IN THE SUPREME COURT OF THE STATE OF NEVADA

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NORMAN BELCHER, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 72325

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE OF DEATH
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH PRESIDING

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APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is a direct appeal from a judgment of conviction and sentence of death, pursuant to a jury verdict. The Judgment of Conviction was filed on February 6, 2017 (ROA Vol. 28 p. 6425-6427). A timely Notice of Appeal was filed on February 6, 2017 (ROA Vol. 28 p. 6434).

ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Supreme Court pursuant to NRAP 17(a)(2) which states that the Nevada Supreme Court shall retain all direct appeals in death penalty cases. This case involves a direct appeal from a sentence of death.

STATEMENT OF THE CASE

On January 31, 2011, Mr. Norman Belcher was charged by way of Information as follows: Count 1 – Burglary while in possession of a deadly weapon; Count 2 – Robbery with use of a deadly weapon; Count 3 – Robbery with use of a deadly weapon; Count 4 – Murder with use of a deadly weapon; Count 5 – Attempt murder with use of a deadly weapon; Count 6 – Battery with use of a deadly weapon resulting in substantial bodily harm; and Count 7 – Third degree arson (ROA Vol. 1 p. 38-43). The Notice of Intent to seek the death penalty was filed on February 10, 2011 (ROA Vol. 1 p. 164).

Mr. Belcher's trial began on November 28, 2016, in front of the Honorable Elissa Cadish (ROA Vol. 44 p. 10030). The trial concluded on December 14, 2016 and the jury began deliberations (ROA Vol. 44 p. 10053-10055). On that same day the jury returned with a verdict of guilty as to all counts (ROA Vol. 44 p. 10054). The penalty phase began and concluded on December 15, 2016 (ROA Vol. 27 p. 6029). That same day, the jury imposed a sentence of death (ROA Vol. 27 p. 6026).

The following aggravating circumstances were found by the jury: 1) The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder, is or has been convicted of a felony involving the use or threat of violence to the person of another - The defendant was adjudicated guilty of Voluntary Manslaughter in Case No. C219397; 2) The murder was committed while the person was engaged alone or with others, in the commission of or flight after committing any burglary and the person charged killed the person murdered or knew or had reason to know that life would be taken or lethal force used - the Defendant was found guilty of Count 1 Burglary while in possession of a deadly weapon; 3) The murder was committed while the person was engaged alone or with others, in the commission of or flight after committing any robbery and the person charged killed the person murdered or knew or had reason to know that life

would be taken or lethal force used - the Defendant was found guilty of Count 2 Robbery with use of a deadly weapon of Nicholas Brabham; 4) The murder was committed while the person was engaged alone or with others, in the commission of or flight after committing any robbery and the person charged killed the person murdered or knew or had reason to know that life would be taken or lethal force used - the Defendant was found guilty of Count 3 Robbery with use of a deadly weapon of Alexus Postorino; and 5) The murder was committed by a person who, at any time before a penalty hearing is conducted, is or has been convicted of a felony involving the use or threat of violence to the person of another - The defendant was found guilty of Count 5 Attempt Murder with use of a deadly weapon of Nicholas Brabham (ROA Vol. 27 p. 6022-6023).

The following mitigating circumstance was found by the jury: 1) "He wants to die" (ROA Vol. 27 p. 6027).

Mr. Belcher's sentencing was held on February 6, 2017 (ROA Vol. 44 p. 10058-10059). Mr. Belcher was sentenced as follows: Count 1 – Maximum of 180 months and a minimum of 60 months; Count 2 – a maximum of 180 months and a minimum of 60 months, plus a consecutive term of a maximum of 180 months with a minimum of 60 months to run concurrent with Count 1; Count 3 – a maximum of 180 months, with a minimum of 60 months plus a consecutive 180

months and a minimum of 60 months to run concurrent with count 2; Count 4 – Death, to run concurrent with Count 3; Count 5 – a maximum of 240 months and a minimum of 96 months, plus a consecutive maximum of 240 months and a minimum of 96 months, consecutive to Count 5; Count 6 – a maximum of 180 months with a minimum of 60 months, to run concurrent with count 5; Count 7 – a maximum of 48 months and a minimum of 19 months to run concurrent with count 6 (ROA Vol. 44 p. 10058-10059). Mr. Belcher received 2,255 days credit for time served (ROA Vol. 44 p. 10059).

The Judgment of Conviction was filed on February 6, 2017 (ROA Vol. 28 p. 6425-6427). A timely Notice of Appeal was filed on February 6, 2017 (ROA Vol. 28 p. 6434).

STATEMENT OF THE FACTS

Mr. Nicholas Brabham had been friends with William "Billy" Postorino since 2008 (ROA Vol 20, P. 4536). The two became roommates in 2010, living at Bella Lorena Street, Clark County, Nevada (ROA Vol. 20, P. 4537). Billy's fifteen year old daughter, Alexus also lived at the residence (ROA Vol. 20, P. 4537) (Alexus is the deceased victim in the case). Nicholas claimed to have a close relationship with both Billy and Alexus (ROA Vol. 20, 4537-4538).

Nicholas and Billy were involved in the narcotics trade (ROA Vol. 20, P.

4538). Nicholas admitted to be addicted to methamphetamine and marijuana (ROA Vol. 20, P. 4538). In fact, Nicholas had been abusing methamphetamine on a daily basis for approximately eleven years (ROA Vol. 20, P. 4538-4539). In 2010, Nicholas entered into a year long drug court program (ROA Vol. 20, P. 4539-4540).

Nicholas and Billy would manufacture fraudulent prescriptions and have other individuals proceed to the pharmacy to collect the prescriptions so the pills could be illegally sold (ROA Vol. 20, P. 4540). Billy would manufacture the prescriptions on his computer (ROA Vol. 20, P. 4541). Nicholas testified that they worked closely with a group of people in this drug conspiracy (ROA Vol 20, P. 4542).

During the months of November and December, 2010, Billy and Nicholas were allegedly having "problems" with one of the alleged conspirators, "Bates" (ROA Vol. 20, P. 4543) (Bates was identified as Norman Beltcher) (ROA Vol. 20, P. 4543). Allegedly, the defendant had been concerned that he was unable to cash in or trade in the prescriptions for pills. Then, Nicholas and Billy supposedly told the defendant that he would no longer be able to turn in fraudulent prescriptions to obtain pills (ROA Vol. 20, P. 4544) This allegedly frustrated the defendant (ROA Vol. 20 p. 4544).

On December 1, 2010 Nicholas' and Billy's residence was burglarized (ROA Vol. 20, P. 4545). Although Alexus had been sick that day, when Nicholas came home he noticed that money and drugs were missing (ROA Vol. 20, P. 4545). Apparently, Billy suspected that the defendant was involved in the burglary (ROA Vol. 20, P. 4046). At that point, Billy and Nicholas made a decision that the defendant would be cut out of the drug business (ROA Vol. 20, P. 4547).

Between December 1 and December 6, Nicholas believed that he had a face to face meeting with Mr. Belcher where he gave him $450 (money which Billy gave to Nicholas to give to Mr. Belcher) (ROA Vol. 20, P. 4548).

In the evening of December 5, Nicholas was present in the house with his friend Ashley Riley and Alexus (ROA Vol. 20, P. 4549). Ashley Riley was one of the individuals who would take fraudulent prescriptions to the pharmacy (ROA Vol. 20, P. 4549). Nicholas wanted to be romantically involved with Ashley, but they were just friends (ROA Vol. 20, P. 4549). In fact, Ashley had a boyfriend name Ravon Harris, (ROA Vol. 20, P. 4550).

Nicholas claimed to be asleep in his room with Ashley when something "woke him up" (ROA Vol. 20, P. 4552). On that night, Alexus was sleeping in Billy's bedroom (ROA Vol. 20, P. 4551). Nicholas went to the bedroom door, and when he opened it, he claimed to see the defendant in front of him (ROA Vol. 20,

P. 4553). Nicholas claimed that the defendant then shot him five or six times causing Nicholas to go back in the bedroom and hide in the closet (ROA Vol. 20, P. 4553). Ashley also hid in the closet and Nicholas stated, "I'm dying" (ROA Vol. 20, P. 4554).

Then, Nicholas heard additional gun shots and Alexus scream (ROA Vol. 20, P. 4554). Nicholas claimed that right before the shooting, he noticed Mr. Belcher's blonde hair, pale complexion, and blue eyes (ROA Vol. 20, P. 4556). The last thing Nicholas remembers from that evening/early morning was the police arriving (ROA Vol. 20, P. 4561). Nicholas then remembered waking up in the hospital (ROA Vol. 20, P. 4562). Nicholas underwent surgeries and believed he was in a coma while in the hospital (ROA Vol. 20, P. 4567).[1]

Nicholas provided a recorded statement to the police on January 12, 2011, and then testified at the preliminary hearing (from the hospital) on January 21, 2011 (ROA Vol. 20, P. 4570).

Nicholas claimed to have no memory of telling the police that two masked men had broken into the house when he initially spoke to them on December 6, 2010. (ROA Vol. 20, P. 4575).

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[1] The defense stipulated that Nicholas had suffered substantial bodily harm (ROA Vol. 20, P. 4570).

Nicholas also admitted that when he was interviewed by Detective Hardy, he claimed he was outside of the home prior to the shooting and that no one else but Alexus was present in the home (ROA Vol. 20, P. 4578). Nicholas claimed that he was under a lot of medication in the hospital and that is why he provided that statement (ROA Vol. 20, P. 4578). In fact, Nicholas claimed that the first thing that he remembered prior to the shooting was being downstairs (ROA Vol. 20, P. 4579). Nicholas admitted that was wrong (ROA Vol. 20, P. 4580). When Nicholas spoke to the police, on December 12, he stated that he was coming up the stairs and noticed the defendant at the top of the stairs, which he now admits is false (ROA Vol. 20, P. 4580).

Nicholas also admitted, that he was wrong when he told the police that he viewed the defendant coming out of Alexus' room (ROA Vol. 20, P. 4583). Nicholas also admitted he was wrong when he told the police that Ashley was not present at the house (ROA Vol. 20, P. 4583). In fact, Nicholas told police that Ashley was waiting in a car (ROA Vol. 20, P. 4584).

In January, Nicholas told the police that he saw "two outlines" and did not see a gun (ROA Vol. 20, P. 4586). Nicholas also told police that he saw no damage to the front door (even though it had it been forcefully kicked in) (ROA Vol. 20, P. 4587).

Nicholas did not remember that Ravon Harris was present at his residence on the day of the initial burglary (ROA Vol. 20, P. 4592).

Between the time of the shooting and his initial recorded interview on January 12, Nicholas had numerous interactions with family members (ROA Vol. 20, P. 4594). At the preliminary hearing, Nicholas testified he was "pretty certain" that the defendant was the shooter (ROA Vol. 20, P. 4596). During the preliminary hearing, Nicholas affirmed that somebody else was present with the individual being identified as the defendant (ROA Vol. 21, P. 4604).

In 2010, Ashley Riley was addicted to methamphetamine (ROA Vol. 21, P. 4611). Ashley admitted that she was involved in the drug conspiracy with Nicholas and Billy (ROA Vol. 21, P. 4612). Ashley would take fraudulent prescriptions to the pharmacy to obtain pills (ROA Vol. 21, P. 4612-4613). During that time, Ashley was romantically involved with Ravon Harris. Ravon was a jealous and controlling individual, causing Ashley to park her vehicle away from Nicholas's home for her protection (ROA Vol. 21, P. 4614). Ravon was a dark skinned African American approximately 6 foot 3 inches tall and 200 pounds (ROA Vol. 21, P. 4615).

On December 5, Ashley noted that Alexus had been painting her room and therefore fell asleep in her father's room (ROA Vol. 21, P. 4618). Ashley was

looking at music on an Xbox and Nicholas was on his laptop (ROA Vol. 21, P. 4619). However, both began to fall asleep (ROA Vol. 21, P. 4619). Ashley was then awoken by a loud bang and glass breaking. Ashley woke up Nicholas (ROA Vol. 21, P. 4620).

Nicholas then left the room and Ashley heard gun shots and hid in the closet (ROA Vol. 21, P. 4620). Nicholas came back to the closet but was unable to state who had shot him (ROA Vol. 21, P. 4622). Then, Ashley heard more gun shots (ROA Vol. 21, P. 4623). Ashley then decided to jumped out of the second story window (ROA Vol. 21, P. 4624). Police arrived and located Ashley in the backyard (ROA Vol. 21, P. 4625-4626). In a police interview, Ashley admitted that she stated that she was unsure whether Nicholas recognized the person who had shot him (ROA Vol. 21, P. 4635-4636). However, Ashley claimed at trial that she had a difference of opinion and believed that Nicholas did recognize the person (ROA Vol. 21, P. 4635-4536).

