IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS PIMENTEL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No: 68710

E-File

APPELLANT'S MOTION FOR LEAVE TO FILE AMENDED OPENING AND REPLY BRIEF OR IN THE ALTERNATIVE MOTION TO STRIKE PORTIONS OF APPELLANT'S OPENING AND REPLY BRIEFS

COMES NOW Appellant, LUIS PIMENTEL, by and through Deputy Public Defender, WILLIAM M. WATERS, pursuant to NRAP 27, and moves this Honorable Court to grant leave to file an Amended Opening Brief and Amended Reply Brief, amending the original Opening Brief filed on March 28, 2016 and the Reply Brief filed on August 15, 2016 in the above entitled case. In the alternative, Appellant requests this Court simply strike portions of the Opening and Reply Brief.

///

///

///

This Motion is based upon the attached declaration of counsel.

DATED this 10th day of February, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4576

DECLARATION OF WILLIAM M. WATERS

1. I am an attorney duly licensed to practice law in the State of Nevada and the Deputy Public Defender assigned to represent LUIS PIMENTEL on appeal currently pending before this Court.

2. On March 28, 2016 Appellant filed the Opening Brief in this Court. On August 15, 2016 Appellant filed his Reply Brief.

3. In the Opening Brief, page 53 lines 12-28; page 54 lines 1-4 Appellant noted his proposed jury Instruction 1 was a recitation of NRS 200.120. Appellant included NRS 200.120's text in his Opening Brief. AOB 53.

4. Unfortunately, Appellant's citation was to the latest version of NRS 200.120 and not the version in effect at the time of Appellant's trial.

5. Appellant desires to correct this inaccurate factual assertion and to include citation to the correct version of NRS 200.120.

6. These amendments do not in any way change the arguments asserted in both the Opening Brief and the Reply Brief.

7. Appellant prepared an Amended Opening Brief and an Amended Reply Brief for filing with this Court and these amended briefs are attached as Exhibits A and B. The changes to the Opening and Reply Briefs are noted in brackets (< >) and are bolded and underlined in the Amended Briefs.

8. Oral argument is currently scheduled for March 6, 2017 in Carson City, NV. Appellant's instant motion represents the most efficient means to correct the briefs without delaying the scheduled oral argument.

9. This motion is made in good faith for the purpose as noted above and not for the purpose of delay.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 10th day of February, 2017.

/s/ William M. Waters
WILLIAM M. WATERS

POINTS AND AUTHORITIES

On March 28, 2016 Appellant filed his Opening Brief in this Court. Within argument IV section (B)(1) Appellant asserted the district court erred by refusing to give his proposed Instruction 1 because Instruction 1 was an accurate statement of the law and sufficiently apprised the jury regarding Appellant's theory of self-defense. AOB 54. Additionally, Instruction 1's substance was not incorporated into any other instructions actually given. Id.

Unfortunately, in support of his argument Appellant made a mistaken factual assertion in his Opening Brief. The statutory language Appellant used in his brief, which he contended mirrored Appellant's proposed Instruction 1, was based upon an incorrect version of NRS 200.120. Based upon this error, Appellant also relied upon the incorrect statutory language in his Reply Brief section IV(C)(2).

The Nevada Legislature amended NRS 200.120 on June 2, 2015. See S.B. 175, 78th Leg., Regular Sess. (June 2, 2015). Appellant's trial began on May 11, 2015 and ended on May 27, 2015. AA IV 873, 889. At trial Appellant used the version of NRS 200.120 in effect at the time of trial for his proposed Instruction 1. However, on appeal, Appellant cited the post June 2, 2015 amendment in his Opening and Reply Briefs which was not in effect at the time of Appellant's trial and did not mirror Appellant's proposed Instruction 1.

Specifically, in his Opening Brief, Appellant stated "Appellant's proposed Instruction 1 was recitation [*sic*] of NRS 200.120 which provides:

> 1. Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of an occupied habitation, an occupied motor vehicle or person, against one who manifestly intends or endeavors to commit a crime of violence, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, tumultuous or surreptitious manner, to enter the occupied habitation or occupied motor vehicle, of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.
>
> 2. A person is not required to retreat before using deadly force as provided in subsection 1 if the person:
>
> (a) Is not the original aggressor;
>
> (b) Has a right to be present at the location where deadly force is used; and
>
> (c) Is not actively engaged in conduct in furtherance of criminal activity at the time deadly force is used.

AOB 53. The aforementioned citation was to the June 2, 2015 version of NRS 200.120. Appellant's proposed Instruction 1, submitted at trial, was a verbatim recitation of NRS 200.120 prior to the June 2, 2015 amendment. Thus, Appellant's proposed Instruction 1 actually stated:

> 1. Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any

person or persons who manifestly intend and endeavor, in a violent, riotous, tumultuous or surreptitious manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

2. A person is not required to retreat before using deadly force as provided in subsection 1 if the person:

(a) Is not the original aggressor
(b) Has a right to be present at a location where deadly force is used; and
(c) Is not actively engaged in conduct in furtherance of criminal activity at the time deadly force is used.

See AA IV 793.

Appellant respectfully requests this Court allow him to amend his Opening Brief to replace his citation to the June 2, 2015 version of NRS 200.120 with the prior version in effect at the time of Appellant's trial. This proposed amendment will not in any way change, alter, or add to, Appellant's original argument. Under the prior version of NRS 200.120 in effect at the time of trial, Appellant's proposed Instruction 1 was still an accurate statement of the law not adequately covered by any instructions actually given.

Additionally, although Respondent did not note in its Answering Brief that Appellant had cited an incorrect version of NRS 200.120, Respondent nevertheless cited the correct version of both NRS 200.120 and Appellant's

proposed Instruction 1 in its Answering Brief while making its arguments. RAB 43. Therefore, if Appellant is allowed to file an Amended Opening and Reply Brief, Respondent's argument will not change as its argument is already based upon the version of NRS 200.120 which was in effect at the time of Appellant's trial.

Appellant's request to amend the Briefs is based solely upon his desire to correct an inaccurate factual and legal assertion. However, if this Court is not inclined to grant Appellant leave to amend, or does not believe Appellant's mistake necessitates amending the briefs, Appellant would alternately request this Court simply strike lines 15-23 from page 53 in Appellant's Opening Brief and replace the stricken language with:

> Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, tumultuous or surreptitious manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

Additionally, Appellant would request this Court: (1) strike: "an occupied" from page 26 footnote 15 in Appellant's Reply Brief; (2) strike "to commit a crime of violence" on page 28 of Appellant's Reply Brief and replace with "to commit a

felony;" (3) strike footnote 17 on page 28 of Appellant's Reply Brief; (4) strike references to "crime of violence" on page 29 of Appellant's Reply Brief and replace with "to commit a felony."

If this Court does not believe Appellant's mistake warrants either amending the briefs or striking portions of the briefs, then Appellant requests his Motion simply serve notice he is bringing to the Court's and Respondent's attention that Appellant made an erroneous representation in his briefs but that misrepresentation does not in any way affect any of the arguments in his briefs.

CONCLUSION

NRPC 3.3: Candor Toward the Tribunal, requires attorneys to correct representations made to the Court if they are discovered to be in error. In his Opening Brief Appellant represented that his proposed Instruction 1 was a verbatim recitation of NRS 200.120. However, Appellant cited the 2015 version of NRS 200.120 which was not in effect at the time of trial. Accordingly, Appellant respectfully requests this Court grant him leave to file an Amended Opening and Reply Brief so that the briefs refer to the correct version of NRS 200.120 in effect at the time of trial and which was used for Appellant's proposed Instruction 1. If the Court does not believe amending the briefs is necessary or warranted, Appellant would request this Court strike portions of the briefs which reference the incorrect version of NRS 200.120 and replace the stricken language

with corresponding language from the version of NRS 200.120 in effect at the time of trial. Lastly, if this Court does not believe Appellant's mistake warrants either amending the briefs or striking portions of the briefs, Appellant respectfully notices this Court's that he made an erroneous representation in his brief which does not in any way affect his arguments.

Respectfully submitted,

WILLIAM M. WATERS
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10th of February, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

WILLIAM M. WATERS
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

LUIS PIMENTEL
NDOC No. 1144889
Ely State Prison
P.O. Box 1989
Ely, NV 89301

BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office

Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S AMENDED OPENING BRIEF

(Appeal from Judgment of Conviction)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S AMENDED OPENING BRIEF

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S AMENDED OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant, Louis Pimentel, appeals from a final judgment under Nevada Rule of Appellate Procedure 4(b) and NRS 177.015. The State filed the Judgment of Conviction on August 7, 2015. Appellant's Appendix Vol. IV, p. 840 ("AA IV 840"). Appellant filed his Notice of Appeal on August 25, 2015. Id. at 842.

ROUTING STATEMENT

Appellant's case is presumptively assigned to the Nevada Supreme Court because he was tried for a category A and B felony and convicted of the category A felony. Convictions involving category A or B felonies after jury trial are within the original

jurisdiction of the Nevada Supreme Court and not the Court of Appeals. *See* NRAP 17(b)(1).

ISSUES PRESENTED FOR REVIEW

I. The district court violated Appellant's Constitutional right against self-incrimination by allowing the State to introduce his statement to police given after inadequate Miranda[1] warnings.

II. NRS 200.450 is unconstitutionally vague, overbroad, and creates a strict liability offense.

III. The State's expert witness violated the exclusionary rule and improperly commented upon Appellant's veracity which deprived Appellant of his fundamental right to a fair trial.

IV. The district court violated Appellant's fundamental right to a fair trial by denying Appellant's requested jury instructions and by incorrectly instructing the jury regarding the applicable law.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

V. The district attorney committed prosecutorial misconduct which violated Appellant's Due Process right to a fair trial.

VI. Appellant's due process rights were violated when he was convicted based upon insufficient evidence.

VII. Cumulative Error warrants reversal.

STATEMENT OF THE CASE

On December 23, 2013, the State filed a criminal complaint charging Appellant with one count of Murder with Use of a Deadly Weapon. AA I 1. At his first appearance in the Las Vegas Justice Court the magistrate appointed the Clark County Public Defender to represent Appellant, set bail, and scheduled a preliminary hearing.[2] Id. at 2.

