IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WILLIAM RANDOLPH, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 73825

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

SANDRA L. STEWART, ESQ.
Nevada Bar #006834
140 Rancho Maria Street
Las Vegas, Nevada 89148
(702) 363-4656

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

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ROUTING STATEMENT

This appeal is appropriately retained by this Court because it involves a special verdict of death. NRAP 17(a)(1).

STATEMENT OF THE ISSUES

1. Whether evidence of Appellant's guilt of conspiracy to commit murder was overwhelming.
2. Whether Utah's expungement law is binding in Nevada.
3. Whether Appellant's rights to bail and a speedy trial were violated.
4. Whether the State committed prosecutorial misconduct at trial.
5. Whether the district court committed manifest error when it allowed the State to introduce Appellant's prior bad acts.
6. Whether the district court abused its discretion by dismissing jurors for cause.
7. Whether Appellant had the right to argue last during the penalty phase.
8. Whether the death penalty is constitutional.
9. Whether any error is harmless.

STATEMENT OF THE CASE

On January 7, 2009, a grand jury indicted Appellant Thomas Randolph with conspiracy to commit murder, two counts of murder with use of a deadly weapon, and burglary while in possession of a deadly weapon. 1 AA 1-4. On January 21, 2009, Appellant pled not guilty to the charges and invoked his speedy-trial right. 1 AA 179-81. On January 28, 2009, Appellant waived his right to speedy trial. 1 AA 166. On February 4, 2009, the State filed the notice of intent to seek death penalty. 1 AA 170.

On March 13, 2009, Appellant filed a motion to set bail and a pretrial petition for writ of habeas corpus. 1 AA 184, 192. On March 24, 2009, the State filed a return to the petition for writ of habeas corpus. 1 AA 208. On March 26, 2009, the State filed an opposition to Appellant's motion to set bail. 2 AA 228. On March 30, 2009, Appellant filed a reply to the State's return to his petition for writ of habeas corpus. 2 AA 238. On May 4, 2009, Appellant filed a memorandum of law in support of his petition for writ of habeas corpus and dismissal of burglary charge. 2 AA 246. On May 11, 2009, the State filed a response to Appellant's memorandum of law in support of dismissal of burglary charge. 2 AA 251.

On April 1, 2009, the district court held a hearing on Appellant's motion to set bail and whether sufficient evidence supported grand jury Indictment. 2 AA 266. The district court found sufficient evidence supported the Indictment and denied

Appellant motion to set bail. 2 AA 279-80, 290-93. On May 20, 2009, the district court held a hearing on Appellant's petition for writ of habeas corpus that challenged the charge of burglary. 2 AA 257. The district court denied the petition. 2 AA 262.

On June 17, 2009, because Appellant could no longer afford private counsel, the district court attempted to appoint a public defender to represent Appellant. 2 AA 305-06. On July 15, 2009, the public defenders, without confirming as counsel, represented to the district court that they were not ready to proceed to trial. 2 AA 311. They also informed Appellant that the earliest trial date for them was March 2010. 2 AA 311-12. Appellant then represented that he will hire another private counsel who is from Florida. 2 AA 312. On August 5, 2009, two private attorneys confirmed as counsel. 2 AA 318. At this confirmation hearing, the Florida counsel had yet to submit paperwork to be admitted pro hac vice. 2 AA 318-19. Also, the district court gave parties 90 days to file Petrocelli motions. 2 AA 320. On August 19, 2009, the district court admitted Appellant's Florida counsel pro hac vice. 2 AA 346. Appellant also confirmed his desire to proceed with his new counsel. 2 AA 347. The district court also set Petrocelli hearing on December 4, 2009. 2 AA 350.

On September 23, 2009, the State filed a notice of motion and motion to admit evidence of prior bad acts. 2 AA 361. Appellant filed an opposition on November 16, 2009. 2 AA 416. Appellant filed another motion to set bail on February 26, 2010. 3 AA 458. The State filed an opposition on March 9, 2010. 3 AA 465. The district

court denied Appellant's second motion to set bail. 3 AA 483. On July 20, 2010, Appellant filed a motion to exclude testimony of the State's witness William McGuire at the Petrocelli hearing. 3 AA 487. On July 30, 2010, the district court denied Appellant's motion to exclude testimony of McGuire at the Petrocelli hearing. 3 AA 501. After holding the Petrocelli hearing on July 30, 2010, and August 16, 2010, the district court granted the State's motion to admit evidence of prior bad acts. 3 AA 589.

On October 4, 2010, the district court held a hearing on Appellant's renewed motion to place on calendar to address medical issues. 3 AA 593. The district court did not think it had the authority to order the jail to provide specific medical care or prescription drugs because it lacked medical expertise. 3 AA 594-95.

On January 24, 2011, the district court scheduled a status check on trial setting. 3 AA 597. The State announced ready on January 24, 2011. 3 AA 599. Appellant requested a continuance. Id. Another status check on trial readiness was held on May 18, 2011. The State represented to the court that it had been ready to proceed. 4 AA 822-23. The district court acknowledged that the State was ready to proceed in July 2011, but the defense was not ready. 4 AA 823. On November 16, 2011, the district court held a status check on trial readiness. 5 AA 1150. The State again announced ready and wanted to ensure that the defense was ready to proceed

on January 4, 2014. 5 AA 1155-56. Defense counsel represented that they were. 5 AA 1156.

On November 28, 2011, Appellant filed various motions in limine but requested more time to file additional motions in limine. 4 AA 710. The State had no objection to this request if there was good cause. 4 AA 784-85. On December 1, 2011, Appellant filed a motion for stay of proceedings so that he could file a petition for writ of habeas to the Nevada Supreme Court. 4 AA 733.

On December 14, 2011, the district court entered an ex parte order allowing Appellant's doctor to interview him for psychological testing and evaluation. 4 AA 807.

On December 30, 2011, Appellant filed another motion to continue trial. 5 AA 896. A reason for Appellant's request is because a critical part of the defense team was ill. 5 AA 901-02. Appellant also requested more time to file additional motions in limine and opposition to the State's motions. 5 AA 902.

On January 6, 2012, the district court held a hearing on Appellant's request to dismiss his counsel. 5 AA 1037. The district court denied the request. 5 A 1076-77. Due to Appellant's sudden attempt to dismiss his counsel, defense counsel requested a brief continuance to prepare for trial. 5 AA 1078. The district court retained the original trial date of January 17, 2012. 5 AA 1043.

On January 9, 2012, Appellant filed another motion for stay of proceedings so that an emergency writ of mandamus could be filed. 5 AA 1085. On January 12, 2012, the district court granted the stay after the Nevada Supreme Court ordered an answer from the State which was due on January 26, 2012. 6 AA 1131.

On February 2, 2012, the Nevada Supreme Court dismissed the petition for writ of mandamus and issued an order allowing Appellant to fila timely written request to dismiss counsel. 5 AA 1171; 6 AA 1298-99. On February 10, 2012, Appellant's counsel Brent Bryson moved to withdraw as attorney of record because Appellant had refused to assist him in trial preparation since January 6, 2012. Co-counsel Yale Galanter filed an identical motion based on the same reason. 6 AA 1137. On February 13, 2012, Appellant filed a pro per motion to fire his attorney. 6 AA 1144. On February 13, 2012, the district court held a hearing on the motions to withdraw and on trial readiness. 6 AA 1159. The district court granted Bryson's and Galanter's motions to withdraw. 6 AA 1161. The district court ordered the public defender's office to conduct a conflict check. 6 AA 1160, 1162. Deputy Public Defender Norman Reed was informed of the various pending motions filed by Appellant's previous counsel. 6 AA 1163. Parties agreed that Reed would need time to review these pending motions and determine whether he would proceed with them. 6 AA 1164. On February 27, 2012, the district court gave Bryson and Galanter an extra week to give Reed the case files. 6 AA 1168.

On March 5, 2012, the district court held another status check on trial readiness. 6 AA 1253. Reed represented that there were still files missing from previous counsel. 6 AA 1255. Also, Reed represented that a significant amount of mitigation work still must be investigated and completed. Id. A tentative trial date of January 14, 2013 was set. Id.

On March 29, 2013, Appellant filed a motion to dismiss his counsel. 7 AA 1472. The district court denied Appellant's motion. 8 AA 1758.

On January 8, 2014, Appellant requested a continuance due to additional discovery. 39 AA 8550. On February 4, 2014, the district court held another status check on trial readiness. 9 AA 1818. Appellant's counsel represented that additional discovery must be completed. 9 AA 1819. The State also reminded the district court that it had been ready to proceed to trial. Id.

March 21, 2014, Deputy Public Defender Reed withdraw as counsel. 39 AA 8553. On April 2, 2014, Special Deputy Public Defender David Schieck was appointed. 10 AA 2111.

On April 12, 2016, Appellant was deemed not competent to stand trial due to his opioid medications. 11 AA 2274. On June 1, 2016, Appellant was deemed competent to stand trial. 11 AA 2289.

On January 4, 2017, Appellant requested, among other things, to represent himself. 11 AA 2294. On January 4, 2017, Appellant withdrew his motion to represent himself. 11 AA 2321-22.

On June 12, 2017, a jury trial commenced. 13 AA 2665. On June 28, 2017, the jury found Appellant guilty of conspiracy to commit murder and two counts of first-degree murder with use of a deadly weapon. 21 AA 4480-81,4610-11. A penalty hearing followed. 21 AA 4613; 22 AA 4742-4840; 23 AA 4841-4923. On July 5, 2017, the jury returned a special verdict of death. 23 AA 5032-38, 5040-42. On August 23, 2017, the district court sentenced Appellant to between thirty-two and eighty-four months as to Count 1, Death with a consecutive term of ninety-six to two hundred forty months as to Count 2, and Death with a consecutive term of ninety-six to two hundred forty months as to Count 3, consecutive to count 2, with 3,143 days credit for time served. The judgment of conviction was filed on August 23, 2017. 24 AA 5062-64. The district court filed its warrant of execution the same day. 23 A 5058-60; 24 AA 5061. Appellant filed his notice of appeal on August 23, 2017. 24 AA 5067.

STATEMENT OF THE FACTS

Appellant's rocky marriage with Sharon

Appellant Thomas Randolph started dating Sharon Randolph, and the two quickly married. 17 AA3646-47. Sharon's close friend, Antoinette Beam, became

concerned about Sharon's safety because Appellant made Antoinette feel nervous. 17 AA 3647. Alice Wolfe, another good friend of Sharon's, also did not like Appellant as he was rude to Alice during their first meeting. 17 AA 3668-69. Antoinette also felt Sharon did not have a good relationship with Appellant as he would leave Sharon by herself during holidays. 17 AA 3648.

One day, without telling Sharon, Appellant took out a life insurance policy on her. 17 AA 3669. When Sharon found out, she was extremely upset. 17 AA 3670. Sharon responded by having a will made in the presence of Alice. 17 AA 3670. She told Alice that if anything were to happen to her, Alice was to give the will to Colleen, Sharon's daughter. 17 AA 3672. Alice agreed and kept the will in a safe deposit at a bank. Id.

The week leading up to Sharon's murder, she and Appellant were staying in Utah. 17 AA 3650, 3673. One day, Sharon informed Antoinette that Appellant and she were coming back to Las Vegas for a day or two. 17 AA 3651. Sharon also told Antoinette that she and Appellant were going to dinner and a movie. 17 AA 3651.

On May 8, 2008, Sharon was murdered. 17 AA 3652. After Sharon's murder, Appellant told Antoinette that, after he and Sharon returned home from the dinner and movie, he dropped Sharon off outside of the parking garage to their house and let Sharon enter the house first. Id. Appellant told Antoinette this was because the parking garage did not have enough space to allow Sharon to exit the car. Id. After

Sharon entered the house, Appellant did not immediately leave the car after he parked it in the garage; he stayed in the car and listened to music. Id. When he eventually entered the house, he saw Sharon lying on the floor. Id. Appellant never mentioned to Antoinette that he heard a gunshot. 17 AA 3653. Also, Appellant told Antoinette that he could not call 911 right away because his phone, which had Vonage service, was not working properly. 17 AA 3653.

Appellant also called Alice after Sharon's murder. 17 AA 3674-75. Over the phone, Alice immediately accused Appellant of killing Sharon. 17 AA 3674. Alice described Sharon's relationship with Appellant at that time was madness and there was no indication that the relationship was going to improve. 17 AA 3675.

Randolph's secretive relationship with Michael Miller

Michael Miller lived with his uncle Billy Miller. 17 AA3738. Michael is a calm, mellow, and quiet person. 17 AA 3649. Appellant would call Michael multiple times every day. 18 AA 3746. When Michael didn't pick up, Appellant left more than 200 messages. 18 AA 3793. In fact, Billy had to delete some of Appellant's messages to have room for other messages. Id. Billy also saw Appellant regularly pick up and drop off Michael. 18 AA 3747. Billy also saw Appellant and Michael speak for hours at a mailbox near Billy's house. Id. However, Appellant and Michael would never speak in front of Billy and his wife, Vida Miller. Id. Appellant and

Michael were hanging out so much that Billy and his wife thought they were involved in an intimate relationship. Id.

In the week leading up to Sharon's murder, Michael informed Billy that he was going to housesit for Appellant. 18 AA 3750. Billy suggested to Michael that he should obtain a letter from Appellant just in case if Appellant's neighbors encountered Michael at Appellant's house and did not recognize him as the owner. Id. Michael told Billy that he would get such a letter. Id. At about the same time, Michael informed Billy that he was going to go to Florida and make up with his ex-girlfriend. 18 AA 3750-51. Billy thought this was strange because Michael did not have any money. 18 AA 3751. Despite not working for at least three weeks, Michael informed Billy that he and Appellant were going to get some money, about $400,000. 18 AA 3751, 3796.

Appellant and Michael had a leader-follower relationship. Appellant was the dominate person in the relationship. 17 AA 3649; 18 AA 3792. Vida heard a message where Appellant lectured Michael about how Michael should not have a girlfriend because he did not have any money. 18 AA 3794-95. Appellant lectured Michael as a child even though Michael was 39 years old. 17 AA 3470; 18 AA 3795. Vida also heard a message where Appellant told Michael to return Appellant's gun. Id.

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The unusual crime scene and Appellant's inconsistent testimony

When homicide Detective Clifford Mogg and Detective O'Kelley arrived on the scene of Sharon's murder, the house was in a condition that was atypical of a home invasion. 18 AA 3839-40. Generally, a house would be ransacked in a home invasion with the drawers pulled out and valuables taken away. Id. At this crime scene, jewelries and electronics were left untouched. Id. Sharon's body was to the north of Michael's body, which was positioned near the garage area. 18 AA 3969.

