IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MURPHY, Appellant, v. THE STATE OF NEVADA, Respondent.	)	No. 72103

APPELLANT'S OPENING BRIEF

Direct Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Carolyn Ellsworth, District Judge
District Court Case No. C-15-303991-4

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I. ROUTING STATEMENT

David Murphy was found guilty pursuant to a jury verdict of Second Degree Murder with Use of a Deadly Weapon, a category A felony, for which he received life in prison with the possibility of parole, and six category B felonies.

This appeal is not presumptively assigned to the Court of Appeals because the primary offense arises from a category A felony, is not a plea, and challenges more than the imposed sentenced or sufficiency of evidence. NRAP 17(b)(1)

The Nevada Supreme Court should hear this appeal because it addresses issues of first impression under the United States or Nevada Constitution, raises substantial precedential and public policy questions, and discusses issues of statutory construction. NRAP 17(a)(13) and (14). Specifically, this appeal argues codefendants should be severed with they present mutually exclusive defenses that undermine each other. Further, this appeal addresses the proper remedy necessary to protect a defendant's Constitutional right to a fair trial when the State delays disclosing a cooperation agreement with a codefendant to gain a tactical advantage.

II. JURISDICTIONAL STATEMENT

Appellant brings the instant appeal seeking reversal of the jury verdict and resulting judgment of conviction entered against him. Nevada law permits a direct appeal from a final judgment entered against a defendant in a

felony criminal case. See NRS 177.015. The verdict reached by a jury amounts to a final judgment upon the filing of the judgment of conviction. Castillo v. State, 106 Nev. 349, 351 (1990).

Appellant's sentencing hearing occurred on November 28, 2016. (Appellant's Appendix Volume XIV pp. 3360-3387, hereinafter "XIV:3360-87") Thereafter, the Judgment of Conviction, or final judgment, was filed on December 2, 2016. (X:2175-76) Appellant filed a timely Notice of Appeal on December 30, 2016. (XIV:3388-90) The instant appeal was docketed by the Supreme Court of Nevada on January 11, 2017.

III. ISSUES PRESENTED FOR REVIEW

A. The Trial Court Erred in Denying Appellant's Motion to Exclude Summer Larsen Due to the State's Failure to Provide Reasonable Notice of its Intent to Call Her as a Cooperating Informant

B. The Trial Court's Failure to Grant Severance Deprived Appellant of his Constitutional Right to a Fair Trial and Distorted the Fact Finding Process

C. The Trial Court Erred by Permitting The State to Admit and Rely on Cellular Telephone Records that were not Provided to the Appellant until Day Six of Trial

D. The Trial Court Abused its Discretion and Violated Appellant's Constitutional Rights by Disclosing to the Jury that Figueroa's Agreement to Testify required him to "Testify Truthfully"

E. The Prosecution Failed to Present Sufficient Evidence to Support Appellant's Convictions

F. Cumulative Error Warrants Reversal of this Conviction

IV. STATEMENT OF THE CASE

The State filed an Indictment on January 30, 2015, charging Appellant with Open Murder, Conspiracy to Commit Robbery, Burglary while in Possession of a Deadly Weapon, Home Invasion while in Possession of a Deadly Weapon, Attempt Robbery with use of a Deadly Weapon, and Attempt Murder with use of a Deadly Weapon. (I:0001-02) At the time of that filing, Appellant was charged along with three codefendants, Jorge Mendoza, Robert Figueroa, and Summer Larsen. (I:0001-02) On February 27, 2015, a Superseding Indictment added a forth codefendant, Joseph Laguna, and charged him with the same charges as alleged against his codefendants. (I:0023-29)

The charges stemmed from an attempt to invade a drug house and to rob the occupants therein. (I:0110-13) The occupants of the home were armed

and tipped off to the robbery plan, which resulted in a gunfight that left Monty Gibson, one of the occupants of the home, dead. (I:0110-13)

Appellant entered a not guilty plea and maintained his innocence through trial. Conversely, two of Appellant's four codefendants entered guilty pleas pursuant to a negotiation with the State wherein both agreed to testify against Appellant and the other, remaining codefendants at trial. Robert Figueroa entered into a guilty plea within a month of the Indictment. (II:0264-68) Summer Larsen entered into negotiations with the State less than a week before trial began. (II:0264-69)

Commencing on September 12, 2016, Appellant was tried with codefendants Mendoza and Laguna. (II:0307-0310) After a nineteen-day jury trial, jurors convicted Appellant and his codefendants of all charges alleged against them. (XIV:3260-70) Regarding the Open Murder charge, Appellant and codefendant Laguna were convicted of Second-Degree Murder with use of Deadly Weapon. (XIV:3260-70) Mendoza, the remaining codefendant, was found guilty of First-Degree Murder with use of a deadly weapon. (XIV:3260-70) The trial court sentenced Appellant, in addition to a $25 administrative assessment, to a combined aggregate sentence for all counts of Life in Prison with parole eligibility after twenty three (23) years. (XIV:3388-90) The Judgment of Conviction was filed on December 2, 2016. (XIV:3388-90)

From that final order, Appellant filed a timely Notice of Appeal on December 30, 2016. (XV:3400-3401)

V. STATEMENT OF FACTS

A. The Night of September 21, 2014: A Foiled Robbery

Joseph Larsen resided at single family residence located at 1661 Broadmere Street in Las Vegas, Nevada. (VIII:1704-05) Joseph's occupation as of September 2014 was the illegal sale of marijuana out of that home. (VIII:1705-08)

As is fairly common in Joseph's line of work, his place of business had become the target of thieves who sought to steal his marijuana and the profits he derived therefrom. On at least two occasions prior to the night of September 21, 2014, Joseph's house was burglarized by assailants who were never apprehended by law enforcement. (VIII:1706-08) In an effort to protect his home and place of business, Joseph procured a roommate, Monty Gibson, to help guard the product and profits of his business. (VIII:1709-10)

Sometime during the afternoon of September 21, 2014, Joseph received a phone call from his father, Steven Larsen. (VIII:1710-11) Steven informed his son that one of Joseph's childhood friends told Steven that Joseph's house was rumored to soon be the target of a burglary and/or robbery. (VIII:1710-11) The police were not notified of the situation and Joseph chose to stay in

the house. In preparation for the attack, Joseph and Monty armed themselves with firearms that Joseph kept in the house. (VIII:1710-15)

Shortly after 8 p.m. three masked assailants approached the front door of Joseph's residence at 1661 Broadmere. According to Robert Figueroa's bargained-for trial testimony, he was the first in line as the three approached the door. (IX:2086) Figueroa further testified that Mendoza was directly behind him and Laguna was in the rear of the line. (IX:2084-86) Murphy was waiting in the car down the street from Joseph's residence. (IX:2080) When the trio reached the front door of Joseph's home, Figueroa forced the door open with his body weight and attempted to enter the residence. (IX:2083) Joseph and Gibson heard the pounding on the door and secured defensive positions in the home relative to the front entryway.

Figueroa managed to take two "little steps" into the home before he is shot in the face, right below his lip. (IX:2086-87) The impact causes Figueroa to drop to the ground. (IX:2087) As he regained his footing, Figueroa received a second gunshot to the side of his torso. (IX:2087) Figueroa thereafter retreats from the home and runs down a street situated perpendicular to the front of 1661 Broadmere. (IX:2087-88)

Figueroa testified that as he sprinted away from the house, he looked back and witnessed Laguna enter the getaway car Murphy was driving.

(IX:2088) With Laguna inside, the car quickly sped away from the scene without attempting to pick up Figueroa. (IX:2088) Figueroa claimed that he never removed the gun from its holster while at the Broadmere residence, but admitted to holding the gun as he ran away because it was "flopping around" in the holster. (IX:2088) Figueroa denied that he ever shot during the entirety of the events that night. (IX:2103) Roger Day, a neighbor who observed Figueroa as he fled the scene, provided contradictory testimony. (VII:1649-50) Day testified that he observed Figueroa as he ran away from Broadmere and in the process, Figueroa pointed his gun behind him and "fired off a couple of shots." (VII:1649)

As Figueroa fled on foot, Jorge Mendoza lacked the capacity to do the same. Mendoza, who was armed with a rifle, also sustained a gunshot wound as he stepped away from the threshold of the front door at 1661 Broadmere. (XII:2695-96; 2705; 2711) Specifically, Figueroa was shot in his upper leg, which shattered his femur. (XII:2712) Resultantly, Figueroa was unable to walk since he could not put any weight on his injured limb. (XII:2712)