Ashley admitted that she had drank alcohol and ingested both methamphetamine and marijuana with Nicholas that evening (ROA Vol. 21, P. 4642). While at the residence, Ravon called her on at least two occasions (ROA Vol. 21, P. 4643). Ashley ignored the phone calls which she realized would make Ravon angry based on his past behavior (ROA Vol. 21, P. 4663). Although Ashley

offered her phone to the police, they never seized her phone (ROA Vol. 21, P. 4644). Police tested Ashley's hands for gunshot residue (ROA Vol. 21, P. 4644).

Ashley confirmed that Ravon had hit her in the past when she had lied about her whereabouts (ROA Vol. 21, P. 4650). Ashley also had admitted that Nicholas had moved her vehicle away from the house in case Ravon drove by and saw her vehicle (ROA Vol. 21, P. 4651).

On a prior occasion, Ravon had come to Billy and Nicholas' home to confront them about Ashley (ROA Vol. 21, P. 4651-4652). Ashley also confirmed that Ravon was with Nicholas on the day of the initial burglary (ROA Vol. 21, P. 4654). Ashley recalled grabbing Nicholas' phone from the bed before leaping from the window (ROA Vol. 21, P. 4660).

On December 6, Ashley initially told the police she believed there were two people in the house (ROA Vol. 21, P. 4660). Ashley based this opinion on the fact that she heard rummaging in the house in a separate area from where she believed the shooter was (ROA Vol. 21, P. 4661).

Ashley Riley testified that Ravon had a male friend who had access to a small white four door vehicle (ROA Vol. 21 p. 4664). Ashley also admitted that Ravon hit her on more than one occasion for associating with different men (ROA Vol. 21 p. 4667).

Claudia Ortiz lived at 9752 Villa Lorena and was a neighbor to Billy and Nicholas (ROA Vol. 21 p. 4677). In the early morning hours of December 6, 2010, Claudia was on her way home with her boyfriend, Jarod (ROA Vol. 21 p. 4677-4678). Claudia noticed an individual that caught her attention. She did not notice any facial features on the man (ROA Vol. 21 p. 4680). Claudia entered her house and shortly after heard gunshots (ROA Vol. 21 p. 4681). Claudia then noticed a bullet hole in her room door and in her east side window (ROA Vol. 21 p. 4683).[2]

In the early morning hours of December 6, 2010, Brenda Williams awoke to a noise of something being dragged on concrete (ROA Vol. 21 p. 4704-4705). Brenda looked out her window and noticed someone dragging something down the street (ROA Vol. 21 p. 4705). At that time, Brenda resided at 9713 Villa Lorena (ROA Vol. 21 p. 4706). Brenda noted that the individual appeared to be a male and was clothed from head to toe, wearing a hooded sweatshirt (ROA Vol. 21 p. 4707). Otherwise, she could provide no description (ROA Vol. 21 p. 4708). Brenda also noticed that the individual appeared rushed and was trying to place something into a vehicle (ROA Vol. 21 p. 4712-4713).

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[2] It is difficult to ascertain from the transcript whether Claudia actually witnessed the individual or whether her boyfriend told her about this at a later time (ROA Vol. 21 p. 4685-4688).

When the white vehicle left the area, a car door was left open because one of the items was too large (ROA Vol. 21 p. 4718). Thereafter, the neighbor heard the sounds of police sirens and a helicopter (ROA Vol. 21 p. 4719). The vehicle could have been a four door Nissan (ROA Vol. 21 p. 4727). Brenda confirmed that the only thing she really could identify about the vehicle was that it was white and had four doors (ROA Vol. 21 p. 4729). The lighting prevented Brenda from making any type of realistic identification of the car (ROA Vol. 21, P. 4733). In fact, Brenda told the police "I'm no good at cars. I have no idea what kind of car was." (ROA Vol. 21, P. 4739).

First responders arrived and located Nicholas suffering from gun shot wounds inside the closet. Police also located Alexus in the bed and she was unresponsive (ROA Vol. 21, P. 4755-4757). The first responding officer claimed that Nicholas provided no description of the assailants (ROA Vol. 21, P. 4757-4758). Portions of the residence appeared to be ransack (ROA Vol. 21, P. 4759).

Lisa Postorino would visit Nicholas when he was in the hospital. Allegedly, shortly before Christmas, Nicholas told her that "Bates" had committed the crime. (ROA Vol. 21, P. 4785). Ms. Postorino then contacted the police to inform them what Nicholas had said (ROA Vol. 21, P. 4785) She admitted that she knew who Bates was even before the incident (ROA Vol. 21, P. 4786-4787). Ms. Postorino

was present when the police interviewed her brother on December 6, wherein he was adamant that the perpetrator was not the defendant. (ROA Vol. 21, P. 4792)

William Postorino had known the defendant since the fifth grade (ROA Vol. 21, P. 4796) The two had been friends through out their life (ROA Vol. 21, P. 4797). William admitted that he was addicted to marijuana and methamphetamine at the time of the incident (ROA Vol. 21, P. 4800). William also admitted that he was involved in the drug conspiracy (ROA Vol. 21, P. 4801). Large quantities of money and drugs were often at the home and so either William or Nicholas were usually there (ROA Vol. 21, P. 4804). William claimed that the defendant was the only person who knew that he and Nicholas were away from the home at the time of the residential burglary on December 1 (ROA Vol. 21, P. 4806-4807). William confronted Mr. Belcher about the burglary and he denied it (ROA Vol. 21, P. 4808).

Prior to December 6, William claimed he received messages from Mr. Belcher. In the text messages Mr. Belcher claimed William owed him money. (ROA Vol. 21, P. 4809). William did not believe he owed him money (ROA Vol. 21, P. 4809). William described the text messages as threats towards his family (ROA Vol. 21, P. 4810). One text message suggested that Mr. Belcher would let his "homies knows where William's family lives in case Norman came up dead."

(ROA Vol. 21, P. 4810). Allegedly, Mr. Belcher sent a text message saying "so $450.00 or war and an element of surprise." (ROA Vol. 21, P.4811). William claimed that he eventually paid Mr. Belcher the $450.00 (ROA Vol. 21, P. 4813) (through Nicholas).

At the time of the murder, William was at a casino (ROA Vol. 21, P. 4815). Initially, William told the police that he was concerned about Ravon, Ashley's boyfriend (ROA Vol. 21, P. 4819). William relayed how a sixty inch TV and a safe had been taken from the house (ROA Vol. 21, P. 4822-4824). William testified that Mr. Belcher had being in the house a hundred times and Ravon had only been in the house twice (ROA Vol. 21, P. 4823). William also claimed that Mr. Belcher knew were the drugs and money were kept inside the house (ROA Vol. 21, P. 4823). William admitted that he had no evidence that Mr. Belcher committed the residential burglary, it was just a suspicion (ROA Vol. 22, P. 4832).

William admitted that he initially told the police that Ravon had a violent past and had threatened him and Ashley. William also told the police that he almost guaranteed that Ravon was responsible (ROA Vol. 22, P. 4832) In fact, William believed that "the spat" with Mr. Belcher was over because he had been paid the $450.00 (ROA Vol. 22, P. 4853) William also stated to the police that it was not Mr. Belcher's "MO" to rob a house (ROA Vol. 22, P. 4854) William also

told the police that Mr. Belcher's threats were "feeble threats" (ROA Vol. 22, P. 4857).

William informed police that Mr. Belcher had actually protected Alexus on one occasion and ensured that she made it home safely (ROA Vol. 22, P. 4861). William told the police that he may need a lawyer based upon their questioning surrounding the narcotics trade (ROA Vol. 22, P. 4862). However, William was never prosecuted by the State of Nevada for the drug dealing the police learned he was involved in during that time period (ROA Vol. 22, P. 4863).[3]

Crime scene analysts located two separate distinct footprints on the front door and multiple footprints in blood inside the home (ROA Vol. 22, P. 4947).

Officer Anthony Cavaricci was working as a patrol officer in the early morning hours of December 6, 2010 (ROA Vol. 22, P. 4972). Officer Cavaricci made a routine traffic stop in the area of the 215 freeway and Durango (ROA Vol. 22, P. 4974). The vehicle was stopped for speeding (ROA Vol. 22, P. 4975). The vehicle was a 2009 white Nissan Versa occupied by a single male, identified as Norman Belcher by the driver's license (ROA Vol. 22, P. 4976). The driver was issued a speeding citation (ROA Vol. 22, P. 4976-4977). The traffic stop was

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[3] William had being convicted of ex-felon in possession of a firearm prior to the murder and again after (ROA Vol. 22, P. 4883).

initiated at 3:16 am (ROA Vol. 22, P. 4977). Mr. Belcher was identified as the driver at trial (ROA Vol. 22, P. 4976). [4] Officer Cavaricci stated that he was probably sure that he would have noticed a sixty inch TV in the back of the vehicle, but he was not positive (ROA Vol. 22, P. 4988). The driver of the vehicle did not seem nervous and the driver's behavior was appropriate (ROA Vol. 22, P. 4990). Officer Cavaricci admitted that nothing seemed out of the ordinary during the stop (ROA Vol. 22, P. 4991).

Shortly before 6:00 am on December 6, Officer Ryan Smith responded to a white compact car which was on fire (ROA Vol. 22, P. 4994-4995). The vehicle was located at Lamb and Stewart streets (ROA Vol. 22, P. 4996). The fire department had extinguished much of the fire at the time Officer Smith arrived (ROA Vol. 22, P. 4997). The vehicle's license plate confirmed it belonged to the Nissan dealership as a loaner (ROA Vol. 22, P. 4999).

Officer Smith eventually made telephone contact with the Officer who had made the traffic stop (ROA Vol. 22, P. 4999). Officer Smith had remembered the stop over police dispatch (ROA Vol. 22, P. 4999). Officer Smith claimed he

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[4] Mr. Belcher was also identified as the driver when he was originally taken into custody after the officer came to the homicide division and identified Mr. Belcher as the individual he issued the citation to (ROA Vol. 22, P. 4985).

remembered the description of the vehicle leaving the scene of the homicide so he contacted homicide (ROA Vol. 22, P. 5000).

Officer Smith reviewed the CAD report that evening and noticed that it reflected that police were looking for two subjects of unknown race wearing masks (ROA Vol. 22, P. 5001). Officer Smith did not believe a large television would fit in the car (ROA Vol. 22, P. 5004).

Records from Nissan on East Sahara Avenue reflect that the vehicle (a 2009 Nissan Versa) was rented by Mr. Belcher on December 3, 2010 (ROA Vol. 22, P. 5010). The vehicle was due to be returned on December 10 (ROA Vol. 22, P. 5011). The vehicle could only be accessed by a key that was given to the renter. Without the key, the vehicle could not be started (ROA Vol. 22, P. 5012-5013).

Ms. Faranceska Sierra is the property manager for the Siegel Suites located at 5230 East Craig Road (ROA Vol. 23, P. 5153). Business records demonstrated that an individual named Norman Belcher moved into the Siegel Suites on December 1, 2010 (ROA Vol. 23, P. 5084-5085). Records also demonstrated that the room key was not utilized between 11:41 p.m. on December 5 and 6:11 a.m. on December 6 (ROA Vol. 23, P. 5089). The manager admitted that the key system appeared to be having "lots of problems" based upon the print out (ROA Vol. 23, P. 5102).

The burnt vehicle had extensive damage (ROA Vol. 23, P. 5104). The entire interior including the trunk area had fire damage (ROA Vol. 23, P. 5104). A matchbook was located in the near vicinity of the vehicle (ROA Vol. 23, P. 5108). Detectives managed to recover video from Fred's Tavern hoping it would provide video of the burning of the vehicle (ROA Vol. 23, P. 5111). The video covered the time period from 5:00-6:00 a.m. on December 6, 2010 (ROA Vol. 23, P. 5112). At 5:38 a.m., an individual is seen running from the area where the vehicle is burning (ROA Vol. 23, P. 5115). The individual has a gray beanie over his head and had previously been seen on the video walking back and forth. The individual is wearing a blue "puffy" type jacket with a hood (ROA Vol. 23, P. 5117).

Bridgette Chaplin was friends with Norman Belcher in December of 2010 (ROA Vol. 23, P. 5151-5152). Ms. Chaplin admitted she had previously been romantically involved with Mr. Belcher (ROA Vol. 23, P. 5152). In December 2010, Ms. Chaplin was running from the federal government for a federal probation violation (for possession of stolen mail) (ROA Vol. 23, P. 5152). Ms. Chaplin also knew William Postorino, as "Dollar Bill" (ROA Vol. 23, P. 5153-54. Ms. Chaplin was aware that Mr. Belcher and William were allegedly involved in a drug business (5154).

