IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LAMAR CHAMBERS

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.Ct. No. 73446

D.C. No. C292987-1

ARGUMENT

I. CHAMBERS' PRIOR FELONIES WERE MORE PREJUDICIAL THAN PROBATIVE

The State argues that the district court did not abuse its discretion in denying Chambers' Motion in Limine to preclude the State from introducing his prior felony convictions if he testified because the felony convictions are relevant to his credibility. State's Answering Brief ("SA") 12. Chambers does not deny that the prior convictions meet the incredibly low burden of relevance. Chambers argues that their prejudicial effect far outweighs their probative value, an issue the State did not address. 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).

As the district court stated, "[t]he prior cases are violent crimes against persons like the crime in this case." 4 Appellant's Appendix ("AA") 308-309. There was no similar modus operandi to warrant their admission but for Chambers testifying. However, they were similar enough that the jury could have been misled. The State does not address the prejudicial nature of these prior convictions at all other than to say the case law that addresses the prejudice inquiry cited by Chambers in his Opening Brief, U.S. v. Wallace [1], is neither applicable nor relevant because it is a Ninth Circuit decision and applicable only to federal cases. SA 13. The five prejudice factors to consider, as enunciated by the Ninth Circuit Court of Appeals, are relevant and applicable because **they were considered by the district court when it denied Chambers' Motion**. Chambers does not argue that Wallace is *binding* but it is most certainly **persuasive** given that NRS 50.095 is modeled after FRE 609 and this Court has not issued a decision announcing what factors to consider when determining when admission of a prior conviction is so prejudicial that its probative value is outweighed, even when a defendant testifies. Pursuant to Wallace, which outlines the five part inquiry, four of those factors (Nos. 1-4) fall squarely on the side of precluding the State from admitting Chamber's priors and only one (No. 5) is *potentially* on the side of allowing the

[1] 848 P.2d 1464 (9th Cir.1988).

admission of his priors. [2] Therefore, these factors are relevant to Chambers' appeal.

Finally, the State argues that ultimately there was no prejudice to Chambers because he voluntarily chose not to testify. SA 13. This argument is circular. He chose not to testify because of the district court's erroneous denial of his Motion in Limine. This is a concern that should have been considered but was not:

> "A special and even more difficult problem arises when the prior conviction is for the same or substantially similar conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' As a general guide, those convictions which are for the same crime should be admitted sparingly. . . . (Par.) . . . One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment."

See People v. Beagle, 99 Cal.Rptr 313, 320 (Cal.,1972)(internal citations and quotations omitted) *cited by* Edwards, 524 P.2d at 334.

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[2] (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. Wallace, 848 P.2d at 1473.

Additionally, the State did not need to introduce Chambers prior conviction to attack his credibility:

> "One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive is there than the avoidance of conviction? We can expect jurors to be naturally wary of the defendant's testimony, even though they may be unaware of his past conduct.7 In fact, when the defendant does take the stand, the jury is charged to consider his interest in the outcome of the trial in assessing his credibility.
>
> This is not to say that a prior conviction has no relevance to credibility. It is to say that the trial judge, in weighing the prejudice that might result from its admission against the interest in having the defendant testify, should focus on just how relevant to credibility a particular conviction may be.8 While one who has recently been convicted of perjury might well be suspected of lying again under oath, the fact that a defendant accused of assault has already been convicted of assault has no such bearing on credibility."

See Brown v. United States, 370 F.2d 242, 244-25, 125 U.S. App. D.C. 220 (D.C. Cir., 1966) *cited by* Edwards, 524 P.2d at 334.

Chambers was prejudiced because he was unable to present his complete defense because he would have faced the highly prejudicial effect of the prior convictions if he testified and told his story. Yes, the district court agreed to give a cautionary instruction if Chambers testified and his felony convictions were admitted but this does not cure the prejudicial effect. Cautionary instructions cannot cure every error or element of prejudice. In fact, the risk is substantial that the "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." U.S. v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985). Again, this 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 when a defendant tesetifies. Chambers asks this Court to find it was error to deny his Motion in Limine and that this error prejudiced him.