With his co-conspirators nowhere in sight, Mendoza scooted down the front yard of 1661 Broadmere attempting to distance himself from the source of the gunfire. (XII:2715) As he slowly slid onto the street in front of the residence, Mendoza balanced his rifle on his lap. (XII:2715) Once he reached

the street, Mendoza testified that he heard multiple gunshots from an unknown source. (XII:2717) Thereafter, while he still was sitting in the street with his rifle nearby, Mendoza looked towards the front door of 1661 Broadmere and observed two individuals in the door way. (XII:2717-18) Upon seeing the men, Mendoza testified that he was scared for his life; fearful that the men who emerged from the house were going to shoot him again. (XII:2717-19) Mendoza then engaged his rifle and fired in the direction of the door way. (XII:2718-20) Mendoza observed one of the shots he fired strike one of the men at the door. (XII:2718-19) At that point, all of the gunfire ceased and Mendoza continued to scoot away from the scene of the crime. (XII:2719-20)

Mendoza scooted about a half block away from 1661 Broadmere when he discovered an unlocked sedan parked in the driveway of a neighboring residence. (XII:2722-23) Mendoza entered the sedan and positioned himself in the back seat. (XII:2722-23) Within minutes Mendoza could hear police sirens near the location of his hideout. Knowing he left a blood trail from the scene of the crime to his hiding place, Mendoza awaited his near certain apprehension. (XII:2723-24)

Even though he was also shot, Figueroa fled the scene with a higher degree of mobility. Figueroa ran through the subdivision and eventually located a walled in back yard to take cover within. (IX:2085-90) Figueroa

positioned himself between the backyard wall and a large bush as he heard an increasing police presence gather nearby. (IX:2090) Figueroa remained in that position throughout the night bleeding from his jaw and his torso. Despite their efforts the police failed to locate Figueroa during their search. Hours later, sometime around 6:00 a.m., Figueroa phones his sister who picks him up and drives him away from the neighborhood. (IX:2108-11) After spending multiple days injured at his residence, Figueroa is driven to a hospital in California where he receives medical treatment for his injuries. (IX:2110) When California law enforcement questions Figueroa at the hospital he informs them he sustained the gunshot wounds while carelessly shooting guns in the desert. (IX:2111-13)

B. The Police Quickly Arrest Two but Struggle to Identify the Rest

Within twenty minutes of the shootout, a heavy police presence converged on 1661 Broadmere and the surrounding area. Upon arriving, the police located Monty Gibson, with a single gunshot wound to the head, dead on the ground at the doorway to the residence. (VI:1305) Upon entering the home, the police located Joseph Larsen and his father, Steven Larsen[1], inside.

[1] Steven Larsen testified at trial that he arrived to Joseph's residence after the shootout but before the police were on scene. (VIII:1716-17) He entered the home to find his son hysterical inside the home. (VIII:1717) Thereafter, the

(VI:1307-1309) Two handguns were located in the kitchen area of the home. (VI:1309) After an extensive search, no marijuana or sums of money were located anywhere in the residence. (V:1157-59)

Outside of the residence, the police on scene located two blood trials that started in the street in front of 1661 Broadmere and headed away from the front door. (VI:1313-16) One of the blood trials was consistent and relatively short in length. (VI:1314-15) It led the police to the sedan where Mendoza was hiding in the back seat. (VI:1315) Mendoza was removed from the sedan and transported to the hospital in police custody. (V:1166)

The second blood trial was less consistent in comparison to the first blood trial left by Mendoza. (V:1184-86) The police followed the blood trial as it stopped and started again on multiple streets within the subdivision. (V:1185-88) Despite their efforts in the hours that followed the crime, the police were unable to locate the individual responsible for the second blood trail.

The police interrogated Mendoza both at the scene and later at the hospital. (VIII:1812-13) On both occasions Mendoza denied involvement in

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two of them attempted to render medical aid to Gibson. (VIII:1718) The police then arrived and placed both Steven and Joseph into temporary police custody. (VIII:1720)

the crime and provided the police with no leads regarding the identity of the other assailants. (VIII:1812-15)

1. Suspicion Forms Around Summer Rice

On the night of the crime, within hours of the shooting, the police interviewed Steven Larsen at the scene. (VIII:1720-23) Steven strongly believed that Summer Larsen was responsible for the events that led to Gibson's death and he communicated that to the police. (VIII:1722-24) Steven's belief that Summer was responsible stemmed from multiple past events. First, a family friend approached Steven hours before the crime and informed Steven that Summer intended to burglarize Joseph's house that night. (VIII:1723-24) Further, roughly two weeks before the crime, Steven witnessed Summer outside of the 1661 Broadmere residence throwing cans in an attempt to smash the windows of the home. (VIII:1724-26) Steven confronted Summer and told her to stop. (VIII:1725) During the conversation that ensued, Summer confessed to burglarizing Joseph's house on two previous occasions and said "I'm about ready to send a couple people over here and end my whole problem." (VIII:1725) Steven believed that Summer expressed an intent to have someone take care of his son in the near future. (VIII:1725)

Based on these revelations, the police quickly developed Summer as a suspect and sought to contact her. Within days of the crime, Summer fled to Utah to avoid police contact. (VI:1374-75) Interviews with Ashley Hall, Steven Larsen and other acquaintances of Summer caused the police to arrest Summer for her alleged role in planning this crime.

When interviewed by the police, Summer denied involvement in the crime and pleads that she has no knowledge of the identity of the assailants. (VI:1379-81). From Clark County Detention Center, Summer made multiple jail calls to David Murphy. (VI:1378) During these recordings, neither Summer nor Murphy admitted to any involvement in the failed home invasion scheme. (VI:1378-83)

2. Gabriel Sotello Breaths Life into a Stagnant Investigation

Sometime in the middle of October 2014, the homicide detectives assigned to the case received a call from a North Las Vegas police detective about an individual who was volunteering information on the homicide. (X:2341-43) The individual, Gabriel Sotelo, was in custody for a string of car burglaries when he sought to better his position by speaking with the police about the homicides.

The homicide detectives responded to the North Las Vegas Police Department to speak with Sotelo. (X:2341-43). Sotelo informed the police

that he was friends with two individuals who confessed to him that they were present and involved in the home invasion and robbery at 1661 Broadmere. Sotelo claimed the he was visiting with Robert Figueroa and Emanuel Barrientos when the two men informed Sotelo that they were responsible for the crime. (X:2341-45) Sotelo reported that Figueroa had two recent gunshot wounds that, according to Figueroa, were sustained during the failed home invasion. (X:2342-46) After providing the information, Sotelo was released from custody and, the next day, he drove with the homicide detectives to show them where Figueroa lived. (X:2343-47)

On October 20, 2014, surveillance was established and Figueroa was apprehended as he exited his residence. (X:2343) Figueroa was arrested and interviewed at the scene. Figueroa denied any involvement in the crime and, after the interview, was transported to jail and booked into custody. (X:2349-50).

3. A Desperate Figueroa Reaches an Agreement with the State

On October 23, 2014, three days after his arrest, Figueroa reached out to the prosecutor assigned to this case to negotiate a plea bargain in exchange for his testimony against his codefendants. (X:2353) A day later, two Las Vegas Metropolitan Police Department (hereinafter "LVMPD") detectives responded to the jail and conducted a taped interview with Figueroa. During

said interview, Figueroa was assisted by court appointed counsel. (IX:2128) Having reached an agreement to testify with the State, Figueroa testified at a grand jury proceeding and later testified at the joint trials of Murphy, Mendoza, and Laguna. (IX:2051-2185)

Figueroa informed law enforcement that he was asked to join in on the crime by Laguna, who Figueroa previously shared a prison cell with in Winnemucca, Nevada. (IX:2062-64) According to Figueroa, Laguna called him around 7:30 a.m. on the morning of September 21, 2014, and upon hearing of the plot, Figueroa agreed to participate. (IX:2065) Soon thereafter, Figueroa, who chose to bring a handgun, was picked up from his home. (IX:2067-69) Figueroa didn't know the legal name of either of the other two men who were involved in the crime that day but he knew one of them went by the moniker of "Duboy" or "Doughboy." (IX:2130-35) Laguna was the only one of the men Figueroa had a close personal relationship with as of the date of the crime.

Figueroa learned that the plan was to burglarize the house at 1661 Broadmere because it was believed that the occupant had recently received thirty to fifty pounds of marijuana. (IX:2075) Figueroa didn't know the identity of the occupant of the home and did not know the name Summer Larsen when he provided a proffer to law enforcement. (IX:2130-35)

Pursuant to his negotiations with the State, Figueroa entered a guilty plea to one count each of Conspiracy to Commit Robbery and Robbery with Use of a Deadly Weapon. (IX:2058; XIV:3395-96) The charge of Open Murder and all other remaining charges were dismissed as part of the agreement.