Three witnesses testified at the preliminary hearing. Id. at 13. At the hearing's conclusion the State amended the complaint to add one count of Carrying a Concealed Weapon and a "challenge to fight" theory of liability for First Degree Murder. Id. at 157-58. Over Appellant's objection the magistrate held Appellant to answer in the

[2] Based upon Appellant's substitution of counsel and Appellant's various medical issues the court continued the preliminary hearing numerous times. *See* Id. at 3, 10.

district court on both charges. Id. at 164. In district court, Appellant pleaded not guilty and waived his right to a speedy trial. AA IV 904. The court scheduled Appellant's jury trial for September 15, 2014. Id. at 908.

Appellant filed a pre-trial Petition for Writ of Habeas Corpus arguing the justice court erred by allowing the State to amend the criminal complaint to allege "challenge to fight" as an alternate theory of liability for First Degree Murder. AA I 187-96. After the district court denied Appellant's Petition, Appellant filed a Petition for Extraordinary Relief in this Court under case number 66304. This Court granted Appellant's petition and ordered the district court to strike the challenge to fight theory from the Information. *See* case no. 66304, Order Granting Petition in Part, filed September 24, 2014. After the district court complied, the State moved to amend the Information to re-add the theory. AA III 729-736. Over Appellant's opposition the district court granted the State's motion. *See* AA III 737-742; AA IV 785-86.

Appellant filed numerous motions prior to trial.[3] Most significantly, Appellant filed a motion to suppress his statement to police. AA III 625-39, 649-85. The State filed an opposition and the court held a hearing on October 7, 2014. Id. at 702-715; AA IV 965. The court denied Appellant's motion after the hearing.[4] AA V 1039-40.

Later, Appellant filed an expert witness notice naming Briana Boyd, Ph.D. as "an expert in the area of post-traumatic stress disorder[.]"[5] AA II 488. In response, the State filed a motion to compel Appellant to submit to a psychological examination and a motion in limine to limit Boyd's testimony. *See* Id. at 640-48. Over Appellant's opposition, the court granted the State's request to compel Appellant to submit to a psychological examination. Id. at 716-22. The court withheld ruling on the State's request to limit Boyd's testimony until trial.[6] *See* AA IV 785-86. Thereafter, the State

[3] The parties resolved many of the motions with minimal court intervention.

[4] Although the court asked the State to prepare an order summarizing the court's findings it appears the State either never submitted the order or the court never filed the order.

[5] Appellant eventually amended his Expert Notice to more fully explain Boyd's proposed testimony. *See* AA III 723-25.

[6] It does not appear the Court ever made a ruling on this issue during trial.

noticed Melissa Paisecki as a rebuttal expert. AA III 750; AA IV 751-773.

Appellant's trial began on May 11, 2015. AA V 1079. After 12 days and 27 testifying witnesses the jury acquitted Appellant of count two, Carrying Concealed Firearm but convicted Appellant of count 1, Murder with Use of a Deadly Weapon. AA IV 838-39. The parties agreed to waive a separate penalty hearing and allow the court to impose sentence. *See* AA IV 788-89. The court sentenced Appellant to 20 to 50 years in prison with a consecutive 32 to 144 months for the use of a deadly weapon. AA XIII 3167. Appellant timely filed his Notice of Appeal on August 25, 2015. AA IV 842-45.

STATEMENT OF THE FACTS

Appellant joined the United States' Army in 2003 and honorably served his county as a combat medic during two deployments in Afghanistan. AA XI 2695. Although Appellant served as a medic he was also a solider and carried both an M4 assault rifle and a 9mm handgun. Id. at 2394. During combat the primary goal for any soldier is to neutralize the enemy. Id. at 2396. Therefore, the army taught Appellant to act instinctively when confronted by a life-threatening situation. Id.

In 2007, Appellant was deployed to the Korengal Valley in Afghanistan. Id. at 2399. During that deployment Appellant's close friend and fellow medic Juan Restrepo was killed.[7] Id. at 2402. After Restrepo's death, Appellant's ability to perform in combat diminished. AA X 2403, 2405.

The army discharged Appellant in 2008. AA XI 2704. Post-deployment Appellant became withdrawn, experienced trouble sleeping, and had nightmares and combat flashbacks. Id. at 2702-03. Appellant sought treatment at the Walter Reed Medical Center in Washington D.C. Id. Doctor's at Walter Reed diagnosed Appellant with post-traumatic stress disorder ("PTSD"), traumatic brain injury, and neuropathy. AA XII 2859. Appellant's symptoms included a heightened awareness of surrounding and an irrational fear of perceived threats. Appellant's symptoms were so serious he was unable to complete school or maintain employment and even attempted suicide. AA XI 2463, 2467.

While receiving treatment at Walter Reed in 2008, Appellant met and married Grace Nunez ("Nunez"). AA XI 2704. Appellant

[7] Appellant's entire unit experienced heavy losses during this deployment and two members were awarded the Congressional Medal of Honor. AA XI 2695-96.

and Nunez had a son, Damien, in December 2009. AA X 2441.

However, Appellant's PTSD strained his marriage ultimately leading to separation in February 2011. Id. at 2443. After a failed reconciliation Appellant left Nunez and moved to Las Vegas in June 2012. Id. at 2444.

When Appellant arrived in Las Vegas he lived with his brother Raymond Gonzalez ("Gonzalez"). Id. at 2482. Gonzalez and Appellant were very close. Id. at 2481. Gonzalez immediately noticed Appellant's time in the army had changed him. Id. Appellant was easily startled by loud noises and would awake in the middle of the night screaming. Id. at 2485. Appellant also could not maintain steady employment. Id. at 2487. However, Gonzalez never witnessed Appellant act violently. Id. at 2488-89.

Appellant first met the alleged victim Robert Holland III ("Holland") when Appellant began dealing methamphetamine. AA XI 2708. Holland was a habitual methamphetamine user and "best friends" with Amanda Lowe ("Lowe"). Id. at 2511. Lowe was a prostitute and although Holland desired a romantic relationship with her, she did not reciprocate his feelings. Id. at 2512. However, Lowe

did spend significant time with Holland and also had sexual relations with him. Id.

In late December 2013, Lowe was staying at Holland's house. Id. at 2528. Lowe wanted to purchase methamphetamine and located Appellant's phone number in Holland's phone. Id. Lowe contacted Appellant who delivered methamphetamine to her. Id. Lowe instantly became attracted to Appellant. Id. Thereafter, Appellant and Lowe began spending time together which upset Holland. Id. at 2531.

On December 21, 2013, Lowe and Appellant met at Boulder Station Hotel and Casino to gamble. Id. at 2535-36. Afterwards, Lowe returned to Holland's house where the two ingested methamphetamine. Id. Later Holland's mother, Debra Battelini ("Battelini"), drove Lowe and Holland to a Sinclair gas station on Boulder Highway where Lowe met a "client." Id. at 2537. Before Lowe left with her client she asked Holland to give her a hug and a kiss and told him she would see him later that morning. AAVII 1602.

After her appointment, Lowe's client drove her to Arizona Charlie's Hotel and Casino on Boulder Highway where she met Appellant. AA XI 2538. Appellant had rented a room for a few nights at Arizona Charlie's. Id. at 39. Appellant and Lowe were affectionate

with each other and spent the evening gambling. Id. at 2539. Eventually Holland arrived and angrily confronted Lowe. Id. at 2540. Holland was belligerent and accused Lowe of not spending enough time with him. Id.

Lowe repeatedly told Holland she did not want to speak to him. Id. at 2545. Undeterred, Holland became increasingly angry until casino security intervened. Id. at 2552. Lowe agreed to accompany Holland outside to calm him down. Id. However, Holland's behavior escalated and Lowe began walking towards Appellant's hotel room. Id. at 2556. In response, Holland slapped Lowe in the face. Id. Security officers monitoring the situation intervened, trespassed Holland, and escorted Lowe inside the casino. Id. at 2559. When Lowe told Appellant Holland had slapped her Appellant replied, "It's not right for a man to hit a woman." Id. at 2560.

Timothy Hildebrand ("Hildebrand") and his fiancé Shannon Salazar ("Salazar"), two of Holland's longtime friends, arrived at Arizona Charlie's and noticed Holland standing outside. AA VII 1743-44. Holland, visibly upset and agitated, asked Hildebrand to speak to Lowe and convince her to come outside. Id. at 1744-45. Hildebrand complied and located Lowe inside the casino. Id. at 1747-

48. However, Lowe told Hildebrand Holland had slapped her and she did not want to speak with him. AA XI 2562.

Holland also called his father Robert Holland II ("Holland II") requesting a ride home. AA VII 1619-20. Holland told Holland II that he was worried about going to jail that morning. Id. at 1620. Holland explained he had argued with Lowe earlier and eventually slapped her in the face. Id. Meanwhile, before he ever encountered Holland, Appellant asked Hildebrand for a ride home. AA XI 2712.

When Holland II arrived, Holland requested he go inside the casino, find Lowe and put her on the phone so Holland could speak to her. AA VII 1619-20. Holland II complied. Id. at 2563. Lowe refused to speak to Holland explaining he had hit her and she did not wish to speak with him. Id. After refusing to speak to Holland, Lowe and Appellant decided to leave the casino and go to Appellant's room to gather his belongings. AA XI 2564. Hildebrand, who had agreed to drive Appellant home, followed. AA VII 1750.

When Lowe and Appellant approached Appellant's room, Holland approached and verbally berated Lowe. AA XI 2565. After Appellant and Hildebrand entered the room, Holland lunged at Lowe.

Id. at 2569. Hotel security officers Juan Knight ("Knight") and Javon Howard ("Howard") arrived to diffuse the situation. AA X 2272-73.

Knight and Howard arrived as Holland aggressively charged at Lowe and threw an unknown object at her. Id. at 2276. Both Knight and Howard physically blocked Holland from running into Lowe. Id. at 2277; AA X 2352. Meanwhile, Appellant exited his hotel room telling Holland "what's your problem" and "leave her alone she doesn't want you."[8] Id. at 2277; 2353. Holland argued with Appellant before threatening to kill Appellant. Id. at 2715. In response, Appellant replied "you know where I be."[9] Id. Appellant never threatened Holland and remained calm during the entire incident. Id. at 2323, 2371.

Holland then left to meet Holland II. AA VII 1622. Holland told Holland II to drive him to "Lorenzo's house." Id. at 1623. Meanwhile Appellant and Lowe met Hildebrand and Salazar at the Arizona Charlie's valet area so Hildebrand could drive them to

[8] Biased witness Hildebrand testified Appellant told Holland "meet me at my house in 30 minutes motherfucker. I'll kick your ass." AA VIII 1754-55.