Based on the unusual nature of the crime scene, Detective Mogg and Detective O'Kelley began to suspect that Appellant might be involved in murdering Sharon. 18 AA 3965. First, the ski mask found on Michael appeared suspicious because it did not have bullet holes on it even though Michael was shot twice in the head. 20 AA 4240-41. This showed that Michael did not wear a ski mask when he was shot; someone must have put the mask on him after the fact. 20 AA 4241. Second, since Appellant told Michael that when Appellant was going back to Utah with Sharon, there was no reason for Michael to burglarize Sharon's house while Appellant and Sharon were still in town—Michael could have waited for Appellant and Sharon to leave. Exhibit 203[1]. Third, Detective O'Kelley explained that he expected to

[1] Contemporaneous with the filing of this Answering Brief, the State moves this Court direct the district court transmit Exhibit 203 for this Court's review. Exhibit 203 is a video recording of Detective Mogg's interview with Appellant on May 8, 2008. 18 AA 3842-43.

discover more bullet cases in the hallway where Appellant claimed to have first opened fire at Michael. 19 AA 4169. Also, the police could not locate Michael's blood, bone fragments, tissue, hair, or cerebral fluid in the hallway. 19 AA 4170-71. In fact, four out of the five bullets relative to Michael's injuries were located in the garage. 19 AA 4172. Fourth, Detective O'Kelley testified that, based on the trajectory of Michael's gunshot wounds, he had to be on the ground when he was shot by Appellant. 19 AA 4177-78. This proved to be inconsistent with Appellant's recount of the event. Id. Finally, Detective O'Kelley testified that it would be extremely difficult for someone to inflict two head shot wounds while someone is moving in an unexpected fashion. 20 A 4182. Michael's uncle, Billy, testified that the ski mask that was found on Michael's dead body was not the one he had ever seen at his house. 18 AA 3752-53.

Detective Mogg also noticed suspicious nature of the crime scene. First, although Appellant stated that he would carry a gun most of the time with him because he had a concealed weapon permit, he did not carry a gun on the day of the murder. 18 AA 3966. Detective Mogg thought this was strange because Appellant had to have a gun to shoot Michael and a gun was conveniently located near the garage. Id. Second, Detective Mogg thought it was strange for Appellant to claim that the home invader jumped from the bathroom to the music room due to the distance between the two rooms and the fact that to do so, the person had to jump

over Sharon's dead body. Id. Next, Detective Mogg was suspicious of Appellant's story because he could not locate a matching amount of ballistic evidence at the location where Appellant claimed to have fired his weapon multiple times. 18 AA 3967. Additionally, Detective Mogg was puzzled by Appellant's representation that the fire department operator had told him to get out and get home invader's gun. Id. To Detective Mogg's knowledge, this request is not something the fire department operator would tell a victim to do in a home invasion situation. Id. In fact, Appellant ignored this alleged request from the fire department and began to search a bag that was in the garage. Id. Appellant claimed he found clothing that belonged to Michael and he thought that the suspect was supposed to go on a date. Id. Finally, the position of the ski mask that Michael allegedly wore was inconsistent with what Appellant had claimed to have seen. Id. Based on these concerns, Detective Mogg and Detective O'Kelly decided to conduct a walkthrough with Appellant, so he can reenact what happened. Id.

A surveillance video was later retrieved from Funny's gas station near Sharon's house. 18 AA 3981. The video showed that Appellant and Sharon left the gas station at 8:26 pm. Id. Sharon's house is about three minutes away from Funny's. Id. The first 911 call was not placed until 8:45 pm. Id.

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Appellant's conspiracy with Michael to murder Sharon

Based on the secretive relationship Appellant had with Michael and the unusual crime scene, the State submitted to the jury that Appellant conspired with Michael to kill Sharon. 20 AA 4352. The only twist was that Michael did not know Appellant was going to kill him, too. 20 AA 4352-53.

The plan was simple. Appellant would take Sharon to a restaurant, and Michael would stage a burglary. 17 AA 3651. Sharon was to walk into the home by herself at which point Michael would shoot her. 20 AA 17 AA 3652. On May 8, 2008, the two set the plan into action. Michael entered Appellant's home while Appellant was out with Sharon. Sharon had told Antoinette that they were going to dinner and a movie that night. 17 AA 3651. The couple returned home, and Appellant let Sharon go on ahead as he stayed behind and turned up the music that was playing in his car until it was so loud that he could not hear anything happening inside the house. 17 AA 3652. After Michael had killed Sharon, Appellant killed Michael to complete his plan.

Appellant's suspicious conduct after Sharon's death

The day after Sharon's murder, Appellant called Alice. 17 AA 3673-75. After Appellant told her what happened, she immediately asked him what he had done to Sharon. 17 AA 3674. Alice had her husband take Colleen the will Sharon had drafted

after finding out about the life insurance policy that Appellant had secretly taken out on her. 17 AA 3680-81.

Even before Sharon's funeral, Appellant was already phoning Colleen constantly about selling Sharon's house and distributing the proceeds. 19 AA 4091.

Appellant mistakenly believed that he was the beneficiary of Colleen's will. 18 AA 4091. Once Colleen informed Appellant that an updated will removed him as the beneficiary, he started calling Colleen continuously. 19 AA 4091-93. He accused Colleen of lying and told her that Sharon did not like her. 19 AA 4093.

Appellant came up with purportedly a third will which made Appellant the beneficiary. 19 AA 4097. Appellant threatened Colleen that if she challenged the will, they would be in court forever. 19 AA 4099. In fact, Appellant accused Colleen of committing fraud and as a result, she had just lost her share of the inheritance. 19 AA 4103.

Randolph's prior murder case

It turns out, Sharon was not the first wife Appellant was accused of killing. Eric Tarantino interviewed and ultimately worked for Appellant, who was a manager at Timberline Cabinets in the 1980s. 17 AA 3586, 3589. Tarantino was only 19 years old when he met Appellant, who was 10 years older. 17 AA 3585, 3588. The two became close friends very fast, and even after Tarantino was laid off, the two continued to see each other regularly. 17 AA 3589-90. At this time, Tarantino and

his wife Lori Tarantino were having financial troubles which caused their eventual separation. 17 AA 3590. Needing to make money, Tarantino was working for Appellant a couple of times a week on odd personal jobs. 17 AA 3590. As Tarantino and Appellant's friendship progressed, Appellant began to constantly ask Tarantino if he would be comfortable hurting or shooting somebody. 17 AA 3592. Eventually, Appellant told Tarantino that he wanted to kill his wife, Becky. 17 AA 3593. Appellant was having a rough marriage with Becky at the time. 17 AA 3592. Tarantino immediately said no, but Appellant responded by saying that because Tarantino knew so much, it was either his life or Becky's. 17 AA 3593. From then on, the two regularly discussed killing Becky, and it became the basis of their relationship. 17 AA 3594. They would practice shooting together, and Tarantino was required to inform Appellant about what he was doing and where he was. 17 AA 3596. In fact, Appellant discussed with Tarantino different scenarios about how they could murder Becky, and they practiced those scenarios. 17 AA 3594.

As the two discussed possible ways to kill Becky, they eventually discussed a "staged residential burglary." 17 AA 3596. Tarantino was "to go in, grab a couple of things, rummage through some drawers … shoot her, and leave." 17 AA 3596. Although the two discussed multiple scenarios, each scenario involved Tarantino actually killing Becky. 17 AA 3597. Appellant explicitly said that he wanted to kill Becky for the insurance money, and even showed the documents to Tarantino. Id.

Conversations about different possible scenarios went on for several months. 17 AA 3597. Tarantino informed his wife of each discussion so that she could "get [him] some kind of legal help" if anything ever happened. 17 AA 3598. His wife eventually told Appellant about this. 17 AA 3600. Appellant physically confronted Tarantino and beat him up, threatening to "come back and finish" the job if he said anything. 17 AA 3600-03. Tarantino had to go to the hospital as a result. 17 AA 3601. Within 24 hours of returning home, Tarantino awoke to Appellant standing over him, where he beat him again. 17 AA 3602.

Tarantino knew that his life was in danger, so he called his sister and told her that he needed to be on a plane immediately. 17 AA 3604. Prior to leaving, he called Becky and warned her of Appellant's plan to kill her, but was interrupted by Appellant, who answered the other line. 17 AA 3604. He told Appellant that he could no longer do this, and he moved to New Hampshire. 17 AA 3604-05. At some point, his then ex-wife called and told him that Becky was dead. 17 AA 3605. Because she was one of only two people besides Appellant who knew what Appellant had done, Tarantino told her to run. 17 AA 3606.

Meanwhile, William McGuire, a former deputy county attorney in the Davis County Attorney's Office in Utah, was assigned to respond to Appellant's home regarding the death of Becky Randolph, Appellant's third wife. 16 AA 3512-15. Becky was found on her bed, with her blankets slightly tucking her in and a bullet

hole to the right side of her head. 16 AA 3516-17. There was no visible exit wound. Id. Becky's hand was over her chest, and there was a gun nearby, "as if she had been holding it." 16 AA 3518. Because there is usually kickback from a gun, McGuire testified that it would be very unusual for the hand to land where it did after a suicide. 16 AA 3519.

An autopsy was performed, and an exit wound was found in Becky's left ear canal. 16 AA 3520. Having found an exit wound, investigators returned to the house to find the bullet, but found that the house was not "in the same condition as when" they had been there the previous day. 17 AA 3522. It was never found. 17 AA 3523. More than a year passed, during which time Becky's case was treated as a suicide. 17 AA 3523. Eventually, it became clear that Tarantino "might know about" the details of Becky's death. 17 AA 3525. Detective Scott Conley contacted Tarantino, who lived in New Hampshire at the time. 17 AA 3560. After a recorded phone conversation took place, McGuire and Detective Conley traveled to Tarantino and took a recorded statement from Tarantino in person. 17 AA 3526-27, 3560-61. As the newly opened investigation progressed, investigators were able to find multiple insurance policies which Appellant had taken out on Becky's life, the value of which exceeded $250,000. 17 AA 3527-28, 3571.

Based on Tarantino's statement, a warrant was issued, and Appellant was arrested in November 1988 in connection with Becky's death. 17 AA 3528, 3563.

Tarantino testified in a preliminary hearing, and the case was bound up. 17 AA 3531. Prior to trial, Appellant threatened to kill Tarantino because of his position as a witness. 17 AA 3534. Bill McCarty, a Salt Lake County detective, went undercover and contacted Appellant "as a person who could effectuate the threat" against Tarantino. 17 AA 3535. The two met via telephone, and it was arranged that Wendy Moore, one of Appellant's girlfriends at the time, would pay McCarty to kill Tarantino prior to Appellant's trial for Becky's murder. 17 AA 3536-37. In January 1989, Appellant gave Moore the title to his car. 17 AA 3626-27. Moore handed McCarty the title as payment on January 9, 1989. 17 AA 3537. The two were arrested for conspiracy to commit the murder of Eric Tarantino. 17 AA 3566. Evidence of the solicitation to kill Tarantino was not admitted at trial, and Appellant was ultimately acquitted for Becky's murder. 17 AA 3541. Appellant did, however, plead guilty to tampering with a witness for soliciting another to kill Tarantino. 17 AA 3542.

SUMMARY OF THE ARGUMENT

Appellant raises multiple arguments to challenge the fairness of his trial, but the record reflects that at each stage of trial, Appellant's constitutional and statutory rights were adequately protected and that the resulting trial was fair. First, he challenges the evidence which the State introduced against him both at trial and during the grand jury proceedings of conspiracy to commit murder. Because the

State ultimately proved its case beyond a reasonable doubt, his grand-jury argument is moot. Further, the State introduced significant evidence to prove Appellant's conspiracy with Michael Miller to murder Sharon Randolph. Accordingly, this claim fails.

Second, Appellant argues that Nevada violated Utah's expungement law but he ignores controlling precedent which allows witnesses with personal knowledge of expunged cases to testify about their knowledge.

Third, Appellant argues that the district court erred when it allowed the State to introduce evidence of (1) his prior murder-for-hire plan and (2) his attempt to kill his accomplice to the plan, but the State carried its burden of showing by clear and convincing evidence that the acts were relevant to certain enumerated exceptions to the prior-bad-acts statute and, because of the factual similarities between each case and this, each was highly probative of Appellant's guilt.

Fourth, Appellant argues that he was held without bail for over eight years, but he ignores the fact that the State was ready as early as January 24, 2011 to present its case to the jury, and each continuance can be attributed to Appellant alone. Further, because of the weight of the State's evidence that Appellant committed two counts of First-Degree Murder, the district court did not abuse its discretion when it held him without bail.

Fifth, Appellant alleges multiple counts of prosecutorial misconduct, but each can be readily addressed using the evidence at trial, and, under the circumstances in which the State made its arguments, each was appropriate.

Sixth, Appellant alleges that several jurors were improperly dismissed, but each dismissed jury expressed a severe reluctance to the death penalty in any circumstance or testified that they would hold the State to a burden higher than legally required during the penalty phase prior to sentencing Appellant to death.

Seventh, Appellant argues that he had the right to argue last at the penalty hearing, but this fails as the State is statutorily required to argue last because it alone has the burden of proving the aggravating factors beyond a reasonable doubt.

Eighth, Appellant argues that Nevada's death penalty is unconstitutional for multiple reasons, each of which is either meritless or has previously been rejected by this Court.

As each claim raised by Appellant is meritless, the State respectfully requests that this Court affirm the Judgment of Conviction.

ARGUMENT

I. EVIDENCE OF APPELLANT'S GUILT WAS OVERWHELMING.

Appellant argues that the State failed to provide sufficient evidence to indict him and later convict him of conspiracy to murder Sharon. AOB at 16.

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A. The State presented a mountain of evidence at trial to prove the conspiracy between Appellant and Michael.

When reviewing a sufficiency-of-the-evidence claim, the relevant inquiry is *not* whether the court is convinced of the Appellant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the Appellant guilty, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (internal quotation and citation omitted).

Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994) (emphasis removed) (overruled on other grounds). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789

(1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

A conspiracy occurs when there is an agreement between two people for an unlawful purpose. Washington v. State, 376 P.3d 802, 809 (2016). "A person is criminally liable as a conspirator as long as that person commits and act to further the object of a conspiracy, or otherwise participates therein. Id. While mere association is insufficient to support a conspiracy offense, "proof of even a single overt act may be sufficient to corroborate a defendant's statement and support a conspiracy conviction. Id. (citing Doyle v. State, 112 Nev. 879, 894, 921 P.2d at 911 (1996) (overruled on other grounds)). This Court has repeatedly stated that "conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." Id. (citing Gaitor v. State, 106 Nev. 785, 780 n.1, 801 P.2d 1372, 1376 n.1 (1990)); Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998).

The State provided an overwhelming amount of evidence showing that Appellant conspired with Michael to kill Sharon. First, the State demonstrated to the jury that Appellant and Michael had a secretive relationship. Michael was a quiet person. 19 AA 4079-80. He would follow Appellant around. 19 AA 4079. Appellant

called Michael incessantly every day, and if Michael did not pick up, Appellant would leave messages. 18 AA 3746. In fact, Appellant left more than 200 messages. 18 AA 3793. Appellant would also talk with Michael for hours away from Michael's aunt and uncle. 18 AA 3747. Appellant also pushed Michael to go shooting with him. 18 AA 3749. Appellant actually gave Michael a gun. Id. Appellant and Michael were together so often, and their relationship was so secretive, that Michael's aunt and uncle thought they were in an intimate relationship. Id. Michael's aunt and uncle also testified that, during the week leading up to Sharon's murder, Michael told them that he was housesitting for Appellant while he and Sharon were in Utah. 18 AA 3750.

Coupled with their secretive and intimate relationship was the fact that Michael knew details about the life insurance policy Appellant had surreptitiously purchased for Sharon. 17 AA 3669. Michael's uncle and aunt testified that he was going to move back to Florida with his ex-girlfriend because he was going to make about $400,000 with Appellant. 18 AA 3750-51. This amount was approximately the amount of insurance policy limit Appellant was going to receive had Sharon been dead. 20 AA 4202.

