IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 69509

AMMAR HARRIS aka
AMMAR ASIM FARUQ HARRIS,

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from Judgment of Conviction and Three Sentences of Death
Eighth Judicial District Court, Clark County
The Honorable Kathleen Delaney, District Court Judge
District Court Case No. C289274-1

APPELLANT'S OPENING BRIEF

Attorneys For Appellant
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
1050 Indigo, Suite 120
Las Vegas, Nevada 89145
Telephone: (702) 878-2889

ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 3988
616 S. 8th Street
Las Vegas, Nevada 89101
Telephone: (702) 960-0686

Attorneys For Respondent
STEVEN B. WOLFSON, ESQ.
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
Telephone: (702) 671-2500

ADAM PAUL LAXALT, ESQ.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Attorneys For Appellant
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
1050 Indigo, Suite 120
Las Vegas, Nevada 89145
Telephone: (702) 878-2889

ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 3988
616 S. 8th Street
Las Vegas, Nevada 89101
Telephone: (702) 960-0686

Attorneys For Respondent
STEVEN B. WOLFSON, ESQ.
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
Telephone: (702) 671-2500

ADAM PAUL LAXALT, ESQ.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

DATED this 21st day of December, 2016.

/s/ *Thomas A. Ericsson*
THOMAS A. ERICSSON, ESQ.
ROBERT L. LANGFORD, ESQ.
Attorneys for Appellant
AMMAR HARRIS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUES

I. Whether the District Court erred in denying the motion to preclude the State from seeking death penalty on Counts 2 and 3;

II. Whether the trial judge erroneously allowed the trial to be broadcast on media which fundamentally impaired Mr. Harris' right to a fair trial;

III. Whether the trial judge erroneously failed to compel the State to produce death penalty data which is only available to the State;

IV. Whether the District Court abused its discretion in improperly admitting a series of prejudicial and cumulative photographs;

V. Whether the District Court erred in refusing proper requested jury instructions;

VI. Whether the erroneous jury verdict form provided to the jury mandates a new trial;

VII. Whether the State of Nevada committed prosecutorial misconduct during closing argument, necessitating reversal;

VIII. Whether the death penalty is unconstitutional; and

IX. Whether the cumulative effect of these errors necessitates reversal of Mr. Harris' convictions.

JURISDICTIONAL STATEMENT

Mr. Harris' Judgment of Conviction was filed on January 5, 2016 (App. Vol. 15 pp. 3022-26). A timely Notice of Appeal was filed on January 5, 2016 (App. Vol. 15 pp. 3028-29). This Court has appellate jurisdiction pursuant to Nev. R. App. P. 17(a)(2) and Nev. Rev. Stat. 177.015(3).

STATEMENT OF THE CASE

On April 26, 2013, the State of Nevada charged Ammar Harris by way of Indictment, AA1 – 5, alleging that Mr. Harris had committed the following crimes: Count 1 – Murder with use of a Deadly Weapon, Count 2 – Murder with use of a Deadly Weapon, Count 3 – Murder with use of a Deadly Weapon, Count 4 – Attempt Murder with use of a Deadly Weapon, Count 5 – Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft, Count 6 – Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft, Count 7 – Discharging Firearm out of Motor Vehicle, Count 8 – Discharging Firearm out of Motor Vehicle, Count 9 – Discharging Firearm out of Motor Vehicle, Count 10 – Discharging Firearm out of Motor Vehicle, Count 11 – Discharging Firearm out of Motor Vehicle.

A jury trial began October 12, 2015, and concluded October 26, 2015 when the jury returned verdicts of guilty as to all counts against Mr. Harris. The jurors

found Mr. Harris guilty of First Degree Murder with use of a Deadly Weapon on the three open murder counts.

On January 4, 2016, Judge Kathleen E. Delaney sentenced Mr. Harris as follows: in addition to a $25.00 Administrative Assessment Fee, and $4,625.55 in Restitution to VC2231382, as to Count 1 – DEATH, consecutive to C289275 and C300665-2, Count 2 – DEATH, consecutive to Count 1, Count 3 – DEATH, Consecutive to Count 2, Count 4 – a maximum of two hundred forty (240) months, with a minimum parole eligibility of ninety-six (96) months, plus a consecutive term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for the use of a deadly weapon, consecutive to Count 3, Count 5 – a maximum of seventy-two (72) months, with a minimum parole eligibility of twenty-eight (28) months, to run concurrent with Count 4, Count 6 – a maximum of seventy-two (72) months, with a minimum parole eligibility of twenty-eight (28) months, to run concurrent to Count 5, Count 7 – a maximum of one hundred eighty (180) months, with a minimum parole eligibility of seventy-two (72) months, concurrent with Count 6, Count 8 – a maximum of one hundred eighty (180) months, with a minimum parole eligibility of seventy-two (72) months, concurrent with Count 7, Count 9 – a maximum of one hundred eighty (180) months, with a minimum parole eligibility of seventy-two (72) months, concurrent with Count 8, Count 10 – a maximum of one hundred eighty

(180) months, with a minimum parole eligibility of seventy-two (72) months, concurrent with Count 9, Count 11 – a maximum of one hundred eighty (180) months, with a minimum parole eligibility of seventy-two (72) months, concurrent with Count 10. Mr. Harris received three hundred seventeen (317) days credit for time served. AA3022 – 3026.

A Judgment of Conviction was entered January 5, 2016, *id.*, and this appeal followed automatically, by operation Nev. Rev. Stat. § 177.055(1).

STATEMENT OF FACTS

The case arises from a shooting that took place in the early morning hours of February 21, 2013, on the Las Vegas Strip. Appellant Ammar Harris shot into a car operated by Kenneth Cherry. Mr. Cherry was struck by one bullet, his Maserati sports car then accelerated down Las Vegas Boulevard and struck numerous other vehicles. One of the vehicles struck by Mr. Cherry's car was a cab driven by Michael Bolden. Sandra Sutton was a passenger in the cab. Mr. Cherry, Mr. Bolden and Mrs. Sutton all died in the event. Mr. Cherry's passenger, Freddy Walters, was also struck by a bullet, but had relatively minor injuries.

