippi, 472 U.S. 320, 340 (1985). That need for reliability exists in Nevada capital cases. Jeremias respectfully submits that Summers should be overruled and the death sentence imposed in this

case should be vacated. The State's use of testimonial hearsay evidence for both the eligibility and selection determinations in the penalty trial was pervasive and prejudicial. The State fails to establish that admission of this evidence was harmless beyond a reasonable doubt.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty trial, right to be free from cruel and unusual punishment, and rights under the Second Amendment were violated by the district court's admission of evidence concerning Jeremias's possession of firearms which were unrelated to the instant case. The State acknowledges that substantial evidence of Jeremias's possession of guns was admitted during the penalty phase, but argues that the evidence was admissible and that its admission did not constitute plain error. Answering Brief at 79-82.

As to whether this Court may address this issue as a matter of plain error, Jeremias submits that review is appropriate under NRS 177.055(2)(c), which requires this Court to review the record on appeal to determine whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor.

Likewise, this issue may be considered as a matter of plain and constitutional error. Olano, 507 U.S. at 730-36; Chapman v. California, 386 U.S. 18, 23-24 (1967).

The State argues that evidence of gun possession was relevant because the jury was entitled to consider all aspects of Jeremias's criminal background. Answering Brief at 80. Most of the allegations of gun possession, however, did not result in convictions for gun offenses and should therefore not have been considered part of his criminal history. Specially, Detective Long presented testimony, along with an exhibit, which informed the jury that on July 1, 2006, Jeremias was arrested after driving his car across a park. 13 ROA 2820. After police stopped the car, they recovered two firearms: a .44 Magnum Hawes firearm and a .45 caliber Sig Sauer GSR semiautomatic handgun. 13 ROA 2820. The officer asserted that the guns were not registered. 12 ROA 2821. He was arrested for three misdemeanor offenses. 13 ROA 2821. The charges were dismissed as part of a negotiation with another case. 13 ROA 2826. No criminal conviction exists based upon this allegation.

The detective next claimed that on August 19, 2006, Jeremias was stopped for a traffic violation and officers found a silver briefcase in the car, learned that it belonged to Jeremias's uncle Randy, called him, and learned there was a gun in the briefcase. 13 ROA 2822. Randy said the gun belonged to another person who worked with him at a bailbonds company. 13 ROA 2823. The gun was impounded.

13 ROA 2823. It was a Ruger semiautomatic P950, 9 mm handgun and the serial number had been removed. 13 ROA 2823. Jeremias was arrested for possession of a firearm with an altered serial number. 13 ROA 2824. The case was negotiated to a misdemeanor offense and he received a six-month suspended sentence, a fine, and was ordered to stay out of trouble. 13 ROA 2825. This misdemeanor offense was of a minimal nature and was of insignificant worth given the circumstances and the highly prejudicial impact of the evidence.

As to the third matter, on January 25, 2007, detectives conducted an investigation concerning allegations that drugs were being sold at various locations. 13 ROA 2828-29. Search warrants were obtained on all of the addresses and officers found a shotgun, a .22 handgun, an AK47 assault rifle, and a Colt .38 semiautomatic handgun at Zapata's house, where Jeremias was arrested for trafficking in a controlled substance. 13 ROA 2829; 26 ROA 5532-33. He ultimately entered a plea to attempt possession of a controlled substance. 13 ROA 2830. Although the State claims that Jeremias was charged with a gun related offense related to this incident, and cites to 26 ROA 5530 as support, review of this matter, including reference to 26 ROA 5530, shows that Jeremias was only charged with trafficking in a controlled substance and was never charged with a gun related offense related to this matter. Thus, there is no

support for the State's assertion that it was necessary to disclose evidence of gun possession to explain Jeremias's alleged criminal history.

The State argues that the Second Amendment is inapplicable to the issue of whether evidence of gun possession is improper in a capital penalty trial. Answering Brief at 81-82. The State acknowledges that in District of Columbia v. Heller, 554 U.S. 570 (2008), the United States Supreme Court held that a law prohibiting possession of handguns violates the Second Amendment. Answering Brief at 81. The State argues that the constitutional right to possession guns does not mean that evidence of gun possession cannot be used against an accused at trial. Answering Brief 81 (citing Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993)). In Mitchell, the Supreme Court considered whether evidence of words spoken by a defendant could be admitted in support of a an enhancement to aggravated battery because the defendant intentionally selected his victim on account of the victim's race. Id. at 479-80. The defendant argued that the enhancement violated the First Amendment by punishing offensive thought and by allowing evidence of the defendant's speech. Id. at 482. The Supreme Court rejected this argument and held that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Id. at 489. The gun evidence, here, however, was not admitted to establish the elements of a crime or to prove motive or intent. Rather, the

evidence was admitted to establish that Jeremias was of a bad character and to imply that he had a long history of violent conduct. Use of such evidence violates the Second Amendment.