Finally, Eric Tarantino testified that Appellant had asked him to murder his wife in 1989, in the same way Appellant conspired with Michael to murder Sharon.17 AA 3593. Just like with Michael, Appellant quickly became friends with

Tarantino. 17 AA 3589-90. Also, just like Michael, Tarantino was a vulnerable person who had just lost his job and was working on odd tasks for Appellant. 17 AA 3589-90. Additionally, Appellant took Tarantino shooting just like Appellant did with Michael. 17 AA 3596. Finally, just like the way Appellant constantly required called and communicated with Michael, Appellant required Tarantino to inform him about his whereabouts at all time. Id. In fact, Tarantino testified about Appellant's conspired plan with him to kill Becky Randolph, Appellant's ex-wife. 17 AA 3596. Tarantino testified that Appellant came up with plan of a staged residential burglary. Id. Tarantino was then "to go in, grab a couple of things, rummage through some drawers … shoot her, and leave." 17 AA 3596. Although the two discussed multiple scenarios, each scenario involved Tarantino actually killing Becky. 17 AA 3597. Appellant explicitly said that he wanted to kill Becky for the insurance money, and even showed the documents to Tarantino. Id. Thus, the State presented evidence to show that Appellant's plan to kill Becky with Tarantino was exactly the same plan Appellant had with Michael to murder Sharon. The evidence produced at trial was significantly more than just a minimum threshold of evidence upon which Appellant's guilty verdict was based. Accordingly, this Court should not disturb the jury's evaluation of the evidence.

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B. The district court properly determined that the grand jury indictment was supported by slight or marginal evidence.

Appellant argues that the district court failed to address whether sufficient evidence supported the indictment on the crime of conspiracy. AOB at 17. As a preliminary matter, because evidence of Appellant's conspiracy with Michael to murder Sharon was overwhelming, the fact that the jury convicted Appellant of the crime renders any error in the grand jury proceeding harmless. Hill v. State, 124 Nev. 546, 552, 188 P.3d 51, 54-55 (2008).

Regardless, Appellant's claims concerning grand jury proceeding are meritless. First, Appellant's claim that the district court failed to consider the issue of whether sufficient evidence supported the indictment is belied by the record. The district court addressed the issue as follows:

> On respect to the first grounds in the petition, wherein, defendant alleged that there was insufficient evidence to sustain an indictment on charge of conspiracy to commit murder, the Court find that there is no basis for this allegation by the defendant.

1 AA 279. The district court then listed the evidence that supported the indictment. 1 AA 279-280. Thus, Appellant's claim that the district court did not address the issue is belied by the record.

Next, consistent with the district court's analysis, ample evidence supported the grand jury's finding. First, Sharon's daughter, Colleen, testified that she had seen Michael many times and on a regular basis. 1 AA 112, 114. Second, Michael's aunt

Vida testified that Appellant visited Michael at her house frequently. 1 AA 126. Appellant also called her house for Michael every day. 1 AA 126-27. In fact, she testified that Appellant would try to reach Michael by phone as many as five times a day sometimes. 1 AA 128. When Appellant could not reach Michael, he would leave messages. 1 AA 129. Vida explained that she thought the relationship between Appellant and Michael was unusually close. 1 AA 129. Michael and Appellant were so close that Appellant gave Michael a gun. 1 AA 130. Third, Michael's cousin Clifton testified that Appellant took Michael shooting at least three times. 1 AA 139-40. Also, Appellant and Michael would never go to a shooting range; they would only go somewhere remote. 1 AA 141. In fact, on the day of Sharon's death, Michael told Clifton that he and Appellant went shooting. 1 AA 140-41. Both Clifton and Vida testified that Michael did not have a gun. 1 AA 133, 142. Finally, Detective Dean O' Kelley testified that Appellant and Michael spoke on the phone three to seven times a day. 1 AA 153. Detective Kelley also testified that, although Michael was shot in the head, the ski mask that was found on him did not have bullet holes or blood on it. 1 AA 27. Thus, the State presented much more than just slight or marginal evidence to the grand jury to show that Appellant and Michael conspired to murder Sharon. Thus, the district court properly rejected Appellant's argument that the Indictment was based on insufficient evidence.

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II. UTAH EXPUNGEMENT LAW IS INAPPLICABLE.

A. Nevada law allows Utah prosecutor William McGuire to testify about Appellant's prior cases of which he had personal knowledge.

Appellant next argues that William McGuire, a Utah prosecutor, is prohibited from testifying about Appellant's two instances of prior bad acts because the Utah expungement statute precludes state officials from divulging information contained in the expunged record. AOB at 22-23. The district court rejected this argument below. Relying on Zana v. State, 125 Nev. 541, 216 P.3d 244 (2009), the court determined that witnesses can testify as to facts independently known to them, and not from records of the expunged court proceedings. 6 AA 1273. This Court reviews the district court's decision to admit prior-bad-acts evidence for an abuse of discretion and will not reverse that decision absent manifest error. Chavez v. State, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009).

The effect of record-sealing statutes is limited— "it erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others." Zana, at 546, 216 P.3d at 247. This is because the purpose of record sealing is to allow a person "previously involved with the criminal justice system to pursue law-abiding citizenship unencumbered by records of past transgressions." Id. at 545, 216 P.3d at 247. What record sealing does not achieve, however, is to erase history or "force persons who are aware of an individual's criminal record to disregard independent facts known to them." Id.

(citing Baliotis v. Clark County, 102 Nev. 568, 571, 729 P.2d 1138, 1340 (1986) (personal knowledge of a person's sealed criminal history can be utilized to deny that person's application for a private detective's license.)). Thus, "individual memories of events outside the courtroom are beyond judicial control." Id. at 546, 216 P.3d at 247.

In this case, the expungement of Appellant's record does not erase McGuire's memory—he can still testify about Appellant's past transgressions based on his personal knowledge. Accordingly, the district court properly relied on Zana and allowed McGuire to testify.

B. Allowing McGuire to testify does not violate the Full Faith and Credit Clause.

Despite Zana clearly allowing any witness to testify from personal knowledge about a defendant's expunged record, Appellant argues that McGuire's testimony violates the full faith and credit clause of the US Constitution. AOB at 22-24. Appellant's argument seems to be based on two theories: (1) McGuire's testimony concerns Appellant's records that were ordered expunged by a Utah court, and (2) McGuire is a Utah prosecutor who was, under Utah expungement law, precluded from divulging information that had been expunged. AOB at 22. Either theory is meritless under Nevada law.

First, the district court never violated the expungement order from the Utah court. The district court and the State painstakingly ensured that McGuire's offer of

proof at the Petrocelli hearing was based on personal knowledge, not information contained in the record expunged by the Utah court. 3 AA 501-02, 541-43, 578-79

Second, even assuming there is a conflict between Zana and Utah expungement laws, Appellant's argument fails because one state cannot use the full faith and credit clause to interfere with the exclusive affairs of another. Donlan v. State, 127 Nev. 143, 146, 249 P.3d 1231, 1233 (2011) (citing Rosin v. Monken, 599 F.3d 574, 477 (7th Cir. 2010)). This means that "the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though the statute is of controlling force in the courts of the state of its enactment." Donlan, at 146, 249 P.3d at 1233 (citing Pacific Ins. Co. v. Comm'n, 306 U.S. 493, 502, 59 S.Ct. 629 (1939)). In Dolan, a California sex offender argued Nevada violated the full faith and credit clause by requiring him to register as a sex offender when the California Attorney General terminated his requirement to register in California. Dolan, at 146, 249 P.3d at 1233-34. This Court rejected the argument because it found "California lacks power to dictate means by which [Nevada] protect its public." Id. Here, prosecuting Appellant for his Nevada crimes is Nevada's exclusive affair—any conflicting Utah expungement laws cannot impede the established Nevada case law. Zana is controlling, and it places no restriction as to who may testify about a person's prior bad acts based on that person's inerasable memory. District courts in Nevada simply

need not comply with conflicting Utah expungement laws so long as it operates within the parameters set forth in Zana. Accordingly, the district court did not violate the full faith and credit clause under the U.S. Constitution.

III. THE DISTRICT COURT DID NOT COMMIT MANIFEST ERROR BY ALLOWING THE STATE TO INTRODUCE APPELLANT'S PRIOR BAD ACTS.

Appellant contends that the district court committed manifest error when it allowed the State to introduce evidence that Appellant killed Becky Randolph and sought to have Eric Tarantino, a potential witness in the trial that resulted, murdered, but the acts were (1) relevant to show multiple exceptions to NRS 48.045(2); (2) highly probative of the same; and (3) proven by clear and convincing evidence in a Petrocelli hearing as required by this Court.

> NRS 48.045 governs the admissibility of evidence of other bad acts:
>
> Evidence of other crimes … is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before a court will admit prior bad acts, the court must conduct a Petrocelli hearing to determine the evidence's admissibility. See Walker v. State, 116 Nev. 442, 446, 997 P.2 803, 806 (2000); McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999). During the Petrocelli hearing the State must prove that: "(1) the incident is relevant to the crime charged, (2) the act is proven by clear and

convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Phillips v. State, 121 Nev. 591, 600-01, 119 P.3d 711, 718 (2005). This Court gives deference to a district court's decision to admit prior bad acts evidence, and such a "decision will not be disturbed on appeal unless it is manifestly wrong." Id.; Fields v. State, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009).

Here, a Petrocelli hearing was held on July 30, 2010, and August 16, 2010. 3 AA 490, 545. The district court found that the State carried its burden and allowed the admission of the acts on September 22, 2010. Id. at 575. Holding a hearing is not all that is required of the district court, however, as before the introduction of prior bad acts at trial, the district court must give an instruction limiting the purposes for which the jury can consider the acts. Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110-11 (2008). The district court followed this requirement with each witness called to testify of Appellant's prior bad acts. 17 AA 3550-51, 3584-85, 3622. Because the district court both held a hearing and gave a limiting instruction, "[t]he issue … is not process but, purely, admissibility." Fields, 125 Nev. at 789, 220 P.3d at 712.

In its motion seeking to admit Appellant's prior acts, the State argued that Appellant's actions in Utah were admissible "based upon no less than six of the enumerated exceptions in NRS 48.045(2), namely: (1) motive; (2) intent; (3)

preparation; (4) plan; (5) knowledge; and (6) identity." 2 AA 402. For the following reasons, the district court did not commit manifest error in allowing the State to introduce the prior bad acts for those purposes.

A. The State's evidence was relevant to show numerous permissible exceptions to NRS 48.045(2).

Phillips first requires that the State demonstrate that the prior bad acts are relevant to the crime charged. Phillips, 121 Nev. at 600-01, 119 P.3d at 718. This is merely an extension of the general rule that evidence be admissible—all relevant evidence is admissible unless its admission would violate an evidentiary rule or constitutional protections. NRS 48. 025(1). "Evidence which is not relevant is not admissible." NRS 48.025(2). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015.

The State sought to introduce evidence of "the killing of Becky Gault Randolph and the solicitation to kill Eric Tarantino" for six reasons enumerated in NRS 48.045. 2 AA 369. For the reasons listed below, this evidence was relevant to prove each enumerated exception.

1. The district court correctly held that the murder of Becky Randolph was relevant to show motive, intent, preparation, plan, knowledge, and identity.

The State first sought to introduce evidence that Appellant killed Becky Randolph to collect the proceeds from life-insurance policies after a plan to have

Eric Tarantino kill her in a staged burglary fell through. Id. at 367. The facts in the instant case, which led to the death of Sharon Randolph, mirrored the plan developed by Appellant with Tarantino:

> Randolph's defense to the instant charges is that an intruder killed his wife and he, in turn, killed the intruder. Thus, Randolph asserts his presence and purpose at the murder scene was to protect his wife, and he had no involvement in her murder. The Utah case illustrates that Randolph's motive in this case was to eliminate his wife to collect life insurance proceeds; the Utah case proves Randolph's actual intent was to have Sharon killed; the Utah case illustrates Randolph's plan to stage a burglary so he could claim his wife was murdered which would enable Randolph to collect insurance proceeds; the Utah case establishes Randolph's knowledge that he indeed knew an "intruder" would be present in the home he shared with Sharon; the Utah case illustrates that the true identity of the person responsible for both Sharon's and Miller's death is Thomas Randolph; and the Utah case rebuts Randolph's defense to the charges in the instant case. Therefore, the State must be permitted to introduce evidence of the Utah case to expose Randolph's true motive, intent, plan, knowledge and identity as the actual perpetrator behind the events of May 08, 2008.

2 AA 369.

The district court agreed with the State and found that Becky's murder was relevant to show motive, preparation, intent, plan, knowledge, and identity. 3 AA 583-87. The State will address each in turn.

Motive. The district court found that the Becky's murder and the resulting insurance proceeds Appellant received was relevant to show that he had a financial motive to repeat the process:

> [T]he State has alleged that Defendant had a financial motive to have his wife killed. Utilizing the prior acts, the State presented testimony

> from Mr. McGuire that Defendant was the beneficiary of Becky Randolph's life insurance policy, and was found by the defendant, dead in the marital residence. Similarly here, the State has also alleged that Defendant was the recipient of over $400,000 in life insurance proceeds after Sharon Randolph was pronounced deceased. The proposed evidence is probative because it illustrates that Defendant had a financial motive to have Sharon Killed.

Id. at 584-85.

Other courts have recognized the relevance of "other bad acts" evidence to show that a person has a motive to recover insurance proceeds. Thus, in United States v. Decicco, 370 F.3d 206, 212 (1st Cir. 2004), an arson prosecution, the appellate court held it was permissible to admit evidence of previous fires started by Decicco to prove to prove a common scheme to defraud using arson of property. The court relied on "the degree of resemblance of the crimes" and the "object" of the crimes in concluding that the evidence was probative of a common scheme or plan. Id. at 212-213.

Appellant does not allege that this evidence was irrelative to show motive. AOB at 48. Instead, Appellant argues that it was not necessary to prove motive because the State could have just introduced the insurance policies. Id. This is not a challenge to whether the evidence was relative to show motive, but rather a challenge to the district court's holding that its probative value was not substantially outweighed by the danger of unfair prejudice. The State addresses that issue here.

Intent. Evidence that Appellant planned to kill Becky Randolph for insurance money was relevant to show that Appellant intended to kill Sharon Randolph for insurance money.

Preparation. Becky's murder was also relevant to show preparation, as Appellant and Tarantino had spent significant time planning and rehearsing her death. 17 AA 3597-98. To rehearse, the two would often practice shooting. Id. at 3596. One of the scenarios that the two discussed was a plan to stage a burglary where Tarantino would shoot Becky. Id.

The State alleged the same preparation in the instant case. Michael's uncle testified that Appellant provided Michael with a gun and wanted to take him shooting. 18 AA 3749. Appellant's prior preparation with Tarantino is relevant to demonstrate his attempted preparation with Michael. Appellant did not merely want to take Michael shooting. As he had with Tarantino before him, Appellant wanted to make sure that Michael could bring his plan to fruition. That required preparation.

Common Scheme or Plan. The district court held that the murder of Becky Randolph was relevant to show a common scheme or plan. 3 AA 585-86. Appellant argues that it is "just ridiculous" to argue that there was a plan which commenced in 1986 with the death of Becky Randolph and ended with the death of Sharon in 2008. Perhaps. But that was not the State's argument below, and it isn't the State's argument now.

