IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS PIMENTEL, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 68710

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
	)	
vs.	)	
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THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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APPELLANT'S REPLY BRIEF

REPLY ARGUMENT

I. Miranda

Upon his arrest, detectives gave Appellant the following warnings:

> You have the right to remain silent. Anything you say could be used against you in a court of law. You have the right to the presence of an attorney during questioning. If you cannot afford an attorney, one will be appointed before questioning. Do you understand these rights?
>
> AA III 669.

Respondent cites various Federal cases and argues the above warnings "reasonably conveyed to [Appellant] that he had the right to speak

with a lawyer before questioning began." Respondent's Answering Brief ("RAB") 17.

Specifically, Respondent cites U.S. v. Waters, No. 2:15-CR-80 JCM (VCF), 2016 U.S. Dist. LEXIS 8913, at *18-20 (D. Nev. Jan. 26, 2016), where Judge Mahan held, "defendant would be able to grasp the substance of what he was told—that he had the right to appointed counsel if he could not afford a lawyer and that right exists both before and during questioning." However, Waters does not provide a recitation of the Miranda warnings given to the defendant in that case.

Next, Respondent cites U.S. v. Davis, No. 2:12-CR-289 JCM (PAL), 2016 U.S. Dist. LEXIS 71925, at *6-10 (D. Nev. June 1, 2016), where Judge Mahan held the word "presence" is synonymous with "consult" and therefore, if police advise a suspect he has the right to the "presence" of an attorney during questioning the suspect would necessarily understand he also has the right to consult with an attorney prior to questioning.

Finally, Respondent cites U.S. v. Ortega, 510 Fed.Appx. 541 (9th Cir. 2013), and U.S. v. Scaggs, 377 F. Appx. 653 (9th Cir. 2010). Although Ortega held the warnings given reasonably conveyed the defendant's right to consult with an attorney before questioning, the

decision does not provide a recitation of the actual warnings given. In Scaggs, the defendant was not told he had the right to consult with counsel before questioning, however the 9th Circuit found "...advice of that right can be inferred from the investigator's statement that [defendant] had the right to have counsel appointed before questioning."

The Federal district court cases Respondent cites were decided by the same District Court judge. The Federal district court cases Appellant cited, which found Metro's standard warnings inadequate, were authored by three different district court judges.[1] Appellant has not found a published decision from this Court addressing this precise issue. However, in Pebley v. State, 121 Nev. 924, ___, 2012 WL 6528998 (Dec. 12, 2012), an unpublished decision, this Court found Miranda warnings inadequate when the defendant "was not

[1] U.S. v. Chavez, 111 F.Supp.3d 1131 (D. Nev. 2015), Judge Boulware; U.S. v. Loucious, No. 2:15-cr-00106-JAD-CWH (D. Nev. filed Feb. 19, 2016), Judge Dorsey; U.S. v. Toliver, 480 F.Supp.2d 1216 (D. Nev. 2007), Judge Pro, adopting Magistrate Foley's recommendation to suppress when the defendant was not advised he had the right to consult with counsel prior to questioning.

specifically advised that he had the right to consult with an attorney prior to questioning."[2]

Appellant raises an issue of first impression for Nevada state courts. The various Federal cases cited by Appellant and Respondent are persuasive but are not binding on this Court. However, Respondent's reliance on two decisions from the same Federal District Court Judge, and two unpublished decisions from the Ninth Circuit, is hardly persuasive compared to three decisions from three different Federal District Court Judges who all found the same warnings inadequate.

Next, Respondent claims the State did not use Appellant's post-invocation silence against him. RAB 20. Respondent claims officers asked Appellant "very specific questions[]" prior to Appellant's invocation and therefore, only impeached Appellant with his pre-invocation inconsistent statements and not his post-invocation silence. Id.

When officers questioned Appellant they initially asked his name, date of birth, social security number, address, last employment, city of origin, details concerning his military service, and whether

[2] Pebley is not precedent and Appellant is not citing it as precedent.

Appellant lived alone and owned a car. AA III 669-74. Thereafter, police asked Appellant background questions concerning the prior day. *See* Id. at 674-83. Specifically: what Appellant did;[3] who he was with;[4] how he got to the casino; what games he played at the casino; what time he left the casino; how he got home from the casino;[5] and where he got on the bus just prior to his arrest.[6] Id.

The foregoing questions did not specifically address Holland's killing. Before police asked a single question concerning Holland, Appellant invoked his right to counsel and police ceased questioning. Id. at 683. Nevertheless, Respondent suggests because Appellant did not volunteer specific answers to general, open-ended, questions the State could permissibly call Appellant a liar. This tactic was not

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[3] Appellant told the police he was at Arizona Charlie's to "relax" and "get away." Id. at 674. This answer was consistent with his trial testimony. *See* AA XI 2741.