The Second Amendment is not strictly construed to protect only the right to possess firearms for self-defense, but extends to other related activities. In Teixeira v. County of Alameda, __ F.3d __, 2016 U.S. App. Lexis 8925 (9th Cir. 5/16/2016), the Ninth Circuit Court of Appeals explained that Heller was not intended to serve as an exhaustive historical analysis of the full scope of the Second Amendment. Teixeira, at ___. The right recognized the natural right of resistance and self-preservation, and extended to commerce in firearms. Id. at ___ (quoting 1 William Blackstone, *Commentaries* 139 (1765)). Allowing the State to use evidence of mere firearm possession as evidence of bad character or bad acts, which are unrelated to the charges at issue, punishes a right guaranteed by our Constitution and is therefore unconstitutional.

In his Opening Brief, Jeremias noted that even before Heller, courts have long recognized that the introduction of testimony concerning dangerous weapons found among the belongings of a person charged with a crime, no part of which depends upon the use or ownership of the weapon, has consistently been regarded as prejudicial error requiring a new trial. See United States v. Reid, 410 F.2d 1223, 1227

(7th Cir. 1969); Thomas v. United States, 376 F.2d 564, 567 (5th Cir. 1967); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967); Brubaker v. United States, 183 F.2d 894, 898 (6th Cir. 1950); United States v. Peltier, 585 F.2d 314, 327 (8th Cir. 1978). The State fails to address any of this authority in its Answering Brief.

This Court recognizes that evidence of possession of weapons not involved in an offense is irrelevant and inadmissible. Bean v. State, 81 Nev. 25, 35, 398 P.2d 251, 257 (1965). It was error to allow the evidence here. The highly prejudicial evidence presented here painted Jeremias as a violent person and furthered the State's assertion that he would be dangerous in the future. The sentence of death should be vacated based upon the admission of this evidence.

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

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment were violated because of prosecutorial misconduct.

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

Jeremias contends that the prosecutor committed misconduct through his questioning of a witness which informed the jury that a person sentenced to a term of

life without the possibility of parole could be released on parole, despite a Nevada statute and jury instructions which were to the contrary. The State argues that questioning of the witness was proper. Answering Brief at 84, 86.

The State acknowledges that the prosecutor summarized the case at issue in Geary v. State, 110 Nev. 261, 269, 871 P.2d 927, 932 (1994), while cross-examining former Parole Board member Tami Bass. Answering Brief at 88. In doing so, the prosecutor explicitly informed the jury that a person sentenced to a term of life without the possibility of parole had his sentence commuted to a term of life with the possibility of parole and was released from custody:

> Q. [Geary] was an inmate sentenced in the State of Nevada for life without prison for a stabbing death murder.
>
> A. Life without parole you mean?
>
> Q. Yes, sir. [sic].
>
> A. Okay.
>
> Q. And he was [inaudible] life with, and the warden of the prison testified before the Parole Commission in 2000 that he was a model inmate.
>
> A. Okay.
>
> Q. And he was released from custody.
>
> A. Okay.

14 ROA 3023-24. The State asserts that the prosecutor asked about the Geary case with the purpose of demonstrating that mistakes can occur during the parole review process and that competent review of applications for parole was contingent of the quality of the individual members of the parole board. Answering Brief at 88 (citing 14 ROA 3024). The State fails to explain why disclosure of the facts that Geary was sentenced to a term of life without the possibility of parole, and that sentence was commuted to a sentence allowing parole, were relevant to achieving the State's alleged purpose. That is, if the State's point at trial was to establish that mistakes can be made by the Parole Board in determining whether a person should be released, it was entirely unnecessary to inform the jury that Geary had once received a sentence of life without the possibility of parole and had received a commutation – a situation that could not happen in this case because of the substantial statutory change which now prohibits commutation of a sentence of life without the possibility of parole.