"Evidence under the 'common plan or scheme' exception must tend to prove the charged crimes by revealing that the defendant planned to commit the crimes. The offense must tend to establish a preconceived plan which resulted in commission of the charged crime." Brinkley v. State, 101 Nev. 676, 679-80, 708 P.2d 1026, 1028 (1985). "The test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a *preconceived plan* which resulted in the commission of that crime. Ledbetter v. State, 122 Nev. 252, 260-61, 129 P.3d 677-78 (2006) (emphasis in original).

The State argued that Appellant had a common plan which involved soliciting a friend to kill his current wife for the insurance proceeds, to get remarried, and to repeat the process. Appellant's wives Becky and Sharon, and his friends Tarantino and Michael, sadly became involved in Appellant's plan, but they were, as callously as this sounds, mere moving parts in Appellant's plan. The State at no point argued that Appellant had a thirty-year scheme to kill Sharon. Sharon just happened to be Appellant's wife when he next sought to profit from the death of an insured spouse.

This Court permits the introduction of "other bad act" evidence to prove common plan or scheme in a variety of contexts. Thus, in Tillema v. State, 112 Nev. 266, 268-269, 914 P.2d 605, 606-07 (1996), this Court held it was proper to admit a previous vehicle burglary to show Tillema's common plan or scheme and his intention to feloniously enter vehicles on subsequent occasions. The evidence was

probative of Tillema's "intent, motive, and plan," and any prejudicial effect was cured by the district court's limiting instruction. Id. at 268, 914 P.2d at 608 (interpreting NRS 173.115's "common scheme or plan" language in the joinder context).

In Brinkley, the trial court similarly permitted the State to introduce evidence of other bad acts for the limited purpose of, *inter alia*, showing a common scheme or plan. The evidence in question revealed that after the occurrence of the substantive crimes, appellant's co-defendant, Drummond, "attempted to obtain a controlled substance by utilizing a forged prescription." Brinkley, 101 Nev. at 679-80, 708 P.2d at 1028-29. "While Drummond attempted to fill the prescription, Brinkley waited outside in the car." Id. "Brinkley admitted he had obtained a blank prescription form[.]" Id.

The court reasoned that evidence under the "common plan or scheme" exception "must tend to prove the charged crimes by revealing that the defendant planned to commit the crimes." Id. at 679, 708 P.2d at 1028 (citing Cirillo v. State, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980)). "The offense must tend to establish a preconceived plan which resulted in commission of the charged crime." Id. (citing Nester v. State, 75 Nev. 41, 47, 334 P.2d 524, 527 (1959), Wigmore on Evidence, 2d Ed. § 300). Brinkley claimed that he mistakenly neglected to inform each practitioner of his prescriptions, but this Court held that "evidence of the forgery

negated this claim of innocent mistake." Id. at 680, 708 P.2d at 1029. This Court reasoned:

> The forged prescription revealed that Brinkley did plan to deceive to obtain controlled substances. The forged prescription also tended to prove that Brinkley and Drummond planned and schemed to obtain numerous prescriptions for controlled substances. The evidence logically tended to show a common plan or scheme. The purpose of admitting the evidence was not merely to show a criminal disposition. … Additionally, the lower court attempted to minimize any unnecessary prejudice by excluding evidence that appellants were arrested because of this forged prescription and that Drummond was convicted for his participation in the offense.

Id. (internal citations omitted).

Additionally, this Court has recognized the admissibility of *prior murders* to prove common scheme or plan in *murder prosecutions*. Thus, in Gallego v. State, 101 Nev. 782, 784, 711 P.2d 856, 858 (1985), "[t]wo young women, Stacey Redican and Karen Twiggs, disappeared from a shopping mall in Sacramento, California, on April 24, 1980. Their brutalized bodies were discovered on July 27, 1980, in shallow graves in remote Limerick Canyon, Nevada." Id. Their hands were tied "with an uncommon variety of macrame rope." Id. "[B]oth victims suffered violent deaths caused by multiple blows to the head with a hammer or hammer-like object." Id.

The State introduced evidence of similar conduct by Gallego in a prior killing where two young women were kidnapped from another shopping mall in the Sacramento area, although "[t]he latter victims were killed by bullets to the head,

whereas Stacey and Karen had been bludgeoned to death by a hammer purchased by Gallego." Id.

At trial, the State was permitted to introduce evidence of the previous murders to show common plan, intent, identity and motive, all exceptions to the evidentiary rule which prohibits evidence of prior misconduct to show that the defendant acted in conformity therewith. Id. at 788-789, 711 P.2d at 861. The Nevada Supreme Court held that the trial court did not err in permitting evidence of the prior killings to be introduced at trial. Id. Despite the dissimilarities in the manner in which the victims were killed, substantial similarities were shown to exist in plan and intent, and the probative value of the evidence outweighed prejudice to the defendant. Id. Finally, evidence of the Vaught and Scheffler homicides satisfied the "plain, clear and convincing" standard required for its admissibility. Id. at 789, 711 P.2d at 861.

Similarly, in Thompson v. State, 102 Nev. 348, 350-51, 721 P.2d 1290, 1291-92 (1986), a district court permitted the introduction of *two prior homicides* in California in Thompson's first-degree murder trial in Reno. "On April 21, 1984, appellant met Randy Waldron and Arnold Lehto, who were camping by the railroad tracks in Reno." Id. at 349, 721 P.2d at 1291. "At that time, appellant knew that the police were looking for him regarding a double homicide in California." Id. Claiming self-defense, Thompson pulled a gun and shot Waldron four times in the head before moving the body and covered it with a blanket. Id. at 350, 721 P.2d at

1291. "He also took Waldron's wallet and money, silver watch and a bottle of wine." Id. After Waldron's body was discovered, Thompson initially denied that he knew anything of the murder, but he later claimed self-defense. Id.

Thompson contended that the trial court erred in admitting evidence of two collateral homicides from California. The admission of evidence of other crimes, the Court recognized, is governed by NRS 48.045(2), which "provides for the admission of such evidence when used for certain limited purposes." Id. at 351, 721 P.2d at 1291-92. One such exception was when the evidence was used to show that "defendant's crime was committed in furtherance of a plan." Id. "The State offered the evidence in question to show Thompson's plan to obtain money to allow him to flee the state because he knew that law enforcement officers were looking for him concerning another homicide." Id. This Court held that the district court did not err when it admitted the evidence for that purpose. Id. Finally, the Court recognized that the trial court minimized any potential prejudice to defendant by instructing the jury on the limited use of the evidence presented. Id. at 352, 721 P.2d at 1292. This Court held that the evidence presented by the State was "substantial and convincing" and was "admitted for a proper purpose under Nevada's evidence code." Id. Accordingly, the Court perceived "no basis for concluding that the district court was manifestly wrong." Id.

Identity. The district court found that there was "a serious issue as to the true identity of the individual who orchestrated the crime charged." 3 AA 586. It found that the acts the State sought to introduce were relevant to showing that Appellant was the person who facilitated Sharon's murder. Id.

This Court recognized in Fields v. State, 125 Nev. at 793, 220 P.3d at 714-15 that where "prior behavior demonstrates characteristics of conduct which are unique and common to both the defendant and the perpetrator whose identity in question," those acts can be admitted to prove identity as long as the "prejudicial effect is outweighed by the evidence's probative value."

Here, Appellant argues that identity was not an issue, but this claim fails to address the ultimate issue of identity for which the State introduced the evidence. AOB at 43. Although Appellant correctly argues that it "was undisputed that [Michael] shot Sharon, and then RANDOLPH shot [Michael]," the State did not introduce the evidence to show the identity of the shooters but rather to show that Appellant was the puppet master who orchestrated Sharon's death by soliciting Michael to kill her. Id. The fact that Appellant had previously conspired with Tarantino was relevant to demonstrate Appellant's identity as the mastermind of this double homicide.

Knowledge. Finally, the evidence of Becky's murder and the plotting, planning, and rehearsing which went into it was relevant to show that Appellant knew that Michael

would be in the home, helping to demonstrate why he remained in the garage loudly listening to music as his friend carried out the plan. 17 AA 3652. As Appellant had with Becky beforehand, Appellant claims to have found her dead. The similarities between the two cases, however, show that Appellant had knowledge about what he would find in the home.

For these reasons, the district court did not err in finding that the Becky's murder and the planning that went into it were relevant to show Appellant's guilt in the instant case for appropriate purposes.

2. The district court correctly held that the Murder-for-Hire plot is relevant to show knowledge, intent, preparation, plan, motive, and identity.

The State also sought to introduce evidence that Appellant sought to have Tarantino killed to prevent him from testifying in his murder trial. 2 AA 367-68.

Appellant twice argues that it is "difficult to understand why the Nevada court allowed in evidence" of the murder-for-hire case. AOB at 39-40. Appellant then cites the exact reason which the district court gave for allowing the State to reference it. Id.

The district court found that the "murder for hire plot is relevant to show knowledge, intent, preparation, plan, motive, and identity because in the instant case, Defendant admittedly knew (and was friends with) the man who allegedly shot his wife." 3 AA 584. Appellant cites this exact language, but inexplicably puts an

ellipsis between the word *case* and the word *Defendant*. AOB at 39. The only thing that Appellant's ellipsis replaces is a single comma. 3 AA 584. Appellant then proceeds by arguing that the district court's finding makes no sense because the district court "was assuming that Tarantino killed Becky," but the quoted language—even without the comma—is referencing Michael Miller, not Eric Tarantino. AOB at 39. The district court, after all, prefaced its holding by saying that Appellant was friends with the man who shot his wife "*in the instant case*," Michael Miller. 3 AA 584 (emphasis added). That the district court was referencing Michael is further strengthened by the sentence which immediately followed, wherein the district court explicitly names Tarantino and refers to him not as the "man who allegedly shot his wife," but rather as "a man with whom Defendant spoke with regarding killing his wife in a staged burglary." Id. Accordingly, the district court correctly understood Appellant's prior bad acts and that Tarantino did not kill Becky Randolph and that he was merely "a man with whom Defendant spoke with regarding killing [Becky] in a staged burglary[.]" Id. The record belies Appellant's assertion to the contrary.

Knowledge. The district court's first enumerated reason for allowing the State to introduce evidence of the murder-for-higher plot was to demonstrate knowledge. 3 AA 584.

In challenging the district court's finding that the murder-for-hire plot was relevant to show knowledge, Appellant makes the same mistake as he did previously

and argues that the district court assumed that Tarantino killed Becky, but this is belied by the court's decision, wherein Tarantino is addressed *by name* as "a man with whom Defendant spoke with regarding killing his wife in a staged burglary." AOB at 41; 3 AA 584. The district court knew what happened, and it was presented with evidence about what initially was purported to be a suicide.

Appellant errs in claiming that the murder-for-hire plot was not relevant to show knowledge. Appellant had knowledge of what would happen if he allowed Michael to live because of his previous interactions with Tarantino. The relevance of this plot to show knowledge is inescapably tied to its purpose to show Appellant's intent, motive, and plan. To Appellant, Michael was a liability, and he knew that because of his previous interactions with Tarantino.

Intent. The district court also recognized that the evidence was relevant to show that Appellant was not acting in self-defense but intended to kill Michael to eliminate a witness who could later testify against him. AOB at 42; 3 AA 585. Appellant argues that "there was never any evidence or even a claim that Tarantino was in any way involved in or knew about the so-called plot to kill Becky." AOB at 42. The record belies this claim. McGuire testified in detail about Appellant's solicitation of Tarantino to kill Becky. 3 AA 523-25. Appellant further contends that at the time of Becky's death, Appellant and Tarantino were no longer friends. AOB at 42. This is irrelevant, particularly when illuminated by the reason the two were no longer

friends—Tarantino withdrew from the plan after he told his wife about the plan to kill Becky, and she, in turn, told Appellant. 17 AA 3599-600. After Tarantino's wife told Appellant what she knew, Appellant "beat the crap out of" Tarantino and told him that if he ever said anything else, Appellant would "finish this." Id. at 3600-03. Tarantino told Appellant that he was no longer interested in carrying out the plan to kill Becky, warned Becky that Appellant was going to kill her, informed her of the insurance policies on her life, and then fled to New Hampshire, believing that if he stayed, Appellant would kill him. Id. at 3603-05.

This evidence was all relevant to show Appellant's intent to kill Michael. Michael, like Tarantino before him, was a liability. The State introduced this evidence to show that Appellant was not acting in self-defense when he killed Michael, but rather was intentionally eliminating a potential witness against him. The district court did not err in finding this evidence relevant to that purpose.

Motive. The district court also held that Appellant's prior bad acts were admissible to show Appellant's financial motive to kill Sharon and the precautionary motive to kill Michael. 3 AA 584-85. Appellant argues that the "witness tampering case was not necessary to show motive, [sic] and was not relevant as to insurance policies" because the State could have shown motive by introducing evidence of the life-insurance policy on Sharon—which listed Appellant as the beneficiary—without evidence of the life-insurance policy on Becky which did the same. AOB at 42-43.

This ignores both the district court's holding and the State's argument. The State did not admit the murder-for-hire case to show Appellant's motive to kill Sharon Randolph, but rather introduced it to show Appellant's motive to kill Michael:

> In each case what we know is that the Defendant solicited a friend to do, what I would call, his dirty work. And what's so telling Your Honor is that in Utah that friend, Erik Tarantino, turned on Mr. Randolph and testified against him. And *it provides the motive that Mr. Randolph would have in this case to kill Michael Miller*, the person he solicited to kill his wife in Las Vegas because Mr. Randolph learned from his previous mistake, he couldn't leave the person he solicited to kill his wife alive. There was fear that he could end up a witness just like Mr. Tarantino did.

3 AA 553 (emphasis added).[2] The district court recognized the same, holding that the "murder for hire plot is relevant to show … motive … because in the instant case, Defendant admittedly knew and was friends with the man who allegedly shot his wife. Thus, the fact that Defendant wanted to have Tarantino killed (a man with whom Defendant Spoke regarding killing his wife in a staged burglary) in the Utah

[2] See also id. at 555 ("[I]t's our theory that he learned from his mistake, that's the reason he killed Michael Miller in the case at hand."); id. at 567 ("It's the very reason he killed Michael Miller in this case because if he left him alive he was concerned he might testify against him. He had to kill him because he learned from his previous mistake in Utah."); 11 AA 2389 ("When Randolph learned Eric Tarantino was going to testify against him in Becky's murder trial, Randolph tried to have Eric Tarantino eliminated. In the instant case, Randolph learned from his previous mistake. He knew he could not leave Michael Miller alive because Miller, like Tarantino, could end up on the witness stand in a prosecution against Randolph.").

case is relevant to the crime charged." Id. at 554. Appellant has challenged neither this portion of the district court's decision nor the State's argument in its opening brief, and even if he had, that argument would have failed. Appellant killed Michael because he learned that any witness he allows to live "might testify against him." 3 AA 567. He learned that lesson from Eric Tarantino. Because Tarantino ultimately testified against him in his Utah trial for Becky Randolph's murder, Appellant "learned from his previous mistake in Utah" and knew that he had to kill Michael Miller to prevent him from testifying. Id. This Court should find that the district court did not err in finding that the murder-for-hire case was relevant to show Appellant's motive to kill Michael, a potential witness against Appellant.