Ms. Chaplin relayed a conversation with Mr. Belcher wherein he asked her

to rent a car for him (ROA Vol. 23, P. 5156). According to Ms. Chaplin, Mr. Belcher was upset with William because he accused him of burglarizing his home and a couple of the fraudulent prescriptions were unsuccessful (ROA Vol. 23, P. 5159). Mr. Belcher specifically denied burglarizing the home (ROA Vol. 23, P. 5159). Mr. Belcher exhibited frustration regarding the dispute (ROA Vol. 23, P.5160).

Mr. Belcher allegedly asked Ms. Chaplin what the worst thing that could happen to her would be. Then, Mr. Belcher stated, "what if something was to happen to your kids?" (ROA Vol. 23, P. 5161). Allegedly, Mr. Belcher also stated that the best way to destroy evidence was to burn it (ROA Vol. 23, P. 5162). Ms. Chaplin believed this occurred within one week of the homicide (ROA Vol. 23, P. 5162-5163).

Eventually, Ms. Chaplin was apprehended by the federal government and charged with 62 different criminal counts in state court (ROA Vol. 23, P.5163 (including forgery, possession of forged instruments, and possession of sale of document of personal information). In state court, Ms. Chaplin was represented by attorney Michael Gowdey (ROA Vol. 23, P. 5164). Ms. Chaplin notified Mr. Gowdey that she wished to provide information to the police to lessen her culpability for her criminal charges (ROA Vol. 23, P. 5164-5165). Ms. Chaplin

met with Chief Deputy District Attorney Robert Daskas to provide a proffer (ROA Vol. 23, P. 5165). After the proffer, her case was negotiated (ROA Vol. 23, P. 5165). All of the charges were negotiated down to one charge. Ms. Chaplin was sentenced for possession of a financial forgery lab and sentenced to 3 ½ -10 years (ROA Vol. 23, P. 5167-5168).

Ms. Chaplin admitted that she had seen information about the case in media coverage and had learned that a burnt car had been recovered that was attributed to Mr. Belcher (ROA Vol. 23, P. 5175). Ms. Chaplin was aware of this information before speaking to detectives and the prosecutor (ROA Vol. 23, P. 5175).

A search of the Seigel Suites residence unearthed a matchbook in a kitchen drawer and a broken lighter (ROA Vol. 23, P. 5187-5188). All shoes that were recovered were photographed. Additionally, a blue jacket was seized from inside the closet (ROA Vol. 23, P. 5192). Crime scene analysts believed they found apparent blood on several items located within the residence (ROA Vol. 23, P. 5198). Five individual socks were recovered from the Seigel Suites to compare to a sock that was located at the scene (ROA Vol. 23, P. 5207-5210). Two cell phones were also seized from the Seigel Suites (ROA Vol. 23, P. 5213). A traffic ticket was also located on a table (ROA Vol. 23, P. 5214).

A navy blue knit cap located at the Seigel Suites had no apparent blood

stains on it and there was no suitable DNA for comparison (ROA Vol. 23, P. 5232). A second knit cap had similar results (ROA Vol. 23, P. 5232). Notably, none of the extensive DNA examination from items recovered at the crime scene matched Mr. Belcher (ROA Vol. 23, P. 5239). Additionally, none of the victim's DNA was found at the Seigel Suites residence (ROA Vol. 23, P. 5239). The sock located at the crime scene had no DNA profile (ROA Vol. 23, P. 5241).

Fingerprints recovered from the scene were never tested against Ravon Harris (ROA Vol. 23, P. 5260-5261). Extensive fingerprint analysis failed to result in any link to Mr. Belcher within the crime scene (ROA Vol. 23, P. 5252-5259).

Seven cartridge cases were analyzed that had been located at the scene (ROA Vol. 23, P. 5281). All seven were fired by a single firearm (ROA Vol. 23, P. 5282).

Analysis of three cell phones was conducted (ROA Vol. 24, P. 5294-5295). This included a cell phone attributed to Mr. Belcher (ROA Vol. 24, P. 5294-5295) The other two phones appeared to have contacts that predated the murder (ROA Vol. 24, P. 5313).

An autopsy was performed on Alexus Postorino on December 7, 2010 (ROA Vol. 24, P. 5325). Dr. Larry Simms noted stippling on the right hand and body of Alexus (ROA Vol. 24, P. 5327-5328, 5334). Stippling is indicative of the

barrel of the handgun being within twenty-four inches of the body (ROA Vol. 24, P. 5328-5329). Alexus died as a result of multiple gun shot wounds (ROA Vol. 24, P. 5342).[5]

Corrections Officer Daniel Webb explained that Mr. Belcher summoned him over to the waiting area when being booked into the Clark County Detention Center (ROA Vol. 24, P. 5383). Officer Webb testified that Mr. Belcher asked whether he was going into "max custody because I killed a kid." (ROA Vol. 24, P. 5384).

Ms. Jan Seaman Kelly analyzed footprints to shoes recovered from Mr. Belcher's Seigel Suites apartment (ROA Vol. 24, P. 5405-5406). The patterns attributed to the shoes from Mr. Belcher's apartment were inconsistent with shoe prints located at the scene (ROA Vol. 24, P. 5406-5407). Ms. Kelly indicated that there were two shoe prints from different and distinctive shoes (ROA Vol. 24, P. 5408). All of the footwear impressions analyzed from the crime scene eliminated the possibility that they were from the shoes attributed to Mr. Belcher (ROA Vol. 24, P. 5410-5419).

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[5] A coroners investigative report reflects that the police were looking for two masked men. The jury heard that the report reflected this but the district court kept the actual report out of evidence (ROA Vol. 24, P. 5345-5352).

Mr. Belcher was contacted by police at the Siegel Suites on East Craig Road, Apt. 218 (ROA Vol. 25 p. 5525-26). Mr. Belcher was taken back to homicide for an interview (ROA Vol. 25 p. 5526). The defendant's redacted statement was admitted into evidence as Exhibit 463 (ROA Vol. 25 p. 5567). Mr. Belcher told police that he had been out at some bars until 3:00am on December 6 (ROA Vol. 25 p. 5571). Mr. Belcher then came back to his apartment and met up with Paula Silvestri (ROA Vol. 25 p. 5571). However, there was no activity shown from the key in the door between 11:41 p.m. on the December 5 until 6:11 am on December 6 (ROA Vol. 25 p. 5571). The State also introduced evidence that Mr. Belcher's claim of being home some time between 2:00am or 3:00am was inconsistent with him receiving a traffic ticket between 3:16am and 3:21am (ROA Vol. 25 p. 5572). Mr. Belcher denied being in the area of the car fire (ROA Vol. 25 p. 5572-73).

Detective Ken Hardy admitted that his superior swore out a warrant that Nicholas Brabham told Officers, prior to entering surgery, that two males wearing dark clothing and ski masks came into the house and shot him (ROA Vol. 25 p. 5579). Detective Hardy also admitted he was unsure whether or not there were two perpetrators involved (ROA Vol. 25 p. 5581).

Detective Hardy also admitted he did not collect Nicholas and Ashley's cell

phones for preservation of calls and text messages (ROA Vol. 25 p. 5585-5586). The police never executed a search warrant at Ravon Harris' home nor did they interview him until forty-five days after the homicide (ROA Vol. 25 p. 5589).

During the course of the investigation, police learned that Ravon Harris had access to white vehicles (ROA Vol. 25 p. 5610). Detective Hardy admitted that he did not ask Mr. Brabham in the hospital how he could identify Mr. Belcher considering he had told people that the perpetrators were wearing ski mask (ROA Vol. 25 p. 5738). Detective Hardy admitted that he never followed up or investigated Ravon Harris' alibi witnesses (ROA Vol. 25 p. 5682-5683). The State rested their case (ROA Vol. 25 p. 5716).

Dr. Jay Coates performed surgery on Mr. Brabham on December 6, 2010. (ROA Vol. 25 p. 5617-5618). Dr. Coates was able to communicate with Mr. Brabham prior to the surgery (ROA Vol. 25 p. 5618-5619). For instance, he told hospital staff that he smoked, occasionally used alcohol, but denied use of illicit drugs (ROA Vol. 25 p. 5619-20). In fact, Mr. Brabham was alert and oriented (ROA Vol. 25 p. 5620).

Mr. Larry Smith had worked for the Las Vegas Metropolitan Police Department for twenty-four years (ROA Vol. 28 p. 6313). Mr. Smith specialized in cell phone forensics (ROA Vol. 28 p. 6313). Mr. Smith analyzed cell phone

records and data surrounding a cell phone attributed to Mr. Belcher (ROA Vol. 28 p. 6316-6317). The results demonstrated that the phone attributed to Mr. Belcher was no where near the murder scene at the time of the incident (ROA Vol. 28 p. 6317). The defense rested their case.

On December 14, 2016, the jury returned guilt verdicts as to all seven counts (ROA Vol. 26 p. 5903-5905).

During the penalty phase, the State presented Mr. Belcher's criminal history through Detective Dean O'Kelly (ROA Vol. 27 p. 6055). Detective O'Kelly summarized Mr. Belcher's manslaughter conviction surrounding the death of Alan Deas (ROA Vol. 27 p. 6057). Mr. Deas' body was found on a construction site located on the 215 beltway and Flamingo (ROA Vol. 27 p. 6058). The body was discovered on May 19, 2003 and the police noted that the construction site was a location where Mr. Belcher worked (ROA Vol. 27 p. 6059-6060). Mr. Deas died as a result of two crescent shaped blunt force injuries to the top of his head (ROA Vol. 27 p. 6061). Allegedly, there had been a dispute at a residence where Mr. Belcher was residing (ROA Vol. 27 p. 6064-6066). A fight ensued resulting in the death of Mr. Deas (ROA Vol. 27 p. 6064-6066). Mr. Belcher was arrested on May 15, 2005 and entered into an Alford plea to voluntary manslaughter (ROA Vol. 27 p. 6067-6068). Mr. Belcher was released on May 12, 2010 (ROA Vol. 27 p. 6068).

Previously, Mr. Belcher had entered into a plea of guilty to conspiracy to commit battery with use of a deadly weapon (ROA Vol. 27 p. 6069). Mr. Belcher was cited in 1993 for obstruction of a police officer (ROA Vol. 27 p. 6070). Mr. Belcher also had several relatively minor drug charges (ROA Vol. 27 p. 6073-6080). In 2005, Mr. Belcher pled guilty to attempt theft of a stolen vehicle (ROA Vol. 27 p. 6082).

Mr. Belcher had previously been charged with battery by a prisoner and also an incident where he was accused of urinating on a prisoner (ROA Vol. 27 p. 6082-6085). Additionally, Mr. Belcher was accused of smoking marijuana in the Clark County Detention Center (ROA Vol. 27 p. 6086).

The State also presented witnesses who testified as to victim impact.

The defense presented Dr. Norton Roitman, in his role as a mitigation specialist (ROA Vol. 27 p. 6148). Dr. Roitman testified that Mr. Belcher wanted the death penatly if he was found guilty of the murder (ROA Vol. 27 p. 6156). Dr. Roitman testified that Mr. Belcher was adamant that he wanted the death penalty during the three interviews he had with him (ROA Vol. 27 p. 6156).

Dr. Roitman testified that Mr. Belcher had utilized his educational opportunities while in custody (ROA Vol. 27 p. 6152). Dr. Roitman also noted that Mr. Belcher continued being the best parent to his three children (ROA Vol.

27 p. 6162-6163). It was also noted that Mr. Belcher believed that his involvement in the drug culture was a cause of his own down fall (ROA Vol. 27 p. 6164). The defense then rested (ROA Vol. 27 p. 6184).

On December 15, 2016, the jury found all five aggravating circumstances beyond a reasonable doubt (ROA Vol. 27 p. 6022-6023). The jury found one mitigating circumstance: "he wants to die" (ROA Vol. 27 p. 6027). The jury then returned a sentence of death (ROA Vol. 27 p. 6026).

ARGUMENT

I. MR. BELCHER'S RECORDED STATEMENT TO DETECTIVES SHOULD HAVE BEEN SUPPRESSED BASED ON A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. FACTS REGARDING THE INTERROGATION

On October 4, 2012, the defense filed a Motion to Suppress Mr. Belcher's statements (ROA Vol. 3 p. 517). In the early morning hours of December 6, 2010, Mr. Belcher was detained at the Siegel Suites located at 5230 East Craig Road, Apartment 218. There appears to be undisputed facts that Mr. Belcher was not Mirandized prior to being interviewed at homicide. When Detective Hardy first encountered Mr. Belcher at the Siegel Suites, the defendant was already in handcuffs (ROA Vol. 14 p. 3057). Mr. Belcher was continuously in handcuffs from the time he was seized outside his residence at the Siegel Suites until he was

placed inside a homicide interview room (ROA Vol. 14 p. 3057). In fact, the handcuffs are removed from Mr. Belcher once inside the room (ROA Vol. 14 p. 3057). Detective Hardy testified at an Evidentiary Hearing that he was unsure why officers had handcuffed Mr. Belcher outside his home (ROA Vol. 14 p. 3057).

