IN THE SUPREME COURT OF THE STATE OF NEVADA

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GARY LAMAR CHAMBERS

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.Ct. No. 73446

D.C. No. C292987-1

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to Nev. Rev. Stat. § 177.015(3). Appellant, Gary Lamar Chambers, appeals from the denial of his Judgment of Conviction, which was entered on June 5, 2017. 4 Appellant's Appendix ("AA") 302-303. A timely Notice of Appeal was filed on July 2, 2017. 4 AA 304-306.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **THE DISTRICT COURT ERRED IN DENYING CHAMBERS MOTION IN LIMINE TO PRECLUDE THE STATE FROM ADMITTING HIS PRIOR FELONY CONVICTIONS IF HE TESTIFIED**

II. **THE DISTRICT COURT ERRED IN GRANTING THE STATE'S MOTION TO ALLOW CYNTHIA LACEY TO TESTIFY VIA AUDIOVISUAL TECHNOLOGY VIOLATING CHAMBERS' RIGHT TO CONFRONTATION**

III. **THE DISTRICT COURT ERRED IN GRANTING THE STATE'S MOTION TO READ INTO EVIDENCE THE PRELIMINARY HEARING TESTIMONY OF BRIDGETTE GRAHAM**

IV. **THE DISTRICT COURT ERRED IN DENYING CHAMBER'S MOTION FOR A MISTRIAL DUE TO STATEMENTS MADE BY THE STATE IN CLOSING ARGUMENT**

V. **THE DISTRICT COURT ERRED IN SENTENCING CHAMBERS AS A HABITUTAL CRIMINAL**

VI. **CUMULATIVE ERROR**

ROUTING STATEMENT

This is a direct appeal from a judgment of conviction of category A and B felonies. Therefore, pursuant to N.R.A.P. 17(b)(2)(A), this appeal presumptively is routed to the Supreme Court of Nevada.

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STATEMENT OF THE CASE

On October 10, 2013, GARY LAMAR CHAMBERS (hereinafter "Chambers") was charged via Information as follows : COUNT 1 – Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060); Count 2 – Murder with use of a Deadly Weapon (Category A Felony – NRS 200.101, 200.030, 193.165); COUNT 3 – Attempt Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165); COUNT 4 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 193.330, 200.010; 200.030, 193.165); COUNT 5 – Battery with Use of a Deadly Weapon (Category B Felony – NRS 200.481); and COUNT 6 – Possession of a Firearm by Ex-Felon (Category B Felony – NRS 202.360). 1 AA 1-4.

On January 26, 2016, Chambers filed a Motion in Limine to preclude the State from admitting Chambers prior convictions at trial if he were to testify. 2 AA 147-157. On March 2, 2016, the State filed an Opposition to Chambers Motion. 2 AA 158-165. On April 28, 2016, Chambers filed a Reply to the State's Opposition. 2 AA 166-169. On July 7, 2016, a hearing was held wherein the district court denied Chambers Motion in Limine. 4 AA 307-309

On February 21, 2017, at 9:51 A.M., the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal, a mere three (3) hours and nine (9) minutes prior to the start of Chambers trial. 2 AA 170-172.

Also on February 21, 2017, Chambers trial commenced in a bifurcated fashion with Count 6 (Possession of a Firearm by Ex-Felon) not being presented to the jury. 4 AA 329-340

On February 22, 2017, the State filed a Motion to Admit Preliminary Hearing Transcript of Bridgette Graham. 2 AA 173-175.

On February 24, 2017, the State filed a Motion to Use Audio Visual Testimony of Cynthia Lacey. 2 AA 176-191.

On March 1, 2017, the seventh day of trial, the jury returned a verdict as follows:

COUNT 1 – Not Guilty
COUNT 2 – Guilty of Second Degree Murder With Use of a Deadly Weapon
COUNT 3 – Not Guilty
COUNT 4 – Guilty of Attempt Murder with Use of a Deadly Weapon
COUNT 5 – Battery with Use of a Deadly Weapon

3 AA 268-270.

On this same day, Chamber entered into a Guilty Plea Agreement ("GPA") and pleaded guilty to **COUNT 6** – Possession of a Firearm by Ex-Felon. He received no benefit from this GPA. 3 AA 271-280.

On April 10, 2017, the State filed a Sentencing Memorandum. [1] 3 AA 281-289. On May 22, 2017, Chambers filed a Sentencing Memorandum. 3 AA 290-299; 4 AA 300-301.

On May 23, 2017 Chambers was sentenced under the violent habitual criminal statute (NRS § 207.012) with respect to COUNTS 2 and 4; and sentenced under the large habitual criminal statute (NRS § 207.010) with respect to Counts 5 and 6. The district court further sentenced Chambers as to COUNT 2, to a maximum term of LIFE without the possibility of parole in the Nevada Department of Corrections (NDC); as to COUNT 4, to a maximum term of LIFE without the possibility of parole in the NDC, to run concurrent with COUNT 2; as to COUNT 5, to a maximum term of LIFE without the possibility of parole in the NDC, concurrent with COUNT 2; as to COUNT 6, to a maximum term of LIFE without the possibility of parole in the NDC, concurrent with COUNT 2; with zero (0) credit for time served. 4 AA 302-303; 310-328.

The Judgment of Conviction was filed on June 5, 2017. 4 AA 302-303.

On July 2, 2017 Chambers filed a timely Notice of Appeal. 4 AA 304-306.

The instant Opening Brief follows.

[1] The exhibits to the State's Sentencing Memorandum are not included in the Appellant's Appendix because they consist of numerous letters from the victim's family and friends. These letters are not relevant to any argument Chambers raises on appeal in the instant Opening Brief.

STATEMENT OF FACTS

The alleged victims in this case, Lisa Papoutsis ("Papoutsis") and Gary Bly ("Bly") were both drug dealers and drug users according to neighbors and evidence found in their trailer. 7 AA 688; 8 AA 714-15; 9 AA 835; 11 AA 1020. Both were living inside a trailer that flagrantly acknowledged that drugs could be purchased there. 3 AA 296-298. Indeed, the State of Nevada conclusively found that alleged victim Lisa Papoutsis was not an actual "victim" and denied her financial assistance under the State's Victims of Crime Program. 4 AA 300.

The evidence presented at trial showed that in July of 2013, Chambers was abusing methamphetamines. 3 AA 143. He purchased drugs at Papoutsis' and Bly's trailer on several prior occasions. 3 AA 143. On July 9, 2013 day of the shooting, Chambers drove over to the trailer and walked in the front door. 4, 11-12. **He was there to purchase more meth. He took his wallet out to pay for the drugs, but a heated argument ensued between Chambers and Papoutsis over the amount to be paid. Bly backed up Lisa and pulled out a gun to challenge Chambers. A struggle occurred over the gun and both Papoutsis and Bly were shot.** [2] 3 AA 290-300; 3 AA 301; 4 AA 310-328. Unfortunately, Mr. Bly died from his injuries. Scared and shocked, Chambers fled the scene, leaving his wallet behind inside the trailer. Afterwards, medical testing showed both Papoutsis had

[2] This boldfaced section was only presented at sentencing through Chambers' statement and through the sentencing memorandum filed by defense counsel.

large amounts of amphetamines, opiates and benzodiazepines. 11 AA 1089-90. Additionally, Bly was found to have large amounts of meth, amphetamine, and ephedrine and other illegal substances in their systems. 11 AA 1083-84.

At trial, Papoutsis testified that that morning, she received a call from Chambers aka Money asking if he could stop by. 8 AA 757-58. Papoutsis identified Chambers in the court room. 8 AA 757. According to Papoutsis, Chambers came to her house and asked her if he knew why he was there. 8 AA 760. She noticed he had car keys, a wallet, and a gun in his hands when he got there. Id. She noticed the gun was in a holster. Id.