At trial, Mr. Harris presented evidence suggesting that he shot at Mr. Cherry's vehicle in what he believed to be self-defense or under a mental state below that required for first degree murder convictions.

At trial, evidence critical to this appeal was presented through the following witnesses:

1. LVMPD Detective Clifford Mogg

Detective Mogg collected videos from approximately twelve to thirteen casinos, cab companies and LVMPD video cameras to compile a video timeline depicting the events of February 20th and 21st, 2013, related to this case. App. Vol. 8, pp. 1656-57. Detective Mogg was the first witness called to testify at the trial and, through him, the State admitted the video compilation which depicted the following the events and the approximate times listed below:

February 20, 2013

11:00 p.m. Ammar Harris and Derrick Irvin arrived at the Aria Hotel and Casino and reserved a table scheduled to be held several hours later at the Haze Nightclub; they left the hotel shortly after reserving a table.

February 21, 2013

1:30 a.m. Mr. Harris and his girlfriend Yenesis ("Yeni") Alfonzo arrived at the Aria

1:37 a.m. Mr. Harris and his group entered the Haze nightclub

3:33 a.m. Decedent Michael Cherry's Maserati arrived in the Aria Valet

3:36 a.m. Cherry and Freddy Walters go down the escalator to the Haze lobby

3:45 a.m. Cherry and Walters returned to the Maserati in the valet area

3:51 a.m. The Maserati departed the valet area

3:51 a.m. Ammar & security officer Greer left Haze Nightclub;

Ammar has a verbal confrontation with a black male adult in the casino

3:52 a.m. Maserati again returned to the valet area

3:54 a.m. Greer, Ammar, Yeni, and Keller exited the north lobby doors into the valet area

3:54 a.m. Maserati left the north valet

3:57 a.m. Maserati again returned to valet area

Cherry and Walters got out of the Maserati - Ammar walked past Cherry and Walters-Cherry and Walters returned to the Maserati

3:57 a.m. Greer, Ammar, and Yeni walked into the valet area

3:58 a.m. Maserati again leaves the valet area

3:59 a.m. Maserati returns to the valet area

3:59 a.m. Altercation between a large black male and another black male

3:59 a.m. Cherry and Walters get out of the Maserati

3:59 a.m. Greer and Ammar walked back toward the north lobby area

3:59 a.m. Cherry entered north lobby doors from the valet area

4:01 a.m. Cherry and Walters exited the north lobby doors into the valet area

4:02 a.m. Cherry and Walters stand in the valet area for a short time before

going back into the north lobby

4:03 a.m. Cherry and Walters entered the north lobby doors

4:05 a.m. Cherry and Walters exited the north lobby doors

4:08 a.m. Altercation – Male pointed what appeared to be a gun toward the crowd and a gun is reported to security

4:08 a.m. Yeni left the black Range Rover and walked toward the north valet doors to find Ammar and let him know there is more fighting going on in the valet area

4:09 a.m. **Cherry appears meets w/ male who had gun; the two were standing next to the Maserati and shook hands**

4:10 a.m. Yeni exited the north lobby doors into the valet

4:11 a.m. Ammar exited the north lobby doors; it appears that the group Cherry is with points at Ammar as he walks to his Range Rover

4:13 a.m. Ammar walked from the Range Rover to the Maserati driver's door

4:13 a.m. Cherry and Walters walk to the Maserati

4:13 a.m. Maserati left the north valet area

4:15 a.m. Ammar returned to the Range Rover

4:16 a.m. The Range Rover departed the valet area

4:17 a.m. Range Rover drove east on Harmon and pulled in front of the Maserati

4:17 a.m. The light turned green and the Range Rover accelerated – the Maserati quickly accelerated after the Range Rover

4:18 a.m. Range Rover was stopped – the Maserati was stopped while at the light next to the Range Rover

4:18 a.m. The Range Rover appears to be trying to jump the light; both vehicles accelerated north when the light turned green

4:19 a.m. A single shot is fired - the Maserati began following the Range Rover at a high rate of speed

4:19 a.m. Several additional shots fired

4:19 a.m. Multiple cars collided at the intersection of Las Vegas Boulevard and Flamingo, including the Maserati and the taxi cab

2. Yenesis Alfonso, Mr. Harris' girlfriend at the time

Ms. Alfonso testified that she was Ammar's girlfriend at the time of the events at issue. App. Vol. 9, p. 1914. She and Ammar went to the Haze nightclub in the early morning hours of February 21, 2013. After the left the nightclub and were walking through the Aria Casino, a black male she knew by the nickname of "Filthy" got into a verbal argument with Ammar. *Id.* at 1921. The confrontation continued between the two in the valet area of the Aria. She and two other young women who were with her went and got into Ammar's Range Rover. *Id.* at 1923. Ammar went back into the casino as he thought he had forgotten his jacket inside. The women in

the vehicle see more fighting going on and someone with a gun. Ms. Alfonso got out of the vehicle and went back into to the casino to let Ammar know his jacket is in the vehicle and that there was fighting going on in the valet area. *Id.* at 1924.

She testified that Ammar eventually came to the Range Rover and asked her to get a hand gun out of the vehicle's glove box. She was unable to and Ammar retrieved the gun. *Id.* at 1925. Ammar handed her the gun and went back to the valet area to talk with people.

3. Ashley Jones

She went to the Haze Nightclub with Derrick Irvin and was with Mr. Harris' group. She was in the Range Rover at the time of the fighting in the valet area and at the time of the shooting. Ms. Jones, Alyssa and Ms. Alfonso got into Mr. Harris' Range Rover. *Id.* at 2077. She observed more men arguing in the valet area. Mr. Harris came to the Range Rover, got a gun from the vehicle, and left the gun with the three women. *Id*. at 2079.

She testified that "there was like a big altercation" between a number of men and Mr. Harris was involved. App. Vol. 10, p. 2073-74. She saw someone she knew as "Filthy" get into a verbal altercation with Mr. Harris inside the casino. *Id*. at 2099. She testified that that the argument between Filthy and Mr. Harris continued in the valet area. *Id.* at 2101.