[4] Police asked Appellant what he did "yesterday." AA III 672, 674. Appellant responded he was alone at Arizona Charlie's. Id. at 675. This was true as Lowe testified she met Appellant at Arizona Charlie's earlier that morning, not "yesterday." AA XI 2537-38.

[5] When asked how he got from Arizona Charlie's to his Apartment, Appellant responded, "I can't say." AA III 677. This is not a **factual assertion** "inconsistent" with his trial testimony.

[6] Appellant responded at "Boulder Station, I think." Id. at 680. Evidence at trial suggested Appellant entered the bus near the Sigel Suites. This is the only statement which could be "inconsistent" with the evidence.

proper impeachment and rendered Appellant's trial fundamentally unfair.

Respondent also claims the State did not draw a negative inference from Appellant's invocation but instead simply noted the variance between Appellant's pre-invocation statements and the evidence presented at trial. Id. at 22. However, this assertion is belied by the record.

On cross-examination, knowing Appellant had invoked his right to counsel before police questioned him about Holland's killing, the State improperly asked Appellant, "...on that particular day you admit that shortly after what you testified to is having a gun pulled on you; you chose not to tell detectives what happened?"[7] AA XI 2728. Later, during closing argument, the Prosecutor argued that if Appellant acted in self-defense he should have said so when questioned by police. *See* AA XIII 3075.

The aforementioned is substantially similar to U.S. v. Caruto, 532 F.3d 822 (9th Cir. 2008). In Caruto, the 9th Circuit held the

[7] Respondent claims Appellant did not object to the State's improper question about Appellant's post-invocation silence. Appellant did object and the Court overruled his objection. *See* AA XI 2728.

government violated the defendant's due process rights by using her post-invocation silence against her. Likewise, here, the State improperly drew a negative inference when it argued Appellant should have told police he acted in self-defense when the State knew Appellant did not do so because he invoked his right to counsel.

Moreover, the error cannot be harmless. "Reference during cross-examination of a defendant and closing argument to the defendant's post-Miranda silence is not harmless error 'when the defendant's credibility is crucial to his defense and the prosecutor's comments are deliberate and repetitious.'" Murray v. State, 113 Nev. 11, 18, 930 P.2d 121, 125 (1997)(*quoting* McCraney v. State, 110 Nev. 250, 256, 871 P.2d 922, 926 (1994)).

Here, the State knew Appellant did not provide details concerning self-defense because he invoked his right to counsel. At trial Appellant testified he acted in self-defense. The State conceded that whether the jury believed Appellant acted in self-defense was the most important issue at trial. *See* AA XIII 3118. Therefore, Appellant's credibility was crucial to his defense. When the State improperly questioned and commented upon Appellant's post invocation silence, it violated Appellant's right to a fair trial.

II. Constitutionality of NRS 200.450.

A. Vagueness.

Respondent essentially claims Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980) settled all questions concerning NRS 200.450's vagueness. RAB 26. This is incorrect.

In Wilmeth, the defendant argued NRS 200.450 was vague because "it fails to define what constitutes a challenge to fight; because it fails to define 'previous concert and agreement' in a manner such that a person of ordinary intelligence knows whether he has in fact violated the statute; and, further, because it fails to distinguish between an aggressor and defender situation." Id. at 404-05, 610 P.2d at 736. This Court disagreed, **but only** based upon the facts of the case. Id.

In Wilmeth, when this Court analyzed NRS 200.450's alleged vagueness it prefaced its holding that the statute was not vague with the qualifiers: "Here;" "in the context of this case;" "on the instant facts." Id. at 405-06, 610 P.2d at 736-37. The Court did not hold that NRS 200.450 would always survive scrutiny and even acknowledged situations where the "warnings in the statute might be considered ambiguous." Id. at 405, 610 P.2d at 737. Basically, Wilmeth denied

the defendant's vagueness challenge but only "as-applied" to the defendant in that case.[8]

Respondent also cites Carlisle v. State, 98 Nev. 128, 131, 642 P.2d 596, 598 (1982) suggesting this Court need not consider Appellant's "hypotheticals" in his Opening Brief. RAB 27. Carlisle noted "this court will not decide the constitutionality of a statute based upon a supposed or hypothetical case which might arise thereunder. Id. However, this holding was in response to the defendant's overbreath argument, not a vagueness argument. Id.

Additionally, Carlisle cited Jones v. State, 85 Nev. 411, 414, 456 P.2d 429, 431 (1969), and explained because "[the appellant] falls squarely within the prohibition of NRS 201.190...[w]e will not decide the constitutionality of a statute based upon a supposed or hypothetical case which might arise thereunder." This holding is simply another way of expressing "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

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[8] A defendant can challenge a statute as either facially vague or vague as-applied. Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 510, 217 P.3d 546, 552 (2009).

Here, the State alleged Holland challenged Appellant to a fight and Appellant accepted when he responded "you know where I be." Alternately, the State suggested Appellant challenged Holland to fight by saying, "meet me at my house in 30 minutes motherfucker, I'll kick your ass." And, although Holland did not verbally assent at that moment, apparently he "accepted" by going to Appellant's apartment five minutes later.