Papoutsis testified that Chambers said something to her that gave her the impression that Chambers was going to rob her so she called for Bly. 8 AA 761. When Bly came into the room, he confronted Chambers. 8 AA 762-63. Papoutsis claimed she did not see Bly touch Chambers. 8 AA 763. She further claimed that neither she nor Bly had any weapons. 8 AA 764. After Bly was shot, she reached for her phone that was on the coffee table and saw Chambers' gun so she swatted it away, which is when it went off. 8 AA 764-65. The bullet went through her hand. 8 AA 766. Despite her previously testimony that Boy did not touch Chambers, she believes the holster came off when Bly and Chambers confronted each other. 8 AA 766.

Papoutsis was taken to UMC where she was kept for three days. 8 AA 768. While there, she gave a taped statement. 8 AA 769. Papoutsis told detectives that she believed Chambers was trying to rob her before and after shooting Bly. 8 AA 778. She also told detectives that Chambers removed the gun from a holster when Bly entered the room. 8 AA 779-80.

On cross, it was made clear that Papoutsis was not truthful with the police, at the preliminary hearing and at trial because her testimony was not consistent. With regard to her relationship with Chambers, at first she told detectives that she didn't know why Chambers came over, but later told them that Chambers came over because he knew Bly and Bly's wife Angel. 8 AA 782. She then changed her testimony and said she didn't say that. 8 AA 781. According to Detective Christopher Bunting ("Bunting"), she never once indicated to him that Chambers had gone over to see Bly. 9 AA 869.

Papoutsis claimed she didn't know Chambers very well, but did not ask him why he was coming over when he called. 8 AA 783. She admits she told detectives that he had been to her trailer before to see a woman named Kristie. 8 AA 784-85. Then at trial she said that she did not tell the detective truth; she does not remember him meeting Kristie at his house. 8 AA 785. In short, Papoutsis did not want the jury to know that Chambers was in fact going to her house to buy drugs from her and that she is a drug dealer but could not manage to keep her lie straight.

During the interview, the detective told Papoutsis that he felt she was leaving something out. 8 AA 786. When asked what the connection between her and Chambers was, she told the detective that Chambers was a drug dealer. 8 AA 786-77. Papoutsis claimed she was heavily medicated at the time she gave the interview. 8 AA 788. However, the detective, Bunting testified that Papoutsis appeared competent during the interview and did not get the impression that she was unable to answer questions. 9 AA 972.

Papoutsis said she never sold meth to Chambers. 8 AA 798. She also claimed that she was under the influence of painkillers and stress when she testified at the preliminary hearing. 8 AA 790. She did not believe her interview with the detective should be given weight because she was heavily medicated. 8 AA 790-91. Papoutsis admitted to lying under oath at the preliminary hearing, but then said she did not lie, she was "confused and tripped up by the question". 8 AA 792. She claimed that she never sold drugs to Chambers because she is not a drug dealer. 8 AA 792. She stated she did not sell Chambers drugs, Bly did. 8 AA793.

She was then questioned regarding "house rules" posted on a sign regarding drug sales although she denied creating the sign or writing the rules. 8 AA 794-796.

Papoutsis testified at the preliminary hearing that there was no meth or illegal drugs in her house on July 9, 2013. . 8 AA 798. She claimed the little plastic baggie on the table did not have meth residue in it. 8 AA 800.

After being released from UMC, Papoutsis claimed she went home and found Chambers' wallet sitting on the coffee table. 9 AA 803-804. Rather than calling the police, she called Daniel Plumlee to come pick it up. 9 AA 804. However, in the pictures taken at the crime scene, the wallet is not on the table. 9 AA 805. Also, when Crime Scene Investigator, Amy Nemcik ("Mencik") searched the trailer, she did not find a wallet or any identification for Chambers. 8 AA 708-09. Finally, the officer first on the scene, Brett Brosnahan ("Brosnahan") testified that when he questioned Papoutsis, she mentioned nothing about Chambers leaving his wallet. 9 AA 859.

Chambers did not take anything from the trailer when he left—not any money or belongings. 9 AA 807-808. Despite Papoutsis' story about how Chambers came to her trailer and tried to rob her, she said Chambers ultimately did not rob her. 9 AA 809. In short, Papoutsis' testimony, the State's only direct evidence, was inconsistent, contradictory, and full of lies.

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ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING CHAMBERS MOTION IN LIMINE TO PRECLUDE THE STATE FROM ADMITTING HIS PRIOR FELONY CONVICTIONS IF HE TESTIFIED

Chambers was convicted Murder with Use of a Deadly Weapon, Attempt Murder with Use of a Deadly Weapon, Battery with Use of a Deadly Weapon, and Possession of Firearm by Ex-Felon. The charges revolve around a single incident that occurred inside the trailer house of Papoutsis and Bly on July 9, 2013. One of the alleged victims claims that Chambers was there to rob her and the other alleged victim. However, Chamber's position is that he went to the alleged victim's house to buy drugs and was forced to defend himself.

In 2003, Chambers was convicted of two (2) counts of Robbery with Use of a Deadly Weapon, and one (1) count of First Degree Kidnapping. The case involved two armed robberies Chambers was accused of committing. As to the two Robbery with Use of a Deadly Weapon convictions, Chambers was sentenced to a term of 52 months to 240 months for each, and 5 years to Life for the Kidnapping count. All three counts were to run concurrently. Due to the large amount of time imposed, at the time Chambers went to trial, he was serving his sentences on these three convictions. 2 AA 147-157.

Chamber intended to testify in order to give his side of what happened in this case. Otherwise, the jury would only hear from one of the surviving alleged victims as to what caused the dispute and who was the initial aggressor. However, Chambers was legitimately concerned that if he were to take the stand to tell the jury what happened inside the trailer house, the State would seek to introduce his three convictions from 2003. Therefore, prior to trial, Chambers moved the district court to preclude the State from introducing at trial these prior convictions. 2 AA 147-157.

A. Standard of Review

The determination of whether to admit or exclude prior felony convictions is reviewed for abuse of discretion. Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965).

In general, Nevada law allows for any person who has taken the witness stand to testify, including a criminal defendant, to be impeached by a prior conviction of a felony crime. *See* NRS § 50.095. "The decision to admit or exclude evidence of prior offenses is within the discretion of the trial court." Owens v. State, 96 Nev. 880, 884, 620 P.2d 1236, 1239 (1980).

Although the statute "declares a prior felony conviction may be admitted for impeachment," a trial court must exclude the conviction "if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or

misleading the jury." Edwards v. State, 90 Nev. 255, 263-64, 524 P.2d 328, 334 (1974) (citing NRS § 48.035(1)); Anderson v. State, 92 Nev. 21, 23, 544 P.2d 1200, 1201 (1976) ("However, prior felony convictions should not be admitted if their 'probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.'").

The Nevada Supreme Court has never given trial courts guidance as to what a court should consider in exercising its discretion on whether or not to admit prior convictions. However, the Ninth Circuit Court of Appeals has in interpreting the Federal Rules of Evidence (FRE) counterpart to Nevada's NRS § 50.095, i.e., FRE 609. *See* Mitchell v. Eighth Judicial Dist. Court Nev., 131 Nev. Adv. Rep. 21, 348 P.3d 675, 679 (2015) ("The Nevada Commission that was tasked with proposing a modern draft evidence code drew on the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates submitted by the Advisory Committee on Federal Rules of Evidence (Draft Federal Rules").

In balancing the probativeness versus prejudicial effect of prior convictions, the Ninth Circuit has explained that a trial court should consider five factors:

> (1) The impeachment value of the prior crime;
> (2) The point in time of the conviction and the witness' subsequent history;
> (3) The similarity between the past crime and the charged crime;
> (4) The importance of the defendant's testimony; and
> (5) The centrality of the credibility issue.
>
> *See* U.S. v. Wallace, 848 P.2d 1464, 1473 n.12 (1988).