She saw Filthy retrieve a hand gun from a vehicle she believed to be a Maserati. *Id.* at 2102. The person she saw retrieve a hand gun from a car was the same person she saw arguing with Mr. Harris. *Id.* She testified that Ms. Alfonso was aware that the man retrieved a gun from a car. *Id.*

She testified that Mr. Harris returned the Range Rover and retrieved a gun from the glove box. He left the gun with Ms. Alfonso and he indicated to Ms. Alfonso that she should use the gun to protect herself if needed. Mr. Harris again left the Range Rover and he did not take the weapon with him. *Id*. at 2104.

She testified that she did not hear what, if anything, was said between Mr. Harris and Mr. Cherry. She also testified that she told the police it was dark inside the Range Rover and hard for her to see. *Id.* at 2110.

3. Courtney Harper, friend of Mr. Harris

Ms. Harper testified that she had known Mr. Harris for a number of years. *Id.* at 2114. On the day of the shooting, she was in Las Vegas working, although she was generally living in California. *Id.* She testified that Mr. Harris contacted her on the morning of the shooting and that he sounded "panicked, worried." Id. at 2130. She testified that Mr. Harris said he killed three people. She asked him what happened and he "said he had [an] altercation with someone at the club I believe in the valet area. **And when they left he was being followed and the other person**

pulls on the side and he thought that they were reaching for something and so he want[ed] to shoot them before he got shot." *Id.* at 2130-31; emphasis added. She testified that Mr. Harris asked her to help him travel to California. She let him and Ms. Alfonso go to her apartment in California. *Id.*

SUMMARY OF THE ARGUMENT

The District Court allowed the State to improperly seek the death penalty on Counts 2 and 3, for which deaths Mr. Harris had no intent to cause, and for which the death penalty is therefore a disproportionate and unconstitutional. The same reasoning which limits the felonies which qualify for so-called felony murder treatment should be applied to limit the death penalty's application in so-called transferred intent cases.

Mr. Harris' trial was imbued with unfairness, often undetectable, because of the pervasive presence of the media in the courtroom during his trial and also during pre-trial hearings. The United States Supreme Court has noted that the requirement for open court rooms does not mean that the media have special access to courtrooms and certainly does not guarantee televised trials. It simply guarantees the right of the public to attend trials and discuss what they've seen. By contrast, the publication of trials causes unforeseeable and undetectable biases against defendants. The trial court erroneously denied Mr. Harris' motion in this

regard and his convictions should therefore be overturned, because his trial was rendered unfair by virtue of the pervasive media coverage.

At trial, the State moved to admit a series of gruesome, and extremely prejudicial photographs, which depicted the victims as they were found at the scene, and throughout the autopsy performed on each of them. The photos depict the victims in a grotesque state – the bodies are charred almost beyond recognition, some are eviscerated, limbs hang from the window of twisted and wrecked cars – and beyond this the photos were depicted in color, and were cumulative of each other. There are at least three photos in which a charred, eviscerated body is depicted. In two photos, an arm or hand is seen hanging through a window of the wrecked vehicle. Several photographs depict the excised trachea of a victim, along with numerous photos of the open chest cavity. In admitting these photographs the District Court abused its discretion. Mr. Harris made a contemporaneous objection – indeed he filed a Motion in Limine which was denied without prejudice before the trial, and later renewed that motion – which was apparently denied, although the record is bereft of an explanation why the photographs were admitted. However, no explanation would suffice, as the photographs were indisputably highly prejudicial, which prejudice dramatically outweighed whatever probative value they had, particularly as they were

cumulative of each other and of other testimonial and video evidence presented to the jurors.

Furthermore, Mr. Harris was unfairly denied the right to instruct the jury as to his theory of the case. This Court has previously stated that a Defendant is entitled to jury instructions which inform the jury on his theory of the case, so long as slight or marginal evidence has been presented during the trial to support that theory. In this case, evidence was presented which certainly met the standard of slight or marginal, and Mr. Harris requested certain jury instructions accordingly, regarding intoxication and voluntary manslaughter. Despite the evidence in support, the District Court refused to give these instructions.

Further, although Mr. Harris was charged with open murder, the jury form did not contain a box indicating Voluntary Manslaughter.

Mr. Harris was further prejudiced by egregious prosecutorial misconduct, when counsel for the State engaged in a comparative weighing of the value of human life, a line of argument this Court has repeatedly ruled is improper, and which was met with a timely objection.

The death penalty, in and of itself, and as applied in Nevada, is unconstitutional.

Lastly, the cumulative effect of these errors rendered the trial unfair, the result unreliable, and necessitates reversal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE MOTION TO PRECLUDE THE STATE FROM SEEKING DEATH PENALTY ON COUNTS 2 AND 3

It is clear under the undisputed facts of this case that the deaths of cabdriver Michael Bolden and his passenger, Sandra Sutton, were not intended victims of Mr. Harris. The location of the collision occurred over one half mile from the location of the alleged shooting of Mr. Cherry. Additionally, the driver of the Maserati, Kenneth Cherry, appeared to be in control of the vehicle, accelerated up to the intersection and braking prior to the first collision.

In the case of *Ochoa v. State,* 115 Nev. 194 (Nev. 1999), this Court adopted and interpreted the use of "transferred intent" in the context of criminal liability:

> Accordingly, the doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the specific intent to harm an intended victim whether or not intended victim is injured.

The court noted that the doctrine is "a theory of imputed liability" preventing an "individual who intended to commit murder to escape full responsibility for his conduct simply because he killed the wrong person." The court adopted the following language:

> The doctrine of transferred intent was created to avoid the specific intent requirement and thus hold the defendant accountable for the consequences of his behavior when he injures an unintended victim. [Citations omitted.]

Id.