II. CYNTHIA LACEY SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY VIA TELEVIDEO CONFERENCE

The State's argument regarding Cynthia Lacey's testimony is as follows: 1) the district court properly found Lacey to be credible with regard to her health condition, which the court felt would be jeopardized by being forced to travel; and 2) Chambers was not prejudiced by her testifying via televideo because he was able to "confront" her, yet chose not to do so, and that physical presence is not the most essential condition of the Confrontation Clause, citing to Maryland v. Craig, 497 U.S. 836, 847, 110 S. Ct. 3157, 3164 (1990). SA 17-21. The district court erred in finding Lacey credible; State misinterprets and misapplies Craig; and the State improperly minimizes the need for face-to-face confrontation.

A. Lacey Was Not Credible

Lacey was clearly not credible in her explanation of why she could not appear. Just because the testimony of the testifying witness can be sufficient to

determine whether a witness is too ill to travel does not automatically mean that the witness testimony is credible. Here, it was clear Lacey was not being truthful about her medical condition. She could not provide any details about her hospital visit or follow up appointments with her doctor; she returned to physical activity mere hours after the alleged heart attack (walked to train station); returned to a physically strenuous manual labor job three days later; she was given the medical advice of "take it easy" and was not told to refrain from travel; and could not provide any documentation of this supposed heart attack. 10 AA 960-70. She attempted to mislead the court by presenting photos of her blood pressure medication, **which she had been taking since 2008 well before her alleged heart attack.** 10 AA 968.

Lacey's attempt to mislead the court with an old prescription, alone, should have been enough to cause the district court to find her not credible and demand her appearance at trial. Someone being nervous and unwilling to testify is not enough to side step the in person requirement of the Confrontation Clause. The State simply reiterates that the district court found Lacey credible (SA 17-18) but fails to address the following: inconsistencies in her testimony regarding her medical condition; the fact that she did not have any supporting details or documents to support her claim, details and documents any person would have after legitimately suffering from a heart attack; or, most significant, the fact that

she attempted to mislead the court by using an old prescription to support her claim of a new medical condition.

This Court must review Chambers' claim that his Confrontation Clause rights were violation *de novo*. Chavez v. State, 213 P.3d 476, 476 (Nev. 2009). Therefore, Chambers asks this Court to find that Lacey was not credible and to also find that the district court erred in finding that she has a health condition that would be jeopardized by travel thereby finding that the State met the requirement set forth in NRS 171.1975 for testifying by televideo conference. Lacey simply did not want to travel and did not want to be subject to in person cross examination. Her displeasure over this does not trump Chambers' right to confront his accuser *in person*, discussed *infra*.

B. Chambers Was Prejudiced

The State argues that Chambers was not prevented from confronting Lacey and minimizes the in person aspect of confronting his accuser. The State cites to Craig for the argument that physical presence is not the most essential condition of the Confrontation Clause. SA 21. This misrepresents the holding in Craig.

In Craig, the Supreme Court of the United States addressed a **very narrow issue**: whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit

television, a specific exception to the Confrontation Clause that a Maryland statute allowed. 497 U.S. at 840. The Supreme Court concluded that "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." Id. at 857.

Despite carving out a very narrow exception, the Supreme Court noted that "face-to-face confrontation forms the core of the values furthered by the Confrontation Clause." Id. at 847. The Supreme Court further noted that "face-to-face confrontation enhances the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person." Id. at 846 *citing* Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2799 (1988).

> "It is always more difficult to tell a lie about a person to his face than behind his back. In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions."

Coy, 108 S.Ct. at 1019.

Finally, in Craig the Supreme Court noted that despite the exception it carved out for victims of child abuse, the face-to-face confrontation requirement it "may not [be] easily dispensed with." Id. at 850.