[9] Knight and Howard confirmed Appellant never told Holland to "meet me at my house in 30 minutes." AA X 2325. Rather, Appellant said "you know where I'm at or you know where I be." Id. at 2278. Howard testified Appellant added, "I don't want any problems." Id. at 2353.

Appellant's apartment. AA XI 2579. Appellant and Lowe did not discuss the situation with Holland during the ride home. Id. at 2581.

When Appellant arrived at his Apartment Holland was already at the apartment door, banging, and demanding to speak to Lowe. Id. at 2717. Appellant slowly walked towards the stairs leading to the apartment repeatedly telling Holland to "just calm down. Chill out. It doesn't have to go like this." AA XI 2585. Hildebrand, sensing Holland would cause trouble, asked Lowe to drive herself and Salazar to the 4 mile bar across the street. AA VIII 1761. Lowe instead drove behind the Sigel Suites and parked the car. AA XI 2588.

Holland quickly walked down the stairs and confronted Appellant while Appellant continued trying to diffuse the situation. Id. at 2585, 2718. Holland, undeterred, eventually stated, "fuck this. Let's finish this," and punched Appellant in the face.[10] Id. at 2719. Appellant responded by punching Holland in the face. Id. Holland pulled a gun on Appellant but Appellant disarmed Holland and gained control of the gun.[11] Id. Holland, who was 6'2" and weighed 292

[10] Even biased witness Hildebrand noted Appellant had not been physically aggressive with Holland. *See* AAVIII 1767.

[11] Biased witness Hildebrand claimed Appellant had the gun hidden under his t-shirt. AA VIII 1769-70. However, by acquitting Appellant

pounds, quickly "rushed" at Appellant. Id. at 2720. Appellant fired the gun striking Holland in the right portion of his chest. Id. Appellant fired an additional shot after Holland had fallen to the ground. Id.

The first bullet entered Holland's chest, went through Holland's upper right lung, his aorta, and exited through his mid-back. AA IX 2113, 2116. These injuries likely killed Holland almost instantaneously. Id. at 2115. Even with immediate medical intervention Holland would not have survived. Id. The second bullet entered Holland's left buttock traveling upwards through the pelvic region and abdomen before exiting near Holland's belly button. Id. at 2117. Had this been the only wound Holland would have survived with medical attention. Id. at 2119.

When Holland II heard the first gunshot he initially retreated into his vehicle. AA VII 1635. Through his rearview mirror Holland II saw Appellant fire a gun "into the ground" and then throw the gun underneath a truck.[12] Id. at 1636. Holland II then exited his vehicle

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of the carrying a concealed firearm the jury obviously did not believe Hildebrand's testimony.

[12] Holland II testified he heard a total of three shots. AA VII 1648. However, the forensic evidence and the testimony of every other witness indicated Appellant only fired two shots.

and approached the area where Appellant had fired the gun. Id. at 1637. Appellant saw Holland II, and thought Holland II was holding a firearm. AA XI 2723. Fearing Holland II would shoot him Appellant left the scene and boarded a Citizen's Area Transit ("CAT") bus. Id. at 2724. Holland II called 911 and performed CPR on his son. AA VII 1638-39. Hildebrand "freaked out" and ran away. AA VIII 1780.

Las Vegas Metropolitan Police ("Metro") Officer Vincent Pacifico responded to the scene within minutes. AA VII 1673. Pacifico quickly located the firearm. Id. at 1679. After speaking with bystanders, Pacifico learned Appellant entered the CAT bus travelling west on Boulder Highway. Id. at 1680. Pacifico sent Officer Sean Miller to stop the bus. AA VIII 1986. Miller drove west on Boulder Highway, located and pulled the bus over. Id. at 1988. Miller detained Appellant and placed him in a patrol vehicle. Id. at 1993. Eventually, Appellant was transported to Metro's homicide office. Id.

Homicide detective Todd Williams responded to the Sigel Suites, interviewed witnesses, and coordinated evidence recovery. AA IX 2190-93. Later that morning Williams interviewed Appellant. Id. at 2213. Before his interview, Police photographed Appellant to document the injury to his left eye from Holland's punch. Id.

Williams also executed a search warrant at Appellant's apartment. Id. at 2228. Williams did not locate any other guns or related items in Appellant's apartment. Id. at 2229. Williams did not search Holland's room at Battelini's house for firearms, ammunition, or firearm related items, and did not speak to Arizona Charlie's security. AA IX 2231, 2250.

Later that day, Williams interviewed Lowe at her uncle's house in Henderson, NV. Id. at 2204. Williams claimed Lowe acted "hostile" during the interview so he decided to secretly audio-record his conversation with her. Id. at 2204-05. However, both Williams and his partner forgot to turn on their recording devices so Lowe's statement was not recorded. Id. at 2205. Two weeks later, Williams spoke with Hildebrand and Salazar in a Walmart parking lot. Id. at 2207. Hildebrand's and Salazar's, who had two weeks to manufacture their stories, gave similar statements but their statements were contradicted by every other witness statement.

Holland's autopsy confirmed he had abrasions on his knuckles and right knee and his left index finger and calf had contusions. Id. at 2121-25. Holland also had a "lethal, toxic, level" of methamphetamine in his system. Id. at 2127-28. Police attempted to

recover DNA and fingerprints from the recovered firearm. AA VII 1708. The firearm contained no fingerprints, but police recovered a latent print from the gun's magazine. Id. at 1709, 1711. However, the print was not suitable for comparison. AA IX 2077. Police were also able to recover DNA from the firearm, but not the magazine. AA VII 1664, 1669. Although the DNA contained a mixture of at least two people, with one being male, due to the sample's poor quality police were unable to compare it to either Holland's or Appellant's DNA. Id. at 1667.

SUMMARY OF THE ARGUMENT

This Court should reverse Appellant's conviction because Appellant was tried and convicted under an unconstitutionally vague and overbroad statute which makes "challenge to fight" First Degree Murder. The statute fails to provide notice concerning what words or conduct manifests a "challenge" or "agreement" to fight. Without definitions the statute also allows for arbitrary enforcement.

Moreover, the statute is overbroad because it does not include any *mens rea* requirement thereby creating strict liability should someone die during a fight. Additionally, the statute is overbroad because it does not exempt participants in state sanctioned unarmed

combat contests, like boxing or mixed martial arts, from criminal liability.

Even if the "challenge to fight" statute is constitutional, the district court nevertheless eviscerated Appellant's right to a fair trial by incorrectly instructing the jury that self-defense is not available when the State alleges challenge to fight First Degree Murder. This Court has never held one cannot argue self-defense when he kills another during a challenge to fight. Although Appellant steadfastly maintains he never accepted Holland's alleged challenge, even if Appellant had, Holland repudiated the agreement and/or unilaterally escalated the fight by pulling a gun on Appellant. Therefore, Appellant had an absolute right to defend himself under these circumstances and a poorly drafted state statute cannot abridge that right. Additionally, the State alternately charged Appellant with premeditated and deliberate First Degree Murder which would absolutely entitle Appellant to argue self-defense. However, the district court refused Appellant's theory of defense jury instructions which correctly stated the law concerning self-defense.

The court further violated Appellant's fair trial right by allowing the State's expert witness to remain in the courtroom during defense

witness testimony. When the State's supposed "expert" testified she did not offer any expert opinions but instead merely impeached Appellant's trial testimony with statements he made to her during Appellant's court ordered psychological examination.

Most egregiously, the district court violated Appellant's fair trial rights by allowing the State to introduce Appellant's statements to police after invalid Miranda warnings and Appellant's invocation of his right to counsel. After the court's erroneous ruling, the State impermissibly commented upon Appellant's invocation by arguing that Appellant failed to adequately answer police questions. The State committed further misconduct by improperly vouching for its witnesses and arguing that Appellant's trial testimony was a lie.

Even if the aforementioned errors are not reversible, Appellant was nevertheless convicted based upon insufficient evidence. As noted, the State presented absolutely no evidence whatsoever that Appellant and Holland had an agreement to fight. Therefore, Appellant could not be convicted of First Degree Murder under a challenge to fight theory. Additionally, because the State alternately charged Appellant with premeditated and deliberate First Degree Murder, it bore the burden of disproving self-defense beyond a

reasonable doubt. Appellant testified he acted in self-defense and the State failed to present any evidence whatsoever to rebut that claim much less disprove it beyond a reasonable doubt.

Finally, even if this Court does not believe the aforementioned errors individually deprived Appellant of his fundamental right to a fair trial the cumulative effect of the errors absolutely did.

ARGUMENT

I. The District Court Violated Appellant's Constitutional Right against Self-Incrimination by Allowing the State to Introduce His Statement to Police.

The United States and Nevada Constitutions protect an individual's right against self-incrimination. *See* U.S. Const. Amend. V; Nev. Const. Art 1 § 8; Holyfield v. Townsell, 101 Nev. 793, 711 P.2d 845 (1985). Accordingly, prior to police questioning "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda v. Arizona, 384 U.S. 436, 467 (1966).

When the State seeks to admit a defendant's statement at trial it must show police provided certain warnings -- known as Miranda warnings, prior to the defendant's custodial interrogation. Boehm v. State, 113 Nev. 910, 913; 944 P.2d 269, 271 (1997). These warnings

include advising the suspect he has the right to remain silent and has the right to an attorney. Miranda, 384 U.S. at 467. If police fail to provide warnings or give incorrect warnings, but a suspects statement was nevertheless voluntary, the statement can be used only for impeachment if the Defendant testifies and contradicts the statement. Harris v. New York, 401 U.S. 222; 91 S.Ct. 643 (1971). If a suspect invokes his right to counsel, all questioning must cease. Edwards v. Arizona, 451 U.S. 477, 481-82 (1981).

On appeal this Court reviews the district court's legal conclusions regarding whether police complied with Miranda *de novo* and its factual findings for clear error. Lamb v. State, 251 P.3d 700, 702 (2011)(*citing* Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005)). If Miranda was violated the erroneous admission of a defendant's statement is reviewed for harmless error. Arizona v. Fulminante, 499 U.S. 279, 295 (1991). An error is harmless if it does not affect a defendant's substantial rights. NRS 178.598.

A. Police provided Appellant Inadequate Miranda Warnings.

According to Miranda, "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation[.]" Miranda, 384

U.S. at 471-72. Therefore, proper Miranda warnings include notifying a suspect that he has the right to consult an attorney **both before and during questioning**. U.S. v. Noti, 731 F.2d 610, 614-15 (9th Cir. 1984) (emphasis added).