B. Chambers Prior Convictions Were Far More Prejudicial than Probative

Here, a balancing of these factors reveals that Chambers' prior convictions should be excluded. **First**, the prior convictions do not have significant impeachment value as they do not involve crimes of dishonesty, like fraud, false pretenses, perjury, or theft by deception. *See* U.S. v. Bagley, 772 F.2d 482, 487 (9th Cir. 1985). In Bagley, the Ninth Circuit explained:

> Proper impeachment is not, in itself, evidence of guilt or innocence; it merely casts a doubt on other evidence going directly to those issues which the trier of fact should consider. Consistent with this purpose, prior felony convictions which do not in themselves implicate the veracity of a witness may have little impact on credibility. For example, the question of the truth or falsity of a witness's statement generally is not advanced in any material way by a showing of his prior conviction of the crime of burglary or theft, unless issues of credibility are otherwise directly involved.

See Id. (citations omitted).

Thus, the impeachment value of Chambers' prior convictions is quite low, yet its prejudicial impact would be overwhelming.

Second, the prior convictions are very remote as they date back 13 years. A significant amount of time has elapsed since these convictions.

Third, there is a strong similarity between the prior convictions and the charged crimes in that they all deal with alleged robberies with use of a firearm. Similarity between prior convictions and current charges weighs ***against*** admissibility. On this point, the Ninth Circuit has explained:

> To allow evidence of a prior conviction of the very crime for which a defendant is on trial may be devastating in its potential impact on a jury. . . . [T]here is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again.
>
> Bagley, 772 F.2d at 488.

Here, besides being charged with Attempt Robbery, even the Murder charge is predicated on a felony-murder theory based on the robbery allegation, as is the Burglary charge (i.e., entry with the intent to commit a robbery). Thus, the only purpose served by admitting the prior convictions would be to plant in the minds of the jury the spectre that Chambers did it before and he did it again.

Fourth, Chambers testimony is of paramount importance to his defense. The only people who were able to testify about what happened inside the trailer house are Papoutsis and Chambers. There was no one who can provide a defense for Chambers other than himself. Therefore, the importance of Chambers' testimony is overriding.

Lastly, although the issue of credibility is central to Chambers' defense, it is not so with the State's case. Besides the testimony of the alleged victim, the State presented circumstantial evidence of guilt through the testimony of people who witnessed what happened immediately before and after Chambers entered the trailer house.

The district court considered the four factors outlined in Wallace and denied Chambers Motion in Limine pursuant to NRS 50.095. 4 AA 307-309. In doing so the district court made the following findings:

> "I do believe the prior felony conviction for robbery with use of a deadly weapon and first-degree kidnapping are relevant and admissible. I believe that they go to the issue of credibility. Credibility it an extremely critical issue in this particular case so the evidence is highly probative. I don't think it's unfairly prejudicial to admit that evidence considering Defendant did receive parole shortly before the commission of the offense in this case. **The prior cases are violent crimes again persons like the crimes in this case.** And I think that also any prejudice can be mitigated by cautionary instruction as well as voir dire you can conduct."
>
> 4 AA 308-309.

It appears that the district court improperly weighed the four factors enunciated by the Ninth Circuit. The district court did not address ***how*** the crimes or robbery and first degree kidnapping would affect credibility other than the fact that they are simply felony conviction. It appears that the district court only considered when he was paroled, not convicted—thirteen years had elapsed between when Chambers was convicted and when this alleged crime was committed. It also appears that the district court erred in viewing the similarity of the prior felonies and the instant alleged crimes are being in favor of admissibility the felonies whereas Ninth Circuit has stated that similarity between prior convictions and current charges weighs ***against*** admissibility. Bagley, 772 F.2d at 488.

Therefore, the District Court should have granted Chambers' Motion in Limine to preclude the State from introducing his prior felony convictions at trial had he testified and failure to do so amounts to an abuse of discretion. The only defense Chambers had was one of self-defense. The only other witness to the events that took place inside that trial was Papoutsis. She changed her story repeatedly and lied numerous times under oath. Chambers, scared of the jury believing that if he would commit such crimes before, he would do it again, felt he had no choice but to not testify. Therefore, Chambers ability to defend himself obstructed by the court's error in denying his Motion in Limine and the error was prejudicial.

II. THE DISTRICT COURT ERRED IN GRANTING THE STATE'S MOTION TO ALLOW CYNTHIA LACEY TO TESTIFY VIA TELEVIDEO CONFERENCE VIOLATING CHAMBERS' RIGHT TO CONFRONTATION

A. Standard of Review

The Sixth Amendment of United States Constitution "provides that '[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against them.'" Crawford v. Washington, 541 U.S. 36, 42 124 S.Ct. 1354, 1359 (2004). Specifically the Confrontation Clause guarantees an ***opportunity*** for effective cross-examination. Pantano v. State, 122 Nev. 782, 790,

138 P.3d 477, 482 (2006) *quoting* Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)(internal quotations omitted).

"Face-to-face confrontation is the foundation upon which the United States Supreme Court's Confrontation Clause jurisprudence evolved." Chavez v. State, 213 P.3d 476, 483 (Nev. 2009). In Crawford, the Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54, 124 S.Ct. 1354. "In so doing, the Supreme Court observed that the Confrontation Clause was a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Chavez, 213 P.3d at 483.

Whether a defendant's Confrontation Clause rights were violated is "ultimately a question of law that must be reviewed de novo." U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir.2007); *see* U.S. v. Holt, 486 F.3d 997, 1001 (7th Cir.2007); U.S. v. Kenyon, 481 F.3d 1054, 1063 (8th Cir.2007); U.S. v. Townley, 472 F.3d 1267, 1271 (10th Cir.2007); U.S. v. Hitt, 473 F.3d 146, 155-56 (5th Cir.2006).

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B. The State Did Not Establish that Lacey Could Not Travel Due to Health Conditions

Cynthia Lacey ("Lacey") was Chambers fiancé at the time of the altercation. The State sought to call Lacey as a witness in their case-in-chief because according to the State, Lacey had observed Chambers with a firearm days before the crime and she was the only person to whom Chambers expressed his intent to rob Papoutsis. 2 AA 1279. Although the State subpoenaed her and issued a material witness warrant, the warrant was only valid in Nevada and Lacey was living in Arizona. 10 AA 913. However, according to the State, Lacey was unable to travel to appear for trial because she recently had a heart attack and the stress of testifying would allegedly be too harmful to her health. 2 AA 179. Therefore, the State sought to have her testify via audiovisual technology (using a program similar to Skype). 2 AA 1760-191.

Pursuant to The Rules of the Nevada Supreme Court, Part IX, "courts shall permit parties, to the extent feasible, to appeal by simultaneous audiovisual transmission equipment at appropriate proceedings…" RNVSC Part IX (B)(Rule 2). Furthermore, "..a court may follow the procedures set forth in these rules or in **NRS 171.1975**." RNVSC Part IX (B)(Rule 3) (emphasis added).

Rule IX also states that "….the personal appearance of a party or a party's witness is required at trial unless: …(b)The court makes an individualized determination, based on clear and convincing evidence, that the use of

simultaneous audiovisual transmission equipment for a particular witness is necessary and that all of the other elements of the right of confrontation are preserved." RNVSC Part IX (Rule 4)(2)(a) and (b).

Pursuant to NRS 171.1975, the State or defense may present live testimony of a witness by means of audiovisual technology at preliminary hearing and grand jury proceedings. Both statutes refer to three situations when the court must allow the witness to testify via audio visual technology:

> 1. Witness resides more than 100 miles away
> 2. Witness is unable to attend because of a medical condition
> 3. Good cause otherwise exists.
>
> Nev. Rev. Stat. § 171.1975 (2015).

