

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH JEFFRIES,
Defendant/Appellant,
vs.
THE STATE OF NEVADA,
Plaintiff/Respondent.

CASE NO. 68338

District Court Case No. 02-7431

Dept.: XX

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APPELLANT'S OPENING BRIEF

Appeal from a Final Judgment of Conviction in a Criminal Case
Eighth Judicial District Court, Clark County, Nevada
The Honorable J. Charles Thompson, District Judge

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vs.
THE STATE OF NEVADA,
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CASE NO. 68338
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NRAP 26.1 DISCLOSURE

The undersigned counsel of record hereby certifies that the following are persons who must be disclosed pursuant to Nevada Rules of Appellate Procedure (“NRAP”) 26.1(a). No corporate or other entities are nongovernmental parties in this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

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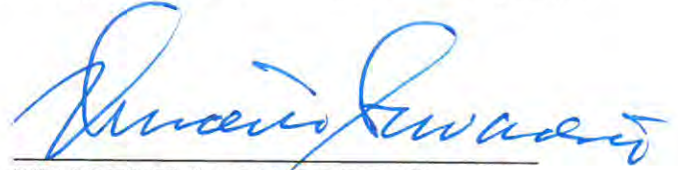
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2.
JURISDICTIONAL STATEMENT

A.
Supreme Court

This Court has jurisdiction in this matter pursuant to Nevada Revised Statutes (“NRS”) 177.015(3) in that this is an appeal from a final judgment of conviction in a criminal case. This Court has jurisdiction to review the district court’s denial of the Defendant’s Motion for New Trial pursuant to NRS 177.015(1)(b).

B.
Timeliness of Appeal

The written Judgment of Conviction was entered by the district court in this case on June 2, 2015. AA, Vol. 3, pp. 701-702. The Defendant filed his Notice of Appeal on June 29, 2015. AA, Vol. 3, pp. 703-705. Therefore, this appeal is timely brought. NRAP 4(b)(1)(A).

C.
Final Order

This is an appeal from a final judgment of conviction in a criminal case. AA, Vol. 3, pp. 701-702.

3.
ROUTING STATEMENT

This case is presumptively retained by the Supreme Court in that this is a direct appeal from a judgment of conviction in a criminal case based upon a jury verdict finding the Defendant guilty of a category A felony. NRAP 17(b)(1).

4.
ISSUES PRESENTED

- I. Whether the district court abused its discretion in denying the Defendant's Motion for a New Trial based upon juror misconduct?
 - A. Whether objective evidence established that juror misconduct in accessing and discussing extraneous information regarding punishment occurred during deliberation?
 - B. Whether there is a reasonable probability that juror misconduct prejudiced the Defendant's rights to due process and a fair trial with respect to the lesser-included offense of voluntary manslaughter; and therefore, affected the verdict?
- II. Whether, in the alternative, the failure of defense counsel to request an evidentiary hearing concerning juror misconduct was objectively unreasonable; and therefore, deprived the Defendant of effective assistance?
- III. Whether the district court abused its discretion in refusing to provide the jury with supplemental clarifying instruction regarding an essential element of the offense of conviction in response to the jury's expression of confusion with respect thereto?
- IV. Whether the district court erred in denying the Defendant's oral motion for mistrial based upon prosecutorial misconduct?
 - A. Whether the prosecutor engaged in prejudicial misconduct during

summation by arguing that the Defendant had endeavored to corruptly influenced the trial testimony of a prosecution witness?

B. Whether the prosecutor engaged in prejudicial misconduct during summation by vouching for the same prosecution witness?

V. Whether the Defendant's conviction must be reversed as a result of cumulative error?

5. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a final judgment of conviction based upon a jury verdict following trial in a criminal case, finding the Defendant guilty of the offense of second degree murder with use of a deadly weapon in violation of NRS 200.010, 200.030, 193.165.

B. Course of Proceedings and Disposition Below

On February 14, 2012, a one count Information was filed in the Eighth Judicial District Court charging Defendant/Appellant Michael Joseph Jeffries ("Michael" or "Mr. Jeffries") with the offense of murder with use of a deadly weapon ("open murder"), a category A felony in violation of NRS 200.010, 200.030, 193.165. AA, Vol.1, pp. 87-89.¹ The offense was alleged therein to have been committed on or

¹ Citations to the Appellant's Appendix are herein designated "AA."

about October 23, 2011 at and within Clark County, Nevada. *Id.* The named decedent was Eric Allen Gore. *Id.*

On March 15, 2012, Mr. Jeffries was arraigned; and to the charge set forth in the Information, entered a plea of not guilty.

On April 19, 2012, Mr. Jeffries, theretofore in custody since his arrest on October 23, 2011, was ordered released pursuant to a bail bond in the amount of \$500,000.

Trial began in the Eighth Judicial District Court on March 23, 2015 before the Honorable J. Charles Thompson, Senior District Judge and a jury. AA, Vol. 1, pp. 93. *et seq.* On March 26, 2015, a verdict was returned finding Mr. Jeffries guilty of second degree murder with use of a deadly weapon, a category A felony. AA, Vol. 3, pp. 671, 677. Mr. Jeffries was thereupon remanded forthwith. AA, Vol. 3, p. 680.

On April 2, 2015, Mr. Jeffries filed a Motion for New Trial, assigning as grounds that prejudicial juror misconduct in accessing and discussing extraneous information regarding punishment had occurred during deliberations. On April 10, 2015, the state filed an Opposition to that motion. On April 14, 2012, the district court conducted a non-evidentiary hearing and thereupon denied the motion. AA, Vol. 3, pp. 683-685.

On May 27, 2015 Mr. Jeffries was (orally) adjudged guilty by the district court of second degree murder with use of a deadly weapon, (AA, Vol. 3, pp. 688, 698),

and was thereupon sentenced, for the murder, to serve a term of imprisonment for life with parole eligibility after a minimum of ten (10) years of imprisonment have been served. AA, Vol. 3, pp. 698-699, 702. He was further sentenced, for the use of a deadly weapon, to serve a consecutive term of imprisonment for seventy-two (72) months with parole eligibility after twelve (12) months of imprisonment have been served. AA, Vol.3, pp. 699, 702. Mr. Jeffries was further ordered to pay restitution in the amount of \$4,651.81. AA, Vol. 3, p. 699. He was given 424 days credit for time served before release on bond. AA, Vol. 3, p. 699.

Written Judgment of Conviction was filed by the district court on June 2, 2015. AA, Vol. 3, pp. 701-702.

On June 29, 2015, the Defendant timely filed his Notice of Appeal. AA, Vol. 3, pp. 703-705.

6. **STATEMENT OF FACTS**

The Evidence Adduced at Trial

On Saturday, October 22, 2011, Michael Jeffries and his fiancé, Mandy Ames (“Mandy”) – who were then residing together at Michael’s single-family dwelling house located at 8745 Don Horton Avenue, Las Vegas, Nevada (AA, Vol. 1, pp. 114, 126, 146, 208, 215) – invited a small group of friends to join them at their residence that evening for a social get-together. AA, Vol. 1, pp. 122-123, 130-131. In attendance were the couple’s friends Beate Arrington, Kevin Arrington, Megan

Moffitt, Katie Sims and Leah Armor. AA, Vol. 1, pp. 210-211; Vol. 2, pp. 301-302, 318, 320, 322; AA, Vol. 3, pp. 541-542. Also present in the home at the time were Mandy's then-13 year old daughter from a previous marriage, Brittany Ames ("Brittany"),² and Mandy's then-2 year old niece, Mary Jane (who Michael, Mandy and Brittany were temporarily taking care of).³ AA, Vol. 1, pp. 111, 119-120, 122-123, 200; Vol. 2, p. 321.

Michael, Mandy and their adult guests were talking, playing pool, listening to music, and generally having a pleasant evening. AA, Vol. 1, p. 123, 127-128; Vol. 2, pp. 303, 307, 321. Cocktails were served. AA, Vol. 2, p. 324. And a "happy," "positive," "relaxing," and "fun" atmosphere prevailed. AA, Vol 1, pp. 132, 135, 217; Vol. 2, p. 322.

Later that night, Eric Gore ("Eric") came to the house. AA, Vol. 1, pp. 123-124, 126, 212; Vol. 2, pp. 304-306, 322. He and Michael were "very close friends"; indeed, "best friends" since childhood; frequently spent time together engaging in various activities; and communicated with one another on a daily basis. AA, Vol. 1, pp. 124-125, 213, 215; AA, Vol. 2, p. 306.