Here, prior to Appellant's interrogation, Police provided the following warning:

> 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.

Appellant acknowledged his rights, but when asked whether he wanted to speak with police answered, "Uh, regarding what sir?"[13] Id. Police did not answer Appellant's query but instead asked Appellant background questions. Id. at 670. Then, police asked Appellant general questions concerning Appellant's actions on the night Holland died. Id. at 674-82. As detectives continued to ask questions Appellant invoked his right to counsel. Id. at 683. After Appellant's invocation Police ceased the interrogation but lectured Appellant before terminating the interview. Id.

[13] Appellant signed a Miranda waiver acknowledgement. AA III 715.

Appellant challenged his statement's admissibility claiming police failed to receive an express waiver of Appellant's rights before questioning. Id. at 632. Appellant did not challenge the warnings' adequacy below. However, this Court has repeatedly held that it will address constitutional issues raised for the first time on appeal. *E.g.* State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998); Phipps v. State, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995); *see also* U.S. v. Tisor, 96 F.3d 370, 378 (9th Cir. 1996)(Federal appellate courts will review issues raised for the first time on appeal, "if to do so would not require the development of new facts."); Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir. 1996)(appellate court will review issue raised for the first time on appeal when the issue is "purely one of law" or "to prevent a miscarriage of justice.").

In U.S. v. Chavez, 111 F.Supp.3d 1131, 1146 (D. Nev. 2015)[14], the United States District Court for the District of Nevada held that the Las Vegas Metropolitan Police Department's standard Miranda warnings were constitutionally deficient because the warnings failed to properly advise the suspect that he had the right to consult with an attorney **before questioning**. The district court came to the same

[14] *See also* U.S. v. Toliver, 480 F.Supp.2d 1216, 1242 (D. Nev. 2007).

conclusion as recently as February 19, 2016, in U.S. v. Loucious, No. 2:15-cr-00106-JAD-CWH (D. Nev. filed Feb. 19, 2016).

The inadequate Miranda warnings at issue in Chavez and Loucious were identical to the warnings given to Appellant in this case. *Compare* Chavez, 111 F.Supp.3d at 1146; AA III 668. Here, as in Chavez, the police failed to properly advise Appellant that he had the right to consult with an attorney **before** questioning. Because the Miranda warnings given to Appellant were inadequate, Appellant's statements to police were inadmissible in the State's case in chief and the district court clearly erred by denying Appellant's Motion to Suppress.

B. Because Appellant Invoked his Right to Counsel his Statement was Inadmissible at Trial.

If this Court finds the Miranda warnings were adequate, Appellant's statements were nevertheless inadmissible at trial because Appellant invoked his right to counsel. Although Appellant agreed to speak with police, police did not initially ask specific questions regarding the incident involving Holland. Rather, police asked very general questions. *See* AA III 668-83. The State essentially characterized Appellant's answers to those questions as evasive or "lies." *See* Id. at 712; AA V 1032. In actuality, the initial questions

were simply general and not specific. Once police asked Appellant **direct** questions concerning the events surrounding Holland's death Appellant invoked his right to counsel and police ended the interrogation. Id. at 683-84.

In the district court, Appellant argued his invocation necessitated suppression of his entire statement. Id. at 635-38. Basically, if the State introduced the statement and characterized it as "evasive," i.e., lies, distortions, or half-truths, Appellant would have to explain his answers were not evasive and that Appellant chose not to elaborate when asked specific questions because he invoked his right to counsel. Id. at 637-38. The district court disagreed, finding the State could introduce Appellant's statements before his invocation. AA V 1039-40. The court further advised it would address any issues regarding Appellant's actual invocation should Appellant testify at trial. Id. Thereafter, at trial the State elicited from Detective Williams that Appellant's answers were either dishonest or not forthcoming. *See* AA IX 2220-21. On cross-examination, Williams confirmed

Appellant invoked his right to counsel during the interview.[15] AA X 2258.

The United States' Supreme Court has held it is error for the State to comment upon, and attempt to draw a negative inference from, a defendant's decision to invoke either his right to remain silent or his right to an attorney. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976). The State is also prohibited from commenting upon a defendant's post-invocation silence even if the defendant initially gives a limited statement before invoking his right to remain silent or to an attorney. U.S. v. Caruto, 532 F.3d 822, 824 (9th Cir. 2008). The error is reversible unless the State demonstrates beyond a reasonable doubt that the error was harmless. U.S. v. Baker, 999 F.2d 412, 416 (9th Cir. 1993).

In Caruto the defendant was arrested after border agents located 75 pounds of cocaine in a car she drove across the U.S. – Mexico border. Caruto, 532 F.3d at 824. The defendant initially waived her Miranda rights and agreed to make a statement. Id. However, later during the interview she invoked her right to counsel. Id. At trial the

[15] Based upon the court's ruling, Appellant decided the only way to explain why Appellant did not answer specific questions concerning Holland's death was because police stopped questioning after Appellant invoked his right to counsel. *See* AA V 1081-88.

prosecution emphasized that contrary to her trial testimony, the defendant did not give the same explanation when questioned by border patrol agents. Id. at 826. The defendant was convicted and on appeal argued "the alleged inconsistencies here were omissions attributable to Caruto's invocation of her Miranda rights." Id. at 830. The appellate court agreed and held the prosecution's argument violated the defendant's due process rights under Doyle. Id. at 831. The court also held the error was not harmless. Id. at 833.

Here, like Caruto, the State asserted Appellant's answers were dishonest, evasive, and his trial testimony was different than his statement to police. However, the pre-invocation questions posed to Appellant were general and not specific. Appellant invoked his right to counsel when police began asking specific questions regarding the shooting. AA III 683. Although the State knew Appellant had invoked, it nevertheless argued to the jury:

> Then when he has the opportunity to say, Well, gosh, this 300-pound meth addled guy who's been after me all night pulled out a gun on me, he didn't even say that. Lies, doesn't tell the truth about where he came from, who he was with that night, or where he was going.
>
> AA XIII 3075.

The State's argument was clearly an attempt to draw a negative inference from Appellant's invocation of his right to counsel. The State must prove the error was not harmless. However, it cannot do so as the error was substantially harmful and warrants reversal.

Appellant testified he acted in self-defense.[16] The State's entire case rested upon biased witness Hildebrand's testimony which contradicted Appellant's self-defense claim. Accordingly, Appellant's credibility was crucial for the jury to decide whether Holland's killing was justified. In fact, the State acknowledged as much when it argued "if you don't believe [Appellant] acted in self-defense and his fight-or-flight was out of control, then he's guilty of first degree murder with use of a deadly weapon. It is as simple as that." AA XIII 3118.

Because the State's case rested upon whether the jury believed Appellant's testimony concerning self-defense, it was reversible error for the State to argue Appellant never mentioned self-defense to Williams. The reason Appellant never mentioned self-defense was because he invoked his right to counsel. This error violated Appellant's fundamental rights and warrants reversal.

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[16] Although the State repeatedly argued, and instructed the jury, that Appellant could not claim self-defense under a challenge to fight theory of liability this argument was incorrect and will be discussed in greater detail *infra*.

II. Nevada's "Challenge to Fight" Statute is Unconstitutionally Vague and Overbroad.

The State charged Appellant with First Degree Murder under two theories of liability. First, Appellant killed Holland with premeditation, deliberation, and malice aforethought. AA I 185. Alternately, Appellant killed Holland after a challenge to a fight.[17] Id. NRS 200.450 prohibits challenging someone to fight or accepting a challenge to fight.[18] If a fight occurs and one participant dies as a result, the penalty is the same as the penalties for first degree murder. NRS 200.450(3).

Here, the State charged Appellant with violating NRS 200.450(1),(3) which pertinently states:

> If a person, upon previous concert and agreement, fights with any other person...the person giving, sending or accepting the challenge to fight...shall be punished
> ...

[17] Appellant argued in his Petition for Writ of Mandamus in this Court that challenge to fight is not a theory of liability for First Degree Murder. However, this Court rejected that argument. *See* case # 66304, Order Granting Petition in Part, fn. 1 (Filed September 24, 2014). Accordingly, Appellant does not re-address that argument on appeal.

[18] If a fight occurs but does not involve deadly weapons the punishment is a gross misdemeanor. NRS 200.450(1)(a). If a fight occurs with deadly weapons but no death results the punishment is a category B felony. NRS 200.450(1)(b).

> Should death ensue to a person in such a fight, or should a person die from any injuries received in such a fight, the person causing or having any agency in causing the death... is guilty of murder in the first degree which is a category A felony and shall be punished as provided in subsection 4 of
> NRS 200.030.

Appellant contends NRS 200.450 is unconstitutionally vague and overbroad. This Court reviews the constitutionality of a statute or ordinance *de novo*. Scott v. District Court, 131 Nev. Adv. Op. 101, 363 P.3d 1159, 1161 (2015).

A. NRS 200.450 is Unconstitutionally Vague

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[19] U.S. v. Williams, 553 U.S. 285, 304 (2008). "Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, and must also provide explicit standards for those who apply the laws, to avoid arbitrary and

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

discriminatory enforcement." Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636-37 (1983) (*citing* Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 498 (1982)).

"By requiring notice of prohibited conduct in a statute, the first prong offers citizens the opportunity to conform their own conduct to that law. However, the second prong is 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 v. District Court, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006)(*quoting* Kolender v. Lawson, 461 U.S. 352, 358 (1983)). When a challenged statute "involves criminal penalties or constitutionally protected rights," this court will review the statute to determine whether "vagueness permeates the text." Flamingo Paradise Gaming, LLC, v. Chanos, 125 Nev. 502, 512, 217 P.3d 546, 553 (2009). "[T]his standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances." Id. at 513, 217 P.3d at 554.

NRS 200.450 fails to provide adequate notice because it lacks definitions for essential terms thereby forcing one to guess at what

actions would subject him to criminal liability. NRS 200.450 does not define "previous concert and agreement," "challenge," or "acceptance." Without definitions one cannot conform his behavior to avoid criminal charges. Specifically, must words be spoken to manifest a "previous concert or agreement" or would actions suffice? If actions suffice, what actions would constitute a challenge or an acceptance of the challenge? If there is an acceptance, do the mutual combatants have to have the same understanding of the terms of the fight? What happens if one combatant believes the fight only involves fists and the other brings a weapon? Moreover, if one person "challenges" another by stating, "I'll kick your ass" and the other person doesn't verbally manifest an agreement but instead returns blows -- after being struck, would the person's decision to defend himself be an acceptance? NRS 200.450 fails to answer these important questions.