Mr. Belcher was kept in a small interview room for approximately three and a half hours (ROA Vol. 14 p. 3057-3058). The room remained locked and he was not free to leave the room (ROA Vol. 14 p. 3057-3058). Mr. Belcher never left the room. Detective Hardy did not inform Mr. Belcher he was free to leave or that he had the right to counsel prior to the inception of the interview (ROA Vol. 14 p. 3058).

Eventually, Detective Hardy advises Mr. Belcher of his Miranda rights (ROA Vol. 3 p. 639). The State conceded that they would not utilize any portion of Mr. Belcher's statement after page fifty-four of the transcript where he was Mirandized.

Detective Hardy testified that when he would leave the interview room he would ensure the door was locked (ROA Vol. 3 p. 658). Mr. Belcher was never told he was free to leave (ROA Vol. 3 p. 648). On page fifty of the recorded transcript from Mr. Belcher's statement, Mr. Belcher stated that before he got to homicide he had requested a lawyer (ROA Vol. 3 p. 659). Detective Hardy made

no comment in response to Mr. Belcher's statement (ROA Vol. 3 p. 659). Detective Hardy also admitted that police were searching the Siegel Suites apartment contemporaneously with the interview (ROA Vol. 3 p. 661).

The district court made a finding that the police investigation had focused on Mr. Belcher as a result of the information the police already had. In the district court's Order denying the Motion to Suppress, the court noted the following facts: 1) the dispute between Mr. Postorino and Mr. Belcher, 2) information from a citizen who had seen Mr. Belcher's car close to the crime scene about time of crime, 3) the fact that a ticket had been issued to a person driving Mr. Belcher's car and using Mr. Belcher's license shortly after the events, and 4) the fact that the car had been found burned later that day. This led to the court's conclusion (ROA Vol. 4 p. 713-714).

The district court also noted that Mr. Belcher could not have freely walked out of the interview room (ROA Vol. 4 p. 714). The court also noted that Mr. Belcher was present inside the interview room for twenty-two minutes before the detectives began to question him (ROA Vol. 4 p. 714).

B. LAW REGARDING CUSTODIAL INTERROGATION

The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial

unless the police first provide a Miranda warning. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 322 (1998); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning." Taylor, 114 Nev. at 1081. If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel "at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed.2d 383 (1995), Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997) ("The test for whether one is in custody is if a reasonable person would believe he was free to leave.")

In Taylor, this Court concluded that a person is in custody where, "there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave." Taylor, 114 Nev. at 1082. A suspect's or the police officer's subjective view of the circumstances does not determine whether the suspect is in custody. Id.

In determining whether objective indica of custody exists, these factors should be considered: 1) whether the suspect was told that the questioning was

voluntary or was free to leave; 2) whether the suspect was not formally under arrest; 3) whether the suspect could move about freely during questioning; 4) whether the suspect voluntarily responded to questions; 5) whether the atmosphere of questioning was police dominated; 6) whether the police used strong arm tactics or deception during questioning; and 7) and whether the police arrested the suspect at the termination of questioning. Id.

In Carroll v. Nevada, 371 P.3d 1023. 132 Nev. Adv. Rep. 23 (2016), this Court held that the district court erred in denying Mr. Carroll's Motion to Suppress his statement to the police because the police had subjected Mr. Carroll to custodial interrogation without advising him of his Miranda rights. This Court noted that the determination of custody presents a mixed question of law and fact subject to *de novo* review. In Carroll, this Court focused on three main inquiries in the determination of whether custody for purposes of Miranda exists. The main inquiries were as follows: 1) the site of the interrogation; 2) objective indicia of arrest; and 3) the length and form of the questioning. Id. at 1032. An individual is not in custody for purposes of Miranda if the police are merely asking questions at the scene of a crime or the individual is merely a focus of the criminal investigation. Id.

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C. ANALYSIS FROM THE FACTS OF THE CASE

1. The site of the Interrogation

In Carroll, this Court held that the site of the interrogation at the police station indicated Carroll was in custody when he gave a statement. This is directly applicable to Mr. Belcher's case. Detectives admitted that they drove Mr. Carroll from the Palomino Club to homicide. Id. Here, Mr. Belcher was driven from his residence to homicide. Whereas, Mr. Carroll was simply driven from his place of employment. In Carroll, the detective testified that the interrogation room was small and had only one door. Again, Mr. Belcher was kept in a small homicide room and was never permitted to leave. This Court found that the environment suggested Carroll was in custody. Mr. Carroll had been driven to homicide and could not have left unless detectives agreed to give him a ride home. This is the exact same situation with Mr. Belcher.

Mr. Carroll was not handcuffed for at least forty-five minutes prior to being placed in the interview room. Whereas, Mr. Belcher was handcuffed. As in Carroll, Mr. Belcher was not permitted to use a phone and when he asked to leave, just as in Carroll, Mr. Belcher was told to sit tight.

The police most certainly could have interviewed Mr. Belcher outside his residence just like they could have interviewed Mr. Carroll at his place of

employment.

2. Objective indicia of Arrest

The Court should consider the seven factors provided in Taylor, 114 Nev. 1071, 1082. First, Mr. Belcher was not told he was free to leave and was handcuffed for approximately thirty to forty minutes prior to being placed in the interrogation room. In fact, the handcuffs were not removed until Mr. Belcher was placed inside the interrogation room. The custody factor weighs heavily in favor of Mr. Belcher.

Mr. Belcher was never told he was formally under arrest until hours into the interrogation. Police did not inform him he was free to leave. Hence, factor two weighs heavily in favor of Mr. Belcher.

Third, Mr. Belcher was denied freedom of movement during the entire interrogation and the time period leading up to when he arrived at the police station. For approximately five hours, Mr. Belcher remained either in handcuffs or in a locked interrogation room. Therefore, there is overwhelming evidence that Mr. Belcher's movement had been completely restricted.

Fourth, Mr. Belcher was required to answer questions because police would not honor his request nor give him freedom of movement. In fact, at one point, the police bring in the traffic patrol officer who had cited Mr. Belcher and Mr. Belcher

allegedly attempted to cover his face. As such, the fourth factor weighs in favor of Mr. Belcher.

Fifth, the atmosphere was completely police dominated. Mr. Belcher's residence was secured and he was handcuffed. Mr. Belcher was then placed in a police vehicle and transported to the police station, still handcuffed. Once inside a small locked room, detectives began questioning Mr. Belcher. At some point, the police lied to him. At one point, the defendant stated, "I want to leave." (ROA Vol. 14 p. 3061). Then, Mr. Belcher was formally arrested.

In Carroll, Mr. Carroll was actually permitted to leave at the conclusion of the interrogation. Mr. Belcher was restrained for approximately one hour and forty-three minutes before the questioning began at 7:43 pm. (ROA Vol. 14 p. 3062). The interrogation concluded at 11:15 pm. Thus, the district court correctly determined that Mr. Belcher was either shackled or present in a locked interrogation room for approximately five hours. Whereas, Mr. Carroll's interrogation only lasted two and a half hours. Id. at 1034. This Court explained, "[a]nd if the police had simply questioned Carroll as a witness and not as a suspect, the Detectives would likely not have taken breaks to let Carroll's mind go crazy or found a need to use a third, more aggressive detective." Id. Detective Hardy's intent is obvious. Police maintained actual physical control over Mr.

Belcher either by placing him in handcuffs or a locked room. Mr. Belcher was denied the request for a lawyer. Police took him from his residence to a small room where he was interrogated. No reasonable individual would feel free to leave under the totality of the circumstances.

In the district court below, the State made an extremely telling statement. In the State's Opposition filed to Mr. Belcher's Motion to Suppress Identification filed in the district court, the State makes a startling concession. The State explains, "this is not a situation where police let days go by before they conducted an investigation. ***As they had defendant in custody***, heard his story, they immediately went and got Officer Cavaricci." (ROA Vol. 10 p. 2274) (emphasis added).

In the proceedings below, the State actually claimed that an interview at Mr. Belcher's residence would have been inappropriate (ROA Vol. 15 p. 3227). Mr. Belcher is at a complete loss to figure out the State's rationale for determining that his residence would be an inappropriate place to interview him. If he had truly been a witness he would have been interviewed right where he was located or inside his residence. A witness would not be handcuffed and then transported in handcuffs to homicide for a simple interview. Additionally, while Mr. Belcher was being detained at homicide, his residence was being searched and officers were

recovering items of evidence. As in Carroll, Mr. Belcher could not utilize his phone because police had kept his phone at his residence along with his Nevada identification (ROA Vol. 15 p. 3228). How could Mr. Belcher have even left the police station without keys or identification. His personal belongings that he was carrying when he was apprehended were laid on an air conditioning unit outside his front door.

It is clear the police had focused their investigation on Mr. Belcher and that is why they were searching his home. The search unearthed evidence seized that was owned by the defendant. It is clear from the totality of the circumstances the intent of the police. Yet, on July 26, 2016, the district court denied the defendant's Motion to Suppress.

During trial, the State effectively utilized statements made by Mr. Belcher (ROA Vol. 25 p. 5526). The State introduced Mr. Belcher's statement as Exhibit 463 (ROA Vol. 25 p. 5567). The State presented evidence from Mr. Belcher's statement in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

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II. MR. BELCHER IS ENTITLED TO A NEW PENALTY PHASE BASED UPON THE PRESENTATION OF CLEARLY INAPPROPRIATE AND HIGHLY PREJUDICIAL TESTIMONY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION.

For decades, federal law and Nevada State law have dictated that the breakdown of the adversarial process renders the proceedings fundamentally unfair. Pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, the finders of fact are entitled to the adversarial process wherein defendant's counsel presents evidence in mitigation and not evidence to assist the jury in determining that a death sentence is warranted and morally acceptable to the defense. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed.2d 657 (1984). In this case, the adversarial process was eroded during the penalty phase.

During the penalty phase, Mr. Belcher was not present and did not participate. Prior to the penalty phase, the court had granted Mr. Belcher's request to be absent during the penalty phase.[6]

[6] In the penalty phase, the defense offered a single mitigator: Mr. Belcher

During the defense case in chief, the defense called Dr. Roitman. Dr. Roitman was appointed as a mitigation expert (ROA Vol. 27 p. 6154). Dr. Roitman explained that during meetings with Mr. Belcher, he was not interested in providing any evidence of mitigation (ROA Vol. 27 p. 6155). Dr. Roitman then testified that Mr. Belcher wanted to be found innocent; but if found guilty, he wanted a lifestyle away from general population (ROA Vol. 27 p. 6155).[7]

The report and Dr. Roitman's testimony reflected that Mr. Belcher wanted to receive the death penalty (ROA Vol. 27 p. 6156). This was introduced initially by the defense (ROA Vol. 27 p. 6156). Dr. Roitman even testified that Mr. Belcher was adamant he wanted the death penalty in the three interviews he had with Mr. Belcher (ROA Vol. 27 p. 6156). The defense even presented the motivations for Mr. Belcher's desire to receive the death penalty based upon his jail history (ROA Vol. 27 p. 6156-6159). Dr. Roitman explained, "well, he saw death row as a better environment than what he had." (ROA Vol. 27 p. 6159). Dr. Rotiman further expressed,

He saw that he would be assured to have a room to himself. A cell on

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had three children. The jury did not check this box. At least one juror found a mitigator that Mr. Belcher wanted to die.

[7] Dr. Rotiman's report was introduced by stipulation (ROA Vol. 27 p. 6156).

> death row. And the other thing he told me straight forward that his appeal, any of the next level of legal costs would be paid for by the State, not out of his own funds." (ROA Vol. 27 p. 6159).

Mr. Belcher also apparently did not want to inflict any further "...damage" on any other inmates as he has done in the past (ROA Vol. 27 p. 6159). Mr. Belcher also wanted the death penalty to avoid any "racial conflict" and "he didn't want to be a solider in a battle." (ROA Vol. 27 p. 6160). Again, this testimony was provided by Dr. Roitman in an effort to convince the jury that Mr. Belcher had motivations for wanting to receive the death penalty.[8]

At the conclusion of direct examination, it was clear that Dr. Roitman's only real purpose was to inform the jury that Mr. Belcher did not want mitigation presented and that he had clear and rational reasons for the jury to impose a sentence of death. These reasons included future dangerousness of being involved in racial conflicts and a desire to refrain from harming other inmates. This rationale was most certainly seized upon by the prosecution and the jury. Ultimately, the jury rewarded Mr. Belcher's request, as told through Dr. Roitman,

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[8] Dr. Roitman continuously expressed to the jury Mr. Belcher's desire that no mitigation be presented and that he receive the death penalty (ROA Vol. 27 p. 6155-6163).

by sentencing him to death.