It is true that Lacey was a material witness and resided at the time over 100 miles away in Phoenix, Arizona. However, as Chambers argued at trial, this is approximately a 45 minute flight. While an Arizona magistrate ordered that Lacey appear via audiovisual technology, there was no indication of what that magistrate based his decision on. 2 AA 190-91; 10 AA 919. The only proof Lacey provided in Nevada district court that she had had a heart attack, which would constitute a "medical condition," were photos of her prescriptions for high blood pressure. 10 AA 912. Chambers takes high blood pressure medication. 10 AA 918. Even the

district court judge stated he took one of the same medications Lacey was prescribed and he could travel. 10 AA 921.

The district court indicated that it questioned Lacey's credibility if she could not present *any* documentation of having recently had a heart attack and told the State it was "going to have to do better". 10 AA 921. After discussing confrontation clause issues and applying Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) and Harrell v. Butterworth, 251 F.3d 926 (11th Cir., 2001), the district court determined that the issue of whether or not Lacey was truly in such poor health that she could not travel would be the deciding factor in whether or not it would allow her to testify via audiovisual technology. 10 AA 926-27. The district court stated that "there must be some impediment to testifying beyond mere unwillingness" and cited to State v. Rogerson, 855 N.W.2d 495 (Iowa, 2014). 10 AA 933. The district court further stated, "Because if someone was unwilling to travel, that would pretty much negate the whole confrontation clause if you could just say I'm unwilling to travel and then allow them to do videotape." 10 AA 933-34. The district court further stated, "there's a general consensus among the courts of mere convenience, efficacy and cost savings are not sufficient important public necessities to justify defendant being deprived face to face confrontation." 10 AA 934. The district court elected to allow the parties to

conduct voir dire of Lacey via audiovisual technology to determine how poor her health truly was and why she could not travel. 10 AA 938-39.

During voir dire Lacey was asked a series of questions regarding her alleged heart attack and inability to travel. She claims that she felt a sharp pain in her chest and her employer called 9-1-1. 10 AA 960. She stated that she was taken by an ambulance to the hospital and while she did not remember how long she was there, she knew she did not stay overnight. 10 AA 960. When she was discharged from the hospital, **she walked to the train** and took the train home. 10 AA 970. **She could not name the hospital nor did she know where the documentation from the hospital was**. 10 AA 960, 966

She was given medication and underwent follow up treatment. 10 AA 961. She met with a follow up physician three times. 10 AA 961. **She could not remember the name of the physician nor if he or she was a cardiologist**. 10 AA 961, 967. She said the only lasting effects from the heart attack other than high blood pressure are feeling tired and lacking energy. 10 AA 961. **She was never told not to fly or travel.** 10 AA 963. She said when she was served with papers telling her she had to appear in court she felt "shaky and [she] had to sit down"….and was "short of breath." 10 AA 964. She claimed those effects lasted all day. 10 AA 964. **The only medical advice she was given was to "take it easy."** 10 AA 965. **She returned to work** on her next scheduled day, **3 days after**

the supposed heart attack, where she is am airport janitor and **does manual labor** like cleaning toilets, cleaning windows and walking around the airport. 10 AA 967-68. **Lacey also admitted that she has been taking high blood pressure medication since 2008, well before this supposed heart attack.** 10 AA 968.

Ultimately, the district court found that Lacey's health would be unduly jeopardized of forced to travel and allowed her to testify by videotape. 10 AA 975. This was error given the ridiculous testimony Lacey gave regarding her alleged heart attack. It was error for the district court to find her credible and it was clear that she was simply unwilling to testify—this is not enough to side step Chambers right to confront *in person* his accuser. State v. Rogerson, 855 N.W.2d 495 (Iowa, 2014).

C. Chambers Was Prejudiced by the Court's Error

Lacey testified that Chambers was her fiancé at the time the alleged crime was committed (10 AA 979); that she used her Aunt's Saturn that had handicap plates (10 AA 979-78); that on the date of the incident Chambers stayed with her the night before (10 AA 978); and that a couple of days prior to the incident Chambers had a gun at her house and she told him to remove it. 10 AA 982. She was then asked the following questions:

- What time Chambers left in the morning of the incident? 10 AA 981
- Did he come back during the day before detectives came to the house? 10 AA 981
- If Chambers called her between 10:30 and 11:00 a.m. that day? 10 AA 981.

- Whether or not she spoke to Chambers during the day? 10 AA 981.
- If Chambers said he was in trouble? 10 AA 982.
- If Chambers told her to erase her call log? 10 AA 982.
- How she got her car back after Chambers took it? 10 AA 982.
- Whether the gun he had was in a holster? 10 AA 983.
- What kind of gun it was that he had? 10 AA 983.
- If she told detectives the gun was in a black material case? 10 AA 983.
- If Chambers said he was going to do something stupid? 10 AA 983.
- Whether or not Chambers purchased meth that day? 10 AA 984.
- If she believed Chambers bought it from the victim? 10 AA 984.
- Whether Chambers ever mentioned robbing the victim? 10 AA 985.
- What her relationship with Chambers was on the date of the incident? 10 AA 985.

Lacey's answer to every one of these questions was: "**I don't remember."**

10 AA 981-985.

Ironically, after arguing that Lacey was credible enough to give truthful testimony regarding her inability to travel due a health condition so as to meet the burden allowing her to testify via audiovisual technology, the State then sought to attack her credibility and impeach her subsequent testimony with her prior inconsistent statements. Due to the fact that her testimony of "I don't remember" was inconsistent with her statements made to Detective Raetz, the State was able to admit portions of her recorded interview.

The recorded statements contained the following facts:

> Lacey lived with Chambers. Chambers left the house at 8:00 a.m. and he has not come back. Chambers told her "he got into some s***." Erika brought Lacey the car around 1:00 p.m. Lacey got a call from Da Nuts' number, a friend of Chambers. Chambers is on the phone

> and says "I'm in some s***" and "get rid of the call log." She hasn't heard from him since.
>
> The June 7, 2013, 2 days before the incident he had a gun in Lacey's house. She told him to get rid of it because she does not like guns. She said it was in a black fabric holster; not in a hard plastic case. On June 8, 2013 he came home and told Lacey he was going to do something stupid and so he got rid of the gun before he did something stupid. Lacey knows Chambers associates with a woman named Lisa in the mobile home park. Lacey said she has never seen Lisa and would not be able to identify her. A few weeks prior to the incident Chambers said he wanted to rob Lisa. According to Lacey Chambers said "this b***h has so much money; rips people off; she's the main dope lady around; and I'm going to rob her one day."

See Partial Recording of Interview with Cynthia Lacey Admitted as State's Exhibit 122 at Trial. [3]

Lacey's substantive testimony did not harm Chambers' defense. However, the fact that she was able to testify and then responded with "I don't remember" to every material question, the State was able to then admit her prior statements, which did hurt Chambers' defense. But for the district court's error in allowing Lacey to testify using audiovisual technology, her prior statements would not have been admitted to the jury. Therefore, Chambers was prejudiced by the district court's error in allowing her to testify remotely.

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[3] A Motion to Transmittal of Exhibits Pursuant to NRAP 30 (D) will be submitted shortly after this instant Opening Brief is filed.