Equally concerning, NRS 200.450 fails to address whether death from injuries from the fight must be directly related to the fight or whether the injuries could merely be a contributing factor. Also, NRS 200.450 fails to address **when** someone must die from injuries attributed to the fight. Could the State charge someone years later if

one combatant dies from injuries which were not the direct cause of death but instead a contributing factor? NRS 200.450 doesn't answer any of these questions thereby utterly failing to provide notice of how one violates the statute.

NRS 200.450 also allows for arbitrary enforcement and unconstitutionally pre-empts certain defenses. Without knowing what words or actions constitute a challenge or acceptance the State can charge First Degree Murder when someone merely defends himself because defending oneself could be considered an acceptance. More importantly, without guidelines regarding what constitutes an acceptance, if this Court agrees with the State's argument that self-defense isn't available under a challenge to fight theory of First-Degree Murder, then police and prosecutors can unilaterally decide that every fight is criminal and effectively deny citizens their constitutional right to self-defense. McDonald v. City of Chicago, Ill, 561 U.S. 742, 744 (2010)("Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the Heller Court held that individual self-defense is 'the central component' of the Second Amendment right." (*citing* District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

Finally, because it is First Degree Murder anytime someone dies as a result of a challenge to fight, and there are no definitions regarding what constitutes a "challenge" or an "acceptance," NRS 200.450(3) pre-empts a defendant from ever asserting a voluntary manslaughter defense. Voluntary manslaughter occurs when there is "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing."[20] NRS 200.050; *see also* NRS 200.040. If simply returning blows could be an acceptance, then under NRS 200.450, the initial aggressor's actions could never be a provocation sufficient to reduce murder to second degree murder or manslaughter.

B. NRS 200.450 is Overbroad

"[T]he 'overbreadth doctrine provides that a law is void on its face if it sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment rights[.]'" Silvar, 122 Nev. at 297, 129 P.3d at 688 (*quoting* City of

[20] Some states explicitly recognize mutual combat can constitute a sufficient provocation in order to reduce First-Degree murder to a lesser offense. *See* People v. Thompson, 354 Ill.App.3d 579, 587, 821 N.E.2d 664, 671 (1st Dis. 2004)(*citing* People v. Blackwell, 171 Ill.2d 338, 358, 665 N.E.2d 782 (1996)).

Las Vegas v. District Court, 118 Nev. 859, 863 fn.14, 59 P.3d 477, 480 fn. 14 (2002)(*overruled on other grounds by* State v. Castaneda, 245 P.3d 550, 553 fn. 1, 126 Nev. Adv. Op. 45 (2010)). In an overbroad analysis, the "court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Hoffman Estates, 455 U.S. at 494. Where "conduct and not merely speech is involved, [] the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

NRS 200.450(3) does not contain any *mens rea* requirement. Specifically, the statute does not contain language indicating whether a defendant must intend to cause death during an agreed-upon fight. Therefore, a defendant can be prosecuted, convicted, and potentially sentenced to death for nothing more than agreeing to fight. In this sense, NRS 200.450(3) makes the first degree murder theory of challenge to fight a strict liability offense and is therefore overbroad.[21]

[21] "A strict liability offense is one which dispenses with a mens rea, scienter or wrongful intent element." People v. Albritton, 67 Cal.App.4th 647, 658, 79 Cal.Rptr.2d 169, 176 (1998). "'While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements,'" they occupy a

Furthermore, NRS 200.450 criminalizes all fights including boxing matches and mixed martial arts contests. NRS 200.450 makes no exception for mutual combat contests conducted for sport or entertainment. Likewise, nothing in NRS Chapter 467 or Nevada Administrative Code Chapter 467 exempts unarmed combatants from criminal liability under NRS 200.450.[22] Accordingly, if a boxing match results in one contestant's death the other contestant could be charged and convicted for First Degree Murder under NRS 200.450 for accepting the challenge to fight.

Moreover, because NRS 200.450 lacks definitions, any *mens rea* requirement, or requirement that the fight occur contemporaneously with the challenge and acceptance, the statute would criminalize all speech or conduct which could remotely indicate a "challenge" to fight. This includes when friends jocularly "threaten" to fight as long as a fight occurs at some indeterminate later time between those friends.[23] Also, NRS 200.450 criminalizes mere

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'generally disfavored status[.]'" Ford v. State, 127 Nev. Adv. Op. 55, 262 P.3d 1123, 1127 (2011)(*quoting* U.S. v. United States Gypsum Co., 438 U.S. 422, 437-38 (1978)).

[22] NRS and NAC Chapters 467 govern all aspects of state sanctioned unarmed combat such as boxing and mixed martial arts matches.

[23] Respondent may argue NRS 200.450 prohibits "fighting words," and fighting words do not receive First Amendment protection. *See*

bravado. Men in particular routinely "trash talk" one another. Trash talk typically includes boasts of superior strength and a desire to physically prove one's superiority. NRS 200.450 essentially criminalizes machismo and subjects participants in barroom fist-fights to the death penalty should one combatant unfortunately die from injuries sustained in a fight.

NRS 200.450 is unconstitutional because without any definitions it utterly fails to provide guidance concerning what conduct is prohibited. Additionally, this vagueness gives police and prosecutors unfettered discretion to charge First Degree Murder without ever having to prove felony murder or premeditation and deliberation. Finally, NRS 200.450's lack of *mens rea* requirement criminalizes boxing and UFC matches, makes no exceptions for innocuous jokes or mere puffery, and contains no requirement that a fight occur contemporaneously with an alleged challenge and acceptance. Based upon NRS 200.450's unconstitutionality, Appellant respectfully requests this Court reverse his conviction.

Scott v. District Court, 131 Nev. Adv. Op. 101, 363 P.3d 1159, 1162 (2015). However, NRS 200.450 is silent regarding whether words must manifest the challenge and acceptance. Therefore, NRS 200.450 cannot be saved from Appellant's constitutional challenge by simply asserting it prohibits "fighting words."

III. Witness Melissa Piasecki Violated the Exclusionary Rule and Improperly Commented upon Appellant's Veracity which Deprived Appellant of his Fundamental Right to a Fair Trial.

Appellant noticed Briana Boyd as an expert who would "give opinions regarding PTSD as it relates to Mr. Pimentel's actions in the instant matter." AA III 723. Additionally, "Ms. Boyd will explain how the human brain functions in threatening situations such as that at issue here, for both the population at large and an individual with PTSD. She will relate this information to Mr. Pimentel's behavior in the time immediately preceding, during, and after the instant shooting." Id. In response the State filed a motion requesting Appellant submit to a psychological examination with its own expert. Id. at 640. The court granted the State's request and thereafter the State noticed Melissa Piasecki as a rebuttal expert. Id. at 750. In its rebuttal notice, the State asserted Piasecki would testify "as to the findings resulting from her interview of Defendant Louis Pimentel and his psychological diagnosis in relationship to the instant case." Id. Appellant met with Piasecki as ordered. AA XII 2922. During trial, before she testified, Piasecki sat in the courtroom and observed Amanda Lowe's, Briana Boyd's, and Appellant's testimony. Id. at 2916-17.

A. Piasecki's Presence in Court During Witness Testimony Violated the Exclusionary Rule.

NRS 50.155 states, "at the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the judge may make the order of his or her own motion."[24] NRS 50.155 is colloquially referred to as "the exclusionary rule."

"The purpose of sequestration of witnesses is to prevent particular witnesses from shaping their testimony in light of other witnesses' testimony, and to detect falsehood by exposing inconsistencies." Givens v. State, 99 Nev. 50, 55, 657 P.2d 97, 100 (1983)(*overruled on other grounds by* Talacon v. State, 102 Nev. 294, 721 P.2d 764 (1986)). Regarding NRS 50.155 violations this Court has held, "because requiring the requesting party to prove that actual prejudice occurred would be overly harsh and unjust, we will presume prejudice from a violation of NRS 50.155 unless the record shows that prejudice did not occur." Givens, 99 Nev. at 55, 657 P.2d at 100.

Piasecki's expert notice claimed her testimony would simply encompass how Appellant's psychological diagnosis related to his

[24] To the extent Respondent may claim neither Appellant nor the court invoked the exclusionary rule at the trial's commencement, the trial prosecutor noted the rule was in effect. *See* AA X 2251.

actions on the night Holland died. AA III 750. Piasecki acknowledged that she reviewed all reports, statements, transcripts, and Appellant's military and medical records. *See* AA XII 2916. This information was sufficient for her to relate her opinion regarding Appellant's PTSD diagnosis and whether and how it affected him on the night he shot Holland. Essentially, there was no legitimate reason why Piasecki had to listen to Appellant's testimony before her own.

1. Piasecki's exclusionary rule violation caused Appellant prejudice.

Appellant suffered actual prejudice by the State's deliberate exclusionary rule violation. After forcing Appellant to submit to Piasecki's evaluation, the State exploited the court's decision and merely used Piasecki to impeach Appellant's trial testimony. In fact, Piasecki repeatedly commented upon Appellant's veracity and opined that Appellant's explanation regarding the events leading to Holland's death during her evaluation was inconsistent with his trial testimony. *See* AA XII 2925-53, 2968-76. This tactic was nothing more than an impermissible attempt to cast doubt on Appellant's credibility.[25]

[25] *See* Dechant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000)("it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony.")

Problematically, because Piasecki did not record Appellant's interview Appellant had no ability to rebut her claims that his answers were inconsistent.[26]

Appellant's testimony was crucial to support his self-defense theory. In fact, the State acknowledged as much in closing argument claiming "if you don't believe [Appellant] acted in self-defense and his fight-or-flight was out of control, then he's guilty of first degree murder with use of a deadly weapon. It is as simple as that." AA XIII 3118. Piasecki's testimony was nothing more than improper impeachment under the guise of expert opinion. It cannot be credibly asserted that the jury did not give significant weight to Piasecki's unsubstantiated claims implying Appellant manufactured his trial testimony. Accordingly, Appellant suffered actual prejudice and respectfully requests this Court reverse his conviction.

IV. The District Court Violated Appellant's Fundamental Right to a Fair Trial by Denying Appellant's Requested Jury Instructions and by Providing Incorrect Instructions Regarding the Applicable Law.