The prosecution seized on this evidence. On cross-examination, the prosecutor asked, "but Mr. Belcher expressed to you that he wants the death penalty?" Dr. Roitman responded, "yes." (ROA Vol. 27 p. 6182). In an effort to explore Mr. Belcher's reasoning, the prosecutor asked Dr. Roitman whether Mr. Belcher wanted to ensure that he would be in a single cell (ROA Vol. 27 p. 6183).

Redirect examination begins with the following:

Q: The sum and substance of your testimony on cross is that Norman Belcher's brain works pretty well?
A: Yes.
Q: And he wants to be sentenced to death.
A: Yes.
Q: And he didn't participate with you in your attempts to create a mitigation case?
A: That's correct.
Q: Because he didn't want anybody taking pity on him?

At no time does the record reflect that Mr. Belcher consented to this extraordinary concession. Additionally, Mr. Belcher was not even present when this testimony occurred. In Mazzan v. State, 100 Nev. 74, 77, 675 P. 2d 409, 411 (1984), this Court held,

> During the penalty stage of the trial, Mazzan's counsel had the opportunity and obligation to present any evidence of mitigating circumstances. He chose, instead, to harshly berate the jury for returning its guilty verdict during the prior phase. Counsel neither presented any witnesses nor substantially argued any mitigating consideration on his client's behalf; instead, he displayed an open

> disdain for the jury and virtually invited the jurors to condemn his client to death.

This Court further explained,

> Turning now to the penalty phase of Mazzan's trial, the issue for our consideration concerns appellant's claim of denial of his Sixth Amendment right to effective assistance of counsel. Mazzan supports his position on appeal by citing to his trial counsel's failure to effectively present mitigating circumstances compounded by his antagonistic remarks to the jury. Id.

Regarding the issue of considering ineffective assistance of counsel on direct appeal, this Court explained,

> In spite of our stringent standard of review on this issue we do not hesitate to conclude as a matter of law that the performance of Mazzan's counsel at sentencing exceeded the outer parameters of effective advocacy, thereby reducing the proceedings to a sham, a farce, or a pretense. Mazzan's cause would have been far better served without benefit of his counsel's presentation during the penalty phase. We are unable to perceive any reason or motive for counsel's actions which would be consistent with even a modicum of effective advocacy. An evidentiary hearing before the district judge as to the motives or strategy behind defense counsel's performance, therefore, is not necessary in this case. Id. at 80, 675 P.2d at 413.

As a result, Mazzan's sentence of death was reversed. Here, defense counsel presented Dr. Roitman as the main witness for the defense in penalty. Then, the defense presented compelling evidence that Mr. Belcher desired to die and the community at large would be safer with a death sentence.

The prosecution jumped on the bandwagon and elicited testimony from Dr.

Roitman that further provided evidence that a death sentence was necessary to protect the community and that Mr. Belcher was free from any type of significant psychological ailments.

This issue is very rare throughout the United States. However, by analogy, the break down of the adversarial process has been criticized when defense counsel concedes the defendant's guilt, in conflict with the defendant's desire to argue for an acquittal. "A lawyer may make a tactical determination of how to run a trial, but the due process clause does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent." Brown v. Rice, 693 F. Supp. 381, 396 (W.D.N.C.1988), Brown v. Dixon, 891 F.2d 490 (4th Cir.1989), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed.2d 545 (1990).

Recently in McCoy v. Louisiana (16-8255), the United States Supreme Court heard oral argument regarding a capital defendant whose attorney had conceded his guilt to a triple murder. When the defendant learned that trial counsel in tended to concede his guilt, the defendant objected. Defense counsel proceeded to concede guilt, claiming a tactical advantage by gaining credibility with the jury. The tactic failed and the defendant was sentenced to death.[9]

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[9]Mr. Belcher reserves the right to supplement this issue when the United

In sum, the adversarial system was completely eroded when the defense presented some of the most compelling evidence and rationale for the jury to return a sentence of death. Undoubtedly, the State will argue that this matter was presented for some type of tactical reason similar to the tactical reason of the attorney in Mazzan and McCoy. Here, there is no conceivable tactical reason for this presentation other than to ensure that a death sentence would be returned.

III. MR. BELCHER WAS DENIED DUE PROCESS WHEN THE DISTRICT COURT FAILED TO STRIKE THE STATE'S THEORY OF AIDING AND ABETTING.

On November 28, 2016, the defense filed a Motion to preclude the court from providing jury instructions regarding aiding and abetting and to strike the language from the charging document (ROA Vol. 16 p. 3627). The defense alleged the prosecution had always proceeded under the theory that Mr. Belcher acted alone in committing the crimes (ROA Vol. 16 p. 3629). The defense also complained that the State never presented evidence at the preliminary hearing or alleged specific acts which constitute the means of aiding and abetting (ROA Vol. 16 p. 3629). In the motion, the defense also complained that the State had consistently claimed there was no second suspect (ROA Vol. 16 p. 3629). The district court denied the defense motion.

States Supreme Court issues a decision on the matter.

In Barren v. Nevada, 99 Nev. 661, 669 P.2d 725 (1983), this Court held:

> Although any prosecutor might well desire the luxury of having an option not to reveal his or her basic factual theories, and wish for the right to change the theory of a case at will, such practices hardly comport with accepted notions of due process. As we observed in Simpson v. District Court, 88 Nev 654, 503 P.2d 1225 (1972).

This Court further provided,

> Accordingly, we now hold that where the prosecution seeks to establish a defendant's guilt on a theory of aiding and abetting, the indictment should specifically allege the defendant aided and abetted, and should provide additional information as to the specific acts constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense. Id. See Sheriff v. Standal, 95 Nev. 914, 604 P.2d 111; Lane v. Torvinen, 97 Nev 121, 624 P.2d 1385.

In Randolph v. State, 117 Nev. 970, 36 P.3d 424 (2001), this Court reaffirmed that the indictment should specifically allege aiding and abetting and should provide additional information as to the specific acts constituting the means of aiding and abetting so as to afford the defendant adequate notice to prepare his defense. In this case, the State did not present any facts constituting notice of how Mr. Belcher allegedly aided and abetted. Therefore, reversal is mandated.

IV. MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UPON HIGHLY PREJUDICIAL CHARACTER EVIDENCE BEING ELICITED.

Prior to trial, the State filed no formal motion to introduce bad act evidence

against Mr. Belcher. Despite this, the following bad acts were elicited against Mr. Belcher.

A. MR. BELCHER'S ALLEGED COMMENTS ABOUT HARMING CHILDREN

During the direct examination of Ms. Bridgette Chaplin, the State was eliciting testimony surrounding an alleged conversation between Ms. Chaplin and Mr. Belcher where he was describing that the worst thing that could happen to somebody would be to harm their children. The prosecutor questioned as follows:

Q: And, in fact, when you heard the comment about your kids were you concerned?
A: Yes.
Q: What did you do based upon your concern?
A: I contacted my kid's father and told him not to take them to school.
Q: That's how concerned you were based on hearing the defendant speaking that?
A: Yes. (ROA Vol. 23 p. 5168–5169).[10]

B. THE ALLEGATION THAT MR. BELCHER COMMITTED A RESIDENTIAL BURGLARY ON DECEMBER 1, 2010

During trial, the State elicited that on December 1, 2010, Nicholas' and

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[10] There was no contemporaneous objection to this testimony. Therefore, the Court reviews the issue for plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94–95 (2003).

Billy's residence was burglarized (ROA Vol. 20 p. 4545). The State's witness claimed the burglary was committed by Mr. Belcher.

The following is a summary of the testimony presented to the jury concerning the alleged burglary: When Nicholas came home that day, he noticed money and drugs were missing (ROA Vol. 20 p. 4545). Billy suspected that Mr. Belcher was involved in the burglary (ROA Vol. 20 p. 4046). Billy claimed Mr. Belcher was the only person who knew that he and Nicholas were away from the home at the time of the burglary (ROA Vol. 21 p. 4806-4807). Billy confronted Mr. Belcher about the burglary, and he denied committing the burglary (ROA Vol. 21 p. 4808). Billy admitted he had no evidence that Mr. Belcher committed the burglary, it was just a suspicion (ROA Vol. 22 p. 4832).

In this case, the State elicited evidence that Mr. Belcher committed a burglary of the Billy and Nicholas' residence. Yet, Mr. Belcher was not charged with committing the December 1, 2010 burglary and there was no evidence he committed such a burglary.

The State elicited testimony that portrayed Mr. Belcher as a person of poor character in violation of NRS 48.045(b).

NRS 48.045(2) provides, Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the acted in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Once the court's ruled that evidence is probative of one of the permissible issues under NRS 48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

In Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1977), this Court held that to deem a prior bad act admissible, the district court must first determine outside the presence of the jury that "1) the incident is relevant to the crime charged; 2) the act is proven by clear and convincing evidence; and 3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice".

This type of prejudicial evidence precluded Mr. Belcher from receiving a fair trial. There was no rational basis to present Ms. Chaplin's subjective fear of the defendant or that Mr. Belcher committed a burglary other than to portray him as a person of poor character in violation of NRS 48.045(b).

V. MR. BELCHER IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS BASED UPON WITNESS VOUCHING.

Detective Teresa Mogg repeatedly vouched for the credibility of Ashley Riley. During examination by the prosecution, Detective Mogg was asked if she

was skeptical of Ms. Riley's story at the inception of the interview (ROA Vol. 28 p. 6282). Detective Mogg admitted that she was skeptical at first, but stated she believed Ms. Riley by the end of the interview (ROA Vol. 28 p. 6282). Thereafter, when questioned again, by the defense, Detective Mogg repeatedly stated she believed Ms. Riley. Detective Mogg stated, "so I believed what she was telling me." (ROA Vol. 28 p. 6290). Detective Mogg further explained, "so what I did with her was I needed to make sure that I believed what she was telling me." (ROA Vol. 28 p. 6290). Detective Mogg also explained, "and I did believe her statement, and she was consistent in her statement." (ROA Vol. 28 p. 6290).

In United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980), the court stated, "[I]t is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. In Browning v. State of Nevada, 120 Nev. 347, 359 91 P.3d 39, 48 (2004), this Court found:

> The prosecution may not vouch for a witness; such vouching occurs when the prosecution places "'the prestige of the government behind the witness'" by providing "'personal assurances of [the] witness's veracity.'"

Mr. Belcher is entitled to a trial free of repeated witness vouching, especially given the importance of Ms. Riley's credibility in the overall context of

the trial.

VI. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. BELCHER OF THE ROBBERY OF NICHOLAS BRABHAM (COUNT NUMBER TWO). MR. BELCHER IS ENTITLED TO A NEW PENALTY PHASE BECAUSE OF THE INVALID AGGRAVATING CIRCUMSTANCE.[11]

This Court has stated that when the sufficiency of evidence is challenged on appeal, "[t]he relevant inquiry for this Court is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of a fact could have found essential elements of the crime beyond a reasonable doubt." Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)).

The evidence utilized by the prosecution to convict Mr. Belcher of this count is best summarized in the prosecutor's closing argument (ROA Vol. 26 p. 5931-5932). The prosecution argued that Mr. Brabham had been robbed based upon Ms. Riley's testimony that when Mr. Brabham fell asleep, his laptop was open. However, Mr. Brabham's computer was found in Billy Postorino's room

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[11] The jury also found count two, robbery with use of a deadly weapon on Mr. Brabham as an aggravating circumstance (aggravator number three) (ROA Vol. 27 p. 6022-6023). Therefore, Mr. Belcher specifically appeals the finding of the aggravating circumstance based upon insufficient evidence.

(ROA Vol. 26 p. 5931). The prosecutor argued that Mr. Belcher must have moved the computer. Next, the prosecution argued that Mr. Brabham's wallet was located in a closet and he did not remember placing it there (ROA Vol. 26 p. 5931-5932). Obviously, it is clear that the items were not taken. These items could easily have been located in the area where they were found and were not the subject of any type of attempt to remove the objects by the perpetrators. In fact, the inconsistencies between the testimony of Ms. Riley and Mr. Brabahm was profound. Mr. Brabham told the police that he was outside of the residence and when he entered he encountered the assailants. Ms. Riley provided a completely different scenario by which the two of them were asleep in Mr. Brabham's room. The testimony and recollection of these two witnesses is questionable at best.

Moreover, to convict Mr. Belcher based on two items being located in areas around the residence that the occupants did not remember placing them in is highly speculative. Additionally, if the perpetrators believed the laptop and the wallet to be of value, why were they not taken? It would be a lot easier to remove a wallet and a laptop than a sixty inch television. In the light most favorable to the State, there was insufficient evidence to convict Mr. Belcher.

More importantly, there was insufficient evidence to find aggravator number three, which mirrored this robbery with use of a deadly weapon count. A

re-weighing process cannot conclude beyond a reasonable doubt that the jury would have sentenced Mr. Belcher to death absent this aggravating circumstance. See State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 678 (2003).