NRS 200.450 did not provide Appellant notice that his response, "you know where I be" to Holland's threat to "kick [Appellant's] ass," would be an acceptance and/or a challenge to fight. Indeed, the overwhelming evidence suggests otherwise. Appellant sought to protect Lowe from Holland who was acting deranged and violent. In doing so, Appellant engaged in typical male bravado. "You know where I be" was simply meant to convey to Holland that Appellant was not afraid of him. It was not a "previous concert and agreement" to fight.

Appellant's conduct did not fall squarely within NRS 200.450's prohibitions. Accordingly, it was permissible for Appellant to give **examples** in his Opening Brief Appellant regarding how NRS 200.450's lack of definitions renders it vague.

Next, Respondent acknowledges NRS 200.450 does not explain whether words or actions could constitute a "challenge" or "acceptance" to fight but suggests this does not render the statute vague because the jury can decide what these words mean. RAB 26. This argument is unavailing because when this Court analyzes a statute's vagueness the issue is not whether the jury can collectively decide what words mean, but whether, as a threshold matter, the statute provides adequate notice to the defendant of the prohibited conduct. *See* Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006)("By requiring notice of prohibited conduct in a statute, the first prong offers citizens the opportunity to conform their own conduct to that law.").

Finally, under either a facial or as-applied vagueness challenge this Court determines whether the statute "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."[9] Pitmon v. State, ___ Nev. ___, ___, 352 P.3d 655, 658 (NV. Ct. App. 2015). The second part of the test "is

[9] "[T]he vagueness tests are independent and alternative, not conjunctive." State v. Castaneda, 126 Nev. 478, 482 fn.1, 245 P.3d 550, 553 fn. 1(2010).

more important ... because absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.'" Silvar, 122 Nev. at 293, 129 P.3d at 685.

Appellant was not originally charged with violating NRS 200.450 even though police and prosecutor's knew of the alleged "challenge" and "agreement" to fight. However, during the preliminary hearing, when it became clear Appellant was claiming self-defense, the prosecutors pursued their own predilections and amended the criminal complaint to allege First Degree Murder via NRS 200.450. *See* AA I 1; 157. The State did this mistakenly believing self-defense was not available under challenge to fight murder. Therefore, the State's arbitrary charging decision proves NRS 200.450 is both facially vague and vague as-applied to Appellant.

B. Overbreadth.

Respondent argues NRS 200.450 is not overbroad because Appellant has not alleged that NRS 200.450 prohibits a constitutionally protected right. RAB at 29. On the contrary, Appellant alleged that NRS 200.450 violates his rights under the First Amendment. *See* AOB 34-37. Essentially, NRS 200.450 criminalizes

all words or expressions which could theoretically be construed as a "challenge to fight" or an "acceptance" of a challenge to fight.

The State alleged Appellant either challenged Holland to a fight or accepted Holland's challenge by stating "you know where I be." However, Appellant has a fundamental right, by words or actions, to express his displeasure concerning another person's threatening behavior. Appellant also has a First Amendment right to verbally defend himself from a deranged methamphetamine addict, and to engage in bravado. Appellant has a fundamental right to counter a threat with an assertion that he is not afraid of the threat or to respond with a joke or sarcasm if he misunderstood he's been threatened. A poorly drafted law cannot abridge Appellant's First Amendment rights and require him to remain silent and stand down when he is being verbally accosted. Because NRS 200.450 does not provide any limitations, definitions, or qualifiers, it prohibits almost all speech or conduct used to respond to a verbal or physical threat if the response could possibly be considered a "challenge" or an "acceptance" of a challenge to fight. Therefore, NRS 200.450 is unconstitutionally overbroad.

Respondent also claims NRS 200.450 contains a *mens rea* requirement because the statute requires the State to prove a defendant specifically intended to "engage in a challenge to fight." RAB 30. Thus, the statute is similar to felony murder because "the intent is the agreement to enter into a fight or engage in a challenge to fight" and that intent "satisfies the *mens rea* of first degree murder." Id.

However, an agreement to fight without weapons and not involving death is punished as a gross misdemeanor. *See* NRS 200.450(1)(a). Unlike felony murder where the underlying felony's dangerousness provides the requisite *mens rea*, the legislature has not deemed challenging or accepting a challenge to fight, without more, so inherently dangerous as to automatically supply first degree murder *mens rea*.[10]

Here, assuming the State proved Appellant specifically accepted Holland's challenge -- and specifically intended to fight Holland, this was only gross misdemeanor conduct. If Respondent is correct, NRS 200.450 would be the only statute where a defendant could be convicted of first degree murder when the State only proves the

[10] The felony murder statute does not include any gross misdemeanors. *See* NRS 200.030(1)(b).

defendant intended to commit a gross misdemeanor. A constitutional criminal statue, on the other hand, should require the State to prove beyond a reasonable doubt that Appellant not only agreed to fight, but introduced a weapon, specifically intended to use it, or engaged in some inherently dangerous felony where death results.