² Brittany – who then resided with her father during the week, generally spent the weekends at that time with her mother and Michael Jeffries, and had her own room at Michael's house for that purpose. AA, Vol. 1, pp. 114-117, 119-120, 132.

³ By approximately 9:30 P.M., Mary Jane had been put to bed in Brittany's bedroom. AA, Vol. 1, pp. 123, 131-132. She thereafter slept through all of the subsequent events of October 22-23, 2011 described herein. AA, Vol. 1, p. 142.

By all accounts, when he arrived at Michael's home, Eric was obviously intoxicated. AA, Vol. 1, pp. 128, 216. And he continued to drink heavily after his arrival. AA, Vol. 1, pp. 216-217; Vol. 2, p. 324. Indeed, toxicology testing ultimately determined that Eric had a Blood Alcohol Content level of .276 (3 ½ times the legal driving limit in Nevada); and had pharmacologically active levels of both marijuana and the prescription medication "Xanax" in his system that night. AA, Vol. 2, pp. 369-370, 380.⁴

By all accounts, Eric was also in an agitated state; exhibited an exaggerated "macho" demeanor; and was "loud and obnoxious," (AA Vol. 1, pp. 133, 216; Vol. 2, p. 323; Vol. 3, p. 544.); causing both Michael and Mandy to repeatedly ask him to calm down and lower his voice. AA, Vol. 1, p. 133, 216.

Before long Eric became embroiled in an altercation with Megan Moffitt ("Megan"), (AA, Vol. 1, pp. 135, 217-219; Vol. 2, pp. 307, 325; AA, Vol. 3, pp. 542-548); screaming extremely vulgar and abusive profanities at her; addressing her in a very confrontational manner; and representing that he was a member of "Hell's Angels" in doing so.⁵ AA, Vol. 2, pp. 314, 325-327; Vol. 3, pp. 544-545.

⁴ Clark County Medical Examiner Dr. Lary Simms testified that the synergistic effect of this combination of substances diminishes an individual's ability to engage in rational decision-making; changes an individual's normal perceptions and emotions; and renders an individual's behavior unpredictable. AA, Vol. 2, p. 380.

⁵ By all accounts, this altercation concerned what was actually a trivial matter.

In the process, the heavily-tattooed, 6 foot, 5 inch tall Eric physically encroached upon the 5 foot tall Megan – a “little girl” who is “very small in stature.” AA, Vol. 2, p. 331; Vol. 3, pp. 544, 546. And, as a result, Beate Arrington (“Beate”) – who was seated next to Megan on a couch at the time – became quite concerned; perceiving that Eric was “itching to get into it with someone;” and anticipating, on the basis of her observations, that he was about to physically assault Megan. AA, Vol. 3, pp. 544, 546. She therefore put her arms around Megan and laid her across her lap in order to physically protect Megan from Eric, and asked Michael to get Eric away from them. AA, Vol. 2, pp. 308, 326; Vol. 3, pp. 544, 546.

Michael then walked Eric outside to the backyard of the residence, (AA, Vol. 1, p. 134; Vol. 3, pp. 544, 545); whereupon Eric told Michael that he was going to physically batter Megan. AA, Vol. 1, p. 23. And in an effort to defuse the situation, Michael endeavored to calm Eric down. AA, Vol. 1, p. 134; Vol. 3, pp. 544-545.

Nevertheless, when the two thereafter re-entered the residence, Eric resumed his loud and disruptive behavior; requiring Michael to continue to endeavor to calm him, to no avail. AA, Vol. 1, p. 136. In so doing, Michael was being “friendly . . . but assertive”; “reminding [Eric] that . . . he need[ed] to calm down because he was in his [(Michael’s)] house.” AA, Vol. 1, p. 137. However, Eric refused to desist; and, as a result, the two “became . . . more aroused towards each other.” AA, Vol. 1, pp. 137-138.

As a result of Eric's behavior, the other guests decided to leave. AA, Vol. 1, pp. 134, 217-219; AA, Vol. 2, pp. 308-310, 315, 325-326, 330; AA, Vol. 3, p. 547; AA, Vol. 1, p. 48. And when they thereupon exited the house together, Eric followed them out to the front of the house, screaming obscenities at them. AA, Vol. 2, p. 332; Vol. 3, pp. 547-548.

Upon his re-entry, the only persons now remaining in the home were Michael, Mandy, 13 year old Brittany, 2 year old Mary Jane, and Eric Gore. AA, Vol. 1, pp. 143, 220. Eric was "riled up" and continued to rant and rave about his confrontation with Megan Moffitt; loudly referring to her in profoundly profane, pejorative terms, (AA, Vol. 1, pp. 220-221); and vociferously complaining that Michael had failed to take his side in the matter of his dispute with her. AA, Vol. 1, p. 24. Meanwhile Michael, in a continuing futile effort to calm Eric down, repeatedly urged him to "let it go." AA, Vol. 1, pp. 220-221.

Both Mandy and Michael asked Eric to leave the house, but he refused to do so; responding that "he didn't have to." AA, Vol. 1, pp. 221-224, 227-228. Concerned about the effect of Eric's continuing disruptive behavior and vulgarity upon his fiancé, 13 year old Brittany, and 2 year old Mary Jane, (AA, Vol. 1, p. 26), Michael thereupon repeatedly demanded that Eric leave the home. AA, Vol. 1, p. 224. And as Brittany testified at trial, it was her first-hand perception that, in doing so, Michael was trying to be "very protective." AA, Vol. 1, p. 84.

But Eric defiantly persisted in his refusal to leave the residence, (AA, Vol. 1, pp. 25-26, 224), causing a heated verbal argument between the two men to ensue. AA, Vol. 1, pp. 224-225. And when Eric thereupon threatened to physically assault Michael, (AA, Vol. 1, pp. 24, 26, 48), a fistfight broke out, and both men wound up struggling on the kitchen floor. AA, Vol. 1, pp. 138-139; Vol. 2, p. 283.

Michael thereupon got up from the floor and retreated to his master bedroom, with Eric in immediate pursuit. AA, Vol. 1, pp. 83, 139). He therein retrieved a pistol from under the mattress of his bed, (AA, Vol. 2, p. 283); believing that if he displayed the firearm, Eric would realize that Michael was serious about asserting his dominion over the premises and would finally agree to leave. AA, Vol. 1, p. 27.⁶

However, upon retrieving his pistol, Michael was immediately confronted with Eric aggressively screaming and “charging” at him as he stood near the bedroom door. AA, Vol. 1, pp. 1-4, 27-28, 31-33. At that point, Michael therefore had to consider – within a split second –whether, in charging at him, Eric intended to wrest the pistol from him and kill or seriously injure him. AA, Vol. 1, p. 34. Michael thereupon fired a single shot as Eric closed within 2 feet of him. AA, Vol. 1, pp. 27-28, 31-33, 141; Vol. 2, pp. 465-466.

⁶ Michael, the son of a former Las Vegas Metropolitan Police Department (“LVMPD”) detective, was trained in the use of firearms. AA, Vol. 2, pp. 464-465. He had a Nevada permit to carry concealed weapons, and the pistol in question was duly registered. AA, Vol. 2, p. 407.

The foregoing circumstances were corroborated by the subsequent investigation of the physical evidence at the scene conducted by Las Vegas Metropolitan Police Department (“LVMPD”) homicide detectives and crime scene analysts as well as the autopsy conducted by the medical examiner. Thus, as the detectives and police analysts testified at trial, upon their arrival, the house was in “disarray” – consistent with a “struggle” having taken place (AA, Vol. 2, p. 445, 473) – and Eric was found lying on the floor at the spot where he had fallen, just outside the master bedroom door, lying on top of blood deposited at that location, with his head toward the master bedroom and his feet toward the kitchen area. AA, Vol. 2, pp. 278-279, 288, 291, 414. And as they further testified, based on the location of the spent cartridge casing; the location of the blood on the floor; the original location of the body when found by first responders; the trajectory of the spent bullet; and the testimony of the medical examiner that Eric was shot at a distance of 2-3 feet, the physical evidence at the scene showed that Eric fell to the floor *behind* the location at which Michael was standing when he fired the weapon; indicating forward momentum on the part of Eric toward Michael at the time that the shot was fired. AA, Vol. 3, pp. 523-525, 528.