VII. MR. BELCHER WAS DENIED A FAIR TRIAL WHEN THE STATE INTRODUCED INADMISSIBLE HEARSAY IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE UNITES STATES CONSTITUTION.

During direct-examination of Detective Ken Hardy, Detective Hardy was asked whether he was provided a statement by Ravon Harris (ROA Vol. 25, P. 5532-5533). Detective Hardy testified that Ravon told him that he was at home at the time of the incident (ROA VOL. 25, P. 5533).

Ravon did not testified at trial.[12] NRS 51.435 provides, "hearsay means a statement offered in evidence to prove the truth of the matter asserted." Here, the defense vehemently pointed at Ravon as a possible alternative suspect. Without an opportunity to confront Ravon, the State presented an alibi for Ravon through the testimony of Detective Hardy. Additionally, it does not go unnoticed that detective Teresa Mogg also vouched for the truthful nature of Ashley Riley's testimony. This was done in an effort to dispel the defense's theory of the case.

The United States Supreme Court has held that an out of court statement may not be admitted against the defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

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[12] There was no objection to his testimony. Therefore, this Court can consider the issue pursuant to the plain error standard. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94–95 (2003).

The United States Supreme Court reasoned that the only indicia of reliability sufficient to satisfy the United States's Constitution confrontation clause was "actual confrontation". Crawford v. Washington, 541 U.S. 36, 124 S.C. 1354, 158 L. Ed. 2d. 177 (2004). Pursuant to Crawford, hearsay evidence is to be separated into that which is testimonial and that which is not testimonial. If the statement is testimonial, the statement should be excluded at trial unless: 1) the declarant is available for cross-examination at trial, or 2) if the declarant is unavailable, the statement was previously subjected to cross-examination. Id.

The United States Supreme Court has held that "confrontation means more than being allowed to confront the witnesses physically. Our cases construing the confrontation clause hold primary interest secured by its right of cross-examination. Davis v. Alaska, 415 U.S. 308, 315, 39 L. Ed. 2d. 347, 94 S.C. 1105 (1974) (quoting, Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)).

In this case, Detective Hardy's testimony clearly amounted to testimonial hearsay. The State elicited that Detective Hardy interviewed Ravon in connection with the investigation.

The error amounted to plain error and should result in a reversal of Mr. Belcher's convictions.

VIII. MR. BELCHER WAS DENIED A FAIR TRIAL WHEN THE DISTRICT COURT PRECLUDED A FELONY CONVICTION OF RAVON HARRIS TO BE ADMITTED OVER THE DEFENSE REQUEST IN VIOLATION OF THE UNITED STATES CONSTITUTION.

The defense was precluded from admitting a certified copy of Ravon Harris' felony conviction for home invasion (ROA VOL. 24, P. 5460-5469). The defense

presented the document in order to effectuate their theory of defense (that the police had failed to adequately investigate Ravon Harris) (ROA VOL. 24, P. 5460-5461).

The conviction was admissible not only under the defendant's theory of defense but also because the State had introduced testimonial hearsay that Ravon Harris was at home at the time of the crime.

The Ninth Circuit has traditionally applied a balancing test to determine whether the exclusion of evidence in the trial court violated due process rights weighing the importance of the evidence against the State's interest in exclusion. See Miller v. Stagner, 757 Fd. 2d 998, 994 (9th Cir. 1995) (amended on other grounds, 768 Fd. 2d. 1090 (9th Cir. 1985)). "The right to present a defense is fundamental" in constitutional jurisprudence. Perry v. Rushen, 713 Fd. 2d. 1447, 1450-51 (9th Cir. 1983).

The Ninth Circuit has invoked a five part balancing test which includes: 1) the probative value of the excluded evidence on the central issue; 2) its reliability; 3) whether it is capable of evaluation by the prior fact; 4) whether it is the sole evidence on the issue or merely cumulative, and 5) whether it constitutes a major part of the attempted defense. Miller, 757 Fd. 2d at 994.

Recently, the United States Supreme Court addressed the right of a defendant to present a theory of defense. See Nevada v. Jackson, 569 U.S. 505, 133 S. Ct 1990, 186 L. Ed. 2d 62 (2013). In Jackson, the Unites States Supreme Court noted that the trial court gave the defense wide latitude in cross-examination but refused to admit reports. Id. The United States Supreme Court determined that the proffered evidence had little impeachment value because it merely showed that the victim's report could not be corroborated and the defendant had been given

wide latitude to cross-examined the ex-girlfriend.

Mr. Belcher was not given an opportunity to introduce Ravon Harris' certified copy of his home invasion Judgment of Conviction. Yet, the State was even permitted to introduce the testimonial hearsay of Ravon Harris' alibi. When it came time to the defense theory, the State successfully stifled the attempt to introduce the conviction.

NRS 51.069(1) provides, when a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked or supported by any evidence which would be admissible for the purpose if the declarant had testified as a witness. Detective Hardy testified that he interviewed Ravon Harris and learned he was at home at the time of the incident. Therefore, Mr. Belcher should have been permitted to introduce the felony conviction as part of his theory of defense. Mr. Belcher also had a right to introduce the conviction in response to the admission of Ravon Harris' hearsay statement pursuant to NRS 50.095 (impeachment with felony conviction). Mr. Belcher is entitled to a reversal of his convictions.

IX. MR. BELCHER IS ENTITLED TO A NEW TRIAL AS HE WAS DENIED HIS RIGHT TO CONFLICT FREE COUNSEL DURING THE PRELIMINARY HEARING.

The defense filed an extensive motion to dismiss reference this issue (ROA Vol. 4 p. 764). At the preliminary hearing, held on January 21, 2011, Mr. Belcher was represented by attorneys Mr. Robert Langford and Mr. Lance Maningo (ROA Vol. 5 p. 1014). During the preliminary hearing, counsel elected not to cross-examine Nicholas Brabham who was testifying from a hospital bed at UMC (ROA Vol. 5 p. 1014).

On December 12, 2011, at a hearing in the district court, Mr. Maningo

informed the court of an actual conflict of interest. Mr. Maningo explained that while reviewing the photographs in the case, he observed a photograph of a wallet which presumably belonged to Nicholas Brabham, with his business card inside of it (ROA Vol. 15 p. 1015). In fact, Mr. Maningo's law firm had represented Mr. Brabham. Mr. Maningo was removed from the case at the request of the state (ROA Vol. 15 p. 1015).

In the motion to dismiss, Mr. Belcher complained that Mr. Maningo had not examined Mr. Brabham and had an actual conflict of interest because of his previous representation of Mr. Brabham. The district court found that Mr. Maningo's decision not to cross-examine Mr. Brabham, was a reasonable strategic strategy (ROA Vol. 5 p. 1016).

In Patterson v. Nevada, 129 Nev. Adv. Rep. 17, 298 P. 3d 433, 435 (2013), this Court explained, "the preliminary hearing is a critical stage of the criminal proceedings at which the defendant's Sixth Amendment right attaches." In Patterson, this Court recognized the Sixth Amendment right of counsel of choice at the preliminary hearing stage. The United States Supreme Court has also recognized that the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial or a preliminary hearing. See Gideon v Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

In Holloway v. Arkansas, 435 U.S. 475, 484, 98 S. Ct. 1173, 55 l. Ed. 2d 426 (1978), the United States Supreme Court stated that, "joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." The Court further explained, "accordingly, when a defendant is deprived of the presence and assistance of his attorney either throughout the prosecution or during a critical stage, at least, the prosecution of a capital offense,

reversal is automatic." Id. at 489-90 (internal citations omitted).

Here, Mr. Belcher was deprived of effective, conflict free representation at the preliminary hearing. An attorney with a significant conflict failed to cross-examine one of the most important witnesses in the case. This can hardly be construed as a meaningful preliminary hearing. Moreover, even the state recognized that an actual conflict of interest existed. It was incumbent upon the court to grant Mr. Belcher's motion and at a minimum, remand the case for a meaningful preliminary hearing. Based on the foregoing arguments, Mr. Belcher respectfully requests that his convictions be reversed.

X. MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UPON THE FAILURE TO PROPERLY PRESERVE POTENTIALLY EXCULPATORY EVIDENCE IN VIOLATION OF THE UNITED STATES CONSTITUTION.

The defense filed a motion to dismiss based on the failure of the police to take possession of William Postorino's cellular phone (ROA Vol. 13 P. 2916). The court entertained oral argument on the issue and denied the motion (ROA Vol. 14 p. 3038). The issue surrounds the failure of the police to properly preserve the cell phone. Mr. Belcher contended that the text message chain, which would have been contained in the cell phone's data, would have proven that the drug debt was settled and that there was no motive to then attack the victims (ROA Vol. 14 p. 3016). The defense argued that Mr. Postorino believed that the drug debt had been extinguished and this was based upon the text message chain (ROA Vol. 14 p. 3022). The defense bitterly complained that the State was being permitted to select portions of the testimony which was favorable to their theory and leaving the defense without a complete record of the entire story which would have been contained within the cell phone data (ROA Vol. 14 p. 3022).

The defense requested the court dismiss the charges or alternatively, preclude the state from introducing only portions of the text messages which established their theory (ROA Vol. 14 p. 3022).[13]

In Rodriguez v. State, 128 Nev. 155, 273 P.3d 845 (2012), this Court held that text messages are subject to the same authentication requirements under NRS 52.015(1) as other documents, including proof of authorship. Recognizing the importance of authenticity, this Court must also be concerned about the completeness of a story being presented without the preservation of all text messages. In determining whether circumstantial evidence exists to identify the text at issue with the sender, "the proponent of the evidence must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship as condition precedent to its admission." Id. at 849. Citing NRS 50.015(1).

In Daniels v. State, 114 Nev. 261, 266, 956 P.2d 111, 114 (1998), this Court reaffirmed the principal that the State's failure to preserve potentially exculpatory evidence may result in the dismissal of the charge if the defendant can show bad faith or connivance on the part of the government or "that he was prejudiced by the loss of the evidence." Id. This Court adopted a two part test to analyze the failure to preserve evidence questions. The two part test was derived from Ware v. New Mexico, 118 NM 319, 881 P.2d 679 (1994).

The first part requires the defense to show there is a reasonable probability

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[13] Curiously, in the district court the State acknowledged that they had made a misstatement when they claimed that Mr. Postorino's phone was impounded and later stated that it was not impounded (ROA Vol. 14 p. 2994-2995).

that, had the evidence been available to the defense, the result of the proceedings would have been different. If the evidence was material, than the second part involves a court determination as to whether the failure to gather the evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case. Daniels, 114 Nev. at 266. This Court also noted in Daniels that in the case of bad faith, the trial court may order the evidence suppressed. Id. at n.2.

Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), prosecutors are required to disclose material exculpatory evidence in the government's possession. A Brady violation occurs when: 1) evidence is favorable to the accused because it is either exculpatory or impeaching; 2) evidence was suppressed by the prosecution, either willfully or inadvertently; and 3) prejudice ensued. See also, United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), Kyles v. Whitley, 514 U.S. 419, 436, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 286 (1999).

Based upon the extreme importance of the unpreserved evidence, the court should have dismissed the charge. Alternatively, Mr. Belcher requested that the incomplete text message chain should be excluded from the trial. The district court did neither. Mr. Belcher is entitled to a reversal of his convictions based upon the failure to preserve this evidence.

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XI. THE DISTRICT COURT ERRED IN DENYING MR. BELCHER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS RESIDENCE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION.

On May 5, 2015, Mr. Belcher filed a Motion to Suppress Evidence. The Motion requested that evidence seized from a backpack be suppressed as well as evidence seized from the apartment. The district court granted the Motion as it pertained to the backpack (ROA Vol. 12 p. 2548). The district court denied the motion to suppress reference the search of Apartment 218 (ROA Vol. 12 p. 2548).

This Court has stressed the protection afforded the privacy of ones home in Howe v. State, 112 Nev. 458, 916 P.2d 153 (1996). In Howe, this Court provided,

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimension of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "the right of people to be secure in their...houses...shall not be violated." The language unequivocally establishes the proposition that "at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 683, 5 L. Ed. 2d 734 (1961).

In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant. Howe, Id. Citing Payton v. New York, 445 U.S. 573, 589–90, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

In the order denying the Motion, the district court appears to agree that

"...there may have been an initial entry by police before the warrant was obtained..." (ROA Vol. 12 p. 2550). The Court concluded that if there was initial entry into the home before the warrant, that nothing was taken of importance prior to the warrant being issued (ROA Vol. 12 p. 2550-2551). The Order also acknowledges the defendant's testimony at the evidentiary hearing. Mr. Belcher testified that he left his apartment on December 6, 2010, he was approached by police. Mr. Belcher testified that after being detained he observed police enter into his apartment (ROA Vol. 12 p. 2550). Based upon Mr. Belcher's observation and the district court's order acknowledging that entry was made into the apartment prior to the issuance of the warrant, the search was unreasonable pursuant to the Fourth and Fourteenth Amendments to the United States Constitution.