In addition to the erroneous argument that the face-to-face aspect of confrontation is of minimal importance, thereby allegedly rendering Lacey's televideo testimony harmless, the State argues that Chambers had "the same" opportunity to cross examine her. SA 20. Yes, he had an opportunity to ask Lacey questions but it was certainly not "the same" because she was not there under the scrutiny of Chambers, the court and jury. Coy, 108 S.Ct. at 1019; Craig 497 U.S. at 846-47. Furthermore, the damage had already been done. Lacey had already been able to lie from afar and claim she "didn't remember," which allowed the State to admit her prior statement to a detective, which was very damaging to Chambers' case. Had Lacey been forced to testify in person, she would have been under greater scrutiny and a more watchful eye; she would have had the fear of committing perjury and/or lying about Chambers while physically in a court with Chambers, a district court judge, district attorney and marshal nearby; and she would have been subject to the jury seeing her mannerisms and full and in person physical demeanor. Coy, 108 S.Ct. at 1019; Craig 497 U.S. at 846-47. This would have yielded more truthful testimony and Lacey's prior statement would not have been admitted.

As Crawford [3] and its progeny point out, face-to-face confrontation safeguards, promotes and helps ensure truthful testimony. This is why in person testimony is important. This is what Crawford, Coy and Craig demand with very limited and rare exceptions. Lacey's desire not to testify cloaked with an obviously fabricated and unsubstantiated heart attack claim does not fall under one of these exceptions. While the State claims Chambers has not cited to any legal authority in his Opening Brief that supports this contention that he was prejudiced, he has cited to the Sixth Amendment, Crawford, and Chavez, 213 P.3d at 483, both of which hold high the right to face-to-face confrontation. Moreover, Craig, the case the State cites to, while not on point with regard to the specific exception to face-to-face confrontation (trauma to child vs. a tenuous, at best, medical condition), makes it very clear that the fact-to-face element is at the core of the Sixth Amendment right to confrontation and should only be dispensed of in rare and exceptional situations, none of which were applicable here.

III. THE PRELIMINARY HEARING TESTIMONY OF BRIDGETTE GRAHAM SHOULD NOT HAVE BEEN READ INTO EVIDENCE

The State argues first that Graham was unavailable; second, that the State exerted reasonable efforts to secure her presence at trial; and third, that Chambers was given an opportunity to cross-examine her at the preliminary hearing. SA 23-24. Chambers does not disagree with points one and two. However, Chambers

[3] Crawford v. Washington, 541 U.S. 36, 42 124 S.Ct. 1354, 1359 (2004).

contests the State's argument regarding his ability to previously cross-examine Graham and to what extent he would have been able to cross-examine her regarding her prior conviction.

The State claims that Chambers had the opportunity to cross-examine Graham at the preliminary hearing; goes into how many questions she was asked by defense counsel; notes that Graham said she was high on methamphetamine the day of the crime, which the State claims was more damaging to her credibility than a petit larceny would be; and finally, that she also stated she never saw Chambers with a gun, which was helpful to Chambers' case. SA 25. In short, the State is arguing that while Chambers did not get exactly what he wanted, he should be happy with what he did get. It is not the State's place to determine what kind of defense Chambers puts on at trial or what questions to ask a witness. The jury may very well have determined that Graham's crime of petit larceny and dishonesty made her not credible. If Chambers wanted to question Graham regarding the facts of her petit larceny at the preliminary hearing, he would have been able to pursuant to NRS 50.085, discussed *infra* below. However he was not able to because the State did not disclose this information prior to the preliminary hearing. Therefore, although Chambers was given the opportunity to conduct *some* cross-examination and ask Graham *some* questions at the preliminary hearing, it was not an *adequate* opportunity due to the missing discovery. Chavez, 213 P.2d at 482.

The State then claims that Chambers mistakenly cited to Yates v. State, 596 P.2d 239, 95 Nev. 446 (1979) for the argument that he would have been able to ask Graham specific questions about her commission of petit larceny. The State further argues that Yates is not applicable because in Yates, the prior in question was a felony not a misdemeanor and it was admitted for the purpose of impeachment under NRS 50.095, which allows for the admission of a class of certain prior convictions, of which petit larceny is not a member. SA 25. The State mischaracterizes Chambers' reliance on Yates and his argument regarding the admissibility of details of Graham's petit larceny.