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As a result of the single gunshot fired by Michael Jeffries, Eric Gore was killed. AA, Vol. 2, pp. 345-346.⁷

The Instructions to the Jury

The district court explained to the jury that the charge of “open murder” contained in the Information “includes Murder of the First Degree, Murder of the Second Degree, and Voluntary Manslaughter”; and that it was their duty “to apply the rules of law contained in the [] instructions to the facts of the case and determine whether or not the defendant is guilty of any offense and, if so, of which offense.” Instruction Number 3, AA, Vol. 3, p. 642. And accordingly, the verdict form submitted to the jury provided the panel with the options of finding Mr. Jeffries (1) guilty of murder of the first degree; (2) guilty of murder of the second degree; (3) guilty of voluntary manslaughter; or (4) not guilty. AA, Vol. 3, p. 671 (verdict).

⁷ Brittany Ames was called and testified as a trial witness on behalf of the prosecution. On direct examination, Brittany testified that she was unable to clearly remember some of the historical events that had occurred 3 ½ years earlier; and accordingly, the district court admitted previous versions provided by her into evidence. AA, Vol. 1, pp. 184-194; AA, Vol. 2, pp. 466-468, 470-472, AA, Vol. 3, pp. 489-490. These included an unsworn, audio-recorded voluntary statement provided to LVMPD Detective Dean Raetz on October 23, 2011; an unsworn, audio-recorded voluntary statement provided to LVMPD Detective Dean O’Kelley on October 27, 2011; and the preliminary hearing testimony given by Brittany before the Las Vegas Justice Court. These various versions were materially inconsistent in several significant respects and were objectively inaccurate in others.

The district court instructed the jury that “Murder is the unlawful killing of a human being, with malice aforethought, either express or implied,” (Instruction Number 9, AA, Vol. 3, p. 649); that “Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation,” (Instruction Number 10, AA, Vol. 3, p. 650); and that “Malice shall be implied when no considerable provocation appears.” Instruction Number 11, AA, Vol. 3, p. 651.

The district court instructed the jury that, in contradistinction, “Voluntary Manslaughter is the unlawful killing of a human being, without malice aforethought and without deliberation and premeditation. It is a killing upon a sudden quarrel or heat of passion, caused by a provocation sufficient to make the passion irresistible.” Instruction Number 17, AA, Vol. 3, p. 657. The district court further explained that “[t]he provocation required for Voluntary Manslaughter . . . m[ay] . . . consist of . . . an attempt by the person killed to commit a serious personal injury on the person killing”; that “the sudden heat of passion can occur without direct physical contact”; and that a sudden, violent and irresistible impulse of passion may attach where there has not “been an interval between the assault or provocation and the killing sufficient for the voice of reason and humanity to be heard . . . [and] for a cool head to prevail.” Instruction Number 17, AA, Vol. 3, p. 657. Thus, the district court explained to the jury that “[t]he basic inquiry is whether or not, at the time of the killing, the reason

of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable man of average disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.” Instruction Number 18, AA, Vol. 3, p. 658.

As the district court instructed the jury: “Should you find that the defendant did not commit Murder of either the First or Second Degree but believe beyond a reasonable doubt that he is responsible for the homicide, you must determine if that killing was Voluntary Manslaughter.” Instruction Number 15, AA, Vol. 3, p. 655. And as the court further duly explained: “If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or voluntary manslaughter, you must give the Defendant the benefit of that doubt and return a verdict of voluntary manslaughter.” Instruction Number 16, AA, Vol. 3, p. 656. Thus, as the district court instructed the jury: “If after consideration of all the evidence you have a reasonable doubt as to whether or not the defendant acted in a heat of passion caused by the requisite legal passion, you must return a verdict of voluntary manslaughter. This is because the State has the burden of proving that the defendant did not act in the heat of passion.” Instruction Number 18, AA, Vol. 3, p. 658.

The district court duly instructed the jury that “you are to consider only the evidence in the case in reaching a verdict,” (Instruction Number 23, AA, Vol. 3, p.

663); that “[i]n your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court,” (Instruction Number 24, AA, Vol. 3, p. 664); and that “[y]our duty is confined to the determination of whether the State has proven the charge beyond a reasonable doubt.” *Id.*

The State’s Summation

In an effort to address the memory lapses testified to by state’s witness Brittany Ames and the inconsistencies and inaccuracies of the various versions of events that had previously been provided by her, the prosecutor argued in summation that Michael Jeffries had “worked on” Brittany for “three-and-a-half years” in an effort to influence her testimony. AA, Vol. 3, p. 623. However, Brittany testified at trial that she had had no contact whatsoever with Michael Jeffries since the events of October 22-23, 2011, (AA, Vol. 1, pp. 145-146.); that she deliberately avoided any contact with Michael because her mother wanted to insure “that none of our words ever got twisted or no one ever believed that . . . stories were ever interchanged,” (AA, Vol. 1, p. 146); that, prior to her trial testimony, she had never spoken to her mother about the events of the night that Eric Gore was shot, (AA, Vol. 1, p. 147); and that neither Michael nor her mother had ever tried to influence her testimony. AA, Vol. 1, p. 194. Brittany further testified that Michael’s defense counsel had never suggested to her how she should testify, (AA, Vol. 1, pp. 194-195); and that she never even met defense counsel before testifying at trial, (AA,

Vol. 1, p. 194). Likewise, Mandy Ames testified that she had never tried to influence her daughter's testimony, (AA, Vol. 1, p. 240); that she had never even spoken to Brittany about her testimony other than to tell her to tell the truth, (AA, Vol. 1, pp. 240-241); and that there had been no communication between Brittany and Michael since the night that Eric was shot. AA, Vol. 1, p. 242.

Defense counsel contemporaneously objected to the prosecutor's argument and moved for a mistrial; protesting that his client "was directly accused of corruptly trying to influence the testimony of a witness," and that "[t]here's no evidence at all as to that." AA, Vol. 3, pp. 623, 637, 680. The district court ruled that the prosecutor's assertion was "within the realm of [appropriate] argument," and denied the motion." *Id.*

The prosecutor further told the jury during his closing argument that he "really grew to like Brittany Ames during this whole period that I've had this case." AA, Vol. 3, p. 623. The district court found that statement to be "inappropriate" (AA, Vol. 3, p. 637), but did not provide a limiting instruction to the jury or apply any other remedy. AA, Vol. 3, p. 638.

The First Note from the Jury

Following a period of jury deliberation, court was convened on the morning of March 26, 2015 in response to the district court's receipt of a note signed and dated by the foreman, reading as follows: "One Juror openly stated they looked up

the consequence of a guilty [verdict] and was against the penalty. What do we do at this time?" Court's Exhibit 3, AA, Vol. 3, pp. 668, 673.⁸ In the wake of this

⁸ At all times relevant hereto, the following provisions of NRS were in full force and effect.

Subsection 4 of NRS 200.030 provides:

" A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances, unless a court has made a finding pursuant to NRS 174.098 that the defendant is a person with an intellectual disability and has stricken the notice of intent to seek the death penalty; or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served."

Subsection 5 of NRS 200.030 provides:

"A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served."

NRS 200.080 provides:

"A person convicted of the crime of voluntary manslaughter is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and *a maximum*

revelation, the district court did not conduct an evidentiary hearing or other investigation whatsoever to determine the precise facts and circumstances referred to in the note and whether there was objective evidence indicating that prejudice to Mr. Jeffries' rights to due process and a fair trial had attached under the circumstances. AA, Vol. 3, p. 673. Rather, the district court simply directed the jury to retire and further deliberate without considering punishment. *Id.*

The Second and Third Notes from the Jury

That afternoon, court was again convened in response to a second and third note received from the jury, each of which was likewise signed and dated by the foreman. AA, Vol. 3, p. 674. The second note read as follows: "May we have more clarity/explanation on Malice Aforethought," (Court's Exhibit 4, AA, Vol. 3, p. 669); and the third note read as follows: "Can we also get further understanding between 2nd Degree [Murder] vs Manslaughter. Does a conscious intent to cause death or Great Harm BEFORE committing the crime fall into the criteria of Malice?" Court's Exhibit 5, AA, Vol. 3, pp. 670, 674-676 (emphasis in original).

term of not more than 10 years, and may be further punished by a fine of not more than \$10,000" (emphasis added).