At trial, the district court incorrectly instructed the jury that Appellant could not assert self-defense under a challenge to fight

[26] Because Piasecki testified during the State's rebuttal case Appellant also did not have an opportunity to offer further testimony to counter Piasecki's claims.

theory. Additionally, the court erroneously refused Appellant's theory of defense instructions. *See* AA IV 792-800. Appellant's theory of defense instructions were accurate legal statements supported by evidence presented at trial and accordingly, should have been submitted to the jury. The district court's instructional errors deprived Appellant of his fundamental right to a fair trial.

A. The District Court Incorrectly Instructed the Jury Regarding the Law.

The district court is responsible for ensuring that the jury is fully and correctly instructed regarding the law governing the case. Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005). This Court reviews *de novo* whether an instruction given is a correct statement of law. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). When an instruction incorrectly states the law by omitting, misdescribing, or presuming an element of the offense this Court reviews the instruction for harmless error. Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000). Under this standard the Court asks, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Id. at 722-23, 7 P.3d at 449. If the Court "cannot reach this conclusion...it

should not find the error harmless.'" Id. at 723, 7 P.3d at 449; *quoting* Neder v. U.S., 527 U.S. 1, 19 (1999).

1. Instruction 19 Incorrectly Stated Self-Defense was Unavailable when the State Alleges Challenge to Fight Murder.

Instruction 19 stated, "Under the theory of challenge to fight for First Degree Murder, the right of self defense is not available to someone who engages in a challenge to fight and a death results." Id. Appellant objected to the instruction. AA XIII 3023. The district court overruled Appellant's objection citing various Nevada cases as proof that self-defense is not available when the State alleges murder under a "challenge to fight" theory. Specifically, the court cited: (1) Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980); (2) Carlisle v. State, 98 Nev. 128, 642 P.2d 596 (1982); (3) Sheriff v. Martin, 99 Nev. 336, 662 P.2d 634 (1983); (4) Sheriff v. Luqman, 101 Nev. 149, 697 P.2d 107 (1985); (5) Sheriff v. Vlasak, 111 Nev. 59, 888 P.2d 441 (1995); (6) Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002); and (7) Gallegos v. State, 123 Nev. 289, 163 P.3d 456 (2007). Id. at 3024. The Court's reliance on the aforementioned cases was clearly erroneous.

Carlisle, Martin, Luqman, Vlasak, and Williams cite Wilmeth, but not as proof a defendant cannot argue self-defense when the State alleges murder under a challenge to fight theory. Instead, those cases cite language in Wilmeth regarding whether a challenged statute is void for vagueness. Therefore, the court's reliance on these cases was clearly erroneous.

Moreover, the court misinterpreted Wilmeth. In Wilmeth, the State alleged murder under a challenge to fight theory. Id. at 404, 610 P.2d at 736. On appeal, Wilmeth argued NRS 200.450 was void for vagueness and the district court erred in rejecting his "no duty to retreat" jury instruction. Id. at 404-07, 610 P.2d at 736-38. Regarding NRS 200.450's alleged vagueness, this Court noted, **"[i]n the context of this case**, we believe that [NRS 200.450] provided appellant with sufficient warning of the proscribed conduct." Id. at 405, 610 P.2d at 737 (emphasis added). Furthermore, "[a]lthough we can envision innumerable factual situations on which the warnings in the statute might be considered ambiguous, **on the instant facts**, self-defense is no defense to the violation of this statute." Id. (Emphasis added).

Next, Wilmeth's proposed "no duty to retreat" jury instruction stated "'where a person, without voluntarily seeking, provoking,

inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant,' he has the right to stand his ground and need not retreat." Id. at 407, 610 P.2d at 738 (*quoting* State v. Grimmett, 33 Nev. 531, 534, 112 P. 273 (1910)). This Court upheld the lower court's refusal to give the instruction noting the district had given defendant's "mutual combat"[27] and self-defense jury instructions and those instructions "substantially embodied appellant's proffered instruction [no duty to retreat] **for the purposes of this case**." Id. (emphasis added). In dicta, this Court noted, "[h]ere, neither the defense of self-defense nor the no-retreat rule **was relevant**, and the instructions given improperly benefitted appellant." Id. (Emphasis added).

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[27] The defendant's mutual combat instruction stated:

> When a defendant voluntarily enters into a mutual combat with the deceased, knowing, or having reason to believe, that it will or probably may result in death or serious bodily injury to himself or to the deceased, the defendant cannot claim that he acted in self-defense in taking the life of the deceased, unless before the fatal shot is fired he in good faith withdrew or attempted to withdraw from the combat, and either by word or act made that fact known to the deceased, and the latter thereafter continued to press him, and gave the defendant reasonable cause to believe that he was in danger of being killed or of receiving great bodily injury at the deceased's hands.
> Id. at 406 fn.2, 610 P.2d at 737 fn.2.

Wilmeth did not hold that self-defense is inapplicable, as a matter of law, under challenge to fight. Indeed, Nevada has long recognized one can assert self-defense during mutual combat provided he "endeavored in good faith to decline any further struggle before the mortal blow was given." *See* NRS 200.200(2); State v. Hall, 54 Nev. 213, 13 P.2d 624 (1932); *see also* State v. Robison, 54 Nev. 56 (1931); State v. Smith, 10 Nev. 106 (1875). Other states also allow mutual combatants to assert self-defense. *See* State v. Friday, 297 Kan. 1023, 1038, 306 P.3d 265, 277 (2013)(self-defense generally not available to one willfully engaged in mutual combat "**unless** the defendant has withdrawn in good faith and done everything in the defendant's power to avert the necessity of the killing."); Gill v. State, 184 S.W. 864 (TN. 1916)("the mere unlawfulness of an attack does not deprive the aggressor of his right to slay the assailed party if this party, in his turn, in a manner disproportioned to the character of the assault, put in jeopardy, or on reasonable grounds appeared to do so, the life of the assailant."); State v. O'Bryan, 318 Conn. 621, 635-36, 123 A.3d 398, 408 (2015)(explaining the mutual combat self-defense disqualifier does not apply when "when one party unilaterally and dangerously escalates the previously equal terms of a fight."). Here,

assuming Appellant's statement, "you know where I be" was as an agreement to fight, notwithstanding the overwhelming evidence otherwise, Appellant clearly withdrew from that agreement well before Holland delivered the first blow. Therefore, Appellant could argue self-defense against the State's challenge to fight theory.

Wilmeth's holding was limited to the facts of the case. Problematically though, the Opinion did not describe the facts with any specificity. Instead, this Court merely noted the defendant's contention "he would not have encountered the decedent had he known he was going to be armed" was belied by the record. *See* Wilmeth, 96 Nev. at 406-07 fn.4, 610 P.2d at 738 fn.4. Clearly, by repeatedly referencing Wilmeth's facts this Court did not create a rule precluding self-defense under NRS 200.450, but instead merely expressed its' opinion that Wilmeth's facts did not warrant a self-defense instruction.

Appellant's case is vastly different than the known facts in Wilmeth. First, Appellant's actions belie any claim he agreed to fight Holland. Arizona Charlie's security officer Howard testified Appellant was calm during the entire incident and Howard did not interpret "you know where I be" as a threat. AA X 2370-71. Although biased

witness Hildebrand implied Appellant plotted to murder Holland, Hildebrand also claimed that when Appellant arrived at his apartment and noticed Holland, Appellant expressed confusion stating "what the fuck are you doing here?" AA VIII 1833. Additionally, Salazar claimed Holland told Appellant he was not at the apartment to fight but instead was there to talk to Lowe.[28] Id. at 1850. James Tabele, who lived at the Sigel Suites, testified when he awoke he saw a thin individual with dark hair trying to calm things down.[29] Id. at 1951. Finally, Lowe testified Appellant approached Holland at the Sigel Suites "with his hands up trying to make peace" while telling Holland to "just calm down. Chill out. It doesn't have to go like this." AA XI 2585.

Finally, responding "you know where I be" to a threat from someone you barely know is very different than the situation in Wilmeth where the parties were "on hostile terms" months prior to the killing and each had previously threatened to kill each other. Wilmeth, 96 Nev. at 406-07 fn.4, 610 P.2d at 738 fn.4. Given the State's reliance on its challenge to fight theory it cannot be said

[28] If true, Holland obviously did not believe Appellant's statement, "you know where I be" was an agreement to fight.
[29] Appellant is thin with dark hair. Holland was 6'2" and 300 pounds. Hildebrand, who was also present, is bald.

beyond a reasonable doubt the jury would have still found Appellant guilty had the court not erroneously instructed it that self-defense does not apply when the State alleges challenge to fight. Therefore, Appellant respectfully requests this Court reverse his conviction.

2. Instruction 11 Relieved the State of its Burden of Proof.

Jury instruction 11, given over Appellant's objection,[30] stated pertinently:

> Murder of the First Degree also includes murder which is committed as a result of a challenge to fight.
> This class of murder carries with it conclusive evidence of premeditation, deliberation, and malice aforethought.
>
> AA IV 811.

NRS 200.030(1)(b) is Nevada's codification of the "felony murder rule." Pursuant NRS 200.030(1)(b), killings during a certain specified felonies are first degree murder. Id. Basically, "[t]he felonious intent involved in the underlying felony may be transferred to supply the malice necessary to characterize the death a murder; hence, there is no need to prove or presume the existence of malice

[30] Appellant objected arguing "[challenge to fight] does not amount to felony murder as -- is not one of the felonies that is delineated in the felony murder component of the first degree murder statute." AA XIII 3018.

aforethought. Ford v. State, 99 Nev. 209, 215, 660 P.2d 992, 995 (1983)(*see also* State v. Contreras, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002)("The felonious intent involved in the underlying felony is deemed, by law, to supply the malicious intent necessary to characterize the killing as a murder, and because felony murder is defined by statute as first-degree murder, no proof of the traditional factors of willfulness, premeditation, or deliberation is required for a first-degree murder conviction."). However, challenge to fight is not a felony delineated in NRS 200.030(1)(b).

In Collman v State, a case analogous to Appellant's, the defendant was convicted for first degree murder for killing his son and was sentenced to death. Collman, 116 Nev. at 693, 7 P.3d at 430. During the trial the court instructed the jury that certain felonies carried "conclusive evidence of malice aforethought" and that one of those felonies was murder committed by child abuse. Id. at 711, 7 P.3d at 442. However, felony child abuse was not mentioned in NRS 200.030(1)(a) and was not an enumerated felony under 200.030(1)(b). On appeal, this Court held the instruction erroneously relieved the State of its burden to prove the defendant acted with malice aforethought. Collman, 116 Nev. at 720, 7 P.3d at 447. However, this

Court determined the error was harmless beyond a reasonable doubt. Id. at 724, 7 P.3d at 450.