Chambers did not cite to Yates to argue that the crime of petit larceny is admissible per se as a prior conviction under NRS 50.085, nor is he arguing that petit larceny would be admissible under NRS 50.095—that would have been a misapplication of the caselaw. **Chambers cited to Yates for the purpose of establishing that the specific instance of the commission of larceny is relevant to truthfulness**. 596 P.2d at 241, 95 Nev. at 449. It does not matter if the larceny was petit or grand, felony or misdemeanor—the untruthful act is the same, the only difference being the value of the item(s) taken. Based upon the fact that this Court has determined in Yates that larceny is a crime relevant to truthfulness [4], it follows

[4] 596 P.2d at 241, 95 Nev. at 449

that pursuant to Butler v. State [5] and NRS 50.085(3), Chambers would have been able to question Graham regarding the specific act of petit larceny.

The State argues that Chambers would not have been permitted to do this because "a conviction, even if admissible under NRS 50.085, cannot be proven by extrinsic evidence" and cites to Drake v. State, wherein this Court held that while a "defendant might be entitled to ask a witness about an arrest record for prostitution, he would normally not be able to introduce extrinsic evidence of such a record if the only purpose if the evidence was to attack the credibility of the witness." [6] SA 26. The State is simply citing the general rule of NRS 50.085 but fails to address the fact that the specific conviction or act Graham committed falls under the exception enunciated in NRS 50.085 because it was an act relevant to truthfulness. Moreover, the State is conflating asking questions about conduct that is relevant to truthfulness with introducing extrinsic evidence. The two are neither one nor the same. As this Court made clear in Butler, asking a witness questions about a prior conviction involving dishonesty is permitted. 102 P.3d 71, 120 Nev. 879.

In Butler, Butler contended that the State engaged in deliberate misconduct by impeaching defense witness Katie Wilson on cross-examination with questions

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[5] 102 P.3d 71, 120 Nev. 879 (2004) *quoting* Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000).

[6] 108 Nev. 523, 527, 836 P.2d 52, 55 (1992).

relating to her prior conviction for attempted forgery — a gross misdemeanor. The State acknowledged that NRS 50.095 did not authorize cross-examining Wilson on her prior gross misdemeanor conviction. However, because the crime of forgery involved dishonesty, the State maintained that the questioning went to Wilson's veracity and that pursuant to NRS 50.085 the trial court properly overruled Butler's objection. Id. at 79.

This Court held that attempted forgery is a crime involving dishonesty and conduct that goes to Wilson's truthfulness as a witness and that there was no indication that the State attempted to impeach Wilson by introducing extrinsic evidence. Rather, the State merely asked her questions about the prior conviction on cross-examination, which she answered. This Court concluded that under these particular facts, the State's cross-examination of Wilson was proper pursuant to NRS 50.085(3). Id. at 80.

Chambers has never once argued that he would have or could have used "extrinsic evidence" to prove Graham's conviction. He merely would have questioned her about the conviction, which is permitted under NRS 50.085, Butler, and Yates, *supra*.

The State claims that Chambers still could have admitted Graham's conviction pursuant to NRS 51.069, a nuanced and rarely used vehicle to admit prior convictions of a hearsay declarant even when the declarant does not testify.

SA 26. Pursuant to NRS 51.069(1), "[w]hen 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 those purposes if the declarant had testified as a witness." While Chambers could have attempted to convince the district court to admit Graham's prior conviction for petit larceny (no doubt over the objection of the State), he still would not have been able to ask her any questions regarding the details of the dishonest act. Therefore, this would not have cured the prejudice Chambers suffered from not being able to adequately cross examine and confront Graham.

Finally, the State argues that the jury knowing about her conviction would not have significantly undermined her credibility and that her credibility was less at issue because her testimony was not "unique." SA 27. **First**, the State offers no legal authority regarding the effect of "uniqueness" of testimony on the importance of the witness's credibility.