Identity. Just as Becky's murder was relevant to show that Appellant was the ultimate person responsible for Sharon's death, the murder-for-hire plot demonstrates that Appellant was not just a person acting in self-defense, but rather was responsible for orchestrating both Sharon's and Michael's deaths.

Common Scheme or Plan. Finally, the murder-for-hire plot is relevant to demonstrate that Appellant had a common plan to repeatedly get an acquaintance to kill his spouse which he modified once he learned that the acquaintance might later testify against him.

For these reasons, the murder-for-hire plot was relevant to prove several permissible exceptions to NRS 48.045(2).

B. The State proved the evidence by clear and convincing evidence.

The district court held a Petrocelli hearing on July 30, 2010 and August 16, 2010 to determine, inter alia, if the State could carry its burden of proving the other bad acts by clear and convincing evidence. Following the hearing, it held that it had. 3 AA 587.

At the July 30, 2010 hearing, the State addressed two "exhibits the Defense attached to their opposition" to its motion to include other bad acts. Id. at 534.Those exhibits were "a couple of records" that were part of the case that Appellant complained "shouldn't be revealed because that case was sealed and expunged." Id. at 494. It argued that the documents were "part of the sealing and expungement order" and were therefore inadmissible, because Appellant could not "have it both ways" by precluding the State from referencing the expunged documents while at the same time, referencing them himself. Id. at 494, 434. The State then argued that if the Court were going to include those exhibits, it would have to call "somebody [to] explain what these documents mean." Id. at 535. In response, both documents were explicitly withdrawn by Appellant on the record. Id. at 535.

Exhibit A, prior to being withdrawn, was the ruling of a Utah court. 2 AA 422, 489-29. Exhibit B, in turn, was a letter from a Utah Assistant Attorney General. Id.

at 423, 431.[3] Appellant cites each in his opening brief even though they have been withdrawn and are no longer a part of the record. AOB at 33-34.[4]

On appeal, Appellant's entire argument that the State failed to meet its burden is based on two exhibits which, at Appellant's own request, were withdrawn from the record. AOB at 33-34; 3 AA 546, 550-52. Appellant made this same error below:

> [T]he gist of the defense argument when you read their opposition is that we, the State, cannot meet the burden of clear and convincing evidence. And the sole evidence on which they rely to support that are the very exhibits that have now been withdrawn, in other words, Exhibit A that they mention and Exhibit B that they mention in their opposition as far as this Court is concerned don't exist because they've been withdrawn by the defense.

3 AA 552.

Absent these documents, Appellant's argument is nothing more than a bare and naked allegation which cannot be used to demonstrate that the district court

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[3] MR. GALANTER: Counsel's letter as to why he did things is outside of that record. That is not part and parcel of the sealed record.
THE COURT Didn't you withdraw it anyways?
MR. GALANTER: Yea but I'm saying that it may come up later …
THE COURT: Well at this point it's really a non-issue because you have withdrawn it—
MR. GALANTER: For this hearing.
THE COURT: -- in support of your opposition.
Mr. GALANTER: A hundred percent.

3 AA 551

[4] Appellant also, while represented by counsel, attempted to reintroduce these documents into the record in an ex parte letter filed under seal on January 3, 2013. 38 AA 8168, 8171 (sealed).

committed manifest error. See generally Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). By withdrawing the exhibits on which he now relies, Appellant precluded the district court from considering them at the time of the Petrocelli hearing.

Appellant later reintroduced the documents he had previously withdrawn through newly appointed counsel *three years* after the Petrocelli hearing and the district court's resulting order. 7 AA 1501, 1508-13. In an opposition filed on September 23, 2013, and in a hearing held on October 16, 2013, the State reminded the district court that Appellant had previously withdrawn the documents for violating the very expungement order that Appellant sought to enforce against the State. 8 AA 1576, 1743. The State's opposition expressed its confusion at the reintroduction of the documents, as they were introduced in a motion alleging that the State used inadmissible evidence from the expunged Utah cases:

> The prosecution is baffled. Defendant – while making a completely unsupported accusation that the prosectuion and this Court relied upon inadmissible evidence during the Petrocelli hearing – attaches to his motion documents which were sealed by the Utah court. Defense counsel is guilty of doing the very thing he wrongfully accuses this Court and the prosecution of doing – possessing, using, and relying upon records that were sealed by the Utah court.

Id. at 1576 (internal footnote omitted). The State further argued that "Defendant provides no authority to establish that anyone who simply *possesses* a sealed

document is in violation of Utah law. The sealing statutes are designed to ensure that the information is not impermissibly *utilized*." Id.

In response, the district court made clear that it would review its analysis to make sure that it was "based solely upon admissible evidence which would be the testimony." Id. at 1743. The initially-withdrawn-but-later-reintroduced exibits which Appellant cites on appeal were *never* considered by the district court because they would have been inadmissible at trial. The district court similarly declined to consider the letter from the attorney general because it "really wasn't necessary for purposes" of deciding the State's motion. Id. at 1743-44.

The State is troubled that Appellant makes no mention of this. At the time of the initial decision, the documents were not on the record. When they were reintroduced three years later by new attorneys, the district court said that it would not consider them because their consideration would have violated the expungement order. Appellant asks this Court to consider documents which were never considered by the district court. It should decline to consider them for the first instance on appeal. If Appellant wanted the district court to consider the documents, it was within his power to unseal the documents, thereby allowing the State to consider them as well. He made the strategic decision to keep the record sealed. Appellant used the Utah expungement statute as a shield to forbid the State from introducing sealed documents. It could not simultaneously be used as a sword.

A review of the record which the district court relied on in making its decision demonstrates that the State carried its burden. William McGuire testified at the hearing that Tarantino's ex-wife informed police of conversations Tarantino had with Appellant about an agreement to kill Becky Randolph. 3 AA 523. She informed police that Tarantino likely would not want to talk to them because he was scared. Id. at 524. Accordingly, police visited Tarantino in New Hampshire without first telling him that they were coming. Id. As they spoke, Tarantino told police that he and Appellant became friends and that Appellant "approached him about taking care of somebody that was a problem to him." Id. Becky Randolph was that person, and the two discussed "several ways of killing her," including a plan to stage a burglary. Id. In that scenario, Tarantino would have been in the house and shot Becky. Id. at 525. As part of that plan, Appellant informed Tarantino that he would pay him $10,000 from the proceeds of an insurance policy. Id. at 526. McGuire testified that Appellant had a $250,000 policy on Becky's life. Id. at 523.

While the murder trial was pending, one of Appellant's cellmates, Steve Williams, approached police and informed them that Appellant "was looking for somebody to kill a witness in his case." Id. at 531. As a result of this, Williams was released to "enable him to communicate" with Appellant and introduce him to William McCarthy, who would be undercover as a hitman or a member of "a criminal group who could effectuate the killing." Id. at 532. Appellant spoke with

McCarthy through phone calls made to the jail, and Appellant requested that McCarthy kill Tarantino, who was scheduled to testify in his case for the murder of Becky Randolph. Id. at 532-33. Appellant offered to pay "a certain amount of money to whack" Tarantino. Id. at 533. Utah prosecutors believed that Appellant's use of the word *whack* implied that he wanted Tarantino killed, but Appellant "tried to show it was something else." Id. Money was exchanged through Appellant's girlfriend who delivered a car title to McCarthy. Id. As a result of this, Appellant was charged with conspiracy to commit murder, but ultimately pled guilty to tampering with Tarantino, a third-degree felony. Id. at 534, 539. The facts to which Appellant pleaded guilty were facts supporting a charge of conspiracy to commit murder even though the crime was labeled witness tampering. Id. at 540.

Without using the exact words, Appellant argues that the State failed to carry its burden of proving the murder-for-hire case because he "did not attempt to hire someone to kill Tarantino." AOB at 32. This is belied by the record, as Bill McGuire testified at the Petrocelli hearing that Appellant payed "a certain amount of money to whack, as the term was used, Eric Tarantino." 3 AA 533. Appellant was charged with conspiracy to commit murder, but ultimately pleaded guilty to witness tampering. Id. at 534. In Utah, as in Nevada, a guilty plea is treated as an admission "that the case was established beyond reasonable doubt," a burden which is undisputibly higher than the requisite clear-and-convincing evidence needed here.

Id. at 536. As is often the case in plea negotiations, Appellant pleaded guilty to a charge less than the State could have proven, but "the facts to which the Defendant pled guilty" were that he entered a conspiracy to kill Eric Tarantino, "[r]egardless of the label" that the crime was ultimately given. Id. at 540.

To rebut this, Appellant cites a voluntary statement that was not before the Court at the time of the Petrocelli hearing and was not even submitted to the district court until February 24, 2014, nearly four years after its September 22, 2010 decision to admit prior bad acts. AOB at 32; 3 AA 575; 9 AA 1834, 10 AA 1987-88 (sealed); 10 AA 2081-85; 28 AA 8227 (sealed); 29 AA 8377-78 (sealed). The voluntary statement was taken on May 8, 2008, and the State provided it to Appellant at that time, two years before the July 30, 2010 Petrocelli hearing. 28 AA 8346 (sealed); 10 AA 2085 ("Those statements were provided to the defense, prior defense counsel, at the time the State received the statements. And so, the attorneys who participated in the Petrocelli hearing would have had those statements."). That statement did not provide the district court with any new information. To the contrary, at the Petrocelli hearing, McGuire explicitly testified that Appellant had tried to demonstrate that his desire to *whack* Tarantino meant something other than killing him. 3 AA 533. The district court ultimately took the statement into consideration but nevertheless denied Appellant's attempt to have it reconsider its September 22, 2010 motion. 29AA 8570.

Appellant also argues that there was never any agreement between himself and Tarantino to kill Becky Randolph, but the State introduced contrary evidence at the time of the Petrocelli hearing from William McGuire. AOB at 40; 3 AA 524-26. Appellant provides no record citation to rebut McGuire's testimony about Tarantino. Moreover, at the time of the Petrocelli hearing, Appellant did not focus on the veracity of McGuire's testimony. 3 AA 537-39. Instead, Appellant focused on whether he had been acquitted of Becky's murder, a fact which was never disputed, and whether in the murder-for-hire case, he had pleaded guilty to a misdemeanor or a felony. Id. The State's evidence that Appellant solicited Tarantino to kill Becky Randolph, accordingly, was not challenged at the hearing. Whether Appellant was acquitted of Becky's murder is beside the point—it does not mean that he was factually innocent, just that there was reasonable doubt at the end of trial. Dowling v. United States, 493 U.S. 34, 349, 110 S. Ct. 668, 672 (1990).

In sum, the information presented to the district court at the Petrocelli hearing allowed the State to carry its burden of proving the prior bad acts by clear and convincing evidence as required by Phillips, 121 Nev. at 600-01, 119 P.3d at 718. The court addressed both the guilty plea agreement and McGuire's independent evidence of the murder-for-hire plot when addressing the State's burden:

> Mr. McGuire further testified that he was aware that Defendant sought to tamper with witness Eric Tarantino, who was a witness in the criminal trial surrounding Becky's death.

> While a guilty plea is not necessarily conclusive as to whether an individual actually committed the crime charged, here the State is not required to prove beyond a reasonable doubt that Defendant committed the prior acts. See Dowling v. United States, 493 U.S. 342, 349, 110 S. Ct. 668, 672 (1990) (noting that "[acquittals] do not prove that the defendant is innocent, it merely proves the existence of a reasonable doubt as to his guilt."). Moreover, while Defendant's guilty plea is not conclusive as to guilt, the State has presented factually independent evidence which illustrates that Defendant actually solicited an undercover informant to kill Tarantino. The Defendant sought to exchange financial compensation for the commission of the crime.

3 AA 587-88.

The district court also found that the State had proven Appellant's plan to kill Becky Randolph by clear-and-convincing evidence:

> [T]he State's offer of proof regarding Eric Tarantino establishes that Defendant spoke with Tarantino regarding plans to murder Becky Randolph. The proposed evidence involving Tarantino also reflects that he was aware that Defendant sought to have him killed during the course of the Utah case. Thus, the proposed evidence involving Tarantino highlights direct admissions from Defendant.
>
> COURT FINDS, the State has proven that the Defendant committed the prior acts by clear and convincing evidence.

3 AA 588.

Furthermore, even addressing the expunged documents or the attorney-general letter for the sake of argument, Appellant cannot show that the district court erred when it found the State's proffered evidence through William McGuire to be clear-and-convincing evidence of the prior bad acts.

Appellant argues that the documents establish a finding that "Tarantino is a liar." AOB at 33. This is not the case for several reasons. First, the Utah court's

minute order was explicitly based only on "[t]he information" which was provided to it. 7 AA 1511. Because the case was expunged, the record is void of any reference to the information relied on by the Utah court. It is unclear whether the state of Utah was given the opportunity to respond to the information presented to the Utah court, it is unclear whether witnesses were called, and, more generally, it is unclear what Appellant himself presented to the Utah court. The State simply does not know, and, without more, neither can this Court. Because the case was expunged, the evidence presented to the Utah court resulting in the minute order was not before the district court. It is unlikely that the district court would find a twenty-year-old document that raises as many questions as it answers to be more compelling than the live testimony of William McGuire at the Petrocelli hearing.

Second, neither document rebut the State's case:

> [T]he Judge reviewing the information concluded, "Nothing that I have read has changed my mind about the sentence in this case. I think prison was the appropriate remedy. The motion to review the sentence and place you on probation is denied."

2 AA 439.

Thus, even though the record was lacking in clarity, "[t]he information" presented to the Utah court made no difference to the Utah court's decision. Appellant's request in the Utah case was *denied*. Id.

The letter from the Assistant Attorney General suffers from the same defect as the Utah court's minute order. Appellant emphasizes language in the letter which

says that Appellant had been "illegally sentenced based upon factual allegations that were untrue but adopted by the judge," but, once more, the record is void of any information about what the untrue factual allegations were which led to the illegal sentencing. AOB at 34; 7 AA 1511. Any guess as to what the allegations were which led to the resentencing would have been based entirely on naked speculation. Nothing in the record would support a suggestion that the district court engaged in such activity. Moreover, the Utah prosecutors only "stipulated to a new sentencing;" the underlying criminal conviction in the murder-for-hire case which was the result of a guilty plea remained undisturbed. 7 AA 1510. Sentences differ from convictions. The facts to which Appellant pleaded guilty remain. Nothing in the letter can be read to suggest anything about Tarantino's character or the veracity of McGuire's testimony. Appellant's illegal sentence was completely lacking in any probative value regarding his conviction. Had it been considered, it would not have made a difference in the court's finding that the State carried its burden.

For these reasons, even if they had been considered, the documents which Appellant relies on do not rebut William McGuire's live testimony at the Petrocelli hearing. They do not stand for the propositions Appellant argues that they stand for, and they are lacking in necessary context that would have allowed the district court to fully weigh their probative value against the State. The district court's finding that

the State proved the prior bad acts by clear and convincing evidence should be affirmed.

C. The State's Other-Bad-Acts Evidence Was Highly Probative of Appellant's Guilt.

The district court did not err when it found that the probative value of the State's other bad acts evidence outweighed the danger of unfair prejudice.

"In assessing 'unfair prejudice,' this court reviews the use to which the evidence was actually put—whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity." Fields v. State, 125 Nev. 785, 790, 220 P.3d 709, 713 (2009).