Defense counsel requested that supplemental instruction be given to the jury in response to these two additional notes; contending that they reflected “the jury’s . . . confusion . . . directed towards the instructions which define malice, both express and implied.” AA, Vol. 3, pp. 676-677. However, the district court refused to provide any substantive response to either note. AA, Vol. 3, pp.674-676. Rather, the district court simply directed the jury to retire, further deliberate, and “do the best you can.” AA, Vol. 3, p. 675.

The Verdict

Within an hour, the jury returned a verdict finding Michael Jeffries guilty of murder of the second degree with use of a deadly weapon.” AA, Vol. 3, p. 377.

The Motion for New Trial

On April 2, 2015, Mr. Jeffries brought a timely Motion for New Trial in the district court pursuant to NRS 176.515 on grounds of juror misconduct. On April 10, 2015, the state filed an Opposition to that motion. And on April 14, 2015, the district court denied the motion without receiving evidence. AA, Vol. 3, pp. 683-685. In so doing, the district court ruled that defense counsel had waived any challenge to juror misconduct, (AA, Vol. 3, p. 683), and further found that any juror misconduct that occurred was “harmless beyond a reasonable doubt because of . . . the nature of this case.” AA, Vol. 3, p. 683.

The district court stated: “It was clear that the defendant admittedly shot the victim. The whole issue was self-defense, and they were either going to find him not guilty or they were going to find him guilty of murder, and they found him guilty of murder.” AA, Vol. 3, pp. 683-684. The court repeated this analysis at sentencing on May 27, 2015; stating: “it was pretty clear to me that the jury wasn’t going to find the defendant guilty of first-degree murder, and it was pretty clear that they weren’t going to find in self-defense.” AA, Vol. 3, p. 698. Thus, in its analysis, the district court did not even consider the prejudicial effect of jury misconduct in accessing and discussing applicable penalties upon the Defendant’s right to due process and a fair trial with respect to the lesser-included offense of voluntary manslaughter.

7.

SUMMARY OF ARGUMENT

Mr. Jeffries’ conviction of second degree murder must be reversed because he was denied his constitutional right to a fair trial by an impartial jury in the following respects.

Objective evidence in the form of a note from the jury foreman established that clear juror misconduct in accessing and discussing information concerning punishment occurred during deliberations, and a reasonable probability exists that this misconduct deprived Mr. Jeffries of the opportunity of obtaining, at minimum, a conviction on the lesser-included offense of voluntary manslaughter consistent

with ample supporting evidence. The district court therefore abused its discretion in denying Mr. Jeffries' motion for a new trial on those grounds.

The district court further abused its discretion in refusing the jury's request to be provided with supplemental clarifying instruction regarding malice aforethought – an essential element of the crime of which he was convicted, and the principal substantive distinction between murder of the second degree and the lesser-included offense of voluntary manslaughter. And this abuse of discretion likewise deprived Mr. Jeffries of the opportunity of obtaining, at minimum, a conviction on that lesser-included offense.

The district court further erred in denying Mr. Jeffries' motion for mistrial in response to clear prosecutorial misconduct in closing argument which prejudicially undermined both his well-founded theory of self-defense and, again, the opportunity of obtaining, at minimum, a conviction on the lesser-included offense of voluntary manslaughter consistent with ample evidentiary support.

Each of the forgoing assignments of error are independently sufficient to warrant a new trial. However, a new trial is certainly warranted here on the basis of cumulative error.

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8.

ARGUMENT

I.

**THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE
DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON JUROR
MISCONDUCT.⁹**

In *Meyer v. State*, 119 Nev. 554, 562, 80 P.3d 447, 453 (2003) (*en banc*), this Court, sitting *en banc*, explained that a criminal defendant is entitled to prevail on a motion for a new trial based on juror misconduct if the objective evidence establishes: “(1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial.” Thus, the *Meyer* Court held that “[o]nce such a showing is made, the trial court should grant the motion”; pointing out that “[p]rejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.” 119 Nev. at 563-564, 80 P.3d at 455.

⁹ This Court reviews a district court's denial of a motion for new trial based upon juror misconduct for an abuse of discretion. *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) (*en banc*). “An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

A.
**The First Note From The Jury Objectively Established That
Juror Misconduct In Accessing And Discussing Extraneous
Information Regarding Punishment Occurred During
Deliberation.**

As this Court further explained in *Meyer*: “conduct by jurors contrary to their instructions or oaths . . . includ[ing] . . . discussing sentencing” constitutes juror misconduct. *See also Valdez v. State*, 124 Nev. 1172, 1179, 196 P.3d 465, 470 (2008) (*en banc*) (“[B]y deliberating the penalty while deciding the issue of guilt We hold that the jury disobeyed the district court’s oral instruction and therefore committed misconduct. We further conclude that this misconduct deprived Valdez of his constitutional rights”).

The *Meyer* Court instructed that “proof of [such] misconduct must be based on objective facts and not the state of mind or deliberative process of the jury.” 119 Nev. at 563, 80 P.3d at 455. *See also Valdez*, 124 Nev. at 1187, 196 P.3d at 475 (“The defendant may only prove the misconduct using objective facts and not the ‘state of mind or deliberative process of the jury’”). And this Court, again sitting *en banc*, held in *Valdez*, that the jury foreperson’s statement to the trial judge, expressly acknowledging that the jury had discussed the subject of punishment while deliberating the defendant’s guilt “was objective evidence of . . . jury misconduct.” 124 Nev. at 1187, 196 P.3d at 475. Thus, so too is the first note from the jury foreman in the case at bar, in which he likewise expressly revealed to the trial court that: “One

Juror openly stated they looked up the consequence of a guilty [verdict] and was against the penalty.” Court’s Exhibit 3, AA, Vol. 3, pp. 668, 673. This conduct violated the instructions of the district court that, in deliberating whether Mr. Jeffries was guilty of any of the 3 degrees of alleged homicide offenses submitted for their consideration, the jury was to consider only the evidence admitted at trial and was not to consider the subject of punishment.

Thus, importantly, this is not a situation in which a juror discussed her generalized pre-existing understanding concerning sentencing implications with her fellow panelists. Rather, as the foreman’s first note to the trial court textually acknowledges, the errant juror in this case “openly stated” that they specifically “looked up” the sentencing consequences during the deliberation process. Thus, the juror in this case deliberately accessed *extraneous* sentencing information during deliberation, and thereby engaged in misconduct. Indeed, as this Court explained in *Maestas v. State*, ___ Nev. ___, ___, 275 P.3d 74, 84 (2012) (*en banc*), “we have indicated that a juror’s opinion based on life experience, general knowledge, and specialized knowledge or expertise is not extrinsic information and does not constitute juror misconduct. *Meyer*, 119 Nev. at 570–71 & n. 54, 80 P.3d at 459 & n. 54 (‘The opinion, even if based upon information not admitted into evidence, is not extrinsic evidence and does not constitute juror misconduct.’). ***The juror may not, however, relate ‘specific information from an outside source, such as quoting***

from a treatise, textbook, research results, etc.’ Id. at 571, 80 P.3d at 459”
(emphasis added).

B.

**A Reasonable Probability Exists That The Juror Misconduct In This Case
Prejudiced The Defendant’s Right To A Fair Trial With Respect To The
Lesser-Included Offense Of Voluntary Manslaughter; And Therefore,
Affected The Verdict.**

As this Court explained in *Valdez*: “[A] new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted from the jury misconduct. The defendant must prove the nature of the jury misconduct and that there is *a reasonable possibility* that the misconduct affected the verdict. 124 Nev. at 1186-1187, 196 P.3d at 475 (emphasis added). And as the *Meyer* Court observed, “[e]ach case turns on its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting.” 119 Nev. at 562, 80 P.3d at 454-455.

As this Court explained in *Valdez v. State*, 124 Nev. 1172, 1184, 196 P.3d 465, 473-474 (2008) (*en banc*), when a jury engaged in the deliberation of criminal charges implicating ascending degrees of homicide improperly becomes exposed to extraneous information concerning the correspondingly ascending gradations of penalty ranges applicable thereto, the “constitutional danger” attaches that “the jury may improperly alter the verdict to affect the sentence, violating the defendant’s right to a fair trial by an impartial jury.” Indeed, as the *Valdez* Court pointed out, where that occurs, “the jury may improperly consider the penalty when deciding

guilt and alter the verdict to impose a greater or lesser sentence. Such jury misconduct would violate the defendant's Sixth Amendment right to a fair trial by an impartial jury." 124 Nev. at 1185, 196 P.3d at 474. And thus, as the *Valdez* Court observed, "serious jury misconduct [occurred] because the jury deliberated on Valdez's guilt and sentence simultaneously." 124 Nev. at 1197, 196 P.3d at 482.