Second, given that Graham testified that Chambers said, "I tried to rob her, and then they had got up and – and so I pulled out my gun"….; how he was "going to come up," which means to get money; and that he said he was "going to hit a lick," which means to rob someone, her testimony is most certainly unique. 14 AA 1346; 14 AA 1348-49; and 14 AA 1350-51. In fact, the statement that Chambers told her that he "tried to rob her, and then they had got up and – and so I pulled out

my gun" amounts to a confession. Graham's testimony did not simply "corroborate the testimony of other witnesses at trial, specifically Charles and Bradley" as the State argues. SA 27.

Charles Braham testified to nothing more than hearing gun shots and seeing whom he thought was Chambers leave the trailer with what appears to be a gun in his pocket, get into a silver or gray car and drive away. He was unable to identify Chambers at trial in court. 8 AA 718-723. Bradley Grieve testified that he heard the Papoutsis shouting so he started walking towards the trailer; that's when he heard the gunshots followed by more screaming. 8 AA 738. Grieve continued walking towards trailer 45 which is when Chambers walked out looking rattled and surprised. 8 AA 739. He identified Chambers in the courtroom. 8 AA 740. Grieve further testified that when Chambers walked out of the trailer, he noticed Chambers was holding a gun in his right hand with the barrel inside of his pocket. 8 AA 741. His sleeve on his arm was bloody. 8 AA 741. Chambers walked towards a car parked by a trailer down the way left. 8 AA 742. Grieve noticed another person in the car. 8 AA 743. **Neither Grieve nor Braham testified to anything Chambers said because they did not speak with him.** Graham's testimony at the preliminary hearing went far beyond what any other witness testified to and consisted of what amounted to a confession by Chambers. Therefore, if this Court does find that uniqueness of testimony affects the weight of

the witness's credibility, Graham's testimony was highly unique and her credibility was extremely relevant.

Third, her crime of larceny is specifically considered by this Court to be relevant to truthfulness. Yates, P.2d at 241, 95 Nev. at 449. It's not just *a* crime, it's a crime involving dishonesty. Because of that, it goes directly to a witness's credibility, so much so that this Court has carved out and exception for larceny to the general rule that a crime punishable by less than a year is not admissible to attack credibility. Id. The argument that admission of her prior conviction for larceny would not have significantly undermined her credibility runs contrary to the both statue and Nevada caselaw regarding the admission of these types of prior conviction. NRS 50.085; NRS 50.095; Yates, P.2d at 241, 95 Nev. at 449; Butler, 102 P.3d 71, 120 Nev. 879.

Clearly Graham's 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. CHAMBERS WAS PREJUDICED BY THE STATE'S INDIRECT REFERENCE TO HIS CHOICE NOT TO TESTIFY

The State argues that commenting on Chambers' conduct after the crime was committed does not constitute prosecutorial misconduct. SA 28. Chambers does not dispute this assertion. However, even if the State did not intend for the statement "he didn't tell his story, right?" to be taken as a comment on Chamber's exercising his Fifth Amendment right not to be compelled to testify as a witness, given the fact that the statement was made in temporal proximity to statements about failure to present a defense of self-defense and that the flight instruction is devoid of any mention of making (or not making) statements after a crime (3 AA 253), the jury would have naturally taken the comment to be about Chambers' 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 v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989).

Even the court expressed that upon only hearing the live closing statement, it was unclear as to whether or not the State was referring to silence prior to or after arrest in its closing remark. 12 AA 1164-66. It took the court **replaying the comment three times and hearing an explanation from the State** to understand that the State was not *intentionally* referring to Chambers silence after he was arrested or silence at trial. 12 AA 1197. However, **the jury did not have the luxury of listening to the closing argument repeatedly or the State's**

explanation of what it meant by the comment because this argument was held outside the presence of the jury. The instruction did not cure the prejudice given the fact that the jury was simply asked not to consider the comment made by the State. 12 AA 1137. Chambers right to refrain from testifying was not addressed in the curative instruction. 12 AA 1137. Moreover, if the comment was so harmless, as the State argues, the district court would not have attempted to cure the issue at all.