III. THE DISTRICT COURT ERRED IN GRANTING THE STATE'S MOTION TO READ INTO EVIDENCE THE PRELIMINARY HEARING TESTIMONY OF BRIDGETTE GRAHAM

A. Standard of Review

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. *See, e.g.*, Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008). However, whether a defendant's Confrontation Clause rights were violated is "ultimately a question of law that must be reviewed de novo." U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir.2007); *see* U.S. v. Holt, 486 F.3d 997, 1001 (7th Cir.2007); U.S. v. Kenyon, 481 F.3d 1054, 1063 (8th Cir.2007); U.S. v. Townley, 472 F.3d 1267, 1271 (10th Cir.2007); U.S. v. Hitt, 473 F.3d 146, 155-56 (5th Cir.2006).

B. Chambers Was Not Given the Opportunity for an Effective Cross-Examination of Graham at the Preliminary Hearing Due to Not Having All Discovery

The State sought to admit the preliminary hearing transcript of Graham because despite their efforts, she refused to appear for trial. 2 AA 173-75. Chambers objected based upon the fact that he was unable to question Graham at the preliminary hearing on her prior conviction for Larceny, a piece of discovery that should have been turned over by the State pursuant to United States v. Giglio, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963). 13 AA 1234. In granting the State's Motion, the district court found that Chambers being "deprived

of a chance to cross examine a witness on a [conviction for larceny] does not rise to the level of depriving a defendant of a fair opportunity at cross-examination." 13 AA 1234.

"A preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to Crawford. The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed." Chavez, 213 P.3d at 482. Nevada law allows a defendant to question a witness's credibility or motive during a preliminary hearing. Id., 213 P.3d at 485.

NRS 50.085(3) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness....

This court has held that "NRS 50.085(3) permits impeaching a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness." Butler v. State, 102 P.3d 71, 120 Nev. 879 (2004) *quoting* Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000). Yet this court has cautioned that in so doing the State may generally not impeach a

witness under NRS 50.085(3) on a collateral matter or by introducing extrinsic evidence. Butler, 102 P.3d at 79-80.

Graham had a prior conviction for Petit Larceny, a misdemeanor. 13 AA 1234. The misdemeanor of larceny is a crime that involves dishonesty, would have gone to Graham's truthfulness as a witness, and is therefore admissible for purposes of impeachment. Yates v. State, 596 P.2d 239, 241, 95 Nev. 446, 449 (1979). Chambers would have been permitted to ask Graham questions about the prior conviction on cross-examination—not simply if she had been convicted of the crime and how long ago. NRS 50.085(3); Butler, 102 P.3d at 79-80. However, this discovery was not available to Chambers at the time of preliminary hearing so he was unable to impeach Graham. 13 AA 1228-29. Therefore, Chambers did not have the opportunity for an effective cross-examination of Graham at the preliminary hearing and it was error for the district court to allow the State to read in the testimony a trial. Chavez, 213 P.3d at 482.

This error was prejudicial because Graham testified as follows at the preliminary hearing:

She was in the car when Chambers went to the trailer to buy drugs from Papoutsis. 14 AA 1339-1344. She saw Chambers go into the trailer and a few minutes later she heard gun shots. 14 AA 1341-42. She then saw Chambers walking and he got into the car. 14 AA 1342. As they drove off Chambers kept

saying, "He shouldn't have wrestled me." 14 AA 1343-44. She also stated that she heard a woman inside the trailer yelling, "he's trying to rob me, he's trying to rob me." 14 AA 1345. Graham then admitted after the State showed her a statement she made to police that she also said that Chambers told her, "I tried to rob her, and then they had got up and – and so I pulled out my gun." 14 AA 1346. She also stated that Chambers was always talking about how he was "going to come up," which means to get money. 14 AA 1348-49. She said that where she is from, that can mean hustling, sell drugs, robbery—anything to get money. 14 AA 1349-50. She also stated that a couple of times Chambers said he was "going to hit a lick," which means to rob someone. 14 AA 1350-51.

Clearly this testimony was damaging to Chambers defense and consisted mostly of prior statements made by Chambers for which there was no independent corroboration. Chambers was unable to properly cross-examine Graham on her prior conviction for larceny, which goes to her truthfulness. This prejudiced Chambers because he was not able to ask the jury to question Graham's credibility and truthfulness regarding her damaging testimony.

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IV. THE DISTRICT COURT ERRED IN DENYING CHAMBER'S MOTION FOR A MISTRIAL DUE TO STATEMENTS MADE BY THE STATE IN CLOSING ARGUMENT

A. Standard of Review

The United States Constitution states that a defendant shall not "be compelled in any criminal case to be a witness against himself." U.S. Const.Amend. V; *see also* Nev.Const. Art. 1, sec. 8. A direct reference to a defendant's decision not to testify is always a violation of the fifth amendment. *See* Griffin v. C1alifornia, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Barron v. State, 105 Nev. 767, 783 P.2d 444 (1989). When a reference is indirect, the test for determining whether prosecutorial comment constitutes a constitutionally impermissible reference to a defendant's failure to testify is whether "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." United States v. Lyon, 397 F.2d 505, 509 (7th Cir.), cert. denied sub nom., Lysczyk v. United States, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968). See also Barron, 105 Nev. at 779, 783 P.2d at 451-52. The standard for determining whether such remarks are prejudicial is whether the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24, 87 S.Ct. 824, 826-28, 17 L.Ed.2d 705 (1967).

The decision to deny a motion for a mistrial rests within the district court's discretion and will not be reversed on appeal absent a clear showing of abuse. Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (internal quotation marks omitted).

B. The State Argued that Chambers "Didn't Tell His Story"

At the close of the State's closing argument, the prosecution pointed out to the jury that Chambers has done nothing to tell his story.

> "You recall what the defense said. He went over there, he didn't have a gun. He acted in self-defense. The dead guy attacked him, right? Mr. Bly had the gun. Ladies and gentlemen, this is not a case of self-defense. There's an instruction that tells you if there is some evidence of self-defense, the State must prove it. And I totally accept that responsibility. **However, when there is no evidence of self-defense, all that there is, is the defense opening statement telling you he acted in self-defense. There's no evidence of self-defense.** Therefore, the State is not obligated to disprove it in any shape or form. This is not a case of self-defense.
>
> Flight instruction, that's going to be number 47. It tells you that basically flight, you leave after a crime. It's the idea of deliberately going away with a consciousness of guilty. And if there's evidence, if you believe there's evidence that the defendant fled from the crime, you can use that evidence for this reason. It's the idea, again, of going away with a consciousness of guilt and for the purpose of avoiding apprehension or prosecution.
>
> **So, let's consider what did he do after the crime?** What did he do? What didn't he do? He left, right? He didn't stay and talk to police, anything like that. **He didn't tell his story, right?"**

12 AA 1136 (emphasis added).

Chambers objected and the Court sustained the objection without any argument. 12 AA 1136. The State withdrew the comment and the Court told the jury the following:

> "The jury will disregard the last remark of the prosecutor regarding telling his story. Please strike that from your minds and don't consider it. Counsel may continue."

12 AA 1137.

However, the bell had already been rung. Furthermore, the Court, in its direction to the jury to disregard the remark, did not, at that time, specifically address the fact that Chambers has a constitutional right to remain silent and that the State's comment should not be taken as holding Chambers responsible for any missing information. 12 AA 1137.

Chambers moved for a mistrial after all closing arguments were completed. 12 AA 1165. The State claimed that the remark was not in reference to Chambers remaining silent at trial and, instead, was in reference to Chambers not talking to police after the incident but before the arrest. 12 AA 1164. The Court expressed that it was unclear whether the state was referring to silence prior to or after arrest in its closing remark and said it would review the JAVS. 12 AA 1164-66.

The following day the district court denied Chambers Motion for Mistrial and found that "a reasonable person would understand the context was in

connection with [Chambers] being silent right after the crime and not being silent here at trial." 12 AA 1197-98.