The State's theory of Mr. Harris' culpability for the deaths of Mr. Bolden and Mrs. Sutton is based upon transferred intent – which is a legal fiction – and the two murder counts should not be eligible for the imposition of the death penalty. While not specifically addressed in Nevada cases, analogous authority is found in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), and its progeny. In *Wilson v. State*, 127 Nev. 740, 745 – 46, 267 P.3d 58, 61 (2011), the Court noted that in *McConnell I*, it held that it is "impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). The genesis of *McConnell I's* holding was rooted in concerns that Nevada's "broad definition of felony murder with no specific intent requirement beyond the intent to commit the underlying felony is insufficient to narrow death eligibility" and that although the felony aggravator in NRS 200.033(4) "is somewhat narrower than felony murder," it is insufficient to narrow death eligibility for felony murderers. *Id.* at 1065-69, 102 P.3d at 621-24.

The *Wilson* Court explained that *McConnell I's* opinion makes it clear that if one or more jurors decides to convict only on a finding of a "felony murder, then

prosecutors cannon use the underlying felony as an aggravator in the penalty phase." *McConnell v. State (McConnell II)*, 121 Nev. 25, 30, 107 P.3d 1287, 1290-91 (2005); see also, *Bejarano v. State*, 122 Nev. 1066, 1080, 146 P.3d 265, 275 (2006). In the present case, the murder counts for the occupants of the cab are based upon an analogous legal fiction as a felony murder theory. Disallowing the death penalty in circumstances such as these is a reasonable extension of the concerns expressed in *McConnell I* about the insufficient narrowing of death eligibility for felony-murders to hold a blanket restriction in cases in which the conviction itself obtained on a similar legal fiction without the specific intent to commit the murders of the second and third victims.

Consequently, the death sentences imposed in this matter for the deaths of Mr. Bolden and Mrs. Sutton must, as a matter of law under the protections of both the U.S. and Nevada Constitutions, be vacated.

II. THE TRIAL JUDGE ERRONEOUSLY ALLOWED THE TRIAL TO BE BROADCAST ON MEDIA WHICH FUNDAMENTALLY IMPAIRED MR. HARRIS' RIGHT TO A FAIR TRIAL

The U.S. Supreme Court has interpreted the freedom of speech, press, and the right to a public trial to allow "members of the public and the press to attend the trial and to report what they have observed." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978). This constitutional right does not extend to the broadcasting of recordings – whether audio or visual – of pretrial and trial proceedings. The U. S.

Supreme Court stated in *Nixon:*

> The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. [Citations omitted.] Second, while the guarantee a public trial, in the words of Mr. Justice Black is "a safeguard against any attempt to employ our courts as instruments of persecution," *In re Oliver*, 333 U.S. 257, 270, 68 S.Ct. 499, 506, 92 L.Ed. 682 (1948), it confers no special benefit on the press. *Estes v. Texas*, 381 U.S., at 583, 85 S.Ct., at 1653 (Warren, C. J., concurring); *id.*, at 588–589, 85 S.Ct., at 1662–1663 (Harlan, J., concurring). Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

Nixon v. Warner Communications, Inc., 435 at 610.

To the contrary, a defendant's due process right to a fair trial can be violated in a highly-publicized case that is broadcast on television. *Estes*, 381 U.S. at 532. For some violations of due process, "a showing of actual prejudice is not a prerequisite to reversal." *Id*. at 542. Specifically, "identifiable prejudice to the accused" is not required when "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.* at 542-43. Certain instances exist wherein a televised trial "might cause actual unfairness -- some so subtle as to defy detection by the accused or control by the judge." *Id.* at 544-45. The influence on witness testimony is subject to such undetectable unfairness in certain types of cases. *Id.* at 547-48. The *Estes* court explained that "[t]he quality of the testimony in criminal trials will often be impaired" during a

televised trial. *Id*. at 547. The *Estes* court outlined three reasons for this potential impairment: first, people act differently in front of television cameras, be it based on nerves or a thirst for attention; second, witnesses may be deterred from coming forward altogether, perhaps for fear of their own reputation; and third, televised trials eliminate the evidentiary protections of the witness exclusion rule (Fed. R. Evid. 615; Nev. Rev. Stat. 50.155). *Id*. Additionally, the court further acknowledged the "impact of courtroom television on the defendant" as "a form of mental -- if not physical -- harassment." *Id.* at 549.

This Court has similarly recognized that for jury trials "due process requires significant restriction of media intrusion." *Minton v. Board of Medical Examiners*, 881 P.2d 1339, 1355 (Nev. 1994) (citing *Estes*, 381 U.S. at 540; *Minton* was disapproved on unrelated grounds in *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014)).

The instant "Strip Shooting" case drew tremendous pre-trial and trial coverage by local and national media. The case was featured in numerous TV reports, newspaper reports, and other forms of media.

The trial court's denial, App. Vol. 5, pp. 974-75, of Defendant's motion to exclude still cameras, tv cameras and media microphones from the courtroom during the trial, App. Vol. 3, pp.664-69, denied Mr. Harris a fair trial due to all of the real concerns outlined by the *Estes* court and, as quoted above, the result was "actual

unfairness -- some so subtle as to defy detection by the accused or control by the judge." *Estes*, 381 U.S. at 544-45. Mr. Harris is entitled to a new trial, free from the subtle, undetectable unfairness present in the highly-publicized trial at which he was convicted, and from which this appeal arises.

III. TRIAL JUDGE ERRONEOUSLY FAILED TO COMPEL THE STATE TO PRODUCE DEATH PENALTY DATA WHICH IS ONLY AVAILABLE TO THE STATE

Where the jury has recommended the death sentence be imposed, it is necessary to determine whether the death sentence is appropriate pursuant to the Eighth and Fourteenth Amendments, corresponding provisions of the Nevada Constitution, and Nevada Statutes. It also must be determined whether the sentence of death is arbitrarily imposed in similar cases. Whether a particular sentence, under the facts of this case, would be excessive or disproportionate to sentences imposed in similar cases is a factor relevant to whether the defendant should be sentenced to death.

NRS § 200.035 is entitled "Circumstances mitigating first degree murder," and indicates that a defendant in a capital case must be given wide latitude to introduce any evidence he considers to be mitigating. The statute specifically lists those things which may be considered as mitigating circumstances in order to reduce the degree of the crime. Additionally, NRS § 200.035(7) states, "Any other mitigating

circumstance," indicating the types and nature of a mitigation evidence is non-exhaustive.