Figueroa was sentenced on December 12, 2016, after the trial against the remaining defendants concluded. (XIV:3395-96) As to the Conspiracy to Commit Robbery charge Figueroa received a sentence of twenty-eight (28) to seventy-two (72) months in prison. (XIV:3395-96) For the Robbery with Use of a Deadly Weapon, Figueroa received a sentence of fifty-five (55) to one hundred eighty (180) months plus a consecutive term of twelve (12) months to forty-eight (48) months for the deadly weapon enhancement. (XIV:3395-96) The two counts were ordered to run concurrent to one another. (XIV:3395-96)

4. Cellular Telephone Records

As part of their investigation, the police determined, what they believed to be, the cellular phone numbers for Mendoza, Laguna, Figueroa, and Murphy. (VIII:1943-50) The police then received the call, text, and cellular location records for all four of the cellular phone numbers they tied to the suspects. Mendoza's cellular phone records showed that two phone calls and

a text message were sent from the number the police associated with Murphy to Mendoza's phone. (VIII:1945-60) Laguna's cellular phone records revealed multiple contacts between his phone and the numbers the police associated with Figueroa and Murphy. (VIII:1950-65)

Further, Laguna, Murphy, and Mendoza's cellular location data showed their phones hitting off of cellular towers in relatively close proximity to the crime scene around the time of the crime. (VIII:1951-80) Likewise, Figueroa's cellular location data also showed his phone hitting off of a cellular tower near the crime scene from minutes after the crime until early the next morning. (VIII:1950-55)

As the case approached trial, the cellular data constituted the only evidence that tied Murphy to the crime beyond the purchased testimony from Figueroa. Put differently, the only corroboration for Figueroa's anticipated accomplice testimony consisted of telephone records that put Murphy in the general area of the crime around the time it was committed and showed Murphy communicated with Laguna and Mendoza on the date of the crime.

5. The Eleventh Hour Agreement with Summer Larsen

The first Indictment, which named Summer as one of the codefendants, was filed on January 30, 2015. (I:0001-06) After multiple continuances, trial was firmly set to begin on September 12, 2016, nearly twenty (20) months

after the first Indictment was filed. As trial neared, the trial court made it clear that this trial would commence as scheduled on September 12, 2016.[2]

As the September trial date neared, Mendoza, Laguna, Murphy and Rice were scheduled to be tried together. Figueroa, who entered into an Agreement to Testify with the State in October 2014, was the only defendant who was not scheduled to be tried.

Fully knowing that a trial continuance was not an option, the State strategically waited until the days before trial commenced to enter into an Agreement to Testify with Summer Larsen. Specifically, in the late afternoon

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[2] The trial court conveyed that message when it denied a motion to withdraw filed by Appellant Murphy's attorney on July 11, 2016. (I:0187-91) Said motion was based on the fact that Murphy's appointed attorney was relocating to Michigan prior to the scheduled start of the trial in this case. (I:0187-91) Even though neither the State nor any of the other parties opposed the motion to withdraw, the Court denied the request because it would cause a continuance of the firm trial setting. (I:0192-99) In making that ruling the court noted that the case was nearly two years old and was difficult to schedule because of the many attorneys involved. (I:193) The court said that unless a newly appointed attorney would be "absolutely" ready for the September trial, withdraw would not be allowed. (I:193)

of September 6, 2016, the State informed defense counsel for the remaining defendants of their agreement with Summer and their intent to call her at trial. (II:0264) Put differently, the State provided notice that it intended to call a coconspirator to testify against Appellant three (3) judicial days before trial was set to begin.

Murphy sought to exclude Summer as a witness based on the late disclosure and his inability to prepare an effective cross examination in the time remaining before trial. (II:0263-75) As an alternative remedy, Murphy asked the court to continue the trial if it refused to exclude Summer as a witness. (II:0263-75) The court denied both of Murphy's requests and trial commenced as scheduled with Summer testifying on behalf of the State.

As further detailed herein, Summer's testimony presented a theory of prosecution that was different than the original theory of prosecution previously disclosed to the defense.

The State's original theory alleged that Summer directed Murphy to burglarize Joseph's house on September 21, 2014, because the house would be full of marijuana and they could share the proceeds of the crime. In accordance with the State's first theory of prosecution, the first Indictment filed in this case asserted Summer was liable because she "identif[ied] Joseph Larsen's home as a target and/or meeting with the co-defendants and/or

unidentified co-conspirators to plan the robbery of Joseph Larsen and/or Monty Gibson." (I:0001-06) The Second Superseding Indictment filed on May 29, 2015 provided the same theory of prosecution. (I:0067-72)

The State provided further first of its original theory of prosecution during a pre-trial hearing addressing the amount of evidence presented to the grand jury. (I:0083-84) Within that argument, the State directly asserted that their theory was that Summer planned the robbery of Joseph's house. (I:0083) The State highlighted evidence that proved Summer made statements to Ashley Hall the day before the crime that she planned on robbing Joseph's residence the next day at 8:30 p.m. (I:0083)

At trial, Summer testified in support of a substantially altered theory of prosecution that Appellant did not learn of until September 7, 2016, when the State revealed its intent to call Summer at trial. In contrast to the State's previous theory of prosecution, Summer testified that she did, in fact, conspire with Murphy to steal from a completely different marijuana dealer sometime in the middle of September 2016. (VI:1363-66) However, Summer testified that she neither planned the robbery of Joseph's residence nor had any knowledge that it was going to occur. (VI:1363-70)

Pursuant to the agreement to testify reached with the State, Summer entered into a guilty plea agreement whereby she pled guilty to one count each

of Conspiracy to Commit Robbery and Attempt Robbery. (XV:3391) On November 28, 2016, Summer was sentenced to a term of probation not to exceed five (5) years for her involvement in this case. (XV:3391-3394)

6. Mendoza Testifies to the Detriment of All

As the joint trial of Laguna, Murphy and Mendoza entered its third week, the time came for each Defendant to exercise his Constitutional right to testify and/or present evidence. Mendoza was the first Defendant to present his case in chief and, as part thereof, he testified before the jury. (XI:2632-34)

Before trial, Appellant Murphy anticipated this possibility and raised concerns over the prejudice that would result by Mendoza testifying to a defense that was antagonistic to his own. On April 3, 2016, Murphy filed a Motion to Sever his trial from Mendoza's trial. (I:0109-21) The primary ground asserted was that "the respective defenses of Murphy and Mendoza are 'mutually exclusive' to one another [and, therefore,] unfairly prejudicial." (I:0118) At its core, Murphy's defense sounded in identity – there was insufficient evidence beyond accomplice testimony to prove Murphy was involved in the events and, therefore, he was entitled to a not guilty verdict. (I:118) In an effort to reduce his level of culpability, Mendoza, in contrast, would present a defense that conceded his involvement in the crime and claim that Murphy was involved in the conspiracy as well. (I:0118) Murphy's

severance request was denied, in large part, because Murphy had no way of predicting or proving what Mendoza's defense at trial would be. (I:0181-184)

Mendoza testified that he was part of a conspiracy to enter the residence at 1661 Broadmere and to steal marijuana and other property therein. (XII:2646-51) As Appellant predicted before trial, Mendoza testified that both Murphy and Laguna were parties to the planning and execution of the crime. (XII:2646-70)

The intent of Mendoza's testimony was to establish that, even though he was guilty of all other crimes charged, he acted in self-defense when he shot and killed Monty Gibson and, therefore, was not guilty of murder. (XII:2724-28) To that end Mendoza claimed that he was in fear for his life when he fired the shot that killed Gibson. (XII:2726-27) Mendoza testified that before he fired the shot he was trying to remove himself from the situation but felt the occupants of the house were still coming after him. (XII:2727)

At the conclusion of Mendoza's direct examination, Murphy and Laguna renewed their severance motions at a bench conference. (XII:2727; 2792-93) The trial court refused to rule on the severance requests until after Mendoza finished his testimony. (XII:2793-94) Mendoza's testimony concluded near the end of a Friday. Thus, the trial court asked the parties to

submit further briefing regarding severance in light of the contents of Mendoza's testimony. (XII:2803-05) After reviewing the briefs, the trial court again denied the severance motions on the following Monday. (XII:2831-40)

In the end, Mendoza's trial testimony not only eviscerated the theories of defense presented by his co-defendants, but also failed to advance his own theory of defense. As jury instructions were settled at the conclusion of trial, Mendoza requested numerous jury instructions on self-defense. (XIII:3074-75) In support of the self-defense instructions, counsel for Mendoza argued that his client's testimony established that the attempt robbery and other felony crimes were complete and his client was retreating at the time that he shot and killed Gibson. (XIII:3074-76) The State opposed the instructions and the trial court refused to allow jury instructions related to self-defense. (XIII:3077-79) Resultantly, Mendoza was prohibited from arguing self-defense during closing arguments, which was the sole intent that motivated him to testify at trial in this case.

Without a legally cognizable defense to any of the charges presented, the jury found Mendoza guilty of First Degree Murder and all of the other counts he faced. (XIV:3270) The jury's verdict against both Murphy and

Laguna found each guilty of Second Degree Murder and all other charges alleged against them.(XIV:3270-75) The instant Appeal follows.