"Pointing out discrepancies or gaps in the evidence and suggesting that appellant is responsible for them is something the jury would 'naturally and necessarily' take to be a comment on the accused's failure to testify." Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). "It is a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt.... The tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper." Id. at 803, 820 P.2d at 761 *citing* Barron, 105 Nev. at 778, 783 P.2d at 451.

Although the State made the comment immediately after a brief explanation of the flight instruction, the explanation of the flight instruction was done immediately after the State talked about how the jury heard no evidence of self-defense. Arguably 30 second seconds passed by between the State's comments about of the lack of evidence of self-defense and the statement that Chambers did not tell his story. Moreover, the court commented how quickly the State was speaking. 12 AA 1164. The State may argue that the jury would have heard the comment about Chambers not telling his story in the context of the flight

instruction. However, the jury instruction regarding flight states nothing about telling a story or giving a statement to police:

> **INSTRUCTION NO. 47**
>
> The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence.
>
> The **essence of flight embodies the idea of deliberately going away** with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstance is entitled is a matter for the jury to determine.

3 AA 253 (emphasis added).

Jury Instruction No. 47 is totally devoid of any mention of giving or not giving a statement to police or telling his story. This combined with the fact that approximately thirty (30) seconds prior to making the statement that "[Chambers] didn't tell his story…" the State was talking about how no evidence of self-defense was presented, suggested to the jury that there were gaps or discrepancies in the evidence and that Chambers was responsible for them, which is something the jury would naturally and necessarily take to be a comment on his failure to testify. Harkness, 107 Nev. at 803, 820 P.2d at 761.

Although the jury was instructed to draw no inferences from appellant's silence during the reading of jury instructions, this instruction was not a sufficient cure for the prosecutor's unconstitutional remarks. 3 AA 256. Harkness, 107 Nev.

at 805, 820 P.2d at 762. This is especially so given that said instruction was not given immediately after the remark was made by the State. 12 AA 1137. Therefore, the district court erred in denying Chambers' Motion for Mistrial.

When judged by the applicable standard, the error cannot be deemed harmless beyond a reasonable doubt and was most certainly prejudicial. This appears to have been a close case. The jury only heard four (4) days of testimony and argument yet deliberated for over four hours before rendering a verdict and acquitted Chambers of two of the six counts. The only direct evidence the State presented was the testimony a witness who lied and was impeached numerous times. All other evidence was circumstantial and there was a total lack of forensic evidence despite forensic testing being completed in this case. "It is quite probable that the jury took into account in its deliberating process the prosecutor's suggestions that appellant was responsible for gaps in the evidence, had the burden of proving or disproving the crime, and was hiding the truth." Harkness, 107 Nev. at 804-805, 820 P.2d at 762 (reversing conviction because prosecutor spoke about gaps in evidence and indirectly referenced appellants failure to fill those gaps; and taking into account the closeness of the degree of guilt when factoring in the fact the jury deliberated for three hours). Therefore, the district court's error was prejudicial to Chambers.

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V. DISTRICT COURT ERRED IN SENTENCING CHAMBERS AS A HABITUTAL CRIMINAL

A. Standard of Review

"Statutory interpretation is a question of law," and this court reviews the district court's interpretation of a statute de novo. State v. Catanio, 120 Nev. 1030 1033, 102 P.3d 588, 590 (2004). "When a statute is plain and unambiguous, this court will give that language its ordinary meaning and not go beyond it." State v. Allen, 119 Nev. 166, 170, 69 P.3d 232, 235 (2003).

B. The State Did Not Comply With the Procedural Requirements of Nev. Rev. Stat. § 207.016 (1)

Trial in this matter started on February 21, 2017, based on an incident that occurred on July 9, 2013. On the same day trial started, the State filed its Notice of Intent to Seek Punishment as a Habitual Criminal. Notably, the Nevada Legislature amended NRS §207.016 during the 2013 legislative session to require the Notice to be filed "not less than 2 days before the start of the trial." The amendment to NRS § 207.016 did not change the *penalty* for a finding of habitual criminal/felon status. Rather, the amendment changed the *procedure* of when notice is to be given. Therefore, the version of the statute that is applicable to Chambers' case should be the version of the statute in effect at the time the procedure became relevant (once he was arraigned), not at the time of the crime.

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NRS 207.016(2) provides:

> If a count pursuant to NRS 207.010, 207.012 or 207.014 is included in an information charging the primary offense, each previous conviction must be alleged in the accusatory pleading, but no such conviction may be alluded to on trial of the primary offense, nor may any allegation of the conviction be read in the presence of a jury trying the offense or a grand jury considering an indictment for the offense. A count pursuant to NRS 207.010, 207.012 or 207.014 may be filed separately from the indictment or information charging the primary offense, but **if it is so filed, the count pursuant to NRS 207.010, 207.012 or 207.014 must be filed not less than 2 days before the start of the trial on the primary offense**, unless an agreement of the parties provides otherwise or the court for good cause shown makes an order extending the time. For good cause shown, the prosecution may supplement or amend a count pursuant to NRS 207.010, 207.012 or 207.014 at any time before the sentence is imposed, but if such a supplement or amendment is filed, the sentence must not be imposed, or the hearing required by subsection 3 held, until 15 days after the separate filing.
>
> Nev. Rev. Stat. § 207.016 (2013)(emphasis added).

The Governor signed the new law on June 1, 2013 and the law went into effect on October 1, 2013. Chambers was arraigned in District Court on October 14, 2013, when the State had its first opportunity to give notice of its intent to seek habitual criminal/felon status. This was a full 13 days **after** the new amendment had gone into effect. Therefore, the State had well over three years to give proper notice, but it failed to do so. At sentencing when Chambers raised this issue, the State can provide no good reason why it waited until the day of trial to give the Notice when it could have easily done so by February 19, 2017, i.e., two days before trial. 4 AA 318-321. Instead, the State argued that because the statute took

effect on October 1, 2013 and the crimes were committed prior to this date, the older version of NRS 207.016 was applicable and all that the State was obligated to do was to file the notice of intent to seek habitual treatment prior to sentencing. The State also argued that despite the fact that it missed the deadline enunciated in NRS 207.016, Chambers was still put on notice. 2 AA 172; 4 AA 318.

The reality is that the State simply did not realize that the notice had not been filed as stated in the Affidavit of Chief Deputy District Attorney, Megan Thomson. 2 AA 172. Also according to this Affidavit, the discovery was made on February 19, 2017, two day prior to trial beginning. The State could have filed the Notice of Intent to Seek Habitual Treatment that same day, which would have placed the State in compliance with NRS § 207.016 but for some unexplained reason, elected not to. Therefore, there was no "good cause" shown by the State in filing the Notice late. In deciding to adjudicate Chambers as a habitual felon, the district court found that even though the notice was untimely, Chambers was still on notice that the State would seek habitual treatment. 4 AA 320.

Due to the fact that the State failed to comply with the mandatory procedural requirements of NRS § 207.016, the Court should not have sentenced Chambers pursuant to NRS §§ 207.010 or 207.012, Nevada's habitual criminal and felon statutes. Allowing the State to seek habitual criminal/felon status after not complying with the filing requirements of NRS § 207.016 was a violation of

Chambers right to Due Process under the U.S. Const.Amend. V and XIV; *see also* Nev.Const. Art. 1 Sec. 8. This statute is plain and unambiguous, the language should be given its ordinary meaning. Allen, 119 Nev. at 170, 69 P.3d at 235. The only exception enunciated by the statute is where "an agreement of the parties provides otherwise or the court for good cause shown makes an order extending the time." Neither of these two things occurred—there was no agreement and the State simply failed to find the Notice and then even when it discovered the failure with enough time to timely file the Notice, it elected not to, the reason for which the State has yet to articulate. Moreover, the district court did not find that the State demonstrated good cause to extend the time. Instead, it simply noted that Chambers had received notice of the State's intent to seek habitual treatment during the negotiation process even if the Notice was not formally filed in a timely fashion. Therefore, the District Court erred in adjudicating Chambers as a habitual felon pursuant to NRS § 207.010 and § 207.012. This was prejudicial because as a result of this error, Chambers is now serving life without the possibility of parole, second in harshness only to the death penalty. Had he not been sentenced as a habitual criminal, he would not be serving life without the possibility of parole.