III. Piasecki.

A. Exclusionary rule

Respondent refutes Appellant's exclusionary rule claim by suggesting "there is no instance in the record where the State or [Appellant] invoked the exclusionary rule." RAB 33. However, the exclusionary rule is typically invoked at the beginning of trial before any witness testifies. Here, it is likely the court addressed the issue before it went on the record. In any event, the State acknowledged the rule had been invoked. AA X 2251.

Respondent argues the State's concession was merely a citation to the rule's purpose during an unrelated objection. *See* RAB 34. However, if the State objected to Appellant's counsel telling one witness what another witness testified to, the objection would either be hearsay or lack of foundation, not violation of the exclusionary rule.

Respondent alternately argues if the rule had been invoked, Piasecki was allowed to remain in the courtroom while other witnesses testified because she was an expert witness. Id. However, Respondent's supporting authority for this argument pre-dates the Legislature's codification of the current exclusionary rule.[11]

Finally, Respondent argues if the court erred by allowing Piasecki to listen to other testimony, Appellant did not object and therefore this Court should review for plain error. Id. Actually, Appellant did object to Piasecki's improper testimony and asked to approach the bench. AA XII 2931. This bench conference was unrecorded because the court previously denied Appellant's request to record bench conferences. AA VII 1687. It is likely during the conference Appellant objected based upon NRS 50.155. Nevertheless, Appellant later made a record where he specifically noted Piasecki's testimony was improper. AA XII 2978-81.

Finally, while Piasecki's exclusionary rule violation arguably may not in-and-of-itself be reversible error, her subsequent improper

[11] Respondent cites Wallace v. State, 84 Nev. 603, 607, 447 P.2d 30, 32 (1968). NRS 50.155 was added in 1971.

testimony, discussed below, proves the error affected Appellant's substantial rights and demands reversal.

B. Improper testimony

Respondent first argues Appellant did not "state with any specificity which of Piasecki's statements he takes issue with, but merely cites her entire testimony." RAB 35 (*citing* AOB 40). Appellant cited Piasecki's entire testimony in his Opening Brief because her testimony was so pervasively improper one must review the entire transcript to fully appreciate the impropriety. Also, to conform to appellate briefing page / word limitations Appellant could not quote each instance of improper testimony.[12]

Nevertheless, Respondent argues Piasecki's testimony was proper because she "merely testified as to her interview with [Appellant], why she asked certain questions, and what his answers were." RAB 35. Additionally, Piasecki's testified to statements by a party opponent and Appellant's prior inconsistent statements. Id.

The district court ordered Appellant to submit to Piasecki's psychological examination over Appellant's objection. AA V 1060.

[12] Piasecki's improper testimony totals almost 1,000 words in the record. If this Court desires, Appellant would gladly supplement his brief to directly quote the pertinent portions of Paisecki's testimony.

The State's only justification for compelling Appellant to participate in the examination was to determine whether Appellant's PTSD affected him on the night he shot Holland and to potentially rebut Appellant's expert witness. Id. at 1062-63.

However, at trial, Piasecki's direct and re-direct examinations are replete with instances where she improperly testified that Appellant's evaluation answers contradicted his trial testimony,[13] compared Appellant's testimony to other witnesses to cast doubt upon Appellant's credibility, and impermissibly commented upon Appellant's guilt. *See* AA XII 2930-31; 2935; 2938; 2942-43; 2946; 2949-51; 2953; 2970.

The Fifth and Fourteenth amendments protect against admission of an accused's un-Mirandized statements made during a court ordered psychological examination. Mitchell v. State, 124 Nev. 807, 820, 192 P.3d 721, 729 (2008). The State can only introduce evidence from the court-ordered evaluation when it's relevant to undermine the accused's justification defense and the evidence does not relate to the accused's culpability for the charged crime. Id.

[13] The State set up this scenario by questioning Appellant about what he told Piasecki during his court ordered evaluation. *See* AA XI 2730-31.

Here, Piasecki could only testify that based upon her interview, she did not believe Appellant was suffering the effects of PTSD at the moment he shot Holland. It was improper to use Appellant's un-Mirandized statements to impeach his trial testimony, compare his statements to other witnesses, or to suggest Appellant was guilty for the charged crimes. *See* Esquivel v. State, 96 Nev. 777, 778, 617 P.2d 587 (1980)(because a testifying defendant's credibility is crucial, it is reversible error to impeach his testimony with statements made during court-ordered psychiatric evaluation); McKenna v. State, 98 Nev. 38, 39, 639 P.2d 557, 558 (1982)(applying the Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1966) harmless error standard when the State uses an accused's confidential communications made during court ordered examination); Winiarz v. State, 104 Nev. 43, 49-50, 752 P.2d 761, 766 (1998)(improper for psychiatrist to imply defendant lied based upon disclosures in a court-ordered evaluation).