Accordingly, this Court held in *Valdez* that "[t]here [wa]s a reasonable probability that the misconduct affected the verdict because the jury considered the penalty while deliberating Valdez's guilt. In particular, the jury may have compromised, selecting the guilty verdict to impose the desired penalty." 124 Nev. at 1187, 196 P.3d at 475. Thus, as the *Valdez* Court reasoned: "Because of the possibility that the jury decided Valdez's guilt by choosing its desired sentence, rather than based on the evidence, there is a reasonable probability that the jury's deliberation of Valdez's sentence while deliberating his guilt affected the verdict." 124 Nev. at 1187, 196 P.3d at 476. Indeed, as the *en banc* Court observed: "the jury may have determined the penalty it thought appropriate and then decided Valdez's guilt, which violates Valdez's right to a fair trial." 124 Nev. at 1186, 196 P.3d at 475. And accordingly, this Court reversed the defendant's murder conviction in that case.

The jurisprudence of *Valdez* is directly on point in the instant case, and independently requires that Mr. Jeffries' conviction of second degree murder be reversed. For here, a reasonable possibility exists – *and cannot be discounted* – that

the juror misconduct in this case affected the verdict by depriving him of his constitutional right to a fair trial with respect to the lesser-included offense of voluntary manslaughter.

Thus, despite the fact that, under the trial court's instructions to the jury, the evidence adduced at trial would amply support a guilty verdict for the lesser-included offense of voluntary manslaughter, in that evidence consistent with provocation, sudden heat of passion, an impending assault by Eric Gore upon Mr. Jeffries, and an absence of malice aforethought was shown, there is a reasonable possibility – and corresponding “constitutional danger” – that, due to the juror misconduct in this case, the rejection of such a lesser verdict was based upon disapproval of the substantially more lenient penalty range applicable to that lesser offense. Indeed, based upon the 3 notes received from the foreman, the known objective evidence shows: (1) that the jury was torn between second degree murder and voluntary manslaughter; (2) that a juror openly discussed punishment with the other members of the panel; revealing that they had researched the applicable penalty law and was “against” it; and (3) that a unanimous verdict was thereafter returned finding Mr. Jeffries guilty of the higher offense of second degree murder.

Thus, the trial court's reasoning in finding that the juror misconduct in this case was harmless beyond a reasonable doubt falls short of a *comprehensive* assessment of the potentiality of prejudice under the circumstances. Indeed, the

district court stated: “It was clear that the defendant admittedly shot the victim. The whole issue was self-defense, and they were either going to find him not guilty or they were going to find him guilty of murder, and they found him guilty of murder.” AA, Vol. 3, pp. 683-684. The district court repeated this analysis at sentencing on May 27, 2015; stating: “it was pretty clear to me that the jury wasn’t going to find the defendant guilty of first-degree murder, and it was pretty clear that they weren’t going to find in self-defense.” AA, Vol. 3, p. 698. Thus, in its reasoning, the district court did not even *consider* the possible prejudicial effect of jury misconduct in accessing and discussing punishment information upon the Defendant’s right to due process and a fair trial with respect to the lesser-included offense of voluntary manslaughter. And the district court’s failure to do so was arbitrary, capricious, and beyond the bounds of law and reason; and was therefore an abuse of discretion. Indeed, there was no accounting for such prejudice, the reasonable possibility of which attached on the basis of the juror misconduct in this case in accessing and discussing comparative sentencing consequences. For, as in *Valdez*, under the circumstances reflected by the known objective evidence in this case, there was a reasonable possibility that the jury may have decided upon the graver offense of conviction based upon a predicate determination of what it deemed to be the appropriate sentence, in violation of Mr. Jeffries’ constitutional rights to due process and a fair trial with respect to the lesser-included offense of voluntary manslaughter.

Thus, the juror misconduct in this case was not harmless beyond a reasonable doubt as the district court erroneously concluded. For where, as here, a reasonable possibility exists that a juror's misconduct influenced the verdict, then the misconduct was prejudicial. *Meyer v. State*, 119 Nev. 554, 564, 80 P.3d 447, 455 (2003).¹⁰

¹⁰ Moreover, Mr. Jeffries respectfully submits that the particular type of juror misconduct involved in this case constitutes “structural error” and is therefore not susceptible to “harmless error” analysis. Indeed, as this Court explained in *Cortinas v. State*, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008), error that “affect[s] the very ‘framework within which the trial proceeds’” is a structural error, requiring that a conviction be reversed without regard to whether or not prejudice is shown. See generally, *Neder v. United States*, 527 U.S. 1, 8 (1999). See *Martinorellan v. State*, Case No. 58904, ___ Nev. ___, ___, 131 Nev. Adv. Op. 8, 343 P.3d 590, 594 (Feb. 26, 2015) (dissenting opinion) (“Because this type of error can substantially alter how the jury deliberates, it ‘affect[s] the very ‘framework within which the trial proceeds’ and is thus a structural error”). As this Court explained in *Cortinas*:

Whether a particular type of error is amenable to harmless-error review depends on whether the error can be categorized as structural error or trial error. The United States Supreme Court has explained the distinction between these two types of errors. Unlike constitutional trial errors, “which occur[] during the presentation of the case to the jury, and which may therefore be *quantitatively assessed* in the context of other evidence presented,” structural errors affect the very “‘framework within which the trial proceeds.’” Consequently, these *intrinsically harmful* errors “‘necessarily render a trial fundamentally unfair.’” Because they are, therefore, never harmless, structural errors require automatic reversal.

124 Nev. at 1023-1024, 195 P.3d at 322 (emphasis added). See also *Knipes v. State*, 124 Nev. 927, 934, 192 P.3d 1178, 1182–83 (2008) (holding that an occurrence that “[is] so intrinsically harmful [to the concept of a fair trial] [constitutes a structural

Nor did the failure of defense counsel to challenge juror misconduct of which the trial judge was well aware insulate the district court from its duty to independently protect Mr. Jeffries' fundamental constitutional right to a fair trial or preclude appellate review. For the misconduct here was patently prejudicial under *Valdez* and the trial court's failure to intervene *sua sponte* in these circumstances was plain error.¹¹ Indeed, as this Court instructed in *Garner v. State*, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962): "whether guilty or innocent, [a defendant] is entitled to a fair trial, and it is the duty of the court . . . to see that he gets it In particular, where . . . misconduct is so prejudicial as to endanger the defendant's right to a fair trial, the trial court has a duty to intervene *sua sponte*." See *Rudin v. State*, 120 Nev. 121, 140, 86, P.3d 572, 584 (2004) (the district court "has a duty to protect the defendant's right to a fair trial"); *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d

error that] require[s] automatic reversal . . . without regard to their effect on the outcome [of the proceeding]''").

The particular type of juror misconduct in this case – involving juror recourse to extraneous sentencing information which is substantively irrelevant and presents a "constitutional danger" to the proper deliberative process (in the manner explained in *Valdez*) "affects the very framework within which the trial proceeds" and is intrinsically harmful to a defendant's right to a fair trial. And its prejudice cannot be quantitatively assessed. Therefore, the error here was structural.

¹¹ "Plain error review considers 'whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights.'" *Gonzalez v. State*, No. 64249, ___ Nev. ___, ___, 131 Nev. Adv. Op. 99, ___, ___ P.3d ___, ___, 2015 WL 9589740, *5 (Dec. 31, 2015) (*en banc*).