Appellant relies on Cooney to argue that the probative value of the State's evidence was "completely outweighed by the danger of unfair prejudice." AOB at 51. This is incorrect. Cooney differs from the instant case in certain key respects. First, in Cooney, the defendant had been previously acquitted of all charges, and that is not the case here. 11 AA 2343; Cooney v. State, Docket No. 66179 (Order of Reversal and Remand, March 21, 2017) (unpublished) at 3. Instead, Appellant entered a guilty plea in the murder-for-hire case, ultimately pleading guilty to witness tampering. 11 AA 2388. As the State argued below, the "tampering charge … is inextricably intertwined with killing of [Appellant's] wife, Becky." Id. Tarantino was set to be the critical witness against Appellant, as the two men had conspired to kill Becky in a staged burglary prior to her death. Id. at 2388-89. The

State's theory was that Appellant had repeated his plan in the instant case with Michael and Sharon Randolph replacing Eric Tarantino and Becky Randolph, respectively.

Second, Cooney's ultimate resolution turned on the fact that the facts demonstrated by Cooney's prior bad acts "could have been presented to the jury" through other means. Cooney, Docket No. 66179, at 3. Here, unlike in Cooney, the State here had no alternative means of introducing and proving Appellant's plan to kill Sharon Randolph because Appellant had killed Michael to prevent him from testifying. Indeed, without evidence that Appellant had previously planned to stage a burglary with an accomplice resulting in the death of his wife, the State would not have been able to prove that Appellant in this case repeated his decades-old plan that he had first developed with Eric Tarantino. The State stressed the importance of both the plan to kill Becky Randolph and the murder-for-hire plot in its response to Appellant's Cooney claim below:

> No one else can introduce evidence to establish that Thomas Randolph's plan was to solicit Michael Miller to kill Sharon, and that Randolph then killed Michael Miller to ensure no one would testify against him. Thus, the prior Utah case is *extremely probative* of Randolph's plan in this case. Unlike Cooney, where the defendant's familiarity with a specific firearm could be established by other means and without mentioning the 20-year-old murder of her husband, thereby minimizing its probative value, the Utah case is extremely probative of Randolph's plan in this case and *cannot* be established through other means.

11 AA 2390 (first emphasis in original, second emphasis added).

The same is true today. The prior bad acts were extremely probative of the State's theory that Appellant staged the burglary with Michael to collect the insurance money and then killed Michael before he could testify against him as Tarantino had in the earlier case. Without the acts to give context to the night Sharon was killed, Michael might well have been a burglar and Appellant might well have merely been acting in self-defense. Moreover, the fact that Appellant took out life insurance policies on Sharon is not, standing alone, inherently probative of guilt. It is only when coupled with Appellant's prior acts that the whole picture becomes clear. The State needed to introduce the acts to provide context to the jury. Appellant had planned the circumstances of Sharon's death more than twenty years before. The actors—save for Appellant—might have changed, but the plan was the same. An examination of Tarantino's trial testimony further demonstrates this.

At trial, Tarantino testified that after he befriended Appellant, Appellant began asking him questions to discover if he could kill someone. 17 AA 3592. Appellant told Tarantino "frequently" that he wanted his wife to die. Id. at 3593. Discussions of killing Becky became "the basis of [their] relationship." Id. at 3594. The two not only discussed killing Becky, but also practiced it. Id. The two practiced shooting, and eventually discussed staging a residential burglary. Id. at 3596. As part of that plan, Becky would come home to find Tarantino, who, having rummaged through some drawers, would shoot her and leave. Id. The plan was always that

Tarantino kill Becky, not Appellant. Id. at 3597. Appellant's express purpose for wanting to have Becky killed was to collect money from insurance policies. Id.; see also 18 AA 3528 (testimony of William McGuire) ("[W]e had located in excess of $250,000 worth of insurance."). As the two talked, Appellant would "repeatedly listen" to Rod Stewart's Foolish Behaviour, which talks about how he wanted to kill his wife[5] and make it look like suicide. Id. Tarantino eventually decided that he could not follow through with the plan. Id. at 3599.

Tarantino's testimony of a plan Appellant imagined back in the 1980s mirrored the State's theory of what happened to Sharon Randolph. In the instant case, Appellant took out insurance policies on Sharon's life and solicited an acquaintance to stage a burglary and kill Sharon. Michael had strewn items around to make it look like a burglary. 17 AA 3727. The fact that this conduct had been not only planned but rehearsed with Tarantino is extremely probative of Appellant's guilt in the instant case.

As the district court held, the details of this plan are probative to show Appellant's financial motive to kill Sharon Randolph:

> [T]he State has provided grounds which establish strikingly similar acts. Defendant, in both instances, discovered his wife shot to death in the home. Defendant was the beneficiary of hundreds of thousands of

[5] Rod Stewart, *Foolish Behaviour*. Warner Bros. Records (1980) ("Do it for mankind take her life Or should I act quite cold and deliberate Or maybe blow out her brains with a bullet They'll think suicide they won't know who done it I'm gonna kill my wife I'm really gonna take her life.").

> dollars in life insurance benefits. Moreover, each fatal incident involved a triangle of Defendant, acquaintance of Defendant, and his wife.

3 AA 585-86.

The murder-for-higher case is also extremely probative of Appellant's guilt. Appellant unsuccessfully sought to have Tarantino killed before he could testify in his murder trial. 18 AA 3533-37. In the instant case, Appellant learned his lesson. His attempt to kill Tarantino to prevent him from testifying was probative of Appellant's knowledge, intent, preparation, motive, identity, and plan to kill Michael. See supra. The State was clear on this throughout the course of this case. 3 AA 555 ("[I]t's our theory that he learned from his mistake, that's the reason he killed Michael Miller in the case at hand."); id. at 567 ("It's the very reason he killed Michael in this case because if he left him alive he was concerned he might testify against him. He had to kill him because he learned from his previous mistake in Utah."); 11 AA 2389 ("When Randolph learned Eric Tarantino was going to testify against him in Becky's murder trial, Randolph tried to have Eric Tarantino eliminated. In the instant case, Randolph learned from his previous mistake. He knew he could not leave Michael alive because Michael, like Tarantino, could end up on the witness stand in a prosecution against Randolph."). Appellant had knowledge that if he left Michael alive, Michael might later testify against him. Appellant, therefore, had motive to kill him, and planned accordingly, preparing by

putting a gun in the downstairs closet which he could quickly retrieve. 20 AA 4252. It also demonstrates Appellant intended to kill Michael, thereby rebutting his theory of self-defense. Finally, it is probative to show identity, as it showed that Appellant had orchestrated this double homicide.

The prior bad acts were highly probative of Appellant's guilt and were not relied on for an improper purpose. Furthermore, any error in the district court's admission of evidence of Appellant's prior bad acts for one purpose is harmless because the State only needed to affirmatively demonstrate one of the NRS 48.045(2) exceptions.

This Court should affirm the decision of the district court to allow the State to introduce Appellant's other bad acts at trial.

IV. APPELLANT'S RIGHTS TO BAIL AND SPEEDY TRIAL WERE NOT VIOLATED.

Appellant next complains that both his right to bail under NRS 178.484 and his Sixth Amendment and statutory speedy-trial rights were violated, but each claim fails under the weight of authority. AOB at 53-60.

A. The District Court Properly Denied Appellant's Request for Bail Because Proof of Appellant's Conspiracy to Murder Sharon was Evident.

Appellant argues that the district court erred in denying him bail. AOB at 56. NRS 178.484(1) provides that "a person arrested for an offense other than murder of the first degree must be admitted to bail." Next, NRS 178.484(4) gives a judge

discretion to grant bail to a defendant charged with first-degree murder; however, that discretion is limited— "[a] person arrested for murder of the first degree may be admitted to bail unless the proof is evident or the presumption great…" that first-degree murder was committed. This Court reviews the district court's denial of Appellant's request for bail under NRS 178.484(4) for abuse of discretion. Bergna v. State, 120 Nev. 869, 567-77, 102 P.3d 549, 554 (2004). Furthermore, this Court need not "automatically or mechanically remand a bail matter to the district court for a hearing and more specific findings where the district court fails to specify adequate reasons for its decision." Id. Appellant carries the burden to "provide this court with those parts of the record of the proceedings below that are essential to this court's thorough understanding of the application." Id. "In opposing, the State may also provide this court with any additional, appropriate parts of the transcript or record below that support the State's position." Id.

In this case, Appellant does not even attempt to direct this court to parts of the record that are essential to this court's thorough understanding of the application. Perhaps Appellant's ignorance of the district court's ruling is attributable to his erroneous belief that the standard of review on this issue is de novo. AOB at 53. Because of Appellant's failure to discuss the district court's detailed ruling, this Court should not consider this issue under Bergna. Alternatively, this Court need not consider the issue because, without any reference to the record, Appellant has failed

to cogently argue the issue. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Regardless, an examination of the district court's detailed findings shows that it properly exercised its discretion under NRS 178.484(4). First, the district court determined there was a high likelihood of conviction. 1 AA 290. The district court found that there was no dispute Appellant was charged with the offense of first-degree murder. Id. The district court further concluded that the evidence produced at the grand jury supported the First-Degree Murder Indictment. 1 AA 290-91; see supra, Section I(b). Second, the district court determined that Appellant was a flight risk as he was in Utah at the time of the arrest. Id. Finally, the district court stated that there was no evidence of community ties or employment history that would mitigate against the evidence produced at grand jury Indictment. 1 AA 291-92. Therefore, the district court properly denied Appellant's motion for bail.

B. Appellant's Speedy-Trial Right was not Violated.

Appellant also argues that his constitutional right to speedy trial was violated by the eight-and-half-year delay. AOB at 58. As a preliminary matter, Appellant provides not a single citation to the record in this section of his brief. AOB at 58-61.

Thus, this Court should not consider this issue because Appellant failed to comply with NRAP 28(a)(4)[6] and (e)[7].

Regardless, Appellant's speedy trial rights granted by Nevada law and the U.S. Constitution were not violated. First, Nevada affords a person the statutory right to a trial within 60 days after arraignment. NRS 178.556(2). However, a person can waive this statutory right either personally or through counsel. Furbay v. State, 116 Nev. 481, 484, 998 P.2d 553, 555 (2000). Here, Appellant waived his statutory right to speedy trial. 1 AA 166-67. Therefore, Appellant's argument that he was unable to assert his right to speedy trial is meritless.

In addition to Nevada law, a person has a constitutional right to speedy trial. "[t]here is no fixed time that indicates when the right to a speedy trial has been violated; thus, the right is assessed in relation to the circumstances of each case. Furbay, at 484, 998 P.2d at 555 (citing Barker v. Wingo, 407 U.S. 514, 515, 92 S.Ct. 2192, (1972)). This Court has held that "[a] court must conduct a balancing test to determine if a defendant's Sixth Amendment right to a speedy trial was violated." Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310 (1998) (citing Barker,

[6] An appellant's brief shall contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."

[7] "Every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found...."

114 at 530, 92 S.Ct. at 2182)). When making this balancing test, four factors are relevant: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. Furbay, at 484-85, 998 P.2d at 555 (citing Barker, at 407 U.S. 530, 92 S.Ct. 2182)).

The length of the delay. Appellant failed to show why the eight-and-half-year delay in this case was presumptively prejudicial. Appellant cites to Doggett but does not meaningfully analyze Doggett inquiry. The length-of-the-delay factor contains two inquires. Doggett v. U.S., 505 U.S. 647, 651, 112 S.Ct. 2686 (1992). First, a defendant must demonstrate that the delay between accusation and the first time that defendant demands a speedy trial exceeded an ordinary delay to a "presumptively prejudicial" delay. Id. at 651-52, 112 S.Ct. 2686. If this burden is met, then this Court considers the extent to which the delay has exceeded beyond the permissible threshold. Id. at 652, 112 S.Ct. at 2686. Thus, "presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger" the four-factor inquiry under Barker. Id. at 652, 112 S.Ct 2686 n.1. This Court employed this Doggett analysis and determined that two-and-half-year delay is not presumptive prejudicial. Middleton, 114 Nev. at 1110, 968 P.2d at 311. This Court never held that an eight-year delay is presumptively prejudicial. In fact, this Court in Middleton specifically stated that the eight-and-half-year delay in Doggett was

presumptively prejudicial because the delay was coupled with governmental negligence. Id. In this case, the length of delay is eight and half years; while lengthy, Appellant does not allege it was combined with any governmental negligence. Thus, the instant case is distinguishable from Doggett, and Appellant has failed to provide a cogent argument to show why the delay in this case was presumptively prejudicial under Doggett.

The reasons for the delay. The reason for the delay was entirely attributable to Appellant. The State had been ready to proceed to trial since January 24, 2011. 3 AA 599. However, the trial could not proceed because Appellant went through four different counsel. Appellant's first counsel, Gabriel Grasso, withdrew on June 11, 2009. 39 AA 8481. Appellant then hired Brent Bryson and Yale Galanter as counsel. 3 AA 318. On February 13, 2012, Appellant fired Bryson and Galanter. 6 AA 1161. The district court then appointed public defender's office to represent Appellant. 6 AA 1160, 1162. On March 21, 2014, Appellant fired his counsel from the public defender's office. 39 AA 8553. On April 2, 2014, the special public defender's office was appointed to represent Appellant. 10 AA 2111. In fact, Appellant attempted to fire his counsel from the special public defender's office and represent himself. 11 AA 2294. Appellant is facing death sentence. Whenever an existing counsel is fired, new counsel must go through the entire record, develop a strategy, and conduct appropriate investigations. Appellant is solely responsible for the delay in his trial

because the State had been ready since January 24, 2011, which was less than two years after Appellant's arrest. 3 AA 599. Thus, the-reason-for-the-delay factor overwhelmingly favors the State.

Appellant's assertion of his speedy-trial right. Appellant waived his speedy trial right. On February 2, 2009, the following exchanges occurred:

> [Defense counsel]: I've talked to [Appellant] and based on the nature of the case, we would be [waiving 60-day speedy trial].
>
> The Court: Mr. Randolph.
>
> [Appellant]: I'm deaf in one year. I didn't hear all of that.
> The Court: All right. Mr. Randolph. So, we're here today—we're going to give you a new trial date. Your attorney says you're—you've waived the 60-day requirement; correct?
>
> [Appellant]: That's correct.

1 AA 166-67. Thus, Appellant knowingly and voluntarily waived his right to speedy trial. This factor favors the State.

Prejudice to Appellant. Appellant was not prejudiced. In fact, Appellant failed to specify how he was prejudiced. He merely states that "[Appellant] asserted prejudice on many occasions, claiming time and again that he was not receiving adequate medical treatment and that he was impaired in his ability to assist in his defense." AOB at 60. Appellant never explained how his constitutional rights were affected. Thus, Appellant failed to provide more than naked and bare allegation as

to how he was prejudiced by the eight-and-a-half-year delay. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Accordingly, Appellant's speedy-trial right was not violated.

V. APPELLANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT ARE MERITLESS.

Appellant claims several instances of prosecutorial misconduct. AOB at62-79. Reviewing prosecutorial misconduct requires a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, this Court determines whether the conduct was improper. Id. If yes, this Court analyzes whether the improper conduct rises to the level that warrants reversal. Id.

