IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH JEFFRIES, Defendant/Appellant, vs. THE STATE OF NEVADA, Plaintiff/Respondent.	CASE NO. 68338

APPELLANT'S MOTION TO RECONSIDER SUBMISSION FOR DECISION WITHOUT ORAL ARGUMENT

COMES NOW Michael Joseph Jeffries, Appellant in the above-entitled matter, by and through his attorney, Vincent Savarese III, Esq. of the law firm of Gentile Cristalli Miller Armeni Savarese, and pursuant to Rule 27(c)(2) of the Nevada Rules of Appellate Procedure ("NRAP"), hereby moves the Court to reconsider the Order of September 8, 2016, entered by a single justice, submitting the above-entitled matter for decision without oral argument. (Appended hereto as Exhibit "A").

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THIS MOTION is made and based upon all pleadings and papers on file herein and the following Memorandum of Points and Authorities.

Dated this 20th day of September, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

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MEMORANDUM OF POINTS AND AUTHORITIES

1.
INTRODUCTION

Rule 34(f)(1) of the Nevada Rules of Appellate Procedure ("NRAP") provides that "[t]he court may order a case submitted for decision on the briefs, without oral argument." The Nevada rule does not prescribe any standards or criteria for consideration by this Court in making this determination. However, its federal counterpart does. Thus, Rule 34(a)(2) of the Federal Rules of Appellate Procedure ("FRAP") provides as follows:

> (2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record

unanimously agrees that oral argument is unnecessary for any of the following reasons:

> (A) the appeal is frivolous;
> (B) the dispositive issue or issues have been authoritatively decided; or
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Although NRAP 34(f)(1) does not prescribe standardized criteria for the submission of an appeal for decision without oral argument, the jurisprudence of this Court does reflect consideration of factors similar to those set forth in the federal rule. See *e.g., In re Discipline of Winter,* 2012 WL 642837 (Nev. February 24, 2012) (ordering appeal submitted on the record without oral argument where parties did not submit briefs challenging findings and recommendation of state bar panel or inform the Court of intent to contest the same); *Simpson v. State,* No. 58435, 2011 WL 5827791 (Nev. Nov. 17, 2011) (ordering appeal submitted on the record without oral argument where "there were no non-frivolous issues . . . on appeal"); *Luckett v. Warden,* 91 Nev. 681, 541 P.2d 910 (1975) (denial of oral argument with respect to successive application for post-conviction relief absent explanation as to why issues were not previously raised); *Barnett v. State,* 85 Nev. 502, 457 P.2d 584 (1969) (oral argument denied where record and briefs showed that appeal was without merit).

Appellant fears that submission of the present appeal for decision without oral argument may be imprudent; and for the reasons hereinafter stated, respectfully submits that the Court should therefore reconsider the Order of the single justice dated September 8, 2016, submitting his appeal on the record and the briefs on file without oral argument.

2.
ARGUMENT

THIS APPEAL CONCERNS A SENTENCE OF LIFE IMPRISONMENT AND PRESENTS SUBSTANTIAL CONSTITUTIONAL ISSUES OF PROFOUND PUBLIC IMPORTANCE DIRECTLY IMPLICATING THE EN BANC JURISPRUDENCE OF THIS COURT INVOLVING JUROR MISCONDUCT, PROSECUTORIAL MISCONDUCT, AND REFUSAL OF THE DISTRICT COURT TO PROVIDE SUPPLEMENTAL CLARIFYING INSTRUCTION TO THE JURY UPON SPECIFIC REQUEST NOTWITHSTANDING ITS EXPRESS CONFESSION OF CONFUSION REGARDING AN ESSENTIAL ELEMENT OF THE OFFENSE OF CONVICTION.

This appeal concerns a jury trial resulting in the imposition of a sentence of life imprisonment following the return of a verdict finding Appellant guilty of the offense of second degree murder after deliberations during which a juror undisputedly conducted, revealed, and discussed with the entire panel the results of outside research regarding the sentencing ranges applicable to the offenses of manslaughter, second degree murder, and first degree murder implicated by the open murder charge against Appellant. This was not only a direct violation of the instructions of the trial judge, but resulted in the undisputed, simultaneous

consideration by the jury of the question of the various gradations of applicable punishment during its deliberations on the question of guilt or innocence as to all three degrees of homicide in direct violation of the en banc jurisprudence of this Court in *Valdez v. State,* 124 Nev. 1172, 196 P.3d 465 (2008) (en banc), expressly recognizing that such a scenario presents the clear and inescapable "constitutional danger" that the jury improperly selected the offense of conviction rather than a lesser offense (here, manslaughter) based upon what it improperly deemed to be the appropriate *punishment.*