Finally the State argues that if the comment was improper, the error was harmless because Chambers cannot show that a substantial right was prejudiced. SA 31. This is legally incorrect. Chambers 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. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Barron, 105 Nev. 767, 783 P.2d 444. 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." Lyon, 397 F.2d at 509 cert. denied sub nom., Lysczyk, 393 U.S. 846, 89 S.Ct. 131*see also* Barron, 105 Nev. at 779, 783 P.2d at

451-52. If this Court finds that there was an indirect reference to Chambers' decision not to testify and that the jury took it to be just that, it is a violation of a **substantial** right per the Fifth Amendment to the United States Constitution. [7] Id.

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

A. The State Improperly Relies on the Information as Providing Adequate Notice so as to Comply with NRS 207.012 and 207.016

The State repeatedly mentions that Chambers was placed "on notice" of his prior felonies due to the Information filed on October 10, 2013, well in advance of trial and sentencing, thereby putting the State in compliance with both the old and new versions of NRS 207.016. SA 37-41. The State is conflating and improperly bootstrapping the notice of intent to seek habitual criminal treatment with the pleading of the ex-felon in possession of firearm charge.

The Information filed on October 10, 2013 simply lists Chambers prior felonies so as to properly plead the charge of Ex-Felon in Possession of Firearm (NRS 202.360). 1 AA 1-4. This Information does not mention that the State intends to seek habitual criminal treatment. Therefore, **it does not meet the notice requirements of NRS 207.016 or NRS 207.012.** The State cites to absolutely no

[7] If this Court finds that the comment was a direct reference, which it is less is likely to, then this is per se a violation of the Fifth Amendment to the United States Constitution regardless of what the jury thought. Griffin, 380 U.S. 609, 85 S.Ct. 1229; Barron, 105 Nev. 767, 783 P.2d 444.

statute or authority supporting the argument that a defendant is put on notice of the State's intent to seek habitual criminal treatment by pleading a charge of Ex Felon in Possession of Firearm. The **possibility that the State could** seek habitual treatment does not constitute **notice of intent** to seek habitual treatment and **it is notice of the intent that the statutes require**. NRS 207.016, 207.010 or 207.012.

B. The State Failed to Address the Allegation that the State's Notice was Also Deficient Pursuant to NRS 207.012

Although the Judgment of Conviction does not indicate whether Chambers was sentenced under NRS 207.010 or NRS 207.012, the sentencing transcript makes it clear he was, in fact, sentenced under NRS 207.012. 4 AA 326-27. The State fails to respond to Chambers' argument that the State's Notice of Intent to Seek Habitual Criminal Treatment, even if deemed timely under the older version of NRS 207.016, is still deficient pursuant to NRS 207.012 given that the State filed a notice and not an information charging the habitual criminal count. NRS 207.012(2) and (3) mandate that an information be filed where the defendant has been charged by way of Information. This language is mandatory and it is what vests the district court with jurisdiction to sentence a defendant as a habitual criminal. Grey v. State, 124 Nev. 110, 123, 178 P.3d 154,163 (2008). Provided the elements of NRS 207.012 are met, the State ***must*** charge it and the sentencing court ***may not*** dismiss it. This results in a mandatory increase in loss of liberty.

Chambers asks this Court to hold that the procedures set forth in NRS 207.012 are mandatory and must be adhered to in the interest of Due Process.

The State has failed to address this claim as raised in Chambers' Opening Brief. Therefore, the State confesses to the error. *See* Bates v. Chronister, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *see also* A Minor v. Mineral Co. Juv. Dep't, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *see also* Moore v. State, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and "effect[ively] filed no brief at all," which constituted confession of error), overruled on other grounds by Miller v. State, 121 Nev. 92, 95–96, 110 P.3d 53, 56 (2005). Likewise, the State also confesses to the prejudicial effect this error had on Chambers. Polk v. State, 126 Nev. Adv. Op. 19, ___, 233 P.3d 357, 361 (2010); see also NRS 49.005(3).

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CONCLUSION

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

Dated this 27th day of February, 2019.

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

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. This brief exceeds the with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 5, 303 words; or

[ ] Monospaced, has ____ or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

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

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter 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 27th day of February, 2019.

/s/ Jean Schwartzer

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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 27th day of February, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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