VI. ARGUMENT

A. The Trial Court Erred in Denying Appellant's Motion to Exclude Summer Larsen Due to the State's Failure to Provide Reasonable Notice of its Intent to Call Her as a Cooperating Informant

Appellant was arraigned on the first (of three) Indictments filed in the case on January 30, 2015. (I:0008-10) For over nineteen months, the State tactically delayed the official solidification of a cooperation agreement with Summer Larsen. Without providing a justification or explanation, the State waited until 3:52 p.m. on Tuesday, September 6, 2016, to inform Appellant that a negotiation was reached with Larsen and they intended to call her as a witness at trial. (II:0250; 0263-64) When the prosecution decided to provide notice, Appellant's trial was set to begin on Monday, September 12, 2016. Thus, the State provided notice of its intent to call a cooperating accomplice to provide highly incriminating testimony three judicial days before trial was set to begin.

On September 7, 2016, the day after Appellant learned of the State's agreement with Larsen, there was a calendar call hearing before the trial court.

(II:0244-62)[3] During that hearing, Appellant argued that the State should be forbidden from calling Larsen as a witness based on the untimely disclosure and the unfair prejudice that resulted. (II:0250-51) Appellant was permitted to file a written motion in support of his position, and the argument was continued to Friday, September 9, 2016. (II:0261-63) Thereafter, Appellant filed a Motion to Exclude Summer Larsen on September 8, 2016. (II:0263-75) The State filed a written opposition on that same date. (II:0276-82)

Appellant's filing asserted that he would be prejudiced because he could not adequately investigate in time to effectively cross-examine Larsen. (II:0264-67) To explain his disadvantaged position, Appellant provided the trial court with specific investigative tasks that he found necessary to adequately prepare for the witness. (II:0269-72) As an alternative remedy to exclusion of the witness, Appellant requested a continuance of the trial to allow him time to prepare. (II:0273-74).

In response, the prosecution argued that they provided timely notice because they had no ability to notice Larsen until after she formally entered

[3] The transcript for September 7, 2016, is titled "Transcript of Proceedings Re: Defendant's Motion in Limine to Conceal Defendant's Tattoos." (II:0244) In actuality, the hearing addressed that Motion in Limine as well as the scheduled calendar call hearing.

into an agreement with them. (II:0276-78) Further, the State claimed that Appellant was to blame for not being prepared to cross examine Larsen because he should have assumed she was going to testify because she was a codefendant. (II:0278-79) Simply because Larsen was a codefendant, the State argued that Appellant should have already completed all of the investigation necessary to impeach and cross-examine Larsen. (II:0277-79)

Agreeing with the arguments presented by the State, the trial court denied the requests to exclude Larsen or continue the trial. (II:0284-95; 0300-05) Trial commenced as scheduled on September 12, 2016. (II:0307) Larsen's trial testimony was presented to the jury on September 22, 2016. (VIII:1700-1844)

1. The State's Late Disclosure of a Cooperating Informant Lacked Justification

The trial court found that the State provided timely notice of its intent to call Larsen as a witness by filing a Notice of Witnesses, which named her for the first time, on September 7, 2016. (II:0284-86) NRS 174.234 provides, in relevant part:

> 1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:

(2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.

. . .

3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:

(a) Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.

The court found that the State complied with NRS 174.234 because it provided written notice of its intent to call Larsen the day after she formally entered into a cooperation agreement with the State in open court on September 6, 2016. (II:0284-86) Accepting the State's argument, the court ruled that the State had no ability to notice Larsen until after she pled guilty and waived her privilege against self-incrimination. (II:0277-78; 0284-87)

The trial court's ruling failed to take into account the perverse incentives the ruling encouraged and the actual prejudice Appellant would suffer based on the timing of the disclosure. Uniform application of the court's ruling would motivate prosecutors to make informal agreements with cooperating defendants then wait until the last possible minute to formalize the agreement via a guilty plea agreement and agreement to testify. That way, a prosecutor could easily gain a tactical advantage by ambushing a defendant with a cooperating witness on the eve of trial. A savvy prosecutor could even wait until the middle of trial, moments before they intend to call a cooperating witness and ask the court to recess so that the guilty plea agreement and agreement to testify could be recorded. In that scenario, under the ruling of the trial court, the defense would not receive notice of the State's intent to call the cooperating witness until minutes before the testimony began. The logical ends of the court's ruling do not promote a fair judicial system.

Instead, to maintain a fair balance of powers between the parties, the trial court must determine if the State had a just reason for the late disclosure or if it delayed simply to get a tactical advantage over the defendant. NRS 174.234(3)(a) requires as much by instructing trial courts to prohibit an additional witness from testifying if the court "determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1."

In both his written motion and at oral argument, Appellant asked the court to determine why the State waited until the week before trial to make their agreement with Larsen official. (II:0293-94) Without making that inquisition, it was impossible for the court to make a reasoned decision as to whether the State acted in bad faith. Nevertheless, at the conclusion of the September 9, 2016, hearing the court orally denied both the request to exclude Larsen and the request to continue trial without making a determination as to whether the State delayed providing notice of its intent to call Larsen in bad faith. (II:0305-07)

The court erred by failing to make factual determinations that were central to the issue, such as:

i) When they State listened to a proffer from Larsen;

ii) When the State and Larsen entered into an informal agreement that she was going to cooperate; and

iii) Why they waited until September 6, 2016, to place the agreement on record.

Without conducting a factual inquiry into these types of issues, the court was in no position to make a legal determination regarding bad faith. The trial erred when it allowed the State to call Larsen to testify without having provided adequate notice to the defense. The court's error prejudiced Appellant and denied him the right to effectively cross-examine Larsen regarding the highly-incriminating testimony she provided at trial.

1. The Late Disclosure Prevented Appellant from Fully and Fairly Cross-Examining Larsen

"[P]ersons vulnerable to criminal prosecution have incentives to dissemble as an inducement for more favorable treatment by the State." Sheriff v. Acuna, 107 Nev. 664, 667 (1991). Based on that reality, this Court has long recognized the importance of ensuring that a defendant receives a full and fair opportunity to cross-examine a witness whose testimony is the product of a cooperation agreement with the State. See Lobato v. State, 120 Nev. 512, 519 (2004); Mazzan v. Warden, 116 Nev. 48, 67 (2000); Jimenez v. State, 112 Nev. 610, 620 (1996); Roberts v. State, 110 Nev. 1121, 1132-34, (1994), *overruled on other grounds by* Foster v. State, 116 Nev. 1088 (2000).

The State's decision to not provide reasonable notice to Appellant of its cooperation agreement with Larsen deprived him of the opportunity to effectively impeach the witness on cross-examination. "It is well settled that evidence that would enable effective cross-examination and impeachment may be material and that nondisclosure of such evidence may deprive an accused of a fair trial." Roberts, 110 Nev. at 1132-33. Appellant's inability to effectively cross-examine Larsen was the direct result of nondisclosure combined the lack of time he was provided to investigate and prepare before Larsen took the witness stand.

Upon learning of Larsen's agreement to testify, Appellant informed the trial court in detail of the many investigative tasks necessary to prepare a full and fair cross-examination of the witness. (II:0269-71) Appellant's Motion to Exclude itemized those necessary investigative tasks as follows:

> 1) Clark County Detention Center ("CCDC") recorded telephone calls placed by Summer Larsen. Larsen has been incarcerated continually since December, 2014. Larsen has placed an unknown number of phone calls during that time period that were recorded and preserved by the jail. Counsel for Murphy estimates Larsen averaged ten calls every week, which now likely extend over one-hundred hours. There is a reasonable probability that those calls contain relevant exculpatory evidence that Murphy should be permitted to utilize when cross-examining Larsen.

Murphy has never been provided with Larsen's jail calls with the exception of five calls Larsen made within a month of her arrest. Thus, Murphy must subpoena those calls, which will delay the start of their review. It is impossible for defense counsel to listen to those calls during evening recesses of this trial. Murphy should not be prevented from procuring this important evidence based on the faults of the State.

2) CCDC Inmate Grievance Forms (a.k.a. kites) written by Larsen and preserved by the jail. Inmates at CCDC routinely write kites asking questions or requesting information that is relevant to their credibility generally as well as the truthfulness of their trial testimony. Murphy estimates that Larsen has written over 100 kites during her time in jail. Murphy has not been provided with a single kite to date, and therefore, akin to the jail calls, must subpoena them before they can be reviewed.

3) Cellular telephone location data. Murphy was provided with Larsen's guilty plea agreement on September 6, 2016. It contained information that the defense was oblivious to previously. Specifically, it claims that Larsen conspired with Murphy and the other defendants in this case to commit a home invasion and robbery of Joseph Larsen's drug supplier. There is little doubt that Larsen will testify that she was aware of location of her husband's drug supplier and provided that information to one or more of the remaining defendants. Murphy (and all other parties) is in possession of cellular telephone location data for all of the defendants for the time period when Larsen will claim this robbery was to occur. The State will allege at trial that the group staked out

the drug dealers house while parked nearby. In fairness, Murphy has the right to inspect that cellular telephone location data to determine if it supports Larsen's claims.