The United States Supreme Court has similarly held that a capital defendant must be allowed to offer into evidence any evidence that he considers mitigating, and that such evidence must be considered as evidence that might warrant a life sentence. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). A fact-finder "may not refuse to consider or be precluded from considering" any mitigating evidence the defense sees fit to offer. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Penry v. Lynaugh*, 492 U.S. 1232 (1989).

Under this authority, the defense is entitled to receive and offer as mitigating evidence facts which indicate that defendants with similar cases within this jurisdiction were given life sentences. The fact that similar cases did not warrant the death penalty is an admissible mitigating factor which the sentence must consider as mitigating in this case.

Prior to trial, the Defendant requested data related to capital cases that is possessed only by the county prosecutor's office. App. Vol. 3, pp. 479-84. The information sought is otherwise not available to the Defendant or this Court absent the prosecuting attorney's compliance. Furthermore, pursuant to NRS § 177.055, if death is imposed, the Nevada Supreme Court is required to conduct an independent

de novo review of the record and decide whether death is the appropriate sentence. The reviewing courts must consider:

> . . .
>
> (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

NRS §177.055.

This Court, at a minimum, must review the death sentences imposed in their jurisdictions. Also, a defendant has a federal and state due process right to have the higher court comply with NRS § 177.055. The Nevada Supreme Court cannot perform its statutory function without the requested data now solely in the possession of the prosecuting attorney.

That the trial court failed to order the production of death penalty data prevented the Defendant from presenting mitigating evidence that very likely could have altered the jury's imposing the death penalty in this case. As such, Defendant is entitled to a new trial in this matter.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPROPERLY ADMITTING A SERIES OF PREJUDICIAL AND CUMULATIVE PHOTOGRAPHS

Over Mr. Harris' Motion, App. Vol. 3, pp. 504 – 509 (hearing on the motion App. Vol. 4, pp. 720 – 747) and later objection to the contrary, App. Vol. 7, pp. 1559 – 1578, the District Court admitted a series of photographs, depicting the bodies of the three victims in the case, including photographs of the bodies as they were discovered at the scene, as well as throughout the autopsy process, which were unfairly prejudicial and robbed Mr. Harris of his right to a fair trial. These photos were so inflammatory as to overwhelm any probative value they offered, and additionally in many cases were cumulative of each other.

The record is silent as to the reasoning under which the District Court admitted these photographs. "An abuse of discretion occurs if the District Court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005), quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.2d 998, 1000 (2001).

The jury was shown no less than four images depicting a charred, eviscerated corpse in full view. (Trial Exhibits 71, 72, 73, 75.) Further, the jury was shown two photographs, nearly duplicates of each other, in which a wrecked car is depicted while a fire and rescue team dismantles it with hydraulic rescue tools (commonly known as 'jaws of life') – in each photograph a charred arm and hand are seen hanging from one of the windows of the car. (Trial Exhibits 65, 66.) No less than six photographs displayed the opened chest cavity or excised throat of

the victims. (Trial Exhibits 62, 63, 69, 70, 76, 77.) In total, not less than nine photographs depict a charred body or a portion thereof. (Trial Exhibits 65, 66, 67, 68, 71, 72, 73, 74, 75.)

Collectively, these photographs have a cumulative effect, and as indicated above, many of them show the exact same subject matter as others do.

A district court's decision to admit or exclude photographic evidence is reviewed for an abuse of discretion. *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997); *Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1367 (1996); *Redmen v. State*, 108 Nev. 227, 231, 828 P.2d 395, 398 (1992).

Although this Court has held that the State is entitled to prove cause and manner of death in a case where the defendant has pleaded not guilty to a charge of murder, *see, e.g.*, *Sonner v. State*, 122 Nev. 1328, 1338 – 39, 930 P.2d 707, 714 (1996), the traditional standards, that evidence must not be admitted if the prejudice it presents substantially outweighs its probative value, nor if it is needlessly cumulative, nonetheless apply. NRS § 48.035(1 – 2).

Prejudicial photographs must be excluded because their admission undermines the right to a fair trial. *Sonner*, 122 Nev. at 1339, 930 P.2d at 714.

To combat this prejudice, some judges may order that photographs be reduced in size, *see, e.g., Ybarra v. State*, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984), or depicted only in black-and-white.

The admission of photographs showing a child's body eviscerated during the autopsy process, "exposing the child's organs," is an abuse of discretion.[1] *Sipsas v. State*, 102 Nev. 119, 122, 716 P.2d 231, 233 (1986).

In Mr. Harris' trial, none of the victims was a minor. However, the jury was shown multiple autopsy photos, including a cross-section of the chest cavity, open chest cavity, multiple photographs of the excised trachea of each of two victims, and multiple photographs of each of the charred remains of two victims, including photographs depicting bodies which cannot be recognized as male or female, such is the level of disfigurement. (Trial Exhibits 62, 63, 68, 69, 70, 74, 75, 76, 77.) Further, in Mr. Harris' trial, the jury was shown four full-color, glossy, eight by twelve inch prints of the charred, eviscerated remains of just one of the victims. (Trial Exhibits 71, 72, 73, 75.) Even if one of these photographs was necessary to illustrate a point, surely four was excessive, cumulative, and unduly prejudicial.

Where this Court has previously ruled gruesome photographs not to be too prejudicial to render their admission an abuse of discretion, it has demanded that

[1] The trial court in *Sipsas* reviewed the photograph in question, and eventually ruled that it was inadmissible, determining that the prejudice substantially outweighed any probative value. Later, the photograph was erroneously admitted to refresh a recollection, which admission was deemed error. *See Sispas*, 102 Nev. at 124, 716 P.2d at 233 – 34. This Court, in its discussion of this error, noted specifically "The photograph in question was more prejudicial than probative." *Sispas*, 102 Nev. at 124, 716 P.2d at 234.

they be necessary to assist a witness in describing to the jury some complicated medical testimony, or to prove the extent or causation of injuries in the case of the death of a child, for instance. *See*, *e.g.*, *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997); *Sispas*, 102 Nev. 119, 716 P.2d 231 (1986). However, in Mr. Harris' case, there was no similar complex theory to describe; one of the victims exsanguinated, two others burned to death. Even in the event this Court finds compelling the argument that permissible medical testimony required the use of photographic evidence to explain these concepts to the jury, surely one photograph of a charred, eviscerated body would have been sufficient, the other three can only be said to have inflamed the jury by their undue prejudice – and this is the case with repetitive photos of the wrecked car at the scene, each victim, evisceration, and the excised trachea of one victim. (e.g. Trial Exhibits 65 and 66 are cumulative of each other, 67, 68, 69 are cumulative of each other, 71, 72, 73, 75 are cumulative of each other, 76 and 77 are cumulative of each other).