Here, the State alleged Appellant violated NRS 200.450(3), challenge to fight involving death. As this Court has noted, "[t]he Legislature has specified the felonies that provide the malicious intent necessary to characterize a killing as first-degree murder."[31] Rose v. State, 255 P.3d 291 (2011)(*citing* NRS 200.030(1)(b) and Contreras, 118 Nev. at 334, 46 P.3d at 662). The legislature did not include challenge to fight as an enumerated felony within NRS 200.030(1)(b). Accordingly, the district court clearly erred in giving instruction 11 because the instruction usurped the legislature's prerogative by making "challenge to fight" felony murder.

Furthermore, the error was not harmless. The State chose to charge Appellant under two distinct First Degree Murder liability theories -- premeditation and deliberation and challenge to fight. Instruction 11 conflated the two theories which effectively absolved the State of its responsibility to prove its allegation beyond a

[31] In Rose, this Court also expressed "it is not this court's role to 'override the [L]egislature's determination that [a certain felony] should be one of the enumerated felonies appropriate to elevate a homicide to felony murder.'" Rose, 255 P.3d at 297 (*quoting* Contreras, 118 Nev. at 337, 46 P.3d at 664).

reasonable doubt. Moreover, because Instruction 11 obviated the State's need to prove premeditation and deliberation, the instructional errors concerning self-defense were profoundly more prejudicial because the omission left Appellant with no defense whatsoever.

B. The District Court Committed Reversible Error by Denying Appellant's Proposed Jury Instructions.

At trial, Appellant offered several theory of defense jury instructions. *See* AA IV 793-800. Appellant's proposed instructions defined self-defense, no duty to retreat, stand your ground, and resistance to felony or attempted felony. Id. at 793-98. The court declined to give Appellant's theory of defense instructions. AA XIII 3031, 3032-33.

This court has consistently held that a defendant has a right to jury instructions on his or her "...theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *See* Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002). Additionally, if a district court fails to instruct the jury on the defense theory of the case when ". . . supported by some evidence which, if believed, would support a corresponding jury verdict, . . . [this

omission] constitutes reversible error."[32] Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

1. Appellant's Proposed Instruction 1

The State charged Appellant with first degree murder under alternate theories of premeditation, deliberation, malice aforethought and challenge to fight. See AA I 185. As argued *supra*, Appellant was entitled to assert self-defense to contest the State's challenge to fight theory. If this Court disagrees however, Appellant was nevertheless entitled to assert self-defense to counter the State's allegation of premeditation, deliberation, and malice aforethought.

Appellant's proposed jury instruction 1 was recitation of NRS 200.120 which provides:

> 1. <**Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, tumultuous or surreptitious manner, to enter the habitation of another for the purpose of assaulting or offering personal**

[32] The Ninth Circuit has held, "failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error." Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995).

> **violence to any person dwelling or being therein**>.
>
> 2. A person is not required to retreat before using deadly force as provided in subsection 1 if the person:
>
> (a) Is not the original aggressor;
>
> (b) Has a right to be present at the location where deadly force is used; and
>
> (c) Is not actively engaged in conduct in furtherance of criminal activity at the time deadly force is used.

NRS 200.120 is Nevada's codification of the "castle doctrine" and allows one to use deadly force to defend oneself or one's dwelling when someone attempts to enter the dwelling to commit a violent act.[33] Under 200.120(2), a person need not retreat before using deadly force provided he is not the original aggressor, had a right to be present, and is not actively engaged in criminal activity when deadly force is used.

However, NRS 200.120 does not **only** apply to one's dwelling. NRS 200.120(1)'s plain language allows justifiable homicide if committed in defense of one's self **or** in defense of one's dwelling.

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[33] *See* Sean Whaley, Nevada gun law reforms in the Legislative bullseye, < http://www.reviewjournal.com/news/nevada-legislature/nevada-gun-law-reforms-legislative-bullseye>, last accessed March 8, 2016.

Proposed instruction 1 was a correct statement of law and sufficiently apprised the jury regarding self-defense and defense of one's dwelling. The district court clearly erred by denying Appellant's instruction by finding it **only** applied to one's dwelling. Moreover, the court did not incorporate instruction 1's language into any instructions actually given. *Compare* AA IV 793 with AA IV 801-37.

2. Appellant's Proposed Instruction 2 and 6

The district court also denied Appellant's theory of defense jury instructions 2 and 6 for the same reason it denied instruction 1. The court claimed instructions 2 and 6 only applied to defense of one's dwelling. AA XIII 3031, 3033.

Appellant's proposed instruction 2 was an almost verbatim recitation of NRS 200.160 which states:

> Homicide is also justifiable when committed:
>
> 1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; **or**

> 2. In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, **or** upon or in a dwelling, or other place of abode in which the slayer is.
>
> (Emphasis added).

NRS 200.160's plain language proves self-defense is not limited one's dwelling. Instead, NRS 200.160 allows one to use deadly force to protect himself **or** his home. Moreover, pursuant to NRS 200.160(1) homicide is justifiable if one believes another person is going to commit a felony or commit personal injury upon either the slayer or some other person. And, NRS 200.160(2) states homicide is justifiable when the person slain is actually committing a felony upon the slayer or some other person.

Because NRS 200.160 allows one to use deadly force against someone attempting to commit a felony, Appellant offered instruction 6 advising Assault with a Deadly Weapon, Battery with Use of a Deadly Weapon, Battery with Substantial Bodily Harm, Attempted Murder, and Murder are all violent felony offenses. If the jury believed Holland was either committing or attempting to commit any of the aforementioned felonies upon Appellant (or even Lowe), Holland's killing would be justified. *See* Newell v. State, 131 Nev. Adv. Op. 97 (Dec. 24, 2015)("in order for homicide in response to the

commission of a felony to be justifiable under that statute, the amount of force used must be reasonable and necessary under the circumstances.").

Appellant's instructions 2 and 6 were correct statements of law and were not covered by any other instruction actually given. Moreover, Appellant presented evidence to support his theory that he was defending himself against Holland's attempt to commit a violent felony upon either Appellant or Lowe. The State's own witnesses testified Holland, a 6 foot 2 inch 300 pound man under the influence of lethal levels of methamphetamine, battered Appellant first. *See* AA VII 1632; AA VIII1767. Moreover, Appellant testified after Holland committed the felonious battery, Holland pulled a gun on Appellant. AA XI 2719. Additionally, the recovered firearm contained DNA from two persons supporting Appellant's testimony Holland possessed the weapon first before Appellant wrestled it away. *See* AA VII 1664.

The jury, as the ultimate arbiter of fact, had a right to consider whether Holland committed or attempted to commit a violent felony against either Appellant or Lowe and whether Appellant was then justified in shooting Holland. Both Appellant and the State presented evidence supporting Appellant's theory of defense. If the jury

believed the evidence it could have acquitted Appellant of murder. Accordingly, the district court's refusal to give Appellant's instructions 2 and 6 was reversible error.

V. The District Attorney Committed Prosecutorial Misconduct which Violated Appellant's Due Process Right to a Fair Trial.

On appeal, this Court applies a two-step analysis to prosecutorial misconduct claims. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). The Court first determines whether the prosecutor did something improper and if so, this Court determines whether the conduct warrants reversal. Id. Prosecutorial misconduct is subject to harmless error review. Id. However, the proper harmless error analysis depends upon whether the misconduct is of a constitutional or non-constitutional dimension. Id. at 1188-89, 196 P.3d at 476.

Constitutional prosecutorial misconduct occurs when the State comments upon the defendant's exercise of a specific constitutional right. Id. at 1189, 196 P.3d at 477. "Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. (*quoting*

Darden v. Wainwright, 477 U.S. 168, 181 (1986)). This Court will reverse prosecutorial misconduct of a constitutional dimension "unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Id.

Non-constitutional prosecutorial misconduct is reversible "only if the error substantially affected the jury's verdict." Id., (*citing* Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001)). When determining whether the error "substantially affected the jury's verdict" this Court looks at "how strong and convincing is the evidence of guilt." Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002). If the issue of guilt or innocence is close "prosecutor misconduct will probably be considered prejudicial."[34] Id.

When a defendant fails to object to prosecutorial misconduct this Court reviews the claim on appeal for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477; *see also* NRS 178.602. Under plain error, this Court will reverse only if the error is plain from the record and affected the Appellant's "substantial rights" by causing "actual

[34] "Improper argument is presumed to be injurious." Pacheco v. State, 82 Nev. 179, 414 P.2d 100, 103 (1966).

prejudice or a miscarriage of justice." Valdez, 124 Nev. at 1190, 196 P.3d at 477.

A. The Prosecutor Impermissibly Vouched for its Witnesses and Argued Appellant Lied.

"A prosecutor may not vouch for the credibility of a witness[.]" Anderson v. State, 121 Nev. 511, 515, 118 P.3d 184, 187 (2005). Vouching includes placing "the prestige of the government behind its witness." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997). "Even when grounded in an inference from the evidence, a prosecutorial statement may nevertheless be considered impermissible vouching if it places the prestige of the government behind the witness by **providing personal assurances of a witness's veracity**. U.S v. Weatherspoon, 410 F.3d 1142, 1147 (2005). (Emphasis added). Additionally, the State cannot assert the defendant has lied or call a defendant a liar because doing so "amounts to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988); *see also* Rowland, 118 Nev. 31, 40, 39 P.3d 114, 119 (2002)("condemning a defendant as a 'liar' is prosecutorial misconduct.").

During closing arguments the prosecutor impermissibly opined that Robert Holland II and Hildebrand gave truthful testimony and Appellant lied. Specifically, the prosecutor stated, "I mean, why not lie about Bobby punching the defendant first? The reason [Holland II and Hildebrand] didn't is because **they're not lying**...**They told you the truth.**" AA XIII 3065 (emphasis added). The prosecutor also argued Appellant's testimony was a lie by arguing Appellant's testimony was "made up" and describing Appellant's statement to police as "lies." *See* Id. at 3068, 3075.

Although Appellant did not object the misconduct the misconduct is plain from the record. This Court's precedent could not be clearer -- the State cannot vouch for its witnesses and cannot condemn a defendant as a liar. Here, the State did both. Moreover, the State's improper argument violated Appellant's substantial right to a fair trial.