IV. Jury Instructions.

A. Instruction 19

Instruction 19 stated self-defense does not apply when the State alleges challenge to fight murder. AA XIII 3023. Respondent maintains the district court correctly provided instruction 19 based

upon Wilmeth v. State. RAB 38. Respondent also claims the court did not erroneously rely upon five cases when overruling Appellant's objection to instruction 19. RAB fn. 7. According to Respondent, the district court instead relied upon these cases when overruling Appellant's objection that challenge to fight is not a valid theory of first-degree murder, not that self-defense is available under challenge to fight. Id.

Appellant objected to instruction 19 on two grounds. First, Appellant re-iterated his belief that challenge to fight is not a valid theory of first-degree murder. AA XIII 3023. The Court summarily rejected this argument advising, "Okay. And of course, you've already discussed reasons for why I think the statute is valid." Id. Appellant also objected stating, "...**secondly**, I object to the language that tells them as a matter of law that self-defense is not available under that liability theory." Id. In response the court explained:

> But **additionally**, the language of the right of self-defense is not available to someone who engages in a challenge to fight and a death results. **There is case law** that indicates that provisions in the statute in that regard could be considered ambiguous with – with respect to the unavailability of self-defense on the facts of the case.

> So, if, in fact the jury does find first degree murder under the challenge to fight theory, assuming the State proves beyond a reasonable doubt to the satisfaction of the jury, each and every element of the challenge to fight, **then the self-defense is not a – it is not a defense to that**.
>
> **Those cases**, Wilmeth v. State, 96 Nev. 403, also cited Princess Industries, Inc. v. State. There's Carlisle v. State, 98 Nev. 128, [] Sheriff of Washoe County v. Martin, 99 Nev. 336, Sheriff v. Luqman, []101 Nev. 149, Sheriff v. Vlasak, [] 111 Nev. 59, Williams v. State, 118 Nev. at 536, and potentially also Gallegos v. State, 123 Nev. 289.
>
> Id. at 3023-24.

The record clearly demonstrates the court relied upon these cases when ruling self-defense is not available under challenge to fight. This reliance is clearly erroneous because the cited cases did not involve NRS 200.450 and self-defense. Rather, the cases cited Wilmeth's general language on vagueness.

As argued *supra*, Wilmeth did not hold that a participant in an agreed upon fight can never assert self-defense. Wilmeth addressed whether NRS 200.450 was vague as-applied and whether the defendant

was entitled to a no duty to retreat jury instruction. Wilmeth, 96 Nev. at 404, 610 P.2d at 736. Regarding the jury instruction, this Court held, based upon the evidence presented **in that case**, "neither the defense of self-defense nor the no-retreat rule was **relevant**[.] Id. at 407, 610 P.2d at 738.

Although Respondent acknowledges Wilmeth stated, "**on the instant facts**, self-defense is not a defense to the violation of [NRS 200.450]," Respondent claims the Court only "intended that phrase to mean that they will not entertain hypotheticals and will instead decide on the facts before them." RAB 38. However, if Wilmeth actually held that self-defense is **never** available under NRS 200.450, this Court would not need to "decide on the facts before them" because under any set of facts self-defense would not apply.

Next, Respondent claims the principle that self-defense is available during mutual combat provided the slayer first declined further struggle does not apply to Appellant because the cases cited in Appellant's Opening Brief did not involve NRS 200.450. RAB 39. However, Nevada has long recognized circumstances where a mutual combatant or original aggressor can assert self-defense. *See* State v. Forsha, 8 Nev. 137, 140 (1872); State v. Smith, 10 Nev. 106, 119

(1875); State v. Vaughan, 22 Nev. 285, 39 P. 733, 736 (1895). Moreover, Nevada has codified the common law right of self-defense. *See* NRS 200.120; 200.160; 200.200; Runion v. State, 116 Nev. 1041, 1047, 13 P.3d 52, 56 (2000)("This court's decisional law with regard to self-defense has construed Nevada's statutory scheme to be consistent with the common law[.]"); *see also* NRS 193.050(3)(common law prevails in Nevada unless abrogated).

NRS 200.450 did not abrogate the common law right for a mutual combatant or original aggressor to assert self-defense. Here, the court should have instructed the jury that if the State proved an agreement to fight, Appellant could nevertheless kill Holland in self-defense if the jury found that Holland unilaterally escalated the fight by pulling a gun or if it found that Appellant declined further struggle before he killed Holland.

Finally, the district court's instructional error was not harmless. This Court reviews *de novo* whether a jury instruction comprises a correct statement of law. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). If the instruction does not, this Court asks "whether it appears 'beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained.'" Id. at 1027, 195 P.2d at 324.