691, 700 (1996) (“Failure to object . . . [does not] preclude[] appellate review . . . [where] the error is patently prejudicial and requires the court to act *sua sponte* to protect a defendant's right to a fair trial”); *Ross v. State*, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (failure to object does not preclude appellate review “in instances where the errors are patently prejudicial and require the court to intervene *sua sponte* to protect the defendant's right to a fair trial”); *Downey v. State*, 103 Nev. 4, 5, 731 P.2d 350, 352 (1987) (same); *Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 234-235 (1986) (“the failure to object, assign misconduct, or request an instruction . . . [does not] preclude review by this court . . . where the errors are patently prejudicial and . . . misconduct was so prejudicial as to require court intervention *sua sponte* to protect the defendant's right to a fair trial”). *Accord, e.g., United States v. Davis*, 177 F.3d 552, 556-557 (6th Cir. 1999) (“the Sixth Amendment's right to trial by jury is designed to ensure criminal defendants a fair trial by a panel of impartial, ‘indifferent’ jurors. Thus, when possible juror misconduct is brought to the trial judge's attention he has a duty to investigate and to determine whether there may have been a violation of the constitutional guarantee”); *United States v. Gaston-Brito*, 64 F.3d 11, 12 (1st Cir. 1995) (“When a nonfrivolous suggestion is made that a jury may be biased or tainted by some incident, the district court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial”); *Waldorf v. Shuta*, 3 F.3d 705, 709 (3rd Cir 1993) (“It is

fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. Thus, we have held that where a member of the jury may have learned extra-record information that could adversely affect the jury's ability to decide the case impartially on the record evidence alone, the trial court must determine whether the jury can be impartial and unprejudiced, and whether the jury can confine its deliberations to the record evidence"); *United States v. Boylan*, 898 F.2d 230, 258 (5th Cir. 1990) ("When a colorable claim of jury misconduct surfaces, the . . . trial judge['s] . . . primary obligation is to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial"); *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981) ("The trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information. The defendant is entitled to a new trial if the judge finds a "possibility that the extrinsic material could have affected the verdict").

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II.
**IN THE ALTERNATIVE, THE FAILURE OF DEFENSE COUNSEL TO
CHALLENGE THE JUROR MISCONDUCT IN THIS CASE WAS
OBJECTIVELY UNREASONABLE; AND THEREFORE, DEPRIVED THE
DEFENDANT OF EFFECTIVE ASSISTANCE.¹²**

To prevail on a claim of ineffective assistance of counsel, the defendant in a criminal case must show: (1) that counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Powell*, 122 Nev. 751, 759, 138 P.3d 458 (2006). He must show that “counsel failed to act reasonably considering all the circumstances.” *Cullen v. Pinholster*, 563 U.S. ___, ___, 131 S.Ct. 1388, 1403 (2011). And in order to show prejudice, he must demonstrate “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland* 466 U.S. at 694; *Powell* 122 Nev. at 759, 138 P.3d at 458.

“[I]n Nevada, claims of ineffective assistance of counsel may be raised on direct appeal” where “an evidentiary hearing would be unnecessary.” *Echavarria v.*

¹² A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. *State v. Love*, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993). This Court evaluates a claim of ineffective assistance of trial counsel under the ‘reasonably effective assistance’ test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) and followed in *Warden, Nevada State Prison v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985).” *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

Baker, No. 3:98-CV-00202-MMD, 2013 WL 1181951, at *16 (D. Nev. Mar. 20, 2013). *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006) (“ineffective-assistance-of-counsel claims [may be raised] on direct appeal . . . [where] an evidentiary hearing would be needless”); *Pelligrini v. State*, 117 Nev. 860, 883-884, 34 P.3d 519, 535 (2001) (same); *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995) (same); *Jones v. State*, 110 Nev. 730, 877 P.2d 1052, (1994) (where ineffective assistance of counsel is plainly apparent from the trial record and any arguable “strategy” consideration was objectively unreasonable, the claim may be raised on direct appeal); *Mazzan v. State*, 100 Nev. 74, 80, 675 P.2d 409, 413 (1984) (same).

Mr. Jeffries submits, with due respect, that his counsel’s failure to challenge the juror misconduct in this case and request that the district court conduct an evidentiary hearing or other judicial investigation with respect to this critical development at trial deprived him of effective assistance. He further respectfully submits that any purported motive or “strategy” of counsel in failing to do so was objectively unreasonable under the circumstances. And he therefore submits that this specific and particular claim of ineffective assistance may be brought on direct appeal. Indeed, the objective evidence showed that serious juror misconduct occurred in this case that palpably threatened Mr. Jeffries’ fundamental constitutional right to a fair trial by an impartial jury, and no reasonable strategy on

the part of counsel can justify failure to develop the record and preserve the error for appellate review. Indeed, the juror misconduct at issue in this case likely corrupted the entire trial process by resulting in a verdict predicated upon a constitutionally impermissible, extraneous basis overriding the evidence properly admitted. It was therefore objectively unreasonable for counsel to have relied upon his confidence that the evidence justified and may well have resulted in an acquittal. Counsel therefore “failed to act reasonably considering all the circumstances.” And there is “a reasonable probability that, but for . . . [this] error[], the result of the proceeding would have been different.” For had judicial investigation revealed that actual prejudice had attached as a result of the juror misconduct in this case, the district court would have been clearly obligated to declare a mistrial.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO PROVIDE THE JURY WITH SUPPLEMENTAL CLARIFYING INSTRUCTION.¹³

As this Court, sitting *en banc*, explained in *Gonzalez v. State*, No. 64249, ___ Nev. ___, ___, 131 Nev. Adv. Op. 99, ___, ___ P.3d ___, ___, 2015 WL 9589740,

¹³ This Court reviews a district court’s refusal to respond to jury inquiries for an abuse of discretion. *Gonzalez v. State*, No. 64249, ___ Nev. ___, ___, 131 Nev. Adv. Op. 99, ___, ___ P.3d ___, ___, 2015 WL 9589740, *2 (Dec. 31, 2015) (*en banc*). As pointed out *supra*, “[a]n abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

*1-2 (Dec. 31, 2015) (*en banc*): “in situations where a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the judge has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion.” (Citing *United States v. Southwell*, 432 F.3d 1050, 1053 (9th Cir.2005) (“Because it is not always possible, when instructing the jury, to anticipate every question that might arise during deliberations, the district court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue”); *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 761 P.2d 1022, 1025 (1988) (holding that when jurors “express confusion or lack of understanding of a significant element of the applicable law, it is the court's duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion”); *State v. Juan*, 148 N.M. 747, 242 P.3d 314, 320 (2010) (holding that “when a jury requests clarification regarding the legal principles governing a case, the trial court has a duty to respond promptly and completely to the jury's inquiry”)). Thus, as this Court explained in *Gonzalez*: “In such situations, the court has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion.” 2015 WL 9589740 at *2. (Citing *Southwell*, 432 F.3d at 1053; *Harrington*, 761 P.2d at 1025; *Juan*, 242 P.3d at 320).

The *Gonzalez* Court pointed out that “[t]his is true even when the jury is initially given correct instructions.” 2015 WL 9589740 at *2. (Citing *People v.*

Brouder, 168 Ill.App.3d 938, 119 Ill.Dec. 632, 523 N.E.2d 100, 105 (1988); *see also Harrington*, 761 P.2d at 1025 (holding that the court has a duty to respond to the jury even when “the original instructions were complete and clear”)). Thus, in *Gonzalez*, on appeal, the defendant “d[id] not allege that the given jury instructions were inadequate or incorrectly stated the law. 2015 WL 9589740 at *2. Neither does Mr. Jeffries. However, in *Gonzalez*, the *en banc* Court nevertheless *forthwith* applied an *exception* to the previous jurisprudence of *Tellis v. State*, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968), wherein the Court had laid down a bright-line rule that “[t]he trial judge has [such] wide discretion in the manner and extent he answers a jury’s questions during deliberation [that] If he is of the opinion the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, his refusal to answer a question already answered in the instructions is not error.” Accordingly, in *Gonzalez*, the *en banc* Court determined that “*Tellis* does not go far enough in describing a judge’s duty to answer questions from the jury during deliberations”; and that “there should be an exception to the bright-line rule in *Tellis* regarding situations where the jury’s question suggests *confusion or lack of understanding* of a *significant element* of the applicable law.” 2015 WL 9589740 at *2 (emphasis added).

In *Gonzalez*, the defendant had been convicted, pursuant to jury verdict, of conspiracy to engage in an affray, carrying a concealed weapon, discharging a

firearm into a structure, murder of the first degree with use of a deadly weapon with a gang enhancement, and conspiracy to commit murder. As this Court explained, during deliberations the jury sent a note to the trial judge which stated: “Looking at Instruction no. 17: If a person has *no* knowledge of a conspiracy but their actions contribute to someone [else's] plan, are they guilty of conspiracy?” 2015 WL 9589740 at *2 (emphasis in original). The district court refused to answer the first question, instead stating: “It is improper for the Court to give you additional instruction on how to interpret Instruction no. 17. You must consider all the instructions in light of all the other instructions.” 2015 WL 9589740 at *2.