Also, two separate harmless-error standards apply to two different types of prosecutorial misconduct. Id. at 1189, 196 P.3d at 476-77. Instances of prosecutorial misconduct can be classified as constitutional or nonconstitutional error. Id. at 1189, 196 P.3d at 476-77. Constitutional error includes conducts that "so infected the trial with unfairness as to make the resulting conviction a denial or due process." Id. The misconduct can also be constitutional in nature if it involves improper commentary on a defendant's exercise of constitutional rights. Id. This Court applies the Chapman standard if the prosecutorial misconduct is of constitutional dimension. Id. (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). If the misconduct is not of constitutional dimension, this Court will only

reverse if the misconduct substantially affects the jury's verdict. Valdez, at 1189, 196 P.3d at 477.

However, the application of these harmless-review standards is dependent upon a defendant's preservation of the error for appellate review. Rose v. State, 12 Nev. 194, 208 163 P.3d 408, 418 (2007). Thus, the failure to object to prosecutorial misconduct generally precludes appellate review. Id. However, this Court can still review the unpreserved conduct for plain error if the error: "(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity of public reputation of the judicial proceedings." Id. at 208-09, 163 P.3d at 418.

A. Appellant's Meritless Claim of Vindictive Arrest is not Cogently Argued.

Appellant provides no legal authority to support a claim of vindictive arrest. In fact, not a single authority was cited in Appellant's vindictive-claim section of the brief. AOB 59-61. Also, Napue v. Illinois, 360 U.S. 264, 78 S.Ct. 1173 (1959) was cited in the previous section, but none of the Napue three-factor test was discussed. Furthermore, the issue of vindictive arrest was never raised below. Thus, this Court should not review Appellant's claim of vindictive arrest because it was not cogently argued or properly preserved. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); Rose, 12 Nev. at 194, 208, 163 P.3d at 418.

Regardless, Napue deals with the prosecution's knowing use of false evidence or failing to correct false evidence when it appears. Napue, 360 U.S. at 264, 78 S.Ct at 1173. Appellant claims that Utah Detective Conley and prosecutor McGuire provided untruthful information. AOB at 62. However, the basis of this allegation is a letter from Appellant's first wife, Kathryn. Id. First, it is puzzling how this letter alone can prove the testimonies as false evidence. Second, Appellant does not demonstrate the State knowingly used false evidence. Third, Appellant does not discuss whether the alleged false testimonies were material to Appellant's conviction. Thus, Appellant failed to raise a proper claim under Napue.

B. The Argument that Appellant Attempt to Kill, Hired Someone to Kill, or Killed Five out of the Six of His Ex-Wives was Supported by Evidence.

As a preliminary matter, this Court should not consider Appellant's argument because it was unsupported by any relevant case law. AOB 64-66. In fact, not a single authority was cited by Appellant in this argument. Maresca, 103 Nev. at 673, 748 P.2d at 6. Also, this Court should not consider issue because it was unpreserved. Rose, 12 Nev. at 194, 208, 163 P.3d at 418. Finally, Appellant lists four instances where the allegations were made outside of the trial. AOB at 64-65. It is puzzling how allegations outside of a trial can affect the integrity of a jury verdict. Appellant does not provide any authority to show comments made directly to the court during motion practice and outside of a trial can support a cognizable claim of prosecutorial

misconduct that warrants reversal. Accordingly, this Court should not consider this issue.

Regardless, the State did not err in stating during penalty phase opening that "five out of six of [Appellant's ex-wives], he either attempted to kill, hired someone to kill or killed five of those women. And today and tomorrow you will learn their stories." 21 AA 4616-17. The State provided evidence at penalty hearing to support this statement.

First, through Kathryn Thomas, Appellant's first wife, the State established that Appellant was psychologically abusive. 22 AA 4638. Kathryn also testified that living with Appellant was dangerous because Appellant owned guns with silencers. 22 AA 4639-40. Just like with Sharon, Kathryn testified that Appellant purchased life insurance policies on her, and she did not find out about it until a detective told her. 22 AA 4642-43. Stephen Thomas later testified that, when he was 24 years old, Appellant asked him if he would kill someone for $25,000. 22 AA 4652-53. Thus, the State produced evidence from which a juror could have inferred that Appellant contemplated killing Kathryn using Thomas, just like how he conspired with Michael to kill Sharon. Accordingly, the State's comment that Appellant "attempted to kill" Kathryn is supported by the evidence.

Second, concerning Becky Randolph, the State already produced evidence at trial through Eric Tarantino that Appellant was attempting to use Eric to kill Becky in a staged burglary. 17 AA 3596.

Third, through Gayna Allmon, one of Appellant's ex-wives, the State produced the evidence that Appellant purchased life insurance on Gayna. 22 AA 4719. Appellant told Gayna the beneficiaries of the life insurance were her children when the real beneficiary was Appellant's father. 22 AA 4720. Gayna also testified that Appellant almost shot her when he was cleaning a gun at her kitchen table. 22 AA 4721. The bullet was only inches away from where Gayna was. Id. Glen Morrison later testified that Appellant spoke to him about killing Gayna in a staged burglary. 22 AA 4729.

Fourth, through Rachel Gaskins, the daughter of Appellant's ex-wife Francis Randolph, the State produced the evidence that Appellant tried to kill Francis by preventing her from following post-surgery procedures. 22 AA 4766. Specifically, despite that Francis should have refrained from eating and drinking, Appellant continuously gave Francis things to eat and drink. 22 AA 4767. Appellant would give Francis things to drink in a Styrofoam cup, but when Rachel asked to take a sip out of the cup, Appellant would never let her. Id. Appellant refused to let Rachel drink out of the same cup he gave Francis despite the fact that Appellant never prevented Rachel drinking from Francis's cup before her surgery. 22 AA 4767-68.

Once those Francis's other family members had left after her surgery, Appellant made Gaskins remain outside of Frances's hospital room as he went inside alone. Id. at 4768. Although Frances had been perfectly fine minutes before, when Appellant emerged from the hospital room, and told Gaskins that she had died. Id. at 4769. Doctors asked if Appellant wanted an autopsy, but he declined. Id. at 4769-70. Appellant had Frances cremated, and he gave her ashes to several members of her family in pill bottles. Id. at 4793. Gaskins testified that Appellant had life-insurance policies on Frances. Id. at 4773. She later discovered that Appellant had taken out life-insurance policies on her as well and had listed himself as the beneficiary. Id. Rachel later found out that that Appellant had a life insurance policy on Francis. 22 AA 4773. Instead of using the proceeds to raise Rachel, Appellant sent Rachel to a foster home within a year of Francis's death. 22 AA 4772. Thus, the State produced ample evidence from which a juror could have inferred that Appellant killed Francis for insurance money.

The State thus produced evidence that supported the statement that "five out of six of [Appellant's ex-wives], he either attempted to kill, hired someone to kill or killed five of those women." 21 AA 4616-17. The five ex-wives were Kathryn, Becky, Gayna, Francis, and Sharon. Thus, the State's during opening was not improper because it was supported by ample evidence.

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C. The State did not Improperly Use Expunged Records.

Appellant claims that the Stated "gleaned its information regarding the Utah case from trial transcripts, officer's reports and witness statements." AOB at 67. First, Appellant failed to identify these trial transcripts, officers' reports, and witness statements. Thus, this Court cannot determine the relevance of these materials. Second, this claim has nothing to do with prosecutorial misconduct—Appellant is rearguing the issue of whether the district court violated the Utah expungement law. As discussed in Section II of this answering brief, Appellant's argument is meritless.

Regardless, as the district court understood it, the State never needed these alleged materials to offer up its prior-bad-act motion. 3 AA 482 ("That was [the court's] recollection as well that the defense wanted all the records"). The State made it clear that, while it would be beneficial to possess these materials, it could prevail at the Petrocelli hearing through live testimonies. 3 AA 481. Thus, any transcripts, documents, or reports were unnecessary to the State. It was Appellant who wanted these documents to have more effective cross-examination. However, it was also Appellant who hired an attorney and opposed the release of these documents in Utah. 3 AA 479. Appellant can only blame himself for withholding these documents. Thus, the State did not commit any prosecutorial misconduct; the instant claim is merely Appellant's attempt to reargue the issue of Utah expungement law.

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D. The State did not Disregard any Court Orders.

Appellant first claims that the State violated the district court's pretrial ruling that the State refers to Appellant's murder of Becky as the "Utah case." 11 AA 2331. Specifically, the State should not have used the word "murder." AOB at 71. Also, the State should not have referenced Appellant's witness-tampering conviction as a murder-for-hire plot. AOB at 72. Wendy Moore was charged with solicitation to commit murder and conspiracy to commit murder. 17 AA 3624. There was no other term that could have replaced what she was charged with. Moore would not have known what "Utah case" was referring to as Appellant was jailed for multiple other crimes while he was in Utah. 17 AA 3625. The State also did not elicit the title of her crimes repeatedly. Indeed, the fact that Appellant was charged with murdering his wife was only referenced once during Moore's testimony. 17 AA 3624. Thus, the district court did not abuse its discretion in allowing the State to reference Appellant's murder case.

Appellant next argues that the following statement by Detective Conley violated the district court's order that parties should call Appellant's conviction in Utah as the witness tampering crime:

> Now, at some point you were aware that Mr. Randolph and a person by the name of Wendy Moore were arrested as the result of the investigation Mr. McCarthy conducted involving charges of attempting to kill Eric Tarantino prior to his testimony in the charges involving Becky Randolph.

17 AA 3565. The district court correctly allowed this testimony because the statement accurately describes why Moore and Appellant were arrested. Id. Also, the district court correctly determined that Tarantino had already testified in detail that Appellant discussed with Tarantino about killing Sharon in a "staged residential burglary." 17 AA 3596. Thus, it was abundantly clear that Appellant "hired" Tarantino to "murder" Sharon. Any prejudice arising out of referring to the incident as "murder-for-hire plot" cannot exceed Tarantino's testimony. Finally, Appellant claims that the State referenced "murder-for-hire plot" three additional times. AOB at 73. However, an examination of Appellant's citation to the record, 11 AA 2332, 16 AA 3434, and 16 AA 3481, shows that the State did not do so. Thus, Appellant's argument is belied by the record.

Appellant finally argues that the State should not have referenced Appellant's shooting of Michael as "execution style" or "coupe de grace." AOB at 74. The district court sustained Appellant's objection below and instructed the jury to disregard the State's "coupe de grace" reference. 20 AA 4183, 4186-87. The term came from the witness; the State did not attempt to elicit the term of coupe de grace. Furthermore, the district court properly cured any prejudice the term may have carried by instructing the jury to disregard the term. The witness's single utterance of the term "coupe de grace" was a fleeting comment. Thus, the district court properly minimized any prejudice with its curative instruction.

To the extent Appellant argues that it was improper for the State to argue during closing that Michael killed and executed a homeowner, it is belied by the record. AOB at 75. The State was referring to Sharon being executed and killed, not Michael. 20 AA 4425. It is puzzling how Appellant was prejudiced by a statement that was not about him. Regardless, even if the State was referring to the Appellant, the State did so in the closing when explaining its theory of the case. This is unlike the previous situation where a witness was giving his opinion as to what occurred. The district court properly determined that Appellant executed Michael had been the State's theory of the case throughout the trial, and it should be allowed to argue so at closing.

E. The State did not Make any Misrepresentations to the Jury.

Appellant claims that State made several misrepresentations to the court, the grand jury, and the jury. AOB at 76-77. Appellant does not explain how the alleged misrepresentations to the grand jury and the district court affected the outcome of the trial. Regardless, because evidence of Appellant's conspiracy with Michael to murder Sharon was overwhelming, the fact that the jury convicted Appellant of the crime renders any error in the grand jury proceeding and previous proceedings harmless. Hill v. State, 124 Nev. 546, 552, 188 P.3d 51, 54-55 (2008).

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1. Appellant attempted to hired Tarantino to kill Becky.

The State did not make any misrepresentations at trial. Appellant complains that the State lied when it stated during opening statement that Appellant hired Tarantino to kill his then wife. AOB at 77. Appellant reasons that because there was never any evidence that any money ever changed hands between Tarantino and Appellant, Appellant could not have hired Tarantino to do so. Id.

Appellant's flawed argument is meritless. Just because there was no evidence of money changing hand does not mean that Appellant did not try to hire Tarantino to murder Becky. Tarantino's testimony at trial fully supports the State's statement during opening. Tarantino testified that Appellant and he discussed killing Becky so often that it became the basis of their relationship. 17 AA 3594. They also discussed possible ways to kill Becky, and they eventually settled on the plan of a staged residential burglary. 17 AA 3596. Appellant specifically told Tarantino that they will recover insurance proceeds if Becky is dead. 17 AA 3597. Thus, there was no money changing hands because Tarantino decided not to continue with the plan. The benefit Tarantino was going to receive was a share of Becky's insurance proceeds. Accordingly, the State did not misrepresent the theory that Appellant hired Tarantino to kill Becky; it was supported by ample evidence.

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2. The State did not make misleading inferences concerning the insurance contract.

Appellant argues that the State made misleading inferences concerning an insurance contract. AOB at 77. Appellant claims that the so called "insurance contract" was in fact an annuity that belongs to the Appellant's mother. Id. Thus, Appellant reasons that it was improper to argue the inference that Appellant was checking to see how much money was in the insurance contract as Sharon had nothing to do with the annuity. Id.

Appellant's claim is belied by the record. Appellant is correct that his mother had an annuity for him. 24 AA 5208. The May 1, 2008, letter was concerning the value of this annuity account. Sharon does not appear to be part of this annuity account. See 24 AA 5208-18. However, this does not mean the State misrepresented anything during rebuttal. The State argued the following in rebuttal:

> Now, before, like I just discussed, we—we talked about it was a quick courtship, they had separate beneficiaries for the policies, but we also know that May—on May 1st, seven days before Sharon is killed, there is a letter from one of the insurance policies talking to the defendant, writing to the defendant, saying thank you for your recent inquiry, here are the answer to your questions, this is how much money can be paid out.

20 AA 4364.

Thus, the centrality of the State's argument was that the amount of insurance policies was unusual for a quick courtship like the one Appellant and Sharon had.

Detective O'Kelly testified that his investigation revealed that Sharon had four insurance policies. 20 AA 4201; 24 AA 5116 (Monumental Life Insurance), 5124 (Stonebridge Life), 5144 (Protective Life), 5193-5120 (Prudential Financial). All four insurance policies listed Appellant as the beneficiary. 24 AA 4202. Thus, the State's argument was supported by ample evidence produced at trial. In fact, it was perfectly reasonable for the State to argue that Appellant "wanted to make sure all his ducks were in a row" before murdering Sharon. AOB at 78. Appellant had four life insurance policies on Sharon and one annuity from his mother. It was reasonable for him wanting to know the total amount he was going to receive if Sharon is dead.

Even assuming the State misspoke about the inquiry letter from May 1, 2008, it does not cause Appellant any prejudice. The State's argument would have been exactly the same—Appellant quickly courted Sharon to eventually utilize her for insurance proceeds. Thus, this Court should not be distracted by the relevant evidence at issue—Sharon's four life insurance policies that all listed Appellant as the beneficiary.