Here, the jury likely believed Appellant did not kill Holland with premeditation and deliberation but instead killed Holland after a challenge to fight. Indeed, the jury acquitted Appellant of carrying a concealed weapon suggesting it believed Holland possessed the gun first. However, the court erroneously instructed that Appellant could not assert self-defense under this scenario. Therefore, even if the jury believed Holland was the initial aggressor and introduced the firearm, the jury could not legally acquit Appellant. Had the jury been properly instructed it would have found Appellant acted in self-defense.

B. Instruction 11

Respondent claims Appellant objected to instruction 11 "on the same basis as his Petition for Mandamus. RAB 40. Therefore, Appellant's argument is barred by "law of the case." RAB 40. In truth, Appellant's Mandamus petition argued that challenge to fight is not a theory of liability for first degree murder because it is not listed in NRS 200.030(1)(b). The State countered that NRS 200.030(1)(b) does not apply because NRS 200.450 is a stand-alone crime punished as first-degree murder.

Here, instruction 11 essentially added NRS 200.450 to NRS 200.030(1)(b). AA XIII 3019. Appellant objected reiterating that challenge to fight is not a theory of liability for first-degree murder, but **also** objected "to the incorporation of the language regarding that...talks about the class of murder carrying with it conclusive evidence of premeditation, deliberation, and malice aforethought." Id. Therefore, Appellant's appellate argument is not barred by law of the case.

C. Appellant's proposed instruction 1

Respondent argues the district court correctly denied proposed instruction 1 because the instruction applies only to defense of habitation. RAB 43. Alternately, Respondent argues "the part of the instruction regarding defense of one's self is substantially covered in Instructions 20 and 21." RAB 43.

1. NRS 200.120

Respondent claims because NRS 200.120 is Nevada's codification of the castle doctrine and "because the fight and the murder occurred in the parking lot of the Siegel Suites, a public

place[,]" NRS 200.120 is not applicable in Appellant's case.[14] RAB 43. While Appellant noted in his Opening Brief that NRS 200.120 is Nevada's codification of the castle doctrine, Appellant **did not** concede that NRS 200.120 **only** applies to defense of one's dwelling. AOB 54. Rather, Appellant argued NRS 200.120 also applied to defense of one's self and does not require one to retreat before using deadly force.[15] Id.

The Nevada Legislature amended NRS 200.120 in 2015 to apply the castle doctrine to occupied motor vehicles. During legislative hearings, Senator Roberson explained NRS 200.120 encompassed both the "castle doctrine" and Nevada's "stand your ground" law. *See* Hearing on S.B. 175 Before the Senate Judiciary Comm., 78th Leg. (Nev., February 25, 2015). Roberson explained:

> I want to make a distinction between the castle doctrine and stand your ground. Stand your ground was added to NRS 200.120, subsection 2 in 2011 by then-Speaker John Oceguera. This was A.B. No. 321 of the 76th Session...Senate Bill 175 makes no changes to stand your ground. **Assembly Bill No. 321**

[14] The State objected to Appellant's instruction at trial claiming, "...our issue with this is that there's no duty to retreat when you're in your dwelling. Those facts don't even apply here." AA XIII 3031.

[15] NRS 200.120 states pertinently, "Justifiable homicide is the killing of a human being in necessary self-defense, **or** in defense of an occupied habitation[.]"

> **of the 76th Session provided for the conditions outside of the castle doctrine when one has no duty to retreat before using deadly force**.
>
> Id. (Emphasis added).

Both NRS 200.120's plain text and the Legislative history prove NRS 200.120 does not **only** apply to one's dwelling but also applies outside one's dwelling. Here, Appellant presented evidence at trial consistent with his "stand your ground" defense. The district court clearly erred when it rejected Appellant's instruction because Holland's killing did not occur in a dwelling.

2. Proposed instruction 1 was not covered by instructions 20 and 21.

Respondent alternately claims proposed instruction 1 was substantially covered by instructions 20 and 21. RAB 43. Instructions 20 and 21 contained verbatim language from Runion v. State. *Compare* AA IV 820-21 with Runion v. State, 116 Nev. at 1051-52, 13 P.3d at 59. Runion did not create "standard" self-defense jury instructions. Instead, Runion offered "sample instructions for consideration by the district courts in future cases where a criminal defendant asserts self-defense." Id. Additionally, "[w]hether these or other similar instructions are appropriate in any given case depends

upon the testimony and evidence of that case."[16] Id. at 1051, 13 P.3d at 59.

The Nevada Legislature eventually codified Runion's principles but also expanded the circumstances where one could "stand [his] ground." Specifically, a person has a right to kill in self-defense **or** to kill while defending one's habitation "against one who manifestly intends or endeavors **to commit a crime of violence**[.]" NRS 200.120(1). Moreover, if a person acts in self-defense, **or** defense of habitation, pursuant to NRS 200.120(1), the person can stand his ground provided he was not the original aggressor, has "a right to be in the location where deadly force is used," and "is not actively engaged in furtherance of criminal activity at the time deadly forced is used." NRS 200.120(2). When read together, NRS 200.120(1) – (2) allows one to stand his ground and use deadly force when confronted by someone intending to commit **a crime of violence** provided he is not the original aggressor, has the right to be at the location, and is not actively involved in criminal activity.[17]

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[16] This Court expressly disavowed Runion was creating "stock" self-defense jury instructions to be used in every case. Id.