C. The State Did Not Comply With the Procedural Requirements of Nev. Rev. Stat. § 207.012 (2) and (3)

If this Court chooses to apply the version of NRS § 207.016 that was in effect prior to the 2013 amendment, then the State still did not adequately notice

the habitual treatment. Prior to this amendment, the notice had to be done in the information, not simply with a notice. The State only filed a Notice.

Pursuant to NRS 207.012(2) and (3), in order to give the District Court jurisdiction to sentence a defendant as a Habitual Felon, the following requirements, *inter alia*, **must** be met.

NRS 207.012 provides in relevant part:

* * *

> 2. "The district attorney **shall** include a count under this section in any information or shall file a notice of habitual felon if an indictment is found….[…]"
>
> 3. The trial judge may not dismiss a count under this section that is **included in an indictment or information.**

Nev. Rev. Stat. § 207.012 (emphasis added).

The Nevada Legislature enunciated **two** different situations in the language of NRS 207.012 (2):

1) A defendant charged by way of information; and
2) A defendant charged by way of indictment.

Each of these situations requires a different procedure through which the State has to go so as to give the District Court jurisdiction to sentence a defendant as a habitual criminal. If a defendant is charged by way of information, the district attorney **"shall"** include the count of habitual criminal treatment **"in any information."** NRS 201.012(2)(emphasis added). The only way the filing of a *notice* of habitual felon meets the requirements of NRS 207.012(2) is **"if an**

indictment is found." Id. (emphasis added). Chambers was charged by way of Information. 1 AA 1-4. Therefore, the District Court would only have had jurisdiction to sentence Chambers as a habitual felon under NRS 207.012 had the State filed an amended information including the charge of habitual criminality. However, the State did not do so.

In the language of NRS 207.012(3), the Nevada Legislature enunciates that the District Court only loses discretion to dismiss a count under the habitual felon statute **"that is included in an indictment or information."** NRS 207.012(3). Again, the count **must** be included in the information for this non-discretionary aspect of the statute to apply.

In NRS 173.095 the Nevada Legislature distinguishes between how a defendant is charged with the habitual criminal count where the defendant has been originally charged by way of indictment vs. information. NRS 173.095 provides:

> 1. The court may permit an **indictment or information to be amended at any time** before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.
>
> 2. If an **indictment** is found charging a primary offense upon which a charge of habitual criminality may be based, **the prosecuting attorney may file a notice of habitual criminality with the court**. If an indictment is found charging a primary offense upon which a charge of:

(a) Habitually fraudulent felon may be based, the prosecuting attorney shall file a notice of habitually fraudulent felon with the court.
(b) Habitual felon may be based, the prosecuting attorney shall file a notice of habitual felon with the court.

3. The court shall permit an information to be amended pursuant to subsection 4 of NRS 173.035.

Nev. Rev. Stat. § 173.095 (emphasis added).

Here the legislature has outlined, again, that where a defendant is charged by way of **information**, **an amended information may be filed** by the State to add the habitual criminal count. However, if a defendant is charged by way of indictment, the State may either file an amended indictment or a notice of habitual criminality. There is no such allowance when a defendant is charged by way of information.

In 2013, when the Nevada Legislature amended NRS 207.016, it added language stating that the State could give notice of intent to seek habitual treatment in a document other than the information or indictment thereby allowing the State to simply file a notice of intent to seek habitual treatment.

Section 1. NRS 207.016 is hereby amended to read as follows:

207.016 1. A conviction pursuant to NRS 207.010, 207.012 or 207.014 operates only to increase, not to reduce, the sentence otherwise provided by law for the principal crime.

2. If a count pursuant to NRS 207.010, 207.012 or 207.014 is included in an information charging the primary offense, each previous conviction must be alleged in the accusatory pleading, but no such conviction may be alluded to on trial of the primary offense, nor may any allegation of the conviction be read in the presence of a jury trying the offense or a grand jury considering an indictment for the offense. A count pursuant to NRS 207.010, 207.012 or 207.014 may be ~~[separately]~~ filed ~~[after conviction of]~~ **separately from the indictment or information charging** the primary offense, but if it is so filed, **the count pursuant to NRS 207.010, 207.012 or 207.014 must be filed not less than 2 days before the start of the trial on the primary offense, unless an agreement of the parties provides otherwise or the court for good cause shown makes an order extending the time. For good cause shown, the prosecution may supplement or amend a count pursuant to NRS 207.010, 207.012 or 207.014 at any time before the sentence is imposed, but if such a supplement or amendment is** filed, the sentence must not be imposed, or the hearing required by subsection 3 held, until 15 days after the separate filing. [4]

Assembly Bill No. 97–Assemblymen Aizley; Munford, Neal and Ohrenschall.

This bold faced language was not contained in the version of NRS § 207.016 that was in effect at the time the events took place that lead to Chambers arrest.

In Crutcher v. Eighth Judicial Dist. Court, the defendant pleaded guilty to the charging information and agreed to stipulate to his prior felony convictions. 111 Nev. 1286, 1287, 903 P.2d 823, 824 (1995). The prior felonies were not presented at sentencing. Id. The Supreme Court of Nevada held that the District Court erred in adjudication Crutcher a habitual criminal because, at that time, "the

[4] Strike through font denotes what language was removed; bold font denotes what language was added; underlined font denotes what language Chambers wishes to emphasize to this Court.

state had not **filed an information** seeking to impose the habitual criminal enhancement and listing Crutcher's prior felony conviction." Id. at 825, 903 P.2d at 1289. At no point did the Supreme Court mention a "notice" of habitual criminality because Crutcher was charged by way of information, not indictment. Id. *generally*.

It is clear from the language of NRS 207.012 and NRS 173.095 that prior to the 2013 amendment, the Nevada Legislature intended for the State to file a count of habitual criminality in an information when a defendant was charged by way of information and **not** a notice of habitual criminality so as to give the District Court jurisdiction to sentence the defendant as such. It is clear from Crutcher that the Supreme Court of Nevada agreed prior to the amendment in 2013.

Therefore, if this Court chooses to apply the version of NRS § 207.016 that was in effect prior to the 2013 amendment, then the State did not adequately notice the habitual treatment by filing an amended information including the count and the district court erred in sentencing Chambers as a habitual felon.

D. The Procedures Set Forth in NRS § 207.012 and § 207.016 Are Mandatory.

Pursuant to NRS 0.025(d), the use of the word "shall" in a statute imposes a duty to act. Goudga v. State, 287 P.3d 301, 128 Nev. Adv. Op. 52 (2012). This court has explained that, when used in a statute, the word "shall" imposes a duty on

a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute. Id.; *see also* Johanson v. Dist. Ct., 124 Nev. 245, 249–50, 182 P.3d 94, 97 (2008) (explaining that " ' "shall" is mandatory and does not denote judicial discretion' " (*quoting* Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298 1303, 148 P.3d 790, 793 (2006))). Therefore, where a defendant is charged by way of information, **it is not discretionary** for the district attorney to put the habitual criminal count in an information (the original information or a separately filed amended information) pursuant to NRS § 207.012 in conjunction with the version of NRS § 207.016 **in effect prior to the 2013 amendment**.

Pursuant to NRS 0.025(c),

> "Must" expresses a requirement when:
>
> (1) The subject is a thing, whether the verb is active or passive.
>
> (2) The subject is a natural person and:
>
> (I) The verb is in the passive voice; or
>
> (II) Only a condition precedent and not a duty is imposed.