Determining the cellular towers those phones "pinged" off of during that time period requires expert assistance. The telephone records themselves only provide a cellular tower number (such as "65327") with latitude and longitude coordinates for the tower. An expert is required to determine the location of the tower and to determine the approximate radius that tower provides cellular service for. Murphy has retained and noticed a cellular location data expert in this case. However, Murphy must obtain additional funding from the Office of Appointed Counsel before said expert will perform additional services. The lack of time provided to Murphy through the State's choices prevents him from testing the veracity of Larsen's testimony on this highly relevant issue.

4) Witness Interviews. Based on the fact that Larsen intends to testify about a planned robbery of the drug supplier's house, Murphy has the need and right to interview multiple witnesses the State will call at trial. Ashley Hall testified before that grand jury that she was giving Summer a ride when Summer disclosed that she had plans to rob Joseph's house again. See Reporter's Transcript of Proceedings, Grand Jury hearing held January 8, 2015, pp. 23-26. Based on Larsen's guilty plea agreement, it would appear that Ashley's testimony may directly contradict Larsen's trial testimony. Murphy needs to interview Ashley to clarify the contents of Larsen's statements to her. This need did not exist prior to Larsen's cooperation agreement.

> Murphy further needs to attempt to ask Joseph Larsen about the veracity underlying Summer Larsen's guilty plea agreement. Joseph can say if Summer knew the location of his drug supplier. Joseph can say if he even had a drug supplier located in Clark County.
>
> (II:0269-71)

During the oral argument on Appellant's motion, the trial court dismissed Appellant's investigative requests as products of unfounded speculation. (II:0286-87) The court stated:

> [Y]ou really engage in a lot of speculation in your arguments that – that she made calls at all which we don't know. And that there would be, you know, you estimate well she's making ten calls and how long those calls would be so that your – you come up with saying there are hundreds of calls which there's absolutely no support for that…[Further,] I can't think of how a kite will contain anything.

(II:0286-92) The court concluded that the defendants had been incarcerated for nearly two years, the trial was difficult to schedule because of the many parties involved, and the court was not going to continue the trial to allow Appellant more time to investigate. (II:0296-98)

After his request for a trial continuance was denied, Appellant labored to obtain the information he sought necessary to impeach Larsen. On

Saturday, September 10, 2016, the prosecutor provided Appellant with Larsen's jail calls spanning from December 2014 through September 2016. (III:0451-52) On September 15, 2016, at the court's request, the Appellant provided details about the number of calls Larsen made from jail that were disclosed by the State. (III:0451-52) Appellant informed the court that the State turned over approximately 739 phone calls from Larsen that spanned a total call time of approximately 167 hours. (V:1047-48) The State concurred with those estimates. (V:1048)

The trial court's belief that Appellant should been preparing to cross-examine and impeach Larsen before he received notice that she was cooperating with the State is patently absurd. Larsen's "testimony was central to the case, and therefore the jury's assessment of [her] credibility was important to the outcome of the trial." Jimenez v. State, 112 Nev. at 620. Informant testimony must be highly scrutinized to guard against fabrication. To guard against the inherent unreliability of informant testimony, one indispensable safeguard guarantees the defendant the right to investigate and prepare an effective cross-examination of an informant. See Acuna, 197 Nev. at 669. The trial court's refusal to continue the trial deprived Appellant of his Constitutional right to effectively cross-examine Larsen and deprived Appellant of a fair trial. See Roberts, 110 Nev. at 1132-33; Jimenez, 112 Nev.

at 621; Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

B. The Trial Court's Failure to Grant Severance Deprived Appellant of his Constitutional Right to a Fair Trial and Distorted the Fact Finding Process

The need and desire for judicial economy must yield to the Constitutional rights of a defendant in cases such as the one presently before this Honorable Court. Fundamental fairness for each defendant necessitates severance when mutually exclusive theories of defense are presented at trial. Confidence in the verdict reached by a jury forced to simultaneously weigh mutually exclusive defenses presented by codefendants is reduced to the point of inherent unreliability.

At this trial, the testimony presented by Codefendant Mendoza eviscerated both Appellant's ability to receive a fair trial and the reliability of the guilty verdict reached by the jury. As detailed herein, the only direct, unbiased evidence that linked Appellant to the crimes alleged against him did not come from the prosecution. The prosecution's case against Appellant consisted solely of circumstantial cellular telephone location data and the testimony of two biased witnesses who incriminated Appellant pursuant to

plea agreements that benefited them greatly. By directly implicating Appellant in the conspiracy, Mendoza's testimony prevented the jury from fairly analyzing the credibility of the State's evidence against Appellant and prevented the jury from making a reliable judgment about Appellant's guilt or innocence. Mendoza's theory of defense incriminated Appellant far more than did the entirety of the evidence presented at trial by the prosecution. The prejudicial effect of this joint trial deprived Appellant of a fair trial and entitles Appellant to a new trial in this case.

1. The Mutually Exclusive Defenses Presented at Trial Required Severance

As a general rule, multiple defendants may be charged together in the same Information when they are alleged to have participated in the same acts which give rise to a criminal offense. NRS 173.135. However, "if it appears that a defendant ... is prejudiced by a joinder of ... defendants," the district court has authority to sever a joint trial. NRS 174.165(1); Rodriguez v. State, 117 Nev. 800, 808 (2001). A court has a duty to grant severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Marshall v. State, 118 Nev. 642, 647 (2002) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993). On appeal, the trial court's denial of a severance motion will not be reversed unless the

appellant "carries the heavy burden of showing the trial judge abused his discretion." Buff v. State, 114 Nev. 1237, 1245 (1998) (citing Amen v. State, 106 Nev. 749, 755-56 (1990)).

While a variety of trial dynamics may require severance based upon the facts of each case, the one most germane to the instant appeal involves the presentation of mutually exclusive defenses by codefendants. Inconsistent or antagonistic defenses are prejudicial if they are antagonistic to the point that they are mutually exclusive. See Rodriguez v. State, 117 Nev. 800, 810 (2001); Amen, 106 Nev. at 756. As this Court has previously noted:

> [D]efenses become "mutually exclusive" when the core of the codefendant's defense is so irreconcilable with the core of [the defendant's] own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.

Rowland v. State, 118 Nev. 31, 45 (2002) (citing United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir.1996). The prejudice inflicted upon codefendants asserting mutually exclusive defenses erodes the ability of either defendant to receive a fair trial when a single jury must weigh the irreconcilable theories. Recognizing that reality, the Ninth Circuit held that, "severance should be granted when the defendant 'shows that the core of the co-defendant's defense is so irreconcilable with the core of his own defense

that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant.'" United States v. Mayfield, 189 F.3d 895, 899 (9th Cir 1999), see also, United States v. Romanello, 726 F.2d 173, 177-78 (5th Cir. 1984) ("Severance may be required if only one defendant accuses the other, and the other denies any involvement.")

A. The Defenses Presented Were Mutually Exclusive

The trial defenses presented by Appellant and Codefendant Mendoza were antagonistic to the point that they were mutually exclusive. Appellant unequivocally revealed his theory of defense over five (5) months before trial. Within his filed Motion to Sever Appellant stated that he "intends to present the defense that he didn't drive the assailants to Joseph's house on the offense date and had nothing to do with the planning or execution of that plot." (I:0118) Appellant further informed the trial court that, while he was forced to speculate, he strongly believed that Mendoza would present a defense that conceded that all charged defendants were involved in the crimes and, thereafter, sought to reduce Mendoza's culpability by asserting an affirmative defense.[4] (I:0118-19; 0181-82)

[4] Appellant's pretrial Motion to Sever speculated that Mendoza would implicate Murphy, concede his own involvement in the crimes, and assert that his actions were the product of duress. (I:0118) During oral argument on the

Throughout trial, Appellant stayed true to his word and consistently presented a theory of defense that he was not present or involved in the crimes charged against him. Appellant's opening statement to the jury stressed that the prosecution's case lacked credible evidence to prove he played a part in

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motion, the trial court partially rejected the argument because "[w]e don't know that that's going to happen." (I:0181) At trial, Mendoza testified that he conspired with Appellant, Laguna, and Figueroa to commit the crimes. (XII:2726-27) Mendoza testified in that manner in an attempt to argue self-defense to the murder charge, but the court prevented him from doing so. (XII:2726-27) At the conclusion of Mendoza's testimony Murphy renewed his severance motion and filed a second written severance motion when the trial recessed for the day. (XII:2792-93; 2814-19)

While Murphy's pretrial prediction of Mendoza's trial theory was incorrect, the practical effect in the same; namely, Mendoza testified to committing the crimes charged with Murphy and sought to minimize his criminal liability through an affirmative defense. The partial inaccuracy of Murphy's pretrial prediction should not alter appellate review of this claim because, "the district court has 'a continuing duty at all stages of the trial to grant a severance if prejudice does appear.'" Marshall v. State, 118 Nev. 642, 647 (2002) (citations omitted).

the conspiracy. (V:1106-1108) In closing arguments, Appellant's counsel again argued that there was insufficient evidence connecting Appellant to the crimes. (XIV:3177)

In direct contradiction to Appellant's theory of defense, Mendoza testified that Appellant recruited him to conspire in these crimes. (XII:2643) Mendoza testified that Appellant was the main organizer of the conspiracy plot and was the source of information that caused the group to choose the targets they did. (XII:2695-98) Relating to the events at 1661 Broadmere, Mendoza testified that Appellant drove the group there and waited around the corner in the getaway car. (XII:2703-07)

Mendoza's closing argument reiterated his concession of guilt:

> I told you from the opening that Jorge was going to admit and he testified he admitted to certain of the crimes that did occur at that location. He did commit a burglary. He did commit a home invasion, and he did commit an attempt robbery.