XII. MR. BELCHER IS ENTITLED TO A NEW TRIAL BASED UP ON THE DISTRICT COURT'S REFUSAL TO SUPPRESS AN IMPERMISSIBLE SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION PROCEDURE.

On December 6, 2010 Nicholas Brabaham described the entry of two intruders at approximately at 2:43am at 9758 Villa Lorena. Nicholas was still recovering from his wounds when he was interviewed at UMC trauma on January 12, 2011, five weeks after the incident. During this interview Nicholas identified Mr. Belcher as one of the assailants.

During the interview, Nicholas told the police that he had entered the house at approximately at 2:30am, and at the top of the stairs he noticed the blonde hair of the person he later identified as Mr. Belcher. The police showed Nicholas a

photographic line up which included Mr. Belcher, a photograph which had been widely disseminated through the media beginning in December of 2011.

Of particular concern was Nicholas's original statement to the police that the assailants were wearing ski masks.

In Neil v. Biggers, 409 U.S. 188, 193, 93 S. Ct. 801, 35 L. Ed. 2d 16 (1973), the United States Supreme Court considered Mr. Biggers' claim regarding a due process violation of the identification of a rape victim. In Biggers, the rape victim, on several occasions over a seventh month period, viewed suspects in her home or at the police station, some in lineups and others in show ups. She identified none of the suspects. Id. at 195. Later, police walked Mr. Biggers by the victim and he was ordered to state "shut up or I'll kill you" Id. The victim than stated she had no doubt about her identification. Id.

The United States Supreme Court has considered the scope of due process protection against the admission of evidence derived from suggestive identification procedures. Initially, in Stovall v. Denno, 388 U.S. 293, 301–02, 87 Sup. Ct. 18, L. Ed. 2d 1199 (1967), the United States Supreme Court held that a defendant could claim "the confrontation conducted...was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. Id. The United States Supreme Court held in Stovall that the

court must look at "the totality of the circumstances". Id.

Subsequently, the United States Supreme Court considered in court identifications arguably stemming from previous exposure to suggestive photographic array. In that scenario, the Court restated the test: "we hold that each case must be considered on it's own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic lineup procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification". Simmons v. United States, 390 U.S. 377, 384, 88 Sup. Ct. 967, 19 L. Ed. 2d 1247 (1968).

Thereafter, in Foster v. California, 394 U.S. 440, 442, 89 Sup. Ct. 1127, 22 L. Ed. 2d 402 (1969), the United States Supreme Court recognized that a witness had failed to identify the defendant the first time he confronted him, despite a suggestive lineup. The police then arranged a show up at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time, a lineup, the witness was able to muster a definite identification. The United States Supreme Court held that all of the identifications were inadmissible, observing that the identifications were "all but inevitable, under the circumstances" Id. at 443.

In Manson v. Brathwaite, 432 US 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), the United States Supreme Court held that once an identification procedure is determine to be unnecessarily suggestive, a reliability analysis based up on five factors should be employed. The factors include 1) the opportunity to the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the prior description of the criminal; 4) the level of certainly demonstrate the confrontation; and 5) the time between the crime and the confrontation. This five factors can also be found at Biggers, 49 US at 199-200.

A) The Opportunity to View

First, Nicholas described being outside of the home and then entering the home and seeing the assailants. According to Riley, this was false as she and Nicholas were upstairs in his bed asleep. Nicholas then left the room to see what the disturbance was. However, Nicholas originally told authorities that the assailants were wearing ski masks.[14]

B) The Degree of Attention

At the time of the shooting, Nicholas was under the influence of control substances and alcohol. Additionally, Nicholas told police incompletely

[14] The Motion to Suppress the identification is located at ROA Vol. 2 p. 368 and the decision denying the Motion is located at ROA Vol. 3 p. 515.

inconsistency story compared to Riley.

C) The Accuracy of the Description

Again, Nicholas previously informed police that the two assailants were wearing ski masks and that he came in the house and discovered them. However, Nicholas then informed the police at UMC that Mr. Belcher was the assailant without any explanation as to how the police and Nicholas came to that conclusion given Nicholas' originally story that the assailants were wearing ski masks.

D) The Level of Certainty

Nicholas' complete reversal of his story weighs against any level of certainty.

E) The Time Between the Crime and the Confrontation.

When Nicholas entered the closet with Ms. Riley, he did not respond to her question "who did this"? It was not until approximately five weeks later that he identifies Mr. Belcher. The photograph used in lineup was displayed through out the media. This impermissibly suggestive identification procedure is unconstitutional.

Therefore, Mr. Belcher is entitled to reversal for the failure of the district court to suppress this identification.

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XIII. THE DISTRICT COURT ERRED IN DENYING MR. BELCHER'S MOTION TO SUPPRESS UNNECESSARILY SUGGESTIVE IDENTIFICATION OF THE DEFENDANT BY OFFICER ANTHONY CAVARICCI IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Officer Anthony Cavaricci stopped an individual later identified as Norman Belcher on December 6 at 3:21 a.m. (ROA Vol. 12 p. 2684). Officer Cavaricci could not recall whether or not he observed a sixty inch television inside the vehicle (ROA Vol. 12 p. 2690).

Approximately twenty hours later, Officer Cavaricci arrived at homicide in order to determine whether Mr. Belcher, who was in custody, was the individual that he had stopped (ROA Vol. 12 p. 2619-2630; ROA Vol. 10 p. 2104). When the officer entered the homicide interview room, Mr. Belcher held his hands over his face. When Mr. Belcher let his hands down, Officer Cavaricci identified him as the individual who he had stopped earlier in the morning (ROA Vol. 12 p. 2619-2630).[15]

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[15] Curiously, in the State's Opposition filed in the district court, the State makes a startling concession. The State explains, "this is not a situation where police let days go by before they conducted an investigation. As they had defendant in custody, heard his story, they immediately went and got Officer Cavaricci (ROA Vol. 10 p. 2274).

The practice of showing a single suspect to persons for the purpose of identification and not as part of a lineup has been widely condemned and viewed by courts across the country with deep suspicion. Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). This Court has held that showups are "inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender." Jones v. State, 95 Nev. 613, 617, 600 P.2d 247 (1979).

In certain instances where witnesses participated in pretrial identification procedure that was extremely unreliable, courts have concluded the witnesses memory may be so contaminated that a later in court identification of the same suspect should be excluded. United States v. Bagley, 772 F. 2d 482, 492 (9th Cir. 1985). The United States Constitution prohibits suggestive identification whether they occurred in court prior to trial or during the criminal trial itself when a witness identifies a defendant from the witness stand. Manson v. Brathwaite, 432 U.S. 98, 104–07, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Mr. Belcher would contend that contacting a patrol officer and having him enter a room, being asked to identify an individual that homicide obviously believes is the individual involved, and the individual being told to lift his head is unconstitutionally suggestive.

XIV. DURING THE TRIAL PHASE, THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 12, 29, 31 AND 55 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.[16]

Although trial counsel did not object, NRS 178.602 provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Whether a jury instruction is an accurate statement of the law is a legal question subject to de novo review. Berry v. State, 124 Nev. 265, 269, 212 P.3d 1085, 1088 (2009). When a criminal defendant fails to object to a district court's action, this Court reviews the record for plain error only. Id.

The jury was given the following instructions:

A. THE "IMPLIED MALICE" INSTRUCTION

INSTRUCTION NO. 29

> Express malice is that deliberate intention unlawfully to take away the life of a human, which is manifested by external circumstances capable of proof.

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[16] The undersigned has raised this issue to this Court numerous times and acknowledges that this Court has always denied the issue. These issues are presented here because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." (ROA Vol. 26 p. 5876).

The terms "abandoned or malignant heart" do not convey anything in modern language. See Victor v. Nebraska, 511 U.S. 1, 11, 13-14, 114 S. Ct. 1239, 127 l. Ed. 2d 583 (1994) (term "moral evidence" not "mainstay or the modern lexicon"); Id. at 23 (Kennedy, J., concurring) ("what once might have made sense to jurors has long since become archaic"). The words "abandoned or malignant heart" are devoid of rational content and are merely pejorative, and they allow the jurors to find malice simply on the ground that they believe the defendant is a "bad man." In People v. Phillips, 64 Cal.2d 574, 414 P.2d 353, 363–64 (1966), the California Supreme Court analyzed the element of implied malice, and concluded that an instruction would adequately define implied malice if it made clear that "the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." 414 P.2d at 363: Nevada law is basically consistent with this definition. See Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000):

> "Nevada statutes and this court have apparently never employed the phrase 'depraved heart,' but that phrase and 'abandoned and malignant heart' both refer to the same 'essential concept ... one of extreme recklessness regarding homicidal risk.' Model Penal Code §

> 210.2 cmt. 1 at 15; see also Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970) (malice as applied to murder includes 'general malignant recklessness of others' lives and safety or disregard of social duty')."

The California Supreme Court disapproved the use of the language referring to an "abandoned or malignant heart" as superfluous and misleading:

> Such an instruction renders unnecessary and undesirable an instruction in terms of 'abandoned and malignant heart.' The instruction phrased in the latter terms adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation.
>
> The charge in the terms of the 'abandoned and malignant heart' could lead the jury to equate the malignant heart with an evil disposition or a despicable character; the jury, then, in a close case, may convict because it believes the defendant a 'bad man.' We should not turn the focus of the jury's task from close analysis of the facts to loose evaluation of defendant's character. The presence of the metaphysical language in the statute does not compel its incorporation in instructions if to do so would create superfluity and possible confusion.
>
> The instruction in terms of 'abandoned and malignant heart' contains a further vice. It may encourage the jury to apply an objective rather than subjective standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter.414 at 363-364 (footnotes omitted).

Although the court did not find the use of the language to be error (as it reversed the conviction on other grounds), the passage of time since Phillips has certainly not increased the likelihood that the term "abandoned or malignant heart"

conveys anything rational to a juror. No reasonable juror today would understand that phrase as requiring that the defendant commit the homicidal act with conscious disregard of the likelihood that death would result. The fact that no other state, as far as Mr. Belcher can determine, uses this language in a jury instruction also militates in favor of finding that it does not satisfy due process standards. See Schad v. Arizona, 501 U.S. 624, 642, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).

Wherefore it is respectfully requested that this Court find that the "abandoned and malignant heart" implied malice is unconstitutionally vague and ambiguous and denied Mr. Belcher of due process of law and based thereon reverse his conviction. Likewise the catch phrase of "heart fatally bent on mischief" has no meaning in the definition of malice aforethought. This Court should strike down this instruction and craft language that has meaning and is understandable to the average person.

B. THE "PREMEDITATION AND DELIBERATION" INSTRUCTION

INSTRUCTION NO. 31

The jury was given the following instruction on premeditation and deliberation:

> Premeditation is a design, a determination to kill distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may

> be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constitution the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated (ROA Vol. 26 p. 5878).

By approving the concept of "instantaneous" premeditation and deliberation, the giving of this instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis for distinguishing its verdict from one of second degree murder, and without proof beyond a reasonable doubt of "premeditation and deliberation," which are statutory elements of first degree murder. The instruction violates the constitutional guarantees to due process and equal protection and results in death sentences that violate the constitutional guarantees to due process and equal protection and results in death sentences that violate the constitution's guarantee of a reliable sentence.

The vague "premeditation and deliberation" instruction given during Mr. Belcher's trial, which does not require and sort of premeditation at all, violated the constitutional guarantee of due process of law because it was so bereft of meaning as to the definition of two elements of the statutory offence of first degree murder as to allow virtually unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess

culpability and made defense against the charges virtually impossible, due to the inability to discern what the State needs to prove to establish the elements of the charged offense. By relieving the State of it's burden of proof as to an essential element of the charged offense, this unconstitutional "premeditation and deliberation" instruction was per se prejudicial, and no showing of specific prejudice is required. Nevertheless, substantial prejudice occurred as a result of the giving of this instruction. The unconstitutional "premeditation and deliberation" instruction substantially and injuriously affected the process to such an extent as to render Mr. Belcher's conviction fundamentally unfair and unconstitutional. The State cannot show, beyond a reasonable doubt, that this instruction did not affect the conviction.

C. THE REASONABLE DOUBT INSTRUCTION

INSTRUCTION NO. 12

The trial court's reasonable doubt instruction given improperly minimized the State's burden of proof.[17] The jury was given the following instruction on

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[17] Counsel acknowledges this Court consistently affirmed the use of this instruction, most recently in Jeremias v. State, 134 Nev. Adv. Op. 8 (Mar. 1, 2018). This issue is presented because this Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review

reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation (ROA Vol. 26 p. 5859).