The inherent prejudice of this scenario and the structural error attaching thereto[1] was further exacerbated by the refusal of the trial judge to provide the jury with supplemental clarifying instruction with respect to the element of "malice" – which is essential to the offense of second degree murder of which Appellant was convicted and is the fundamentally distinguishing feature between that offense and the lesser included offense of manslaughter. This despite the jury having expressly confessed in notes sent by the foreman to the trial judge its confusion with respect to both the element of "malice" and its significance in distinguishing between

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[1] Appellant submits that because this type of misconduct substantially affects how the jury deliberates and "the very framework within which the trial proceeds," it is "intrinsically harmful," constitutes "structural error," and requires automatic reversal. *Cortinas v. State,* 124 Nev. 1013, 1023-24, 195 P.3d 315, 322 (2008). *See also Knipes v. State,* 124 Nev. 927, 934, 192 P.3d 1178, 1182-83 (2008). *See generally, Neder v. United States,* 527 U.S. 1 (1999).

manslaughter and murder of the second degree. This was a clear violation of Appellant's constitutional right to a fair trial by an impartial jury as explained in the en banc jurisprudence of this Court in *Gonzalez v. State,* No. 64249, 131 Nev. Ad. Op. 99, 366 P.3d 680 (December 31, 2015) (en banc), rehearing denied, March 25, 2016. For as this Court explained in that case, the issue is not whether a jury *should have* understood all of the essential elements of the offense of conviction under the instructions as previously provided by the trial court as the trial judge opined in this case. Rather, the issue is whether or not the particular jury in the case at hand *actually did.* Here, the objective evidence clearly shows that the jury was confused with respect to this essential element of the offense of conviction (second degree murder) and its application as the critical distinction between that offense and the lesser offense of manslaughter. And the trial Court's refusal to further instruct the jury upon specific request in recognition of that inescapable fact was arbitrary and capricious; and therefore, an abuse of discretion.

Furthermore, in its closing argument, the state engaged in a universally-recognized form of egregious prosecutorial misconduct by arguing to the jury in the absence of any arguable evidentiary support *whatsoever*, that Appellant procured false testimony on the part of a prosecution witness who did not testify consistently with the state's expectations, and who was clearly the single most important witness in the case (thereby also implicitly arguing that Appellant had committed an

additional, independent uncharged crime in doing so). Thus, the state expressly, improperly and very prejudicially argued to the jury in this case that Appellant had purportedly "worked on" trial witness Brittany Ames both "directly" on Brittany personally and "indirectly" by and through her mother (and his fiancé), trial witness Mandy Ames, "for three-and-a-half years" in order to influence, and procure her mother to influence, Britany's trial testimony. This was not fair argument as the trial judge opined. Nor was it harmless. And Appellant therefore submits that the trial judge erred in denying Appellant's motion for mistrial on this basis. For there was absolutely no evidence whatsoever at trial to even arguably justify such patently prejudicial and inflammatory assertions. Indeed, there was abundant evidence at trial expressly and directly to the contrary. *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").

The foregoing contentions at issue are not analogous to those situations in which this Court has denied oral argument in its published decisions. They are rather eminently worthy of oral argument in order to insure that counsel for Appellant has every opportunity to persuade this Court that reversal of Appellant's conviction is mandated in this case.

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3.
CONCLUSION

THEREFORE, for the foregoing reasons, Appellant Michael Joseph Jeffries respectfully requests this this Court reconsider the Order of the single justice dated September 8, 2016, submitting the above-entitled matter for decision without oral argument, and order that oral argument be heard in this case.

Dated this 20th day of September, 2016.

GENTILE CRISTALLI
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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 September 20th, 2016, I caused to be served a true and correct copy of the foregoing **APPELLANT MICHAEL JOSEPH JEFFRIES' MOTION TO RECONSIDER SUBMISSION FOR DECISION WITHOUT ORAL ARGUMENT**, 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).

☐ **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.

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☐ **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.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **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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EXHIBIT A

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 68338

FILED

SEP 08 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER SUBMITTING APPEAL FOR DECISION WITHOUT ORAL ARGUMENT

Cause appearing, oral argument will not be scheduled and this appeal shall stand submitted for decision as of the date of this order on the briefs filed herein. *See* NRAP 34(f)(1).

It is so ORDERED.

_____, C.J.

cc: Gentile, Cristalli, Miller, Armeni & Savarese, PLLC
Attorney General/Carson City
Clark County District Attorney

16-27933