Appellant's case was close. When the jury rejected the Carrying a Concealed Weapon allegation it naturally found that Holland, and not Appellant, first possessed the gun. Therefore, the jury believed Appellant's testimony. Yet, when the State called Appellant a liar the jury very likely discounted Appellant's testimony

on the more important issue regarding whether he killed Holland with premeditation and deliberation, as a result of a challenge to fight, or in self-defense. Because the forensic evidence was generally inconclusive, witness credibility was particularly important in Appellant's case. The State's improper argument, which occurred right before deliberations, must have weighed heavily on the jurors' minds. *See* Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990)("It can be inferred that these remarks were fresh in the jurors' minds as they entered the jury room and commenced their deliberations.").

It cannot be claimed with any confidence that the jury would have reached the same verdict absent the State's prejudicial misconduct. Accordingly, Appellant respectfully requests this Court reverse his conviction.

VI. Appellant's Due Process Rights were Violated When He was Convicted Based Upon Insufficient Evidence.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165, 678 P.2d 669

(1984); Oriegel-Candido v. State, 114 Nev. 378, 382, 956 P.2d 1378, 1380 (1998). "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." LaPierre v. State, 108 Nev. 528, 529, 836 P.2d 56, 57 (1992).

A. Challenge to Fight

The State charged Appellant with First Degree Murder under alternate theories of premeditation and deliberation and challenge to fight. Challenge to fight is codified in NRS 200.450 and requires a "previous concert and agreement" to fight, a fight, and an ensuing death. Therefore, the State had to prove Holland and Appellant had a previous concert and agreement to fight, that they did fight, and Holland died as a result of the fight.

The State failed to present any evidence whatsoever that Appellant and Holland had a previous concert and agreement to fight, or that Holland challenged Appellant to a fight and Appellant agreed to fight. The only evidence the State presented was biased witness Hildebrand who claimed that during the incident at Arizona Charlie's, after Holland told Appellant he would "kick [Appellant's] ass," Appellant responded "meet me at my house in 30 minutes, I'll kick

your ass." AA VIII 1754-55. However, Hildebrand's testimony defies logic, common sense, and is belied by other evidence.

Hildebrand claims Appellant and Holland had an agreement to "meet []at [Appellant's] place in 30 minutes." Id. However, Holland actually arrived at the Sigel Suites five (5) minutes after he left Arizona Charlie's. AA VII 1626. When Holland arrived at the Sigel Suites he immediately went to Appellant's third floor apartment, banged on the door, screaming for Lowe. Id. If Holland agreed to meet Appellant in 30 minutes, and arrived at the Sigel Suites within five (5) minutes, then Holland was 25 minutes early for the supposed agreed upon fight. If he was 25 minutes early, he would know Appellant and Lowe were not inside the apartment. Moreover, when Appellant and Hildebrand arrived at the Sigel Suites Hildebrand claims Holland told Appellant he did not want to fight but just wanted to talk to Lowe. Id. at 1767. If Hildebrand, the State's star witness, is accurate then Holland's statement that he didn't want to fight is either proof there never was an agreement or essentially a repudiation of the agreement.[35] Clearly, Appellant never told Holland to meet him in 30

[35] Hildebrand's fiancé Salazar also testified Holland told Appellant he didn't want to fight. AA VIII 1850.

minutes. Instead, Holland obsessively went to Appellant's apartment seeking trouble because Lowe had spurned Holland's affections.

Hildebrand's testimony concerning the "agreement" is also contradicted by every other witness. First, Appellant testified that during their interaction at Arizona Charlie's Holland said "I'll fucking kill you if I see you." AA XI 2715. Appellant merely responded, "[y]ou know where I be." Id. Appellant explained, "you know where I be" was not an agreement to meet at Appellant's apartment to fight. Id. Indeed, Appellant's explanation makes sense. If Holland threatened to kill Appellant, Appellant's response "you know where I be" was nothing more than bravado suggesting Appellant was not afraid of Holland. Furthermore, when Appellant arrived at his apartment, where he had a legal right to be, and noticed Holland at the apartment door, Appellant tried to calm Holland down, thus further evidencing Appellant's desire to actually avoid a confrontation. Id. at 2718.

Arizona Charlie's security officer Juan Knight, who witnessed Holland attempt to harm Lowe, testified -- consistent with Appellant, that Appellant never told Holland "meet me at my house in 30 minutes." AA X 2325. Instead, Appellant said, "you know where I'm

at, or you know where I be." Id. at 2278. Knight's partner, Javon Howard, testified that after Holland told Appellant, "Fuck you I'll kick your ass," Appellant responded, "you know where I'm at, **I don't want no problems**." Id. at 2353. Howard also noted Appellant was calm during the entire incident. Id. at 2371.

Lowe testified when Holland threatened Appellant at Arizona Charlies Appellant continuously tried to calm Holland down and merely expressed his opinion that Holland should not have struck Lowe. AA XI 2574-76. Moreover, when Appellant arrived at the Sigel Suites and noticed Holland at the apartment door Appellant walked towards the stairs "with his hands up trying to make peace." Id. at 2583-84. Appellant also told Holland, "just calm down. Chill out. It doesn't have to go like this." Id. at 2585.

The evidence overwhelming proves Appellant and Holland did not have an agreement to fight. Every independent witness corroborates the fact that Appellant never told Holland to meet him at the Sigel Suites. Only biased witness Hildebrand claims this extremely important "acceptance" actually occurred. However, even if one accepts Hildebrand's testimony, the challenge to fight allegation

fails because Hildebrand also claimed Holland expressly disavowed any desire to fight Appellant. AA VIII 1767.

Based upon the aforementioned, no reasonable juror could be convinced beyond a reasonable doubt that Appellant killed Holland pursuant to an agreement to fight. Therefore, Appellant respectfully requests this Court reverse his conviction.

B. Premeditated Murder and Self-Defense

Because the State charged Appellant alternately with premeditated and deliberate murder and challenge to fight murder, even under the district court's erroneous legal ruling regarding self-defense and challenge to fight, Appellant could assert self-defense to the State's allegation that Appellant killed Holland with premeditation and deliberation. Appellant presented evidence at trial he acted in self-defense and therefore the State bore the burden of disproving self-defense beyond a reasonable doubt. *See* Barone v. State, 109 Nev. 778, 780, 858 P.2d 27, 28 (1993).

The State failed to present any evidence Appellant premeditated and deliberated before killing Holland. Every witness testified Holland, a 6'2" 292 pound individual high on toxic levels of methamphetamine, physically battered Appellant first. Appellant

testified after he struck back Holland pulled a gun.[36] Appellant, a decorated military veteran, was able to disarm and shoot Holland as Holland began aggressively moving towards Appellant. Appellant fired one additional time within seconds of the first shot. Although biased witness Hildebrand testified contrarily, when the jury acquitted Appellant of Carrying a Concealed Weapon it necessarily rejected Hildebrand's testimony. However, due to the court's erroneous instruction concerning the self-defense's unavailability under challenge to fight, the jury likely found although Appellant acted in self-defense it could not acquit him because the court said self-defense did not apply.

In any event, if the court had not improperly instructed the jury no rational jury could have found beyond a reasonable doubt that Appellant acted with premeditation and deliberation or that he was not acting in self-defense. Accordingly, Appellant respectfully requests this Court reverse his conviction.

VII. Cumulative Error Warrants Reversal.

"Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right

[36] Lowe had previously seen Holland with a similar firearm. AA XI 2520-21, 2525-26.

to a fair trial." Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000)(*citing* Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994)). "When evaluating a claim of cumulative error, [this Court] consider[s] the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 124 Nev. at 1195, 196 P.3d at 481.

1. The Issue of Guilt

The issue of Appellant's guilt was close. By acquitting Appellant of Carrying a Concealed Weapon the jury correctly found that Holland brought the gun to Appellant's apartment. The evidence was also undisputed that Holland attacked Appellant first. However, because the State charged Appellant with an unconstitutional theory of liability -- challenge to fight, and the court erroneously instructed the jury that Appellant could not assert self-defense to that theory, the jury likely ignored the utter lack of evidence that Appellant did not kill Holland with premeditation and deliberation. Likewise, the jury almost certainly ignored the State's obligation to disprove self-defense beyond a reasonable doubt. Had the jury been able to consider self-defense for the challenge to fight theory it would have acquitted Appellant of First-Degree Murder.

2. The Quantity and Character of the Errors

The State and the district court committed numerous errors which negatively impacted Appellant's fundamental right to a fair trial. The court allowed the State to comment on Appellant's post-invocation right to remain silent. The court also allowed the State's "expert" to impeach Appellant's testimony rather than rebut Appellant's expert testimony. The State would not have been able to do this had the court not forced Appellant to submit to the psychological evaluation. Additionally, the court incorrectly instructed the jury and denied Appellant's theory of defense instructions even though his instructions were correct statements of law supported by the evidence. Finally, the State committed egregious prosecutorial misconduct by calling Appellant a liar and vouching for its own witnesses.

3. The Gravity of the Crime

Although all crimes are arguably "serious," murder is the most serious crime the State can allege. Therefore, when the State charges murder the district courts must be hyper-vigilant in ensuring defendants receive a fair trial as demanded by both the U.S. and Nevada Constitutions. Here, numerous trial errors effectively

eviscerated Appellant's right to a fair trial when he was charged with the most serious offense under the law. Therefore, even if this Court finds the individual trial errors were harmless in isolation the cumulative effect of the errors absolutely deprived Appellant of his right to a fair trial and warrant reversal.

CONCLUSION

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

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Deputy Public Defender

CERTIFICATE OF COMPLIANCE

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

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 13,959 words.

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

may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of February, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER
By */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10th day of February, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

WILLIAM M. WATERS
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

LUIS PIMENTEL
NDOC NO: 1144889
c/o Ely State Prison
P.O. Box 1989
Ely, NV 89301

BY *_/s/ Carrie M. Connolly_*
Employee, Clark County Public Defender's Office

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S AMENDED REPLY BRIEF

(Appeal from Judgment of Conviction)

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

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Appellant,	)	
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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 of the 76th Session provided for the**

[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 < > habitation** [.]"

> **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 felony**> [.]" 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 felony**>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] < >

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 <**to commit a felony**>." *See* NRS 200.120. "<**A felony**>" 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 felony**> against Appellant. Evidence showed that Holland, at 6'2", 300 lbs, and high on lethal levels of methamphetamine, committed < **a felony**> 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 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.

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 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 Station instead of the Sigel Suites. Moreover, because Appellant

[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.

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 10th day of February, 2017.

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