The State attempts to distinguish this Court's opinions in Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996) and Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985), by noting that those opinions addressed a commutation instruction and involved unique circumstances. Answering Brief at 86-87. The underlying principle of those case, and subsequent cases, remains the same: the jury must not be misled concerning commutation of a sentence of life without the possibility of parole. See

Nika v. State, 124 Nev. 1272, 1294, 198 P.3d 839, 854 (2008) (finding no error in that case based in part because the prosecutor did not argue to the jury that the defendant could qualify for parole); Leonard v. State, 117 Nev. 53, 80, 17 P.3d 397, 414 (2001) (same); Sonner v. State, 114 Nev. 321, 325-26, 955 P.2d 673, 676 (1998) (same). Here, in contrast to the cases cited by the State, the prosecutor, through the artful use of cross-examination of an expert witness, told the jurors that a sentence of life without the possibility of parole could be commuted and the defendant released on parole. This portion of the examination was entirely unnecessary to establish the purported goal of informing the jury that the parole board sometimes makes mistakes.

The State does not contest the fact that under NRS 213.085(1), if Jeremias had been sentenced to life without the possibility of parole, his sentence could not be commuted to a sentence allowing parole. The State does not contest the fact that the jury here was not told of the important statutory change which took place between the time of the offense in Geary and the time of the offenses at issue here. Under these circumstances, the State's examination was improper and highly prejudicial. The narrative presented by the prosecutor to the jury, especially when coupled with Rios's testimony that Jeremias was highly dangerous, created a great probability that the jury was misled into believing that Jeremias could be released from custody if he did not receive the death penalty. "Under Simmons v. South Carolina, 512 U.S. 154 (1994),

and its progreny, 'where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole,' the Due Process Clause 'entitles the defendant "to inform the jury to his parole ineligibility either by jury instruction or in arguments by counsel."'" Lynch v. Arizona, 195 L.Ed.2d 99, 100 (2016) (quoting Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (in turn quoting Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality opinion))). Precedent from the United States Supreme Court forecloses the argument that future legislative reform could justify the refusal to give a parole-eligibility instruction. Lynch, 195 L.Ed.2d. at 102 (citing Simmons, 512 U.S. at 166). A defendant is entitled to inform the jury that parole is unavailable, and the dispositive fact is that ineligibility is determined by the law at the time of trial. Lynch, 195 L.Ed.2d at 102 (citing Ramdass, 530 U.S. at 171).

"Because a death sentence is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether it is appropriate in a particular case." Coleman v. Calderon, 210 F.3d 1047, 1050 (9th Cir. 2000). See also Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). The Eighth and Fourteenth Amendments require that the jury's attention be directed to the specific circumstances of the crime and the characteristics of the defendant. Coleman, 210 F.3d at 1050. Instructions concerning commutation may not be misleading. Id.

Such instruction can discourage the jury from giving due weight to a defendant's mitigating evidence. Id. A jury must not be led to believe that the only way it can avoid a defendant's release is to sentence him to death. Id. A defendant is prejudiced when the jury is invited to speculate that the only way it could be assured that a defendant would not be released would be to sentence him to death. Id. Here, the prosecutor's questioning of the witness misled the jury about commutation and allowed the jury to speculate that it could only be assured that Jeremias would not be release if it sentenced him to death. These actions were misconduct. See United States v. Morris, 568 F.2d 396, 401 (5th Cir.1978) (explaining that an attorney "may not inject into his argument any extrinsic or prejudicial matter that has no basis in the evidence" because such improper "testimony" will "increase the apparent probative force of [the attorney's argument] by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position."); United States v. Young, 470 U.S. 1, 18-19 (1985) ("prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.").

A prosecutor's misleading and inflammatory arguments may violate a defendant's due process right to a fair trial. Darden v. Wainwright, 477 U.S. 168, 181-82 (1986). Due process is violated if a prosecutor's remarks infect the trial with

unfairness. Hall v. Whitley, 935 F.2d 164, 165 (9th Cir. 1992); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). A prosecutor's repeated statements regarding the likelihood of a defendant's release from prison by parole were he to be sentenced to life without the possibility of parole violates the defendant's right to a fair trial and results in a substantial and injurious effect on the jury's sentencing decision. Sechrest v. Ignacio, 549 F.3d 789, 808 (9th Cir. 2008). Reversal of the death sentence is warranted based upon the misleading examination conducted here.

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

Jeremias contends that the prosecutor committed misconduct by arguing that Brian Hudson's life only had value if Jeremias received the death penalty because he should be sentenced to life without the possibility of parole for Paul Stephen's death alone. See 15 ROA 3231. The State argues in response that the argument was proper and that reversal is not mandated based upon plain error. Answering Brief at 89-90.