[17] NRS 200.120(3) defines "crime of violence" as "any felony for which there is a substantial risk that force or violence may be used against the person or property of another in the commission of the felony."

Instructions 21, again from Runion, stated a person has the right to stand his ground "**when faced with the threat of deadly force**." AA IV 821. As discussed above, in 2011 the legislature amended NRS 200.120 to allow one to stand his ground against one who intends to **commit a crime of violence.**" *See* NRS 200.120. "Crime of violence" encompasses situations vastly greater than those involving "threats of deadly force." Essentially, the 2011 amendments legislatively expanded the applicability of the stand your ground defense.

Here, Appellant's defense theory was that he could stand his ground because Holland committed a crime of violence against Appellant. Evidence showed that Holland, at 6'2", 300 lbs, and high on lethal levels of methamphetamine, committed a "crime of violence" when he punched Appellant and produced a firearm. Appellant was not the original aggressor because Holland punched Appellant first. Appellant had the right to be present because it was his apartment complex. Finally, Appellant was not engaged in the furtherance of criminal activity when he shot Holland.[18]

[18] Respondent will likely assert that Appellant was engaged in challenge to fight. Nevertheless, Appellant was entitled to his jury instruction and the

Appellant presented the minimum evidence required to support his theory of defense. The district court's refusal to instruct the jury concerning Appellant's theory of defense totally removed the theory from the jury's consideration and constitutes reversible error. *See* Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

D. Proposed instructions 2 and 6

Respondent argues the district court properly refused Appellant's instruction 2 because: (1) there was no evidence Appellant was protecting anyone else; and (2) Appellant was not defending his dwelling. RAB 44-45. Respondent argues instruction 6 was unnecessary because it applied to instructions 1 and 2 which are only applicable to one's dwelling. Id. at 45. Finally, Respondent claims the instructions were nevertheless covered by instructions 20, 21, and 22. Id.

1. NRS 200.160.

Appellant's Instruction 2 contained the text of NRS 200.160(1)-(2). AA IV 794. Instruction 6 listed the felonies Holland attempted to or committed against Appellant. Id. at 798. Appellant's instructions 2

State could then certainly argue to the jury that stand your ground did not apply because the State believed Appellant was engaged in criminal activity.

and 6 embodied his alternate theory that he was entitled to use deadly force to prevent Holland from committing a felony against Appellant and/or Lowe. *See* Id. at 794, 798.

NRS 200.160(1) does not **only** apply to one's dwelling. NRS 200.160(1) allows one to use deadly force in the defense of the slayer, his/her family members, any other person in the slayer's presence when it is reasonable to believe the person slain designs to commit a felony or do personal injury to the slayer, the slayer's family, or the other person present. NRS 200.160(2), allows one to use deadly force to when resisting an attempt to commit a felony upon the slayer or in the slayer's presence, **or** upon or in a dwelling.

In Newell v. State, ___ Nev. ___, 364 P.3d 602 (2015), the defendant sprayed the victim with gasoline and lit him on fire during an altercation **at a gas station**. Id. at ___, 364 P.3d at 603. Newell argued his actions were justified as he reasonably believed the victim was committing felony coercion against him. Id. The district court instructed the jury pursuant to NRS 200.160, but added the force Newell used had to be reasonable and necessary under the circumstances. Id. This Court affirmed the district court's decision. Accordingly, because Newell used deadly force at a gas station, and

this Court agreed he was entitled to a NRS 200.160 jury instruction, this Court acknowledged NRS 200.160 does not **only** apply to one's dwelling.

Here, evidence supported Appellant's theory of defense that he was using force to prevent a felony or attempted felony. Holland feloniously punched Appellant and displayed a firearm. AA XI 2719. While Holland was committing these felonies, Appellant justifiably wrested the gun away and ultimately killed Holland. Id. Appellant was entitled to have the jury properly instructed on this theory of defense and the district court's refusal to do so constitutes reversible error. *See* Williams, 99 Nev. at 531, 665 P.2d at 261.