(XIII:3138) Thereafter, counsel for Mendoza admitted that his client shot and killed Gibson and, stripped of the ability to argue self-defense, asked the jury to consider second degree murder for reasons that are difficult to discern from the closing argument.

As presented at trial, the competing theories of defense presented by Mendoza and Murphy were antagonistic to the point that they were mutually exclusive. As that concept has been defined by this Court, "the core of the codefendant's defense [was] so irreconcilable with the core of [Appellant's] own defense that the acceptance of the codefendant's theory by the jury preclud[ed] acquittal of the [Appellant]." Rowland, 118 Nev. at 45 (citing Throckmorton, 87 F.3d at 1072.

In Chartier v. State, 124 Nev. 760, 765 (2008), this Court held that the joint defendants presented "conflicting and irreconcilable defenses" that had an "injurious effect on the verdict." Paralleling the instant case, defendant Chartier "defended on the basis that he was not involved in the crimes at any stage of planning or execution[.]" Id. In contrast, defendant Wilcox presented the theory that Chartier "was not only the mastermind but that he was present at the scene[.]" Id.

The instant case is strikingly similar in that Murphy defended on the basis that he was not involved in the crimes at any stage of planning or execution. In contrast, Mendoza presented the theory that Murphy was not only the mastermind but that he was present at the scene. As presented at trial, the competing defenses presented by Murphy and Mendoza were

irreconcilable with one another and, therefore, mutually exclusive. See Rowland, 118 Nev. at 45; Mayfield, 189 F.3d at 899.

B. Appellant was Prejudiced and Deprived of a Fair Trial Due to the Presentation of Mutually Exclusive Defenses

To fully realize the unfair prejudice Mendoza's testimony imposed on Murphy's defense, it is necessary to view it in the context of where Murphy's theory of defense stood before Mendoza testified. In sum, implementation of Appellant's theory sought to discredit the two sources of potentially incriminating evidence presented by the prosecution against him. First, Appellant attacked the biased, bargained for testimony of accomplices Summer Larsen and Robert Figueroa. (VI:1388-1460; IX:2185-2277) Second, Appellant endeavored to show that the cellular location data was insufficient to incriminate Appellant. (IX:1962-2012)

Appellant's entire defense hinged on two, well-established Nevada legal principles. First, Appellant asked the jury to view the self-serving testimony of the informants with heightened skepticism. Specifically, this Honorable Tribunal has imposed a litany of procedural safeguards that must be followed in jury trials when the testimony of an accomplice is admitted pursuant to a bargain with the prosecution. See Sheriff v. Acuna, 107 Nev. 664, 669 (1991). Following the precedent of this Court, the jury was instructed to view the testimony of Summer Larsen and Robert Figueroa with

greater care and caution than it would use with an ordinary witness. (XIV:3330) Both during his cross examination of those witnesses and during argument, Appellant sought to convince the jury that the testimony of Larsen and Figueroa was unworthy of their belief.

The second legal principle Appellant's theory of defense utilized was the law that forbids a conviction based upon the testimony of an accomplice unless that testimony is corroborated by other evidence that connects the defendant with the commission of the offense. See NRS 175.291; Heglemeier v. State, 111 Nev. 1244 (1995). Pursuant to Nevada law, independent evidence that merely shows the defendant was with the accomplice near the scene of the crime when it was committed is insufficient to corroborate accomplice testimony. See Austin v. State, 87 Nev. 578, 585 (1971) (citations omitted).

Thus, even if the jury rejected Appellant's first argument and chose to believe the testimony of Larsen and Figueroa, it still could not convict because there was insufficient evidence to corroborate their testimony and link Appellant to commission of the crime. To that end, Appellant argued in summation that there was insufficient corroborative independent evidence to link Appellant to the crimes charged. (XIV:3177) Appellant also argued that

the jury should not believe the testimony of Figueroa and Larsen because it was biased, self-serving and lacking credibility. (XIV:3182-84)

Mendoza's testimony gutted Appellant's two-pronged theory of defense and prevented the jury from applying the legal principles Appellant's theory was based upon. Mendoza's testimony provided undue credibility to the bargained-for testimony the jury heard from Larsen and Figueroa, which deprived Appellant of a fair trial.

This Court has consistently recognized the heightened risk of perjury and inherent unreliability that stem from cooperation agreement induced testimony. See Franklin v. State, 94 Nev. 220, 226 (1978); Sheriff v. Acuna, 107 Nev. 664, 669 (1991); Roberts, 110 Nev. at 623. When the Court cautiously changed course and permitted testimony like that at issue here, it further imposed three primary safeguards intended to protect the integrity of trials involving cooperation agreements. Acuna, 107 Nev. at 668-70. In practical effect, all of those mandated safeguards are intended to ensure that the jury fully and critically assesses the credibility of informant testimony. Id.

That full and critical assessment was never realized in this case because Mendoza's mutually exclusive defense directly corroborated the bargained-for testimony from Larsen and Figueroa. No rational juror could critically scrutinize informant testimony after hearing a codefendant on trial testify in a

manner that corroborates and validates the informant's testimony. Mendoza's case-in-chief, which presented a mutually exclusive defense, stripped the jury of any realistic opportunity to assess the informant testimony with the degree of scrutiny needed to protect the integrity of trials founded on bargained-for testimony.

The mutually exclusive defense provided through Mendoza's testimony also prevented the jury from considering if the State presented sufficient independent evidence to corroborate the accomplice testimony from Larsen and Figueroa. Instead of looking at the prosecution's case for the necessary independent corroboration, Mendoza's testimony provided an easily identifiable and abundant source of it.

Based on the nature of Mendoza's trial testimony, it is impossible to conclude that the jury's verdict finding Appellant guilty was based on the evidence the State presented against him. Since Murphy and Mendoza presented mutually exclusive defenses at trial, the most incriminating evidence provided to the jury came from a codefendant and not from the prosecution. Murphy's Constitutional right to have the State prove his guilt beyond a reasonable doubt was never realized due to Mendoza's highly incriminating testimony. See In Re Winship, 397 U.S. 358, 362 (1970) (The

Constitution requires the government to establish proof beyond a reasonable doubt before a conviction can be sustained).

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." Id. at 364. To protect an Individual's Due Process Rights, "the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Id. (citations and internal quotations omitted).

At the heart of both the doctrine requiring corroboration for accomplice testimony and the safeguards imposing heightened scrutiny upon informant testimony, lies the intent to protect the defendant's Due Process Right to have the prosecution prove his guilt beyond a reasonable doubt. The trial court's denial of Appellant's severance motion forced the jury to hear mutually exclusive defenses, which prevented them from rendering a reliable verdict. Mendoza's testimony stripped Appellant of the safeguards regarding bargained-for informant testimony that are necessary for a fair trial. Mendoza's testimony denied Appellant of the right to force the prosecution to provide independent inculpatory evidence that corroborated the accomplice testimony admitted at trial. For these reasons, Appellant was denied a fair trial that forced the State to satisfy its burden of proof. The trial court abused

its discretion by denying Appellant's multiple requests for severance and his conviction must be overturned. Appellant is entitled to a new trial void of the unconstitutional prejudice caused by Mendoza's presentation of a mutually exclusive defense.