Reversing the defendant’s conviction, the *en banc* Court held in *Gonzalez* that “[t]he district court abused its discretion when it refused to answer the jury’s question that suggested the jury was *confused or lacked understanding of a significant element* of conspiracy to commit murder.” 2015 WL 9589740 at *8 (emphasis added). Indeed, as this Court explained:

Here, the jury's question on conspiracy *went to the very heart of that offense*. Conspiracy is a knowing agreement to act in furtherance of an unlawful act. *Bolden v. State*, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005). When a defendant does not know that he or she is acting in furtherance of an unlawful act, *there can be no conspiracy*. Because the jury's first question suggested confusion or a lack of understanding of this central element of the crime of conspiracy, we hold that the district court abused its discretion when it refused to answer the question.

2015 WL 9589740 at *3 (emphasis added).

Gonzalez is directly on point in the case at bar. Indeed, it independently requires that Mr. Jeffries conviction of second degree murder be reversed. Thus, in this case, the second note from the jury *textually* asked for “**more clarity/explanation** on Malice Aforethought,” (Court’s Exhibit 4, AA, Vol. 3, p. 669); and the third note textually asked for “**further understanding** between 2nd Degree [Murder] vs Manslaughter?” Court’s Exhibit 5, AA, Vol. 3, pp. 670, 674-676 (emphasis added).

Malice aforethought is an essential element of the offense of second degree murder and is the principal substantive distinction between that crime and the lesser-included offense of voluntary manslaughter. Thus, here, *precisely* as in *Gonzalez*, “the jury's question[s] . . . went to the very heart of th[e] offense [of conviction] [and] suggested confusion or a lack of understanding of this central element of the crime.” 2015 WL 9589740 at *3. Indeed, in this case, the jury’s second and third notes did much more than merely “suggest” confusion and lack of understanding concerning the central legal issue of malice aforethought, for in them the jury expressly and unabashedly confessed their confusion concerning the conceptual contours of the essential murder element of malice aforethought and their lack of understanding as to its proper application in distinguishing second degree murder from the lesser-included offense of voluntary manslaughter.

Nevertheless, like the trial judge in *Gonzalez*, when defense counsel requested that supplemental instruction be given to the jury in response to these notes;

specifically contending that they reflected “the jury’s . . . confusion . . . directed towards the instructions which define malice, both express and implied,” (AA, Vol. 3, pp. 676-677), the trial court in this case refused to provide the jury with any substantive response; and simply told the jury to “do the best you can.” AA, Vol. 3, pp.674-676. And just as in *Gonzalez*, this was an abuse of discretion. *A fortiori* whereas in this case, based upon its receipt of the first note from the jury, the trial court was well aware that juror misconduct in accessing and discussing extraneous information regarding punishment had already occurred during deliberation, and was therefore reasonably bound to exercise heightened diligence to ensure that a verdict finding Mr. Jeffries guilty of murder not be based upon personal opposition to the lesser penalty range applicable to voluntary manslaughter, but rather upon a proper application by the jury of the governing principles of substantive criminal law to the evidence admitted at trial, particularly the central distinguishing element of malice aforethought.

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IV.
THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S
MOTION FOR MISTRIAL BASED UPON PROSECUTORIAL
MISCONDUCT.¹⁴

A.
The Prosecutor Engaged In Prejudicial Misconduct During
Summation By Arguing Without Evidentiary Foundation That
The Defendant Had Endeavored To Corruptly Influence The
Trial Testimony Of State's Witness Brittany Ames And By
Vouching For Her.

“A prosecutor’s duty is to fairly present cases, not just to obtain convictions.” *Anderson v. State*, 121 Nev. 511, 517, 118 P.3d 184, 188 (2005). His “primary duty is not to convict, but to see that justice is done.” *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). To that end, this Court has repeatedly instructed that,

¹⁴ This Court conducts a two-step analysis in reviewing claims of prosecutorial misconduct at trial where, as here, contemporaneous objection was made. First, this Court considers whether the conduct in question was improper. Second, if the conduct was improper, the Court then considers whether the conduct warrants reversal. A conviction will not be reversed if prosecutorial misconduct was harmless. For misconduct of a constitutional nature, this Court applies the *Chapman v. California*, 386 U.S. 18, 24 (1967) standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. As this Court explained in *Martinoirellan v. State*, Case No. 58904, ___ Nev. ___, ___, 131 Nev. Adv. Op. 8, 343 P.3d 590, 592 (Feb. 26, 2015): “An error is of constitutional dimension if it impairs a defendant's constitutional rights. *See Dickson v. State*, 108 Nev. 1, 3, 822 P.2d 1122, 1123 (1992). A criminal defendant has a ‘Sixth Amendment right to a fair trial by an impartial jury.’ *Valdez v. State*, 124 Nev. 1172, 1185, 196 P.3d 465, 474 (2008). An error which violates this right is therefore of constitutional dimension. *See id.* at 1188, 196 P.3d at 476.” When the misconduct is not of a constitutional nature, this Court will reverse if the error substantially affects the jury's verdict.” *Valdez v. State*, 124 Nev. 1172, 196 P.3d 465, 476 (2008).

in summation, a prosecutor may not argue facts or inferences that are not supported by the evidence of record. *See e.g., Thomas v. State*, 120 Nev. 37, 48, 83 P.3d 818, 825 (2004) (“prosecutors may not argue facts or inferences not supported by the evidence”; “counsel may properly discuss general theories . . . but the prosecutor’s claim here was stated as fact, not theory”); *Butler v. State*, 120 Nev. 879, 897, 102 P.3d 71, 84 (2004) (“It is improper to argue facts or inferences not supported by the evidence”; “It was improper for the State to frame the reference to [an unsupported inference] as fact”); *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (“Lawyers (including prosecutors) may not state facts which are not in evidence or use inflammatory arguments”); *Collier v. State*, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (“these remarks were also improper because they discussed matters not in evidence. Patrick McKenna was not on trial; the record contained no evidence whatever about his unrelated criminal history; no factual basis whatever existed for suggesting any relationship between McKenna and Gregory Collier”).

Nor may a prosecutor inject his personal beliefs into closing argument. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 480 (2008) (*en banc*) (“the prosecutor committed misconduct during closing arguments by improperly injecting his opinion”); *Anderson v. State*, 121 Nev. 511, 517, 118 P.3d 184, 188 (2005) (a prosecutor may not “change[] the focus of the case to his personal views”); *Aesoph v. State*, 102 Nev. 316, 721 P.2d 379 (1986) (“the prosecutor’s injection of his

personal beliefs and opinions during closing arguments constituted prosecutorial misconduct We have consistently held that prosecutors must not inject their personal beliefs and opinions into their arguments to the jury”); *Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (“an injection of personal beliefs into the argument detracts from the ‘unprejudiced, impartial, and nonpartisan’ role that a prosecuting attorney assumes in the courtroom. By stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney. Prosecutors therefore must not express their personal beliefs, as was done here”).

Likewise, a prosecutor may not personally vouch for any witness. *Evans v. State*, 117 Nev. 609, 630, 28 P.3d 498, 514 (2001) (“The prosecution may not vouch for the credibility of a witness either by placing the prestige of the government behind the witness or by indicating that information not presented to the jury supports the witness’s testimony”); *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (“A prosecutor may not vouch for the credibility of a witness or accuse a witness of lying”); *Lisle v. State*, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (same).

Neither may a prosecutor insinuate that there was evidence that was not admitted at trial. *Downey v. State*, 103 Nev. 4, 8, 731 P.2d 350, 353 (1987) (“the

prosecutor committed misconduct in closing argument by hinting there was evidence he was not allowed to present to the jury”). As the United States Supreme Court explained in *United States v. Young*, 470 U.S. 1, 18-19 (1985), “such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury.” Secondly, “the 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.”