In fact, during argument over Mr. Harris' motion to exclude these photographs, the State effectively conceded that several of them were cumulative of each other, referring to them as a group and offering no distinction between each of them. *See* AA1565, 13 – AA1566, 2 (Trial Exhibits 65 – 66); AA1567, 7 – 25 (Trial Exhibits 71 – 73), AA1568, 17 – 22 (Trial Exhibits 76 – 77). Surely, at the absolute minimum, several of these photographs should have been excluded.

Even in the event the judge incorrectly determined that a photograph of a charred and eviscerated corpse was necessary to prove that a body was located inside of a certain vehicle (a fact which, it must be noted, was not in dispute), surely three were excessive and offered no purpose but to prejudice the jury against Mr. Harris.

Further, jurors were shown a series of videos which depicted the entire sequence of events, from Mr. Harris and Mr. Cherry leaving the Haze nightclub, exiting the Aria hotel casino, entering their respective vehicles, travelling down Las Vegas Boulevard, and ultimately an explosion as the result of the impact of Mr. Cherry's vehicle into the taxicab in which Mr. Bolden was driving and Ms. Sutton was the passenger. There can be no realistic concern over the need to further educate the jurors as to the causal chain of events by showing them grotesque photographs, multiple photographs of charred and eviscerated bodies.

These photographs, whose admission was timely objected to by counsel for Mr. Harris, served only to inflame the passions of the jurors, and prejudice them against Mr. Harris. They were unfairly and substantially prejudicial. They were cumulative of each other, and of testimonial and video evidence presented to the jury. Their extraordinary prejudice surely outweighed whatever marginal probative value they had, particularly in the case of cumulative photographs. On this basis alone, Mr. Harris' convictions must be vacated.

V. THE DISTRICT COURT ERRED IN REFUSING PROPER REQUESTED JURY INSTRUCTIONS

"A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, *no matter how weak or incredible*, to support it." *Boykins v. State*, 116 Nev. 171, 173 – 74, 995 P.2d 474, 476 (2000) (emphasis added).

Mr. Harris requested a jury instruction regarding the effect of voluntary intoxication on mental state as it relates to specific intent. As this Court stated, "It is true that voluntary intoxication may negate specific intent, and an accused is entitled to an instruction to that effect if there is some evidence in support of his defense theory of intoxication." *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985), citing *Williams v. State*, 99 Nev. 530, 665 P.2d 260 (1983).

As Mr. Harris pointed out at the time of argument over the jury instruction, App. Vol. 11, p. 2362, 2 – 18, there was evidence submitted at trial both that Mr. Harris was "drinking a lot and he popped a Molly or two," on the night in question, App. Vol. 10, p. 2098, 2 – 20, that he consumed "3 or 4 full glasses of liquor," App. Vol. 9, p. 2012, 21 – App. Vol. 9, p. 2013, 6, and that he was in fact intoxicated, App. Vol. 9, p. 2014, 8 – 16.

The State's argument to the contrary, App. Vol. 11, p. 2362, 21 – App. Vol. 11, p. 2363, 6, that there was only evidence of consumption, rather than intoxication, is belied by the record, which clearly shows evidence not only that Mr. Harris was consuming large quantities of alcohol and illicit intoxicants but also that he was thereby intoxicated. These accounts corroborate each other, and offer evidence that Mr. Harris was intoxicated at the time of the relevant events, and was therefore entitled to instruct the jury accordingly. That he was denied the opportunity to do so is error on the part of the District Court, requiring reversal of the convictions entered against him.

VI. THE ERRONEOUS JURY VERDICT FORM PROVIDED TO THE JURY MANDATES A NEW TRIAL

The jury verdict provided to the jury for deliberations and upon which the jury returned its verdict failed to include the option for the jury to find Mr. Harris guilty of voluntary manslaughter on each of the open murder counts. See, Verdict, App. Vol. 11, pp. 2386-89. The trial judge acknowledged that the failure to include the voluntary manslaughter option on the verdict form was a "clerical error" (App. Vol. 12, p. 2617) and that the trial attorneys were not shown the final version of the verdict form before it was given to the jury. Mr. Harris' trial counsel moved for a mistrial after it was discovered that the verdict form presented to the jury did not include the manslaughter option, but the trial judge denied the mistrial.

In *Beck v. Alabama*, 100 S.Ct. 2382, 447 U.S. 625 (1980), the U.S. Supreme Court held that the death penalty may not be imposed after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense when the evidence would have supported such a verdict. *Id*. at 2385. The Court stated:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments: "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (opinion of STEVENS, J.).
>
> To ensure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing

> determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Id. at 2389-90.

In *State of Arizona v. Sanchez*, 659 P.2d 1268 (1983), the Arizona Supreme Court reversed a conviction and held that: "'Although the better practice which is now followed by practically all Arizona trial courts is to submit forms of verdicts to the jury for their convenience, the law does not require that this be done. However, **when the court submits verdict forms to the jury, then the forms must show every kind of verdict that may be returned by the jury**.'" *Id*. at 1269, quoting *State v. Reynolds*, 9 Ariz. App. 131, 133, 449 P.2d 968, 970 (1969) (emphasis added). See also *State v. Clayton*, 109 Ariz. 587, 600, 514 P.2d 720, 733 (1973).