C. The Trial Court Erred by Permitting The State to Admit and Rely on Cellular Telephone Records that were not Provided to the Appellant until Day Six of Trial

The cellular telephone data admitted at trial was of great importance in this case because it was the only direct, incriminating evidence that linked Appellant to this crime beyond accomplice testimony. On September 19, 2016, the State emailed defense counsel previously undisclosed cellular telephone records for the account belonging to Appellant Murphy. (VI:1272-74) Based on the late disclosure, Appellant, citing NRS 174.234, moved to exclude the records. (VI:1272-74)

Beyond the fact that the records themselves were not disclosed until the middle of trial, Appellant argued that the State would need to present expert testimony regarding the new records, which violated Nevada law because they did not provide notice that expert testimony would be admitted regarding those records. (VI:1274-75) Since the State would need expert testimony to translate and explain the new records to the jury, the State failed to provide

notice of the substance of its expert's testimony, specific to the new records, twenty-one days before trial. (VI:1274-76)

The prosecution responded by claiming that they did not have a duty to turn over the records before they received them. (VI:1273) Attempting to justify the late disclosure, the State explained that, as it was preparing for trial, it noticed the cellular records for Appellant's phone were not complete. (VI:1273-74) Thereafter, the State contacted the appropriate custodian of records and asked why they failed to provide the complete cellular records pertaining to Appellant. (VI:1273-74) The custodian of records realized the mistake and sent the complete records to the State on September 19, 2016, and they were immediately forwarded to the defense. (VI:1273-74)

Pertaining to the defense argument alleging an inadequate expert notice, the State claimed that they were not going to elicit any expert testimony about the new cellular telephone records. (VI:1274-1275) The State told the court:

> It's not coming in through Detective Gandy, who's the expert who's going to be testifying to this. ***It's coming from a custodian of records from another company who's going to say, these are the phone records associated with my company and these are true, fair and accurate business records.*** I mean, that's the testimony it's coming in as.

(VI:1275) (emphasis added).

When the court indicated that it was not going to exclude the records, Appellant also requested a continuance so that his expert on cellular data could analyze the new records. (VI:1278) When the court asked how long the defense was requesting, the Appellant told the court that he would need to consult with his cellular telephone expert before could estimate how much time he needed. (VI:1280) The court tabled the discussion until Appellant consulted with his expert during the evening recess. (VI:1280-81) The next day, September 20, 2016, Appellant informed the court that his expert on cellular data needed two days to analyze and interpret the new records, with "today being day one." (VII:1558) The court simply replied, "okay." (VII:1558)

On September 21, 2016, the State called Joseph Sierra, who informed the jury he was a "custodian of records" for "T-Mobile US." (VII:1582) T-Mobile was the provider for Appellant's cellular telephone records and Sierra produced the new records for the State. (VII:1601-03) As the State previously informed the court during argument concerning the tardy disclosure, Sierra wasn't called as an expert witness.[5] (VI:1275)

[5] On September 19, 2016, the State informed the court that the newly disclosed cellular records pertaining to Appellant would be admitted through a

During Sierra's direct examination, the State moved to admit the recently obtained cellular records as Exhibit 303. (VII:1601-02) Appellant renewed his objection to the new records. (VII:1602) Allowing the admission of Exhibit 303, the court stated:

> All right. Now I'm remembering what you're talking to – about, yes. Okay. So those will all we admitted since I previously ruled on the other objections.
>
> (VII:1602)

Beyond asking Sierra to authenticate the newly disclosed records, the State asked him numerous questions about Exhibit 303 that illustrated the prejudice the late disclosure caused Appellant. (VII:1619-23) Sierra first explained that the records contained within Exhibit 303 were formatted differently and used different abbreviations compared to the previous records the State admitted. (VII:1620-21) Since the Exhibit 303 records were

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"custodian of records." (VI:1275) Candidly, however, the State previously filed an expert witness notice that provided it would call a "Custodian of Records and/or designee for T-Mobile," that "will testify as experts regarding how cellular phones work, how phones interact with towers, and the interpretation of that information." (I:0045; 0050)

compiled in 2016 they were in the new T-Mobile "standard format," which differed from all of the other cellular records that were compiled when the State subpoenaed them in 2014. (VII:1620) Further, the 2016 records used "UTC" time when it itemized call times as opposed to the time from the time zone where the call was placed or received, as was the case with the 2014 records. (VII:1621) Pertaining to the abbreviations the new records used for text messaging, Sierra explained:

> Now in this situation, it doesn't say SMS or MMS like it would in the other records. It says MS terminating or MS originating, incoming/outgoing, but then it will say the statement SMS in MSC. So basically text message via the switch.

(VII:1622) Sierra further informed the jury that the 2016 records differed from the 2014 records in that they provided "location information azimuth" for SMS entries. (VII:1623)

Despite the State's representations to the court previously, Sierra provided extensive expert testimony during his direct examination. Sierra explained how an individual cellular telephone emits a radio frequency signal to a nearby tower. (VII:1584) He further explained the communication range of cell towers and the need for more towers in highly populated areas. (VII:1584-85) Sierra informed the jury that a tower takes the communication

it received from the cellular device and sends it to a "mobile base station," which then relays the communication to a "switch." (VII:1584) The jury heard Sierra explain how each tower has multiple sectors that receive communications depending on the direction the cellular device is in relation to the tower. (VII:1585) After providing generalities about how the cellular communication system functioned, Sierra explained how to read the cellular records to determine what tower a device utilized during a particular call as well as where it was directionally in relation to the tower. (VII:1590-93)

The late disclosure of the records comprising Exhibit 303 combined with the expert testimony the State elicited from the T-Mobile custodian of records, which was elicited before Appellant had a chance to review the new records, unfairly prejudiced the Appellant. The trial court erred in allowing the prosecution to utilize records turned over during trial to form the basis of admitted expert testimony.

Nevada law imposes a duty on prosecutors to provide to the defense documents, "which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney." NRS 174.235.

The prosecutor's disclosures must occur not less than thirty days before the start of trial unless the court orders otherwise. NRS 174.285.

In this case, the prosecutor failed to provide Appellant with the cellular records admitted at State's Exhibit 303 thirty days before trial. In fact, the cellular records were not provided before trial at all. Instead, the documents were disclosed during the second week of trial. (VI:1272-74) The State's failure to obtain and disclose the cellular records in a timely fashion was the result of inexcusable neglect. Without good cause, the State waited until trial commenced to review the cellular records for Appellant that it obtained from the telephone company in 2014. (VI:1273-74) When the State reviewed the records it was obvious that the records were not complete. (VI:1273-74) Thus, the late disclosure was a direct product of the State's failure to exercise due diligence in preparing his case. The T-Mobile custodian of records wasn't asked to compile the new records until Friday, September 16, 2016. (VII:1602-03) Had the State exercised timely due diligence it would have learned of the incompleteness of the 2014 records well before trial. Due diligence would have allowed the prosecutor to obtain the complete records well before trial and to disclose them to the Appellant at a time that did not impose a severe prejudice on the defense.

By admitting the new records and permitting detailed expert testimony concerning the records, the trial court both rewarded the State's failure to exercise due diligence and prejudiced the Appellant. The prosecutor's assurances to the court that the T-Mobile Custodian of Records would not offer expert testimony was legally inaccurate. See Burnside v. State, 131 Nev., Adv. Op. 40, 352 P.3d 627, 636-38 (2015). Testimony concerning how cellular towers communicate with devices and record location amounts to expert testimony. Id. Much of the expert testimony elicited from the T-Mobile Custodian of Records focused on how to read and interpret the data found within Exhibit 303. (VII:1620-23) The State failed to provide the defense with pre-trial notice they would elicit expert testimony concerning the interpretation of Exhibit 303. See NRS 174.234 (the substance of expert testimony must be disclosed 21 days before trial). The State's failure to provide timely expert notice combined with the untimely disclosure of the records themselves worked to unfairly surprise and prejudice the Appellant.

Pursuant to NRS 174.295(2), the remedy for a violation of the discovery provisions is that the district court "may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the

circumstances." Appellant asked the court to exclude the records or, in the alternative, to continue the trial to allow the Appellant to review the records and have his expert interpret and explain them to him. (VI:1272-74; 1278) Instead of providing Appellant with a fair remedy, the trial court permitted expert testimony about the records before the defense had a chance to consult with his expert and comprehend the data contained within the records.

In Sampson v. State, 121 Nev. 820, 828-29 (2005), the defense was prevented from presenting testimonial evidence based on its failure to provide adequate notice to the State. This Court found that the untimeliness was the direct product of defense counsel's failure to exercise due diligence in reviewing documents that were in their possession. Id. Further, this Court noted that admission of the untimely testimony would have resulted in "unfair surprise to the State." Id. at 829-30.

Here, the trial court abused its discretion by permitting the State to unfairly surprise the Appellant, which was the direct product of the State's failure to exercise due diligence in preparing for trial. The admission of expert testimony about the untimely cellular records cemented the unfairness imposed on the Appellant. This Court should reverse the trial court's decision that unfairly prejudice the defense and benefited the transgressor.