Furthermore, absent evidentiary foundation, a prosecutor may never suggest in summation that the accused had endeavored to suborn perjury or influence the testimony of any witness. *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (“the prosecutor [committed misconduct when] he contended that appellant purchased the alibi testimony although there was no evidence from which to draw such an inference”), *Accord, e.g., Oliver v. Wainwright*, 795 F.2d 1524, 1532 (11th Cir. 1986) (“To the extent the prosecutor did suggest that Oliver attempted to influence his witnesses to lie, his comments were improper. While a prosecutor may point out that record evidence suggests that a witness may have had some reason to testify as the defendant wished, he or she may not suggest that the defendant has suborned perjury where such a suggestion finds no support in the record. Although

the prosecutor merely insinuated that Oliver had the opportunity to influence the testimony of defense witnesses, we think such veiled hints to be beyond the scope of proper argument”); *Tran v. State of Florida*, No. 94-1141, 655 So.2d 141, 142 (Fla. App. 1995) (“The implication by the prosecutor in this case was that the defense ‘got to’ the witness. That suggests that the defense was engaged in tampering with a witness and suborning perjury, both criminal offenses. Such a comment is highly irregular, impermissible, and prejudicial”).

In his summation in the case at bar, the prosecutor improperly addressed the memory lapses testified to by state’s witness Brittany Ames and the inconsistencies and inaccuracies of the various versions of events that she had previously provided by arguing that Michael Jeffries had “worked on” Brittany “directly and indirectly” “for three-and-a-half years” in an effort to influence her testimony. AA, Vol. 3, p. 623. However, there was no evidence whatsoever admitted at trial even arguably supporting that highly inflammatory and prejudicial assertion. Indeed, there was ample evidence directly to the contrary. Thus, Brittany testified at trial that she had had no contact whatsoever with Mr. Jeffries since the events of October 22-23, 2011, (AA, Vol. 1, pp. 145-146.); that she deliberately avoided any contact with Michael because her mother wanted to insure “that none of our words ever got twisted or no one ever believed that . . . stories were ever interchanged,” (AA, Vol. 1, p. 146); that, prior to her trial testimony, she had never spoken to her mother about the events of

the night that Eric Gore was shot, (AA, Vol. 1, p. 147); and that neither Michael nor her mother had ever tried to influence her testimony. AA, Vol. 1, p. 194. Brittany further testified that Michael's defense counsel had never suggested to her how she should testify, (AA, Vol. 1, pp. 194-195); and that she never even met defense counsel before testifying at trial, (AA, Vol. 1, p. 194). And Mandy Ames testified that she had never tried to influence her daughter's testimony, (AA, Vol. 1, p. 240); that she had never even spoken to Brittany about her testimony other than to tell her to tell the truth, (AA, Vol. 1, pp. 240-241); and that there had been no communication between Brittany and Michael since the night that Eric was shot. AA, Vol. 1, p. 242. Thus, this prosecutorial accusation was made up out of whole cloth.

Nor did that claim constitute a fair and logical inference from the evidence that was adduced. Indeed, the only contextual evidentiary support upon which the prosecutor purported to draw in making that accusation was that Brttany's mother Mandy was Michael's fiancé. However, as the court aptly observed in *Oliver v. Wainwright*, 795 F.2d 1524, 1532 (11th Cir. 1986): "While a prosecutor may point out that record evidence suggests that a witness may have had some reason to testify as the defendant wished, he or she may not suggest that the defendant has suborned perjury where such a suggestion finds no support in the record."

At the same time, the prosecutor further told the jury during his closing argument that he “really grew to like Brittany Ames during this whole period that I’ve had this case”; suggesting that Brittany was a victim of Mr. Jeffries’ pressure to manipulate her testimony. AA, Vol. 3, p. 623.

Defense counsel contemporaneously objected to the prosecutor’s argument and moved for a mistrial; protesting that his client “was directly accused of corruptly trying to influence the testimony of a witness,” and that “[t]here’s no evidence at all as to that.” AA, Vol. 3, pp. 623, 637, 680. Nevertheless, the district court ruled that the prosecutor’s assertion was “within the realm of [appropriate] argument,” and denied the motion. AA, Vol. 3, pp. 623, 637, 680. And although the district court observed that the prosecutor’s statement to the jury that he “really grew to like Brittany Ames” was “inappropriate,” (AA, Vol. 3, p. 637), the court did not provide a limiting instruction to the jury or apply any other remedy. AA, Vol. 3, p. 638.

Under the above-cited authorities, the foregoing assertions constituted prosecutorial misconduct.

B.

The Prosecutorial Misconduct In This Case Was Not Harmless Beyond A Reasonable Doubt.

The prosecutor’s misconduct in this case was hardly harmless. Indeed, he argued to the jury without a scintilla of evidentiary support that the accused had endeavored to suborn perjury on the part of the only percipient witness in this case

other than himself. This was an unfounded allegation that Mr. Jeffries engaged in criminal conduct to cover up other criminal conduct out of consciousness of guilt regarding the alleged offense for which he was on trial. And it palpably suggests that the prosecution was aware of other information that was not admitted into evidence.

Moreover, the prosecutor sympathetically vouched for the same key witness, while suggesting that she was the unfortunate subject of Mr. Jeffries endeavor to manipulate her testimony.

Evidence consistent with murder was hardly overwhelming in this case. For while there was no dispute that Michael Jeffries shot and killed Eric Gore, there was ample evidence consistent with both self-defense and, at minimum, the lesser-included offense of voluntary manslaughter. And therefore, the foregoing highly improper arguments of the prosecutor were particularly prejudicial to Mr. Jeffries' right to a fair trial by an impartial jury, and require that his conviction in this case be reversed.

**V.
THE DEFENDANT'S CONVICTION MUST BE REVERSED AS A
RESULT OF CUMULATIVE ERROR.**

The cumulative effect of trial errors can violate a defendant's constitutional right to a fair trial and warrant reversal of a conviction even if the individual errors involved are harmless in and of themselves. *Gonzalez v. State*, No. 64249, ___ Nev. ___, ___, 131 Nev. Adv. Op. 99, ___, ___ P.3d ___, ___, 2015 WL 9589740, *8

(Dec. 31, 2015) (*en banc*); *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (*en banc*); *DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000); *Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986). This Court considers the following factors in deciding a cumulative error claim: (1) the pervasiveness and scope of the errors; (2) whether the evidence of guilt was close; and (3) the severity of the charged crime. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

As this Court held in *Gonzalez v. State*, No. 64249, 2015 WL 9589740, *7-8: “Here, the errors directly affected Gonzalez’s convictions for conspiracy and, by extension, undermined his affirmative defense that he was acting in defense of others. Furthermore, the crimes he was convicted of were grave. Therefore, we hold that the cumulative effect of these errors has denied Gonzalez the right to a fair trial. The district court abused its discretion when it refused to answer the jury’s question that suggested the jury was confused or lacked understanding of a significant element of conspiracy to commit murder. It also abused its discretion when it refused to give an accomplice-distrust instruction regarding Rudnick’s uncorroborated testimony and refused to bifurcate the guilt and gang-enhancement phases of Gonzalez’s trial. Therefore, because the district court’s errors cumulatively denied Gonzalez of his right to a fair trial, we order his judgment of conviction reversed and remand to the district court for a new trial.” And as this Court held in *Sipsas*, 102

Nev. at 125, 716 P.2d at 235: “the evidence against Sipsas was less than overwhelming on the question of whether Sipsas harbored the requisite intent to be convicted of first degree murder. This question was hotly disputed at trial, and we therefore cannot say that [cumulative error] . . . did not influence the jury’s finding of guilt in this regard. In reviewing the record it is apparent that because of cumulative error, Sipsas was denied his constitutional right to a fair trial.”

In the instant case the district court likewise abused its discretion when it refused to answer the jury's question that suggested the jury was confused or lacked understanding of an essential (scienter) element of the crime of which Mr. Jeffries was convicted; abused its discretion in denying Mr. Jeffries’ motion for a new trial based on objective evidence of clear and presumptively prejudicial juror misconduct; and erred in denying his motion for mistrial based upon the highly improper and palpably prejudicial comments of the prosecutor in closing argument. These errors undermined Mr. Jeffries’ well-founded theory of self-defense and very likely deprived him of the possibility of obtaining, at minimum, a conviction for only the lesser-included offense of voluntary manslaughter in a case in which evidence

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consistent with the graver crime of second degree murder of which he was convicted was hardly overwhelming. Thus, cumulative error likewise deprived Mr. Jeffries of a fair trial, and his conviction must therefore be reversed.

DATED this 10th day of February, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This opening brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14 font size.

I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 12,731 words.

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Finally, I hereby certify that I have read this opening 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 his brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of February, 2016.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On February 10th, 2016, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF**, by the method indicated:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- X **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
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- X **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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