Nev. Rev. Stat. § 0.025 (2003).

Therefore, where a defendant is charged by way of information, it is discretionary for the district attorney to put the habitual criminal count in a notice as opposed to an information (the original information or a separately filed amended information) but it is not discretionary for the district attorney to file said notice less than 2 days prior to the start of trial pursuant to NRS § 207.012 in

conjunction with the version of NRS § 207.016 **in effect after to the 2013 amendment**.

"The relevant statutory scheme clearly premises the district court's authority to impose a habitual criminal sentence on the State's filing of an allegation of habitual criminality." Grey, 124 Nev. at 124, 178 P.3d at 163-64. "When construing statutes, we generally presume that the plain meaning of the statute reflects the legislature's intent, unless that reading violates the spirit of the act or lease to an absurd result." Villanueva v. State, 117 Nev. 664, 27 P.3d 443, 446 (2001). The legislature drafted the language of NRS § 207.012 and § 207.016 for a reason. The language is clear on its face, unambiguous and contains terms making the procedure mandatory. Neither the State nor the District Court had discretion to not following the procedures set forth in NRS 207.012 and NRS 207.016. Goudga, 287 P.3d at 128 Nev. Adv. Op. 52; Villanueva, 117 Nev. 664, 27 P.3d at 446; Johanson., 124 Nev. at 249–50, 182 P.3d at 97; Washoe Med. Ctr., 122 Nev. at 1303, 148 P.3d at 793.

Therefore, if this Court applies the **older** version of NRS §207.016 to Chambers' case, the State had a duty to act in accordance with NRS § 207.012 and file an Amended Information (as opposed to a Notice of Habitual Criminality). The State did not meet this mandatory requirement. If this Court applies the **newer** version of NRS § 207.016 to Chambers' case, the State has a duty to act in

accordance with the requirement that the Notice of Intent to Seek Habitual Treatment be filed two (2) days prior to the start of trial. The State did not meet this mandatory requirement.

Regardless of which version of NRS §207.016 this Court chooses to apply to Chambers' case, the State failed to follow mandatory notice requirements. Therefore, the district court did not have jurisdiction to sentence Chambers as a habitual felon; erred in doing so; and Chambers was prejudiced and is also serving an illegal sentence given the fact that life without the possibility of parole is in excess of the statutory maximum of the punishment ranges for the crimes he was convicted of." Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); *see also* NRS 176.555. Chambers is prejudiced by this given the fact that without the habitual felon statute, none of the crimes he was convicted of expose him to life without the possibility of parole.

E. Most of the Convictions Used to Sentence Chambers as a Habitual Felon under Nev. Rev. Stat. § 207.010 Were Stale

If this Court finds that the State adhered to the statutory requirements of NRS § 207.016, Chambers asks this Court to find that with respect to Counts 5 and 6, the district court abused its discretion in sentencing Chambers a s large habitual criminal pursuant to NRS § 207.010.

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Pursuant to NRS § 207.010,

> "It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality ***if an indictment is found.*** The trial judge may, at his or her discretion, dismiss a count under this section which is included in any indictment or information."

Nev. Rev. Stat. § 207.010 (2013)(emphasis added).

The purpose of this section is to permit dismissal "when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice." Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990) *quoting* French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982). A trial court's adjudication of a defendant as a habitual criminal is reviewed for abuse of discretion. Sessions, 106 Nev. at 190, 789 P.2d at 1244. Under the habitual offender statute, considerations of the nonviolent nature of charged crimes or remoteness of prior convictions are within the discretion of district court. NRS 207.010. Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996); Arajakis v. State, 108 Nev. 976, 843 P.2d 800 (1992).

NRS 207.010 provides in relevant part:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:
>
> (a) Any felony, who has previously been two times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount

> to a felony is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.
>
> (b) Any felony, who has previously been three times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:
>
> (1) For life without the possibility of parole;
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Nev. Rev. Stat. § 201.010 (2009).

Pursuant to NRS 207.010(2), "It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found. The trial judge may, at his or her discretion, dismiss a count under this section which is included in any indictment or information." The purpose of this section is to permit dismissal "when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice." Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990) *quoting* French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982).

In Sessions, Sessions was convicted of drug trafficking and drug possession adjudicated a Habitual Criminal under NRS 207.010. 106 Nev. at 187, 789 P.2d at 1242-43. Sessions was sentenced to, *inter alia*, life without the possibility of parole. Id. at 187-88, 789 P.2d at 1243. The prior convictions used to obtain habitual criminal status were for theft, grand theft and escape, which ranged from twenty-three (23) to thirty (30) years old. Id. This Court held that it was an abuse of discretion for the district court to sentence Sessions as a Habitual Criminal and impose the maximum sentence because "surely a case involving crimes less violent and more stale than presented here would be hard to find; hence, the adjudication of habitual criminality in this case serves neither the purpose of the statute nor the interests of justice." Id. at 191, 789 P.2d at 1245.

Here, the District Court used four prior felony convictions to adjudicate Chambers a Large Habitual Criminal pursuant to NRS 207.010 on Counts Five and Six. At the time of sentencing, these convictions were fourteen (14), twenty (20), twenty (20), and twenty-seven (27) years old. 2 AA 170-172. [5] The two twenty (20) year old convictions for Larceny (a non-violent crime) are arguably stale and

[5] Although the State cited in its Notice of Intent to Seek Habitual Treatment to three felony convictions from Case No. C185775, these arose out of the same act and were prosecuted in the same information. 2 AA 170-172. This was argued at Chambers sentencing and was not disputed by the State or the Court. 3 AA 290-300; 4 AA 301; 4 AA 310-328. Therefore, these three convictions should only be counted as one "prior conviction" for purposes of applying the habitual statute. Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979).

the twenty-seven (27) year old conviction for Robbery is most certainly stale. This leaves one prior conviction, which was fourteen years old (14). Therefore, it was an abuse of discretion for the District Court to adjudicate Chambers a Large Habitual Criminal pursuant to N.R.S § 207.010 based upon mostly stale convictions. Sessions, 106 Nev. at 190, 789 P.2d at 1244. Chambers was prejudiced by this error given the fact that being adjudicated a Large Habitual Criminal exposed him to and resulted in a sentence of life without the possibility of parole.

VI. CUMULATIVE ERROR

The relevant factors to consider in determining whether cumulative error is present include whether (1) the issue of innocence or guilt is close, (2) the quantity and character of the errors (3) and the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). As discussed *supra*, the district court erred in numerous ways that were highly prejudicial to Chambers. Here, Chambers was convicted of the grave crime of Second Degree Murder along with four other non-grave crimes. Chambers went to trial and presented a reasonable self-defense theory. Furthermore, the only direct evidence that he actually committed any crimes was the testimony of a proven liar and drug dealer. The errors on the part of the district court were harmful given the fact that there was no credible direct evidence and a lot of circumstantial hearsay evidence

presented. Furthermore, Chambers was given a sentence second in harshness only to the death penalty—LIFE WITHOUT THE POSSIBILTY OF PAROLE based upon improperly noticed habitual criminal treatment. Thus, the three Mulder factors weigh in favor of finding there is cumulative error warranting reversal of Chamber's conviction. Id.

CONCLUSION

Based upon the arguments herein, *supra*, GARY LAMAR CHAMBERS conviction should be REVERSED and/or his sentences VACATED

Dated this 15th day of August, 2018.

Respectfully submitted,

/s/ Jean Schwartzer

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CERTIFICATE OF COMPLIANCE

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

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Edition in Times New Roman 14 point font; or

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Opening Brief was filed electronically with the Nevada Supreme Court on the 15th day of August, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

STEVEN B. WOLFSON, ESQ.

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

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