In the Opening Brief, Jeremias set forth ample authority holding that arguments such as that presented here are improper. See e.g. Drayden v. White, 232 F.3d 704, 712-13 (9th Cir. 2000); State v. Muhammad, 678 A.2d 164, 179 (N.J. 1996); State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995) (en banc); Lesko v Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991). The State fails to address this authority. Likewise, the State fails to cite a single case holding that it is proper for a prosecutor to argue that a victim's

life is meaningless unless the defendant receives the death penalty. Reversal of the sentence of death is warranted based upon this flagrant misconduct.

L. The death penalty is unconstitutional.

Jeremias contends his state and federal constitutional rights to due process of law, equal protection, and right to be free from cruel and unusual punishment were violated because the death penalty is unconstitutional.

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

Nevada's rate for imposition of the death penalty far exceeds that of most other states. Despite the constitutional mandate that a state's death penalty sentencing scheme must genuinely narrow the class of persons eligible for the death penalty, Nevada has a large number of aggravating circumstances, which make the vast majority of first degree murders eligible for the death penalty, and this Court construes many if not most of those aggravators broadly. See Arave v. Creech, 507 U.S. 463, 474 (1993); Zant v. Stephens, 462 U.S. 862, 877 (1983). Imposition of death sentences in Nevada is just as arbitrary and capricious as those systems found unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972). In response to Jeremias's constitutional challenges to Nevada's death penalty scheme, the State notes that "this Court has repeatedly concluded that Nevada's death penalty scheme sufficiently narrows the class of persons eligible for the death penalty." Answering

Brief at 92 (citations omitted). While it is true that this Court has repeatedly stated this conclusion, it has never done so after a thorough and thoughtful consideration of the issue.

Clark County was recently recognized by United States Supreme Court Justice Breyer as one of a handful of counties in the entire country which has imposed five or more death sentences between 2004 and 2009, and between 2010 and 2015. See Glossip v. Gross, 135 S.Ct. 2726, 2761, 2779-80 (2015) (Breyer, J., dissenting). The State fails to directly confront this issue in its Answering Brief or otherwise defend the fact that Clark County far exceeds the national average for imposing death sentences.

Jeremias invites this Court to conduct the in-depth analysis of its death penalty scheme that it has not previously performed. A true analysis of the breadth and scope of the aggravating circumstances establishes that Nevada's scheme fails to perform a narrowing function and therefore violates the Eighth and Fourteenth Amendments of the federal constitution.

2. The death penalty is cruel and unusual punishment.

"[I]mposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive

and cruel and unusual punishment violative of the Eighth Amendment.'" Baze v. Rees, 553 U.S. 35, 85 (2008) (Stevens, J., conurring) (quoting Furman, 408 U.S. at 312)). The death sentences at issue here, like the numerous other death sentences in this state, as well as those imposed in the few remaining states that still impose this sentence, remains pointless and needless, and therefore violates the Eighth Amendment.

3. Executive clemency is unavailable.

The death sentence here is invalid because executive clemency in Nevada is essentially non-existent for those facing the death penalty. The State argues that there is no constitutional right to executive clemency and relies on Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 285 (1998) in support. Answering Brief at 93. In that case, the Supreme Court addressed procedural requirements for clemency proceedings. It did not hold that clemency procedures can be eliminated. More recent authority, which remains unaddressed by the State, stresses the importance of clemency in capital cases: "'Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.'" Harbison v. Bell, 556 U.S. 180, 192 (2009) (quoting Herrera v. Collins, 506 U.S. 390, 411-12 (1993)). "Far from regarding clemency as a matter of mercy alone, [the Court has] called it the fail safe

in our criminal justice system." Id. (internal quotations omitted). Nevada does not have a functioning clemency procedure for death penalty cases. Jeremias's death sentence must therefore be vacated.

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

The district court abused its discretion and erred in numerous decisions, as set forth in the Opening Brief and above. These improperly rulings violated Jeremias's rights, both singularly and cumulatively. His judgment and sentence of death should therefore be vacated.

II. CONCLUSION

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

DATED this 7th day of July, 2016.

Respectfully submitted,

/s/ JONELL THOMAS
By:_____

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CERTIFICATE OF COMPLIANCE

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

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

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(B)(ii). The relevant portions of the brief are 16,150 words.

4. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction

. . .

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

DATED this 7th day of July, 2016.

/s/ JONELL THOMAS

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 7th day of July, 2016, a copy of the foregoing Reply Brief was served as follows:

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