D. The Trial Court Abused its Discretion and Violated Appellant's Constitutional Rights by Disclosing to the Jury that Figueroa's Agreement to Testify required him to "Testify Truthfully"

Robert Figueroa, Appellant's former codefendant, testified at trial after entering into an agreement to testify for the State. (IX:2059); see NRS 174.061 & NRS 175.282. Before Figueroa testified at trial, Appellant argued that Figueroa's agreement to testify should be provided to the jury after any references to an obligation to testify truthfully were redacted from the document. (VI:1268-70; VIII:1847) The State argued that the need for redactions of the truthfulness language would depend on the nature of defense counsel's cross-examination. (VI:1268-69; VIII:1847) The trial court agreed with the State and ruled that any decisions regarding redactions would be made after cross-examination occurred. (VI:1271; VIII:1847) Specifically, the court ruled that:

> [I]f on cross-examination the witness's credibility is attacked on the basis of the credibility, vis-à-vis the Plea Agreement, then no redaction's required and the State can – will have to admit the Plea Agreement without the redaction.
>
> (VI:1271)

The legal framework applicable to this issue was announced by this Honorable Tribunal in Sessions v. State, 111 Nev. 328, 333 (1995) (NRS

175.282 unequivocally requires the court to "permit the jury to inspect the agreement" after excising any portion it deems irrelevant or prejudicial). Therein, this Court held that "neither the provision added by the State requiring "truthful testimony," nor the statutory provision declaring an agreement void when perverted by false testimony are to be included within the written agreement provided for a jury's inspection." Id. at 334. Finally, the Sessions Court recognized that Nevada law "does not provide a basis for the prosecution to comment on the truthfulness of the witness's testimony as it relates to the agreement." Id. at n. 3.

The Sessions Court relied on the case of United States v. Wallace, 848 F.2d 1464 (9th Cir.1988). In Wallace, a codefendant testified before the jury that she had entered into a plea agreement which required her to "testify truthfully." On appeal, the Wallace court found that such a "truthfulness" provision suggests that a codefendant, who might otherwise seem unreliable, has been coerced by the prosecutor's threats and promises to reveal the bare truth. Id. at 1474. Moreover, it improperly implies to the jury that the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition in the plea agreement. Id. Truthfulness provisions, therefore, constitute improper vouching and are inadmissible. Id.

After the defendants completed their cross-examination of Figueroa, the trial court granted the State's motion to admit Figueroa's agreement to testify without redaction. (X:2302-04) The court ruled that the 'obligation to be truthful' language within the agreement to testify was admissible because the defendants "attack[ed] the credibility of the witness on cross-examination." (X:2303) Appellant objected to the admission arguing that he did not even mention the agreement to testify one time during cross-examination. (X:2302)

The State then took advantage of the court's ruling that admitted the truthfulness language during its redirect examination of Figueroa. The prosecutor asked Figueroa what his obligation was under the agreement to testify. (X:2321) Figueroa replied: "To tell the whole truth – the whole truth and nothing but the truth." (X:2321)

Finally, during closing argument the State again highlighted the truthfulness language within the agreement to testify. (XIV:3206) The prosecutor told the jury:

> Mr. Figueroa's motivations, if he has those, you have a jury instruction about he wants this court to look favorably upon him, and thus, he should – he needs to provide truthful information, and if that information turns out not to be truthful, he's not going to get the benefit.

(XIV:3206)

Appellant did not open the door to the admission of the truthfulness language within Figueroa's guilty plea agreement. Appellant did what every defendant does when faced with incriminating testimony from a coconspirator cooperating with the State. Namely, Appellant attacked the credibility of the witness's testimony and his motivations for testifying on behalf of the State. If the truthfulness language was properly admitted here, then the holding in Sessions is meaningless because the credibility of an informant will always be attacked on cross-examination.

The trial court erred in allowing the jury to learn that Figueroa's agreement to testify required him to 'testify truthfully.' The prosecutor's questions on redirect examination and comments during closing arguments left the jury with the impression that the State believed Figueroa was telling the truth. The State's multiple references to the 'truthfulness language' improperly vouched for and bolstered Figueroa's credibility. See Wallace, 848 F.2d at 1474. The unmistakable prejudice to Appellant's substantial rights based upon this misconduct can't be ignored. "[C]ourts have long recognized [] that the uncorroborated testimony of an accomplice has doubtful worth." Austin, 87 Nev. at 584. The prosecutor's decision to dip Figueroa's objectively valueless testimony in a gold bath of prosecutorial vouching and

corroboration inflicted substantial prejudice onto Appellant's defense and resulted in a miscarriage of justice. Reversal of the conviction is, therefore, warranted.

E. The Prosecution Failed to Present Sufficient Evidence to Support Appellant's Convictions

A criminal defendant's fundamental right to a fair trial includes the presumption of innocence. Hightower v. State, 123 Nev. 55 (2007); U.S. Const. Amend. V; Amend. XIV; Nev. Const. Art, 1 Sec, 8. Consequently, "[e]very person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt…" NRS 175.201. (emphasis added). And at trial, the state is required to prove each and "every element of a crime," as well as "every fact necessary to prove the crime" beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000); In re Winship, 397 U.S. 358, 364 (1970); NRS 175.191; NRS 175.201.

On appeal, when determining the sufficiency of the evidence, the Court considers the evidence in the light most favorable to the prosecution and determines if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); Oriegel-Candido v. State, 114 Nev. 378, 381, (1998).

When making this decision, NRS 175.201 asks the Court to only consider the admissible, competent evidence and ignore the incompetent evidence.

The totality of evidence that was presented in this case relevant to Appellant's guilt can be accurately divided into two categories. Comprising the first category, the great majority of the evidence presented at trial was that of accomplice testimony elicited from Summer Larsen, Robert Figueroa, and Jorge Mendoza. Beyond accomplice testimony, the only other source of incriminating evidence was found in Appellant's cellular telephone records and associated location data. No neutral eyewitness testimony placed Appellant at, or near the scene of the crime. Appellant was never found in possession of any of the weapons or tools used to commit these crimes. Appellant never confessed or made a single incriminating statement. When the great mass of accomplice testimony is removed from the remaining evidence admitted at trial, very little remains to link Appellant to these crimes. The evidence that does exist outside of accomplice testimony simply fails to incriminate the Appellant and corroborate the accomplice testimony.

NRS 175.291(1) provides that:

> [a] conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and

> the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

Interpreting NRS 175.291(2), this Court has held that an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant ... or who is culpably implicated in, or unlawfully cooperates, aids or abets in the commission of the crime charged." Orfield v. State, 105 Nev. 107, 109 (1989). Both during trial and on appeal, there is no dispute that Larsen, Figueroa, and Mendoza were accomplices under Nevada law. See Evans v. State, 113 Nev. 885, 887 (1997); Austin v. State, 87 Nev. 578, 580 (1971).

Corroborating evidence must independently connect the defendant with the offense; evidence does not suffice as corroborative if it merely supports the accomplice's testimony. Heglemeier v. State, 111 Nev. 1244, 1250 (1995). "If there is no independent, inculpatory evidence—evidence tending to connect the defendant with the offense, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to him." Id. (quoting Austin, 87 Nev. at 585). "[W]here the connecting evidence shows no more than an opportunity to commit a crime, simply proves suspicion, or is equally consonant with a reasonable explanation pointing

toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient. " Id. at 1250-51 (citations omitted).

Upon eliminating accomplice testimony from the trial evidence, the remaining evidence was not sufficiently inculpatory to connect Appellant to the crime charged in this case. At most, the remaining evidence in this case "merely casts a grave suspicion on the accused," which is not sufficiently corroborative to connect Appellant with the offense. See Austin, 87 Nev. at 585 (citations omitted). Viewed in the light most favorable to the prosecution, the remaining evidence beyond accomplice testimony merely showed Appellant had an opportunity to commit the crime and simply proves suspicion and nothing more. This lack of sufficient corroborative evidence requires reversal of Appellant's conviction.

F. Cumulative Error Warrants Reversal of Appellant's Conviction

"Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." Byford v. State, 116 Nev. 215, 241-42 (2000). Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. Big Pond v. State, 101 Nev. 1, 3 (1985). When evaluating a claim of cumulative error, this Court considers 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 v. State, 124 Nev. 1172, 1195 (2008). As previously discussed in detail, the issue of guilt was close in this case and the testimony against Appellant was anything but overwhelming. The gravity of the charge, Murder, is of the highest weight attributable to a criminal offense. While each of the trial errors advanced in this pleading may not independently establish interference with Appellant's substantial rights, the combined effects of the errors deprived Appellant of a fair trial. This Honorable Tribunal should reverse Appellant's conviction because the multiple errors that occurred during trial wholly deprived Appellant of his Constitutional right to a fair trial and produced an unjust outcome.

G. Conclusion

Based on the foregoing, David Murphy's convictions should be vacated based on the insufficient evidence produced at trial. In the alternative, David's convictions should be reversed and remanded for a new trial based on one or all of the prejudicial errors made by the trial court.

DATED this 1st day of August, 2017

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1. I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4) and the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font style.

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[ ] Does not exceed 30 pages.

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 relief 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 1st day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 1st day of August, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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