The Ninth Circuit Court of Appeals, in *Braley v. Gladden*, 403 F.2d 858 (1968), reversed a criminal conviction where the trial court mistakenly failed to include a "not guilty" verdict form for the jury's consideration. The court's reasoning is directly on point with the issue at hand:

> A jury is required to presume that an accused is innocent until he is proved guilty, and a court presumes that the jury applies only that law of which it is informed by the judge. Critical deficiencies cannot be supplied by inference or assumption as to the interpretation applied subjectively by twelve jurors, individually and collectively. While it may not be unreasonable to assume that the jury inferred from the instructions that it might be empowered to write its own form of a

verdict of not guilty, it is equally reasonable to assume that the jury inferred that the judge intended that only one verdict was possible, a verdict of guilty upon the one and only form which he supplied.
All recognize that a trial judge's influence upon the jury is profound. See, e.g., *Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1938); *Starr v. United States*, 153 U.S. 614, 14 S.Ct. 919, 38 L.Ed. 841 (1894). Hence, the oversight in not furnishing the not guilty verdict form along with the opposite form constituted, in effect, a severely adverse comment by the trial judge, an impermissibly grave insinuation of judicial attitude toward the ultimate issue of guilt or innocence. Accordingly, we hold that the influence exerted by the trial judge, although unintended and probably resulting from a clerk's oversight, was so significantly irregular as to require a new trial.

Directly in point is *Commonwealth v. Edwards*, 394 Pa. 335, 147 A.2d 313 (1959), wherein, notwithstanding the fact that the defendant admitted a slaying, the Pennsylvania Supreme Court held that the trial court's failure to include not guilty as one possible verdict deprived the accused of a fair trial. The prosecution argued that Edwards could not have been prejudiced by the judge's failure to suggest a simple not guilty verdict owing to the extreme unlikelihood of a jury acquitting an admitted slayer. This argument parallels the rationale that is implicit in the position taken by the Oregon Supreme Court and the District Court in our case. The *Edwards* court rejected the state's supposition because 'It must still be left to the jury to decide whether an admitted slayer had or did not have justification or excuse for what he did.' 147 A.2d at 314.

'To say that a judge need not charge on an indispensable requirement in the law because the defendant is assuredly guilty is to hang the accused first and indict him afterwards. It is the trial and the trial alone which decides whether a defendant is assuredly guilty. The presumption of innocence is not merely a papier-mache figure for dramatic display in the courtroom; it is a reality without which trials become mere playacting with the verdict residing in the judge's pocket before the jury is sworn. Even, if in a hypothetical case, the evidence of guilt piles as high as Mt. Everest on Matterhorn, even if the District Attorney conscientiously believes the defendant to be as guilty as Cain, and no matter with what certainty the Judge views the culpability of the accused at the bar, the defendant is still entitled to all the safeguards of

a fair trial as announced in the Constitution, and the law of the land.

Id. at 860-61.

In the instant case, although the trial court allowed the jury to be instructed on the voluntary manslaughter lesser included offense, the trial court failed to provide the jury with a verdict form which allowed the jury to select voluntary manslaughter as an option under the open murder counts. This omission made it extremely unlikely that the jury would fully and properly consider lesser included offense of manslaughter, despite the trial court agreeing that, given the evidence presented at trial, Mr. Harris was entitled to an instruction on manslaughter and to present the lesser included offense to the jury. Under the fundamental protections of the accused under both the U.S. and Nevada Constitutions, Mr. Harris is entitled to a new trial due to the clear error in the verdict form presented in this capital trial.

VII. THE STATE OF NEVADA COMMITTED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT, NECESSITATING REVERSAL.

When a prosecutor imbues a trial with his misconduct, he robs the defendant of critical rights guaranteed both under the Nevada and United States Constitutions. The right to due process, the presumption of innocence, and to a fair trial by a jury of one's peers are all usurped by prosecutorial misconduct.

Mr. Harris' state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and

unusual punishment were violated because of prosecutorial misconduct. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"[W]hen considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476 (2008), citing *U.S. v. Harlow*, 444 F.3d 1255, 1265 (10th Cir. 2006). Whether a given instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct, and "misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." *Id.*, at 1189.

"Harmless-error review applies, however, only if the defendant preserved the error for appellate review." *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (citing *United States v. Olano*, 507 U.S. 725, 731 (1993)). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this 'allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.'" *Id.* (quoting *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002)). "When an error has not been preserved, this court employs plain-error review." Id. (citing *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "Under that standard, an error that is plain from a

review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice. Id. (internal quotation omitted) (citing *Green*." *Valdez*, 124 Nev. At 1190, 196 P.3d at 477, *quoting Green v. State*, 119 Nev. 542, 434, 80 P.3d 93, 95 (2003); *see also Green*, 119 Nev. at 545, 80 P.3d at 95 and *Olano*, 507 U.S. at 734).

In Mr. Harris' case, he made a timely objection at the time of the State's misconduct, and therefore is entitled to have that misconduct reviewed under the harmless-error standard.

This Court has previously admonished prosecutors, and stated that where a prosecutor asks for a death sentence on behalf of a victim, he commits misconduct. *Nevius v. State*, 101 Nev. 238, 248, 699 P.2d 1053, 1059 (1985); *Howard v. State*, 106 Nev. 713, 718 – 19, 800 P.2d 175, 178 (1990).

During the state's rebuttal argument in the penalty phase, counsel for the State engaged in a line of argument which amounts requesting a penalty on behalf of each victim by stating:

> "If you were to elect that the murder of Ken Cherry should result in the sentence of life without the possibility of parole and you elect that that same punishment should be imposed for the murder of Michael Bolden and that verdict would result in exactly no additional days in prison for the death and murder of Michael Bolden –"

App. Vol. 13, p. 2969, 9 – 15. At this point, the State's improper argument was met with a timely objection, which was sustained. However, the District Court failed to admonish the jury regarding the improper argument. Further, the State continued along the same line of argument despite the objection and ruling, arguing: "And the same would exist for Sandra Sutton." App. Vol. 8, p. 2969, 21 – 22.

The import of the State's argument here is clear: if the jury were to have chosen any penalty other than death, each victim would not have been represented by their verdict. The implication suggested is that each victim's death demands a sentence of death. The prosecutor herein made a semantic change to his argument from those used improperly in *Nevius* or *Howard*, but the intention was identical.