2. Appellant's proposed instructions 2 and 6 were not covered by Instructions 20, 21, and 22.

Instructions 20, 21, and 22, were general self-defense instructions from Runion which only advised Appellant could commit justifiable homicide if facing "the threat of deadly force." AA IV 821. Appellant's proffered instruction was based upon NRS 200.160 which allows justifiable homicide when faced with a felony involving "a threat of serious bodily injury to the slayer[.] *See* Newell, ___ Nev. at ___, 364 P.3d at 605. Felonies involving the "threat of serious bodily

injury" are broader than those involving "threat of deadly force." Therefore Instructions 20, 21, and 22, were not only incorrect statements of law but did not sufficiently explain Appellant's theory of defense.[19]

V. Prosecutorial Misconduct

Respondent claims the prosecutor did not commit misconduct when he vouched for his witnesses but was instead "pointing out facts for the jury to consider in evaluating their credibility." RAB 48-49. However, merely because biased witness Hildebrand and Holland's father acknowledged the irrefutable – that Holland punched Appellant first, does not then give the prosecutor the right to personally assure the trustworthiness of their **entire** testimonies

Respondent also argues it was permissible to argue that Appellant is a liar because Appellant's "testimony was inconsistent with the evidence." Id. at 49. Appellant's testimony was not "inconsistent" with the evidence. The only arguably "inconsistent" statement Appellant made was that he entered the bus at Boulder

[19] Even if this Court believes the various self-defense statutes do not apply under NRS 200.450, the statutes would apply to the State's alternate theory of premeditated and deliberate murder. Therefore, Appellant was still entitled to the instructions.

Station instead of the Sigel Suites. Moreover, because Appellant invoked his right to counsel that statement should have been suppressed.

This Court has held the State cannot call a defendant a liar or assert that a defendant has lied. *E.g.*, Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). This Court has also held "condemning a defendant as a 'liar' should be considered prosecutorial misconduct." Rowland v. State, 118 Nev. 31, 40, 39 P.3d 114, 119 (2002). Although this misconduct is subject to harmless error review, "stating that a defendant lied on the stand is even more egregious than a statement that a defense witness lied. Not only is a testifying defendant's credibility at issue, so is his guilt." Skiba v. State, 114 Nev. 612, 617, 959 P.2d 959, 962 (1998)(Young, J., concurring in part and dissenting in part.)

VI. Insufficient Evidence

Respondent primarily relies upon biased witness Hildebrand, Salazar, and Holland's father's testimonies while arguing the State presented sufficient evidence of Appellant's guilt. *See* RAB 51-55. However, neither Salazar nor Holland's father witnessed the interaction at Arizona Charlie's or the Sigel Suites. Accordingly,

Respondent's sufficiency claim is based almost exclusively upon biased witness Hildebrand.

The actual evidence presented demonstrates that Appellant tried to protect Lowe from Holland's jealous rage. Respondent suggests by doing so Appellant needlessly "inserted himself" into Holland's argument with Lowe. RAB 55. In truth, Appellant should be commended for trying to stop Holland rather than standing by while Holland committed physical violence against Lowe. Domestic violence is a serious problem in this community. When Appellant came to Lowe's aid, an enraged Holland threatened Appellant. In response, Appellant replied "you know where I be." AA XI 2715. This was hardly an acceptance of Holland's supposed "challenge." Rather, Appellant's response simply acknowledged Holland's words did not scare Appellant.

Most importantly, Hildebrand testified when he and Appellant arrived at the Sigel Suites Holland stated he was not there to fight. AA VIII 1767. This fact belies Respondent's claim that "the challenge and agreement had already occurred." RAB 53. Even if the agreement had already occurred, Holland's disavowal proves there was a repudiation of the "agreement" and therefore no agreement to fight. Respondent's

argument that once there's an agreement the parties are forever bound by the agreement proves NRS 200.450 is fatally flawed because it is antithetical to self-defense and contract principles embodied by statutory, case, and common law.

Finally, Respondent also relies upon biased witness Hildebrand to argue the State presented sufficient evidence of premeditation and deliberation. RAB 54-55. However, the jury's decision to acquit Appellant of carrying a concealed firearm cast serious doubt upon Respondent's claim.

VII. Cumulative Error

Respondent claims Appellant "has not asserted any meritorious claims, and thus, there is no error to accumulate." RAB 56. Alternately, Respondent suggests "the issue of guilt was not close." Id.

Appellant has asserted numerous meritorious claims involving the evisceration of Appellant's fundamental rights. These include being convicted for violating an unconstitutional statute, having the State repeatedly comment upon Appellant's post-invocation silence, and being impermissibly called a liar while simultaneously having the State vouch for the truthfulness of its own witnesses' testimony.

Additionally, the district court fundamentally erred by incorrectly instructing the jury regarding the law and refusing to instruct the jury on Appellant's defense theories with evidentiary support. The Court also erred by allowing the State's "expert" witness to systematically and improperly impeach Appellant's trial testimony.

Finally, Respondent's suggestion that substantial evidence supports Appellant's guilt rests exclusively upon biased witness Hildebrand's testimony. However, Hildebrand's testimony was discredited by every independent witness who testified at trial. In truth, the State failed to present any evidence whatsoever that Appellant killed Holland with premeditation and deliberation or pursuant to a challenge to fight. Therefore, if this Court does not believe any individual error warrants reversal the cumulative effect of the errors absolutely warrants reversal.

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CONCLUSION

Based upon the foregoing arguments, Appellant respectfully requests this Court reverse his conviction.

Respectfully submitted,

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DATED this 15th day of August, 2016.

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