The instruction given to the jury minimized the State's burden of proof by including terms "It is not mere possible doubt, but is such a doubt *as would govern or control a person in the more weighty affairs of life*" and "Doubt, to be reasonable, must be *actual*, not mere possibility or speculation." This instruction inflates the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. See Victor v. Nebraska, 511 U.S. 1, 24, 114 S. Ct. 1239, 127 L. Ed. 2d. 583 (1994) (Ginsburg, J., concurring in part); Cage v. Louisiana, 498 U.S.39, 41, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990); Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 l. Ed. 2d 385 (1991). Mr. Belcher recognizes that this Court has found this instruction to be permissible. See e.g. Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998); Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998).

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D. EQUAL AND EXACT JUSTICE

The trial court's "equal and exact justice" instruction improperly minimized the State's burden of proof. The court provided the following instruction to the jury:

INSTRUCTION NO. 55

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law, but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada (ROA Vol. 26 p. 5902).

By informing the jury that it must provide equal and exact justice between the defendant and the State, this instruction created a reasonable likihood that the jury would not apply the presumption of innocence in favor of Mr. Belcher and would thereby convict and sentence based on an lesser standard of proof than the constitution requires. Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Based on the foregoing, Mr. Belcher would respectfully request this Court reverse his convictions.

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XV. DURING THE PENALTY PHASE, THE DISTRICT COURT ERRED IN GIVING INSTRUCTION NUMBERS 5 AND 12 IN VIOLATION OF THE SIXTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The district court erred in giving the following jury instructions to the jury at the conclusion of the penalty phase. Although trial counsel did not object, NRS 178.602 provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court (ROA Vol. 29 p. 6139, 6186).

Whether a jury instruction is an accurate statement of the law is a legal question subject to de novo review. Berry, 125 Nev. 265, 269, 212 P.3d 1085, 1088. When a criminal defendant fails to object to a district court's action, this Court reviews the record for plain error only. Id.

A. INSTRUCTION CONCERNING HEARSAY EVIDENCE

The district court gave the following instruction:

INSTRUCTION NO. 5

> In the penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, and any other evidence that bears on the Defendant's character.
>
> Hearsay is admissible in a penalty hearing. (ROA Vol. 27 p. 6006).

The instruction misstates the scope and role of mitigating evidence. The jury should be instructed as follows: "In a penalty hearing, evidence may be

presented concerning aggravating and mitigating circumstances, and any other evidence that bears on the Defendant's character and background."

Contrary to the instruction, mitigating evidence is not limited to "circumstances relative to the offense," but includes evidence about the defendant's background and character. Watson v. State, 130 Nev. Adv. Rep. 76, 335 P.3d 157 (2014); Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d. 256 (1986). Likewise, jurors are required to consider mitigating evidence even if it does not relate specifically to the defendant's culpability for the crime he committed. Skipper v. South Carolina, 476 U.S. 1, 4, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). Jurors may not dismiss mitigating circumstances on the basis that they do not excuse the crime. Eddings v. Oklahoma, 455 U.S. 104, 110, 113, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). The instruction misstates the role of mitigation by limiting it to circumstances "relative to the offense" and it must therefore be rejected.

Mr. Belcher also submits that hearsay should not be admissible during the penalty phase of a capital trial. Introduction of some types of hearsay evidence violates a defendant's rights of cross-examination and confrontation, as guaranteed by the federal constitution.

In Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337

(1949), the United States Supreme Court held that the introduction of hearsay evidence in a sentencing hearing did not violate the constitution. The soundness of the Williams ruling, however, is unclear after the Supreme Court's opinion in Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), wherein the Court clarified that where testimonial evidence is at issue in a criminal trial, the Sixth Amendment requires "unavailability and a prior opportunity for cross-examination" of the witness proffering the testimony. Justice Scalia, who authored the majority opinion in Crawford, wrote that while the Confrontation Clause's "ultimate goal is to ensure reliability of evidence," the Clause requires more, and "admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." Id. at 61-62.

Since Crawford, several federal courts have concluded that the constitutional right of confrontation applies at a penalty trial. See United States v. Mills, 446 F. Supp. 2d 1115 (C.D. Cal. 2006) (confrontation rights apply at both phases of a penalty trial); United States v. Johnson, 378 F. Supp. 2d 1051, 1060-62 (N.D. Iowa 2005) (applying the right of confrontation at the eligibility phase of a capital penalty trial); United States v. Jordan, 357 F. Supp.2d 889, 902-03 (E.D. Va. 2005) (same). The dissenting opinion in Summers v. State, 122 Nev. 1326, 148 P.3d 778, 784-90 (2006), also recognized that the application of these

important constitutional principles should apply to a capital penalty trial. (Rose, C.J., dissenting in part, joined by Justices Maupin and Douglas).

Other courts recognize that Crawford applies to the eligibility phase of a capital penalty trial. See Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005); State v. Bell, 603 S.E.2d 93, 115-116 (N.C. 2004); United States v. Jordan, 357 F. Supp.2d 880 (E.D. Va. 2005); United States v. Johnson, 378 F. Supp.2d 1051, 1059-62 (N.D. Iowa 2005); State v. McGill, 140 P.3d 930 (Ariz. 2006). Some courts have found that the Confrontation Clause applies to both the eligibility and selection phases of a capital penalty trial. Proffitt v. Wainwright, 685 F.2d 1227, 1254-55 (11th Cir. 1982); United States v. Brown, 441 F.3d 1330, 1361 (11th Cir. 2006); Rodgers v. State, 948 So.2d 655, 663 (Fla. 2007). In Mills, supra, the court concluded that Supreme Court law requires that the Confrontation Clause apply to the entire penalty trials in capital cases. 446 F. Supp.2d 1115 (citing Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The Mills court recognized that "'[g]iven the gravity of the decision to be made at the penalty phase, the [government] is not relieved of the obligation to observe fundamental constitutional guarantees.'" Id. at 1130 (quoting Estelle v. Smith, 451 U.S. 454, 463, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981)). A defendant's right to confront and cross-examine the witnesses against him is a central procedural

safeguard whose "very mission [is] to advance the accuracy of the truth-determining process in criminal trials." Tennessee v. Street, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 425 (1985). It is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405, 85 S. Ct. 1065, 13 L. Ed. 923 (1965).

Mr. Belcher recognizes that this Court has held that Crawford and the Confrontation Clause do not apply at a capital penalty hearing. See Summers, 148 P.3d 778; Thomas v. State, 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006); Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006). Nevertheless, Mr. Belcher presents this issue here for the purpose of preserving this issue for federal review and to give this Court the opportunity to overrule Summers, Thomas and Johnson as they are inconsistent with federal and state constitutional principles of due process, right to confrontation, effective assistance of counsel, and a reliable sentence. See Mills, supra.

B. THE INSTRUCTION CONCERNING MITIGATING CIRCUMSTANCES

INSTRUCTION NO. 12

> Murder of the First Degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime. (ROA Vol. 27 p. 6013).

This instruction misstates the roll of mitigation. Mitigation does not serve as an excuse or justification for first degree murder. Rather, mitigation need not be directly connected to the offense. Mitigation applies to a death sentence, not the underlying offense. Hence, the proper instruction should be:

> A death sentence may be mitigated by any of the following circumstances:

See Watson v. State, 130 Nev. Adv. Rep. 76, 335 P.3d 157 (2014); Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1986). Jurors are required to consider mitigating evidence even if it does not relate specifically to the defendant's culpability for the crime he committed. Skipper v. South Carolina, 476 U.S. 1, 4, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). Jurors may not dismiss mitigating circumstances on the basis that they do not excuse the crime. Eddings v. Oklahoma, 455 U.S. 104, 110, 113, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

Based on the foregoing, Mr. Belcher would respectfully request this Court reverse his convictions.

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XVI. THE DEATH PENALTY IS UNCONSTITUTIONAL.[18]

Mr. Belcher's 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.

The Eighth Amendment, and the Nevada State counterpart to that constitutional right, prohibit the inflict of "cruel and unusual punishment." U.S. Const. Amend. VIII. The "standard of extreme cruelty" remains stable over time; yet, "it's applicability must change as the basic mores of society change." Kennedy v. Louisiana, 554 U.S. 407, 419, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008). Therefore, the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). To gauge whether a punishment practice comports with the Constitution, courts must look to objective indicia of societal consensus. Atkins v. Virginia, 536 U.S. 304, 312, 122 S. Ct.

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[18] This argument was extensively litigated in the district court and the briefing can be found at ROA Vol. 11 p. 2307-2530; Vol 12 p. 2531-2535; ROA Vol. 12 p. 2557-2567; and ROA Vol. 12 p. 2578-2582.

2242, 153 L. Ed. 2d 335 (2002). After the court reviews the societal consensus in favor of or against a punishment, it independently "ask(s) whether there is reason to disagree with the judgment reached by the citizenry and its legislators. Id. at 36 U.S. 313.

"The Constitution contemplates that in the end [the court's] own judgment will be brought to the bear on the question of acceptability of the death penalty under the Eighth Amendment." Coker v. Georgia, 433 U.S. 584, 597, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977). This Court should recognize that under all three claims examined to support question of the acceptability of the death penalty under the Eighth amendment, and Article 1 Sec. 8 of the Constitution of the State of Nevada, the death penalty cannot be tolerated any longer as a constitutional means of punishment. The three claims for examination are; the consensus claim, the penological claim, and, the risk of wrongful executions claim.

The death penalty is an unusual punishment, no county in the free world still administers it as punishment, and with the states in our union continuing to abandon it (both formally and informally) there is strong support under this claim that there is growing consensus that the death penalty is cruel in practice and society is abandoning is support for its imposition. Connecticut v. Santiago. 318 Conn. 1, (No. 17413) (August 25, 2015) (See ROA VOL. 11, P. 2330-2423).

In Santiago, the Connecticut Supreme Court held, "Upon careful consideration of the Defendant's claims in light of governing constitutional principles and Connecticut's unique historical and legal landscape, we are persuaded that, following purpose." (ROA VOL. 11, P. 2332). The penological claims involves and assessment of whether the death penalty is a cruel punishment because it does not serve an additional penological purpose beyond that which can be accomplished through later punishment.

Locally and nationally, the number of executions that allow the death penalty continue to declined, and convicted capital felons in Nevada remain on death row for decades with an almost certainty that they will not be executed for many years to come, if ever. Nevada has executed only twelve inmates in twenty-eight years. Eleven of the twelve executions since capital punishment was reinstated by the Legislature in 1977 have been "volunteers" or inmates who have voluntarily given up their appeal. (ROA Vol. 11 p. 2311). For Nevada's approximately eighty death row inmates, Ely State Prison, Nevada's Death row, is a place where a person convicted of a capital crime is more likely to die of disease or suicide than by execution. (ROA Vol. 11 p. 2311).

The third generalized consideration that compels this Court to strike down the death penalty are wrongful execution claims. Simply put, the death penalty is a

cruel punishment because it is administer in a way that risks wrongful executions. In Justice Breyer's most recent comment on this specific matter in Gossip, he wrote: "The most damming problem in the inability to guarantee the factual guilt of people whom injuries send to death row. Despite the difficulty of investigating the circumstances of an execution for a crime that took pace long ago, research have found convincing evidence that, in the past three decades, innocent people have been executed." Gossip v. Gross, 576 U.S. __, 28-29, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting).

In examining societal views, courts seek to give to "the evolving standards of decency that mark the progress of maturing society." Kennedy v. Lousiana, 554 U.S. 407, 419, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008). It is respectfully suggested that the United States has evolved to place where the killing of its own citizens as punishment no longer masks the progress of decency achieved in 2016. No county in the European Union allows the death penalty.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson, 428 U.S. 280, 296, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6P.3d at 996; Arave, 507 U.S. at 474;

Zant, 462 U.S. at 877; 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 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). since 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 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 make the progress of a maturing society. "Trop v. Dulles, 356 U.S. 86, 101 (1958) have led in 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 (White, J., concurring); See Walton v. Arizona, 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. Belcher recognizes that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See Leonard, 117 Nev. at 83, 17 P.3d at 416 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 unconstitutional, requiring the vacation of Mr. Belcher's sentence.

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XVII. MR. BELCHER IS ENTITLED TO REVERSAL BASED UPON CUMULATIVE ERROR.

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, this Court provided, "[W]e have stated 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. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

Based on the foregoing, Mr. Belcher would respectfully request that this Court reverse his conviction based upon cumulative error.

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CONCLUSION

Therefore, Mr. Belcher respectfully requests that this Court grant this appeal thereby reversing his convictions and sentence of death.

DATED this 19th day of March, 2018.

Respectfully submitted:

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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 excluding the parts of the brief exempted by NRAP 32(7)(b), it does not contain more than 37,000 words, to wit, 20,965 words.

Finally, I hereby 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 19th day of March, 2018.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 19th day of March, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Maria Hernandez
An Employee of Christopher R. Oram, Esq.