This argument is improper and inflammatory, and was immediately followed by further improper argument by the State, suggesting that Mr. Harris would not feel remorseful during his potential time in prison, and therefore that the only punishment the jury could elect which would result in Mr. Harris genuinely feeling punished (and by implication therefore, the only option the jury should even contemplate), was death. App. Vol. 8, p. 2969, 22 – App. Vol. 8, p. 2970, 6. Further, the District Court failed to admonish the jury regarding the improper

argument, before the prosecutor again engaged in his improper argument. These were the last comments the jurors heard before retiring to determine which punishment was the appropriate one. "Because of the qualitative difference [between the death penalty and any other form of punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See, also, Gardner v. Florida*, 430 U.S. 349, 357 – 58 (1977); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Beck v. Alabama*, 447 U.S. 625, 637 – 38 (1980).

VIII. THE DEATH PENALTY IS UNCONSTITUTIONAL

Mr. Harris' state and federal constitutional rights to due process, equal protection, right to be free form cruel and unusual punishment, and right to a fair penalty hearing were violated because the death penalty is unconstitutional. U.S. Const. Amend. V, VI, VII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. *Woodson v. North Carolina*, 428 U.S. 280, 296, 96 S. Ct. 2978, 2987, 49 L. Ed. 2d 944, 955. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 123 L. Ed. 2d. 188 (1993),

quoting Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *McConnell*, 121 Nev. At 30, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually any and all first-degree murderers.

Under the federal constitution, the death penalty is cruel and unusual in all circumstances. See *Gregg v. Georgia*, 428 U.S. 153, 227 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); contra, *id.* at 188-195 (Opn. of Stewart, Powell and Stevens, JJ.); *id.* at 276 (White, J., concurring in judgment). Because *stare decisis* is not consistently adhered to in capital cases, e.g., *Payne v. Tennessee*, 111 S.Ct. 2597 (1991), this court and the federal courts should reevaluate the constitutional validity of the death penalty.

The death penalty is also invalid under the Nevada Constitution, which prohibits the imposition of "cruel or unusual" punishments. Nev. Const. Art. 1 § 6. While the Nevada case law has ignored the difference in terminology, and had treated this provision as the equivalent of the federal constitutional prohibition against "cruel and unusual punishments," e.g. *Bishop v. State*, 95 Nev. 511, 517-518, 597 P.2d 273 (1979), it has been recognized that the language of the Nevada constitution affords greater protection than the federal charter: "under this provision, if the punishment is either cruel or unusual, it is prohibited. "*Mickle v.*

Henrichs, 262 F. 687 (D. Nev. 1918). While the infliction of the death penalty may not have been considered "cruel" at the time of the adoption of the constitution in 1864, "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 , 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958), have led to the recognition – even by the staunchest advocates of its permissibility in the abstract – that killing as a means of punishment is always cruel. See, *Furman v. Georgia*, 408 U.S. 238, 312, 92 S. Ct. 2726, 2764, 33 L. Ed. 2d 346, 390 (1972) (White, J., concurring); see *also*, *Walton v. Arizona*, 497 U.S. 639, 669, 110 S.Ct. 3047, 3066 (1990) (Scalia, J., concurring). Accordingly, under the disjunctive language of the Nevada Constitution, the death penalty cannot be upheld.

Mr. Harris recognizes that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See, *Leonard v. State*, 117 Nev. 53, 83, 17 P.3d 397, 415 – 16 (2001), and cases cited therein. Nonetheless, the Court has never explained the rationale for its decision on this point and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

Based upon the above and foregoing, Nevada's death penalty scheme is

unconstitutional, requiring the reversal of Mr. Harris' sentence.

IX. THE CUMULATIVE EFFECT OF THESE ERRORS NECESSITATES REVERSAL OF MR. HARRIS' CONVICTIONS.

In *Dechant v. State*, this Court held that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction. *Dechant*, 116 Nev. 918, 927, 10 P.3d 108 (2000) (citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (2008) (quoting *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When evaluating a claim of cumulative error, we consider 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." *Id.* (citing *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). Most importantly, "[t]his court must ensure that harmless-error analysis does not allow prosecutors to engage in misconduct by overlooking cumulative error in cases with substantial evidence of guilt." *Id.* (citing *Kelly v. State*, 108 Nev. 545, 559-60, 837 P.2d 416, 425 (1992) (Young, J., dissenting)).

The United States Supreme Court has stated that, "Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may

present evidence and argument before an impartial judge and jury." *Rose v. Clark*, 478 U.S. 570, 578 (1986). Therefore, if *any* of those features is absent, ". . . constitutional errors require reversal without regard to the evidence in the particular case." *Id.*, at 577, citing *Chapman v. Cal.*, 386 U.S. 18, 23, n. 8 (1967).

CONCLUSION

For all the foregoing reasons, the convictions and penalty imposed upon Mr. Harris must be reversed.

DATED this 21st day of December, 2016.

Respectfully submitted by,

/s/ *Thomas A. Ericsson*
THOMAS A. ERICSSON, ESQ.
ROBERT L. LANGFORD, ESQ.
Attorneys for Appellant
AMMAR HARRIS

CERTIFICATE OF COMPLIANCE

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 14 point font of the Times New Roman style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7)(b). Pursuant to NRAP 32(7)(b), this appellate brief complies because although excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 37,000 words, to wit 10,286 words.

///

///

///

///

///

///

///

///

///

Finally, I certify that I have read this amended 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 21st day of December, 2016.

Respectfully submitted by,

/s/ *Thomas A. Ericsson*
THOMAS A. ERICSSON, ESQ.
ROBERT L. LANGFORD, ESQ.
Attorneys for Appellant
AMMAR HARRIS

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 21, 2016. Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT, ESQ.
Nevada Attorney General

STEVE OWENS, ESQ.
Chief Deputy District Attorney

THOMAS A. ERICSSON, ESQ.

ROBERT L. LANGFORD, ESQ.

BY:

/s/ *Thomas Ericsson*
Oronoz, Ericsson & Gaffney, LLC