3. The State did not ask jurors to put themselves in victim's place.

Appellant next argues that the State improperly suggested to the jury that if Appellant was not sentenced to death, he would kill again. AOB at 79. Appellant's failure to discuss the full record paints an incomplete picture that is misleading. At

trial, the State provided the following reasons in admitting Exhibit 213[8]: (1) to show Appellant's untouchable and cavalier attitude as he was cracking jokes with the same judge who acquitted him; (2) to show that the statement from Becky's mother became reality as Sharon was murdered; and (3) to prove Appellant's prior crime of violence in the absence of judgment of conviction due to expungement. 22 AA 4795-96, 4805-06; Exhibit 213.

At trial, Appellant argued:

> [R]e-litigating the case that [Appellant] was acquitted on does not include the fact that it was expunge, because the jury is not free to assess the truthfulness and significant of the testimony because they didn't hear the testimony from that case, and that this violates the due process test of fundamental fairness.

22 AA 4799-80.

The district court reviewed Dowling v. U.S., 493 U.S. 342, 110 S.Ct 668 (1990), and U.S. v. Watts, 519 U.S. 148, 117 S.Ct. 633 (1997), and determined that an acquittal did not preclude the State from relitigating an issue in a later action governed by a lower standard of proof. 22 AA 4800-03. The district court's concern was more concerned about the news reporters making statements based on expunged materials because the statements are made without independent recollection of the

[8] Contemporaneous with the filing of the answer brief, the State moved this Court to direct the district court to transmit Exhibit 213 for this Court's review. Exhibit 213 is a two-minute news clip on Appellant's murder of Sharon.

event. 22 AA 4800-03. However, after reviewing the news clip multiple times, the district court allowed the news clip for the following reasons:

> All right. So it was helpful to listen to it again. And having listened to it again, this court is going to allow it. I am comfortable that there is nothing that's contained the news report that's based upon what was in the expunged record. And I certainly think it meets the burden of proof, and I think that it has relevance to the State's case. I do think that it goes to demonstrate the defendant's attitude. Quite simply, a lot of the information contained in those statements to—by the news reporters are already in the record.

22 AA 4806.

With the complete record as the back drop, Appellant's claim is meritless. First, Appellant argues the State could not use an acquitted case to prove an aggravator during penalty phase. AOB at 79. As a preliminary matter, Appellant does not provide any authority to support his argument. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (this Court need not consider issues that are not cogently argued). Regardless, the State is not precluded from relitigating an issue with a lower standard of proof using information from a prior criminal case in which a defendant was acquitted. Dowling, 493 U.S. at 349, 110 S.Ct. at 672; U.S. v. Watts, 518 U.S. 148, 155, 117 S.Ct. 633, 637 (1997) (holding that the jury cannot be said to have necessarily rejected any facts when it returns a general verdict of not guilty)). Thus, the State did not commit prosecutorial misconduct in introducing evidence from the trial in which Appellant was acquitted.

Next, Appellant claims that the State made this improper suggestion through a news clip which contained the following statement from Becky's mother: "I think it's very unfair and unjust, he's guilty, I think [Appellant] is just gonna kill someone else's daughter. So beware." Exhibit 213. Appellant cites to McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984), but provides no analysis as to the factual situation being analogous to this case. In fact, Appellant boldly claims the remarks made in McGuire were similar to the statement by Becky's mother, but neglects to identify what those statements are. The State could not identify which statement in McGuire is similar to the Statement from Becky's mother. Thus, this Court should not consider this inadequately briefed issue. Maresca, 103 Nev. at 673, 748 P.2d at 6.

Regardless, McGuire is easily distinguishable. McGuire includes numerous improper arguments that permeated the entire trial. McGuire, 100 Nev. at 156, 677 P.2d at 1062-63. In fact, there were so many improper comments in McGuire that the Nevada Supreme Court had to summarize them rather than enumerating each instance of misconduct. Id. at 155, 677 P.2d at 1062. Furthermore, even if the statement was prejudicial, the brief eight-second segment in the news clip was played to the jury only once. The State did not repeatedly reference it. Therefore, Appellant's claim is meritless.

For these reasons, each of Appellant's claims of prosecutorial misconduct fails to either be inappropriate or reversable.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING JURORS FOR CAUSE.

Appellant next argues that the district court abused its discretion by dismissing three jurors for cause. AOB at 80-88. These jurors were strong in their condemnation of the death penalty, however, and their dismissal was properly with the district court's discretion.

A district court has "broad discretion in ruling on challenges for cause since these rulings involve factual determinations. The trial court is better able to view a prospective juror's demeanor than" this Court. Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001) (internal citations omitted). To determine if a challenge for cause is appropriate, courts ask "whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 65, 17 P.3d at 405 (internal citations and punctuation omitted). This Court affords "[g]reat deference … to the district court in ruling on challenges for cause." Nunnery v. State, 127 Nev. 749, 785, 263 P.3d 235, 259 (2011) (quoting Browning v. State, 124 Nev. 517, 530, 188 P.3d 60, 69 (2008).

At times, the jury is required based on the charges brought by the State to determine both guilt and the proper sentence. In those cases, this Court has held that:

> [A] person's constitutional right to a fair trial is not violated by the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong

> that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of trial.

Aesoph v. State, 102 Nev. 316, 319, 721 P.2d 379, 381 (1986), abrogated on other grounds State v. Eighth Judicial District Ct., __ Nev. __, 412 P.3d 18 (2018).

Having said that, however, "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). Accordingly, the Supreme Court has recognized that only those jurors who are unwilling "to temporarily set aside their own beliefs [about the death penalty] in deference to the rule of law" are "subject to removal for cause in capital cases." Lockhard v. McCree, 476 U.S. 162, 176 (1986). The erroneous exclusion for cause of a potential jury member because of her views on the death penalty is not subject to harmless error review. Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 2057 (1987).

Here, Appellant challenges the for-cause dismissal of three jurors at trial. Each dismissal was an appropriate use of the district court's discretion.

A. Juror No. 259, Oscar McGuire, was properly dismissed for cause.

The district court dismissed Juror No. 259, Oscar McGuire, for cause. 15 AA 3186-87. This was not an abuse of discretion, as McGuire made clear that the State the State would have to "prove to [him] without a doubt" Appellant's guilt before he would sentence Appellant to death. Id. at 3143.

McGuire had strong religious beliefs against the death penalty. Id. at 3143-44. Because of those beliefs, he went to his priest to discuss the role he might have to fill in sentencing Appellant to death. Id. at 3143. Because of that conversation, he came to the conclusion that if he were going to have the responsibility for taking Appellant's life, the State would have to prove its case to the point that he did not have a doubt. Id. The State explained that such a burden is "higher than what the law requires," and McGuire said that he understood that. Id. at 3143-44. He nevertheless made clear that he would not follow the law and would require the State to carry a higher burden than required. Id.

In challenging McGuire for cause, the State argued that McGuire's comments reflected that his beliefs impeded his ability to fairly consider the death penalty. Id. at 3184. The State's argument relied heavily on the answers McGuire gave during voir dire and in his questionnaire. Id.

In his questionnaire, McGuire made clear that he did not believe in the death penalty because he did not "want to be the person to cause pain and suffering to others." 33 AA 7208. McGuire made clear that the death penalty was "not something [he] could decide for others [sic] life." Id. The views of his church reflected that "God leads" and that people "don't make those decision [sic] for others." Id. He made clear that "death punishment should not be for us to choose for one another." Id. at 7209. His questionnaire ended with him saying that he could not consider all

four possible forms of punishment because he could not have someone's death on his hands. Id. Later, the questionnaire asked if there was any reason that he could not serve on the jury. Id. at 7210. He responded that he could not serve on the jury because he does not support the death penalty. Id.

Based on these responses, McGuire was not able to consider the death penalty. He repeatedly made clear that the imposition of the death penalty was not something that he could impose on another human being. These were not "general objections" to the death penalty or "religious scruples." Witherspoon, 391 U.S. at 519-20. Instead, they were clear and unequivocal statements about McGuire's inability to faithfully fulfill his role.

Appellant argues that these unequivocal statements were somehow cured by answers McGuire gave when Appellant's counsel questioned him. AOB at 82-83. Yet these answers are insufficient to overcome his clear opposition. He responded that if he had to choose between four possible penalties, he would "have to" pick one of them and begrudgingly said that he would follow the law "as to the Judge." 15 AA 3145.

These answers do not cure the fact that McGuire was clear that he could not even serve on the jury if the death penalty was an option. This Court made clear in Preciado "that a prospective juror who is anything less than *unequivocal* about his

or her impartiality should be excused for cause." Preciado v. State, 130 Nev. 40, 42, 318 P.3d 176, 177 (Nev. 2014) (emphasis added).

If McGuire was unequivocal about anything, it was his absolute and complete opposition to the death penalty. He held that view so strongly that if he were selected, he would require the State to prove its case without any doubt, a burden beyond that imposed on the State by either this Court or statute. 15 AA 3143. The district court considered the entirety of the record in granting the State's motion to excuse McGuire for cause. "Looking at the questionnaire and taking it in conjuction with the elaboration of the questionnaire which was conducted in open court," the district court did not think that McGuire could fulfill his role. Id. at 3186. He continued: "McGuire was pretty consistent saying that he does have a significant problem with the death penalty." Id. "[H]e did state on examination strongly that he cannot be involved in a process that involves taking a life, which gives the Court concern that he could fulfill his obligations." Id. at 3186-87. This determination was not error. It is risible to assume that repeated statements about how McGuire would hold the State to a higher burden, could not participate in the taking of a life, and other significant concerns could be cured by a few questions that directly contradicted everything else which McGuire had said throughout voir dire. Under these circumstances, Preciado makes clear that McGuire was appropriately dismissed for cause. The district court did not abuse its discretion.

B. Juror No. 263, Georgia Reckers, was properly dismissed.

Appellant next claims that Juror No. 263, Georgia Reckers, was dismissed because of her views on the death penalty in violation of Witherspoon. AOB at 83-85. This misrepresents the record, as the district court made clear that his concerns over Reckers were founded in repeated statements that she could not judge another person. 15 AA 3189.

Reckers made clear that it was "up to God to judge." 33I AA 7221.She repeated this twice in the questionnaire. Id. at 7226. This was concerning to the judge, who recognized that Reckers "kept going back to the statement of she still has a hard time passing judgment." 15 AA 3187.

The district court's concern was not limited to whether Reckers could sentence Appellant to die; Appellant notes, she indicated she could. AOB at 84. It was also concerned with Reckers's ability in the "first phase" to pass and "sit in judgment of someone else." 15 AA 3189.

Appellant's argument that Reckers was dismissed because of her views on the death penalty misrepresents the record. She was not. She was dismissed because she failed to make clear to the district court throughout voir dire that she would be able to fulfill her role in either determining Appellant's guilt or, if necessary, sentencing him. The district court did not abuse its discretion by dismissing her after she repeatedly said she could not judge another person's guilt.

C. Juror No. 536, Minerva Acac, was properly dismissed because she made clear that she would hold the State to a higher burden of proof during the penalty phase.

The district court dismissed Juror No. 536, Minerva Acac, for cause. 16 AA 3380. Appellant argues that she was dismissed because of her "strongly held beliefs" about the death penalty. AOB at 82. The record belies this claim—Acac was dismissed because she made clear that she would hold the State to a higher burden than that imposed by NRS 175.554(4). The district court did not abuse its discretion by dismissing Acac when she made clear that she would not follow the law.

Acac made clear that the prospect of sentencing Appellant to death made her nervous and caused her to lose sleep. 16 AA 3346. She was worried that she might make the wrong decision, and it was causing her anxiety and giving her nightmares. Id. The State asked about this anxiety, and she made clear that it was based on the facts of the case—she was anxious because it involved murder. Id. It continued:

> [THE STATE]: What I want to know is because of your anxiety, are you able to sit on a jury like this, on a jury that can consider something like the death penalty?
> PROSPECTIVE JUROR NO. 536: I don't believe so.
> [THE STATE]: And why don't you believe so?
> PROSPECTIVE NO. 536: First, if I make the wrong decision, it's going to go back to me that, you know, the person is innocent and then I send them to jail or to death penalty.
> [THE STATE]: So would that weigh too heavily on you?
> PROSPECTIVE JUROR NO. 536: Yeah.

Id. at 3347.

The State then asked Acac about the burden of proof to which she would hold the State. Id. at 3348. It explained that "the State has to prove to you this case beyond a reasonable doubt." Id. Then it asked Acac if she would hold the State to burden higher than the beyond-a-reasonable-doubt standard. Id. She replied that she would, because the prospect of a person dying made her too uncomfortable. Id.

Acac was dismissed because she made clear that she would hold the State to a higher burden than she should have. The State argued:

> [S]he's incredibly anxious about this process, she's lost some sleep. She believes that she would hold the State to a higher burden because she wants to make sure that she would be positive. She stated that she's always going to be thinking and second guessing herself wondering if she made the right decision, and it's because of that that she would hold us to a higher burden.

Id. at 3379.

The district court agreed:

> THE COURT: I was going to let her go. I couldn't get a good feel on her. The one thing that she kept coming back to was that she would hold the State to a higher burden. And she you know, I just don't think she -- I think she would hold the State to the higher burden and that's my concern.

Id. at 3380.

Acac was not dismissed because of her anxiety, nor was she dismissed because of her views on the death penalty. The State agrees with Appellant that she made clear that she would consider "all four potential penalties," including the death penalty. AOB at 84 (citing 16 AA 3348-49). She was struck instead because in

considering those four penalties, she made clear that she would hold the State to a burden higher than that of reasonable doubt. As the district court made clear on the record:

> [THE COURT]: [W]e had a challenge for cause by the State of Minerva Acac, Badge No. 536. The State indicated it wanted to challenge her for cause.
> I mean, she indicated a high level anxiety, but mostly throughout the questioning she -- she wasn't really good at giving specific responses. But what stood out to the State and the Court as far as *the ultimate reason I excused her for cause was that she would hold the State to a higher burden of -- of proof*. And I felt that she said that without hesitation and that was the one thing where she was very clear. So I did grant her for cause.

16 AA 3416 (emphasis added).

The burden of proving aggravating factors beyond a reasonable doubt is statutory. NRS 175.554(4) provides that:

> If a jury imposes a sentence of death, the jury shall render a written verdict signed by the foreman. The verdict must designate the aggravating circumstance or circumstances which were found *beyond a reasonable doubt* and must state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

NRS 175.554(4) (emphasis added).

Because Acac made clear on the record that she would hold the State to a standard higher than the standard required by the Nevada legislature, the district court did not abuse its discretion when it dismissed her for cause.

D. THE STATE WAS FREE TO USE ITS PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO OTHERWISE COULD NOT HAVE BEEN STRICKEN FOR CAUSE.

Appellant next claims that the State improperly used its peremptory challenges when it used them to strike jurors who had problems with the imposition of the death penalty. AOB at 86. This claim fails for two reasons. First, it is not supported by any authority.[9] The only case he cites, Brown v. Dixon, 693 F. Supp. 381, 392-93 (W.D.N.C. 1988), was reversed by the Fourth Circuit on the very issue presented by Appellant here. Appellant is not the first to cite Brown to show nonexistent error. When presented with Brown, the California Supreme Court, sitting *en banc*, held:

> Defendant urges us to follow a federal district court decision, apparently the only court ever to find merit in his position. We are not persuaded. Nor was the circuit court that *reversed* that decision on this very point. We agree with the circuit court, and with the opinion of Justice O'Connor concurring in the denial of certiorari in an earlier appeal of the same case.

People v. Edwards, 54 Cal. 3d 787, 831, 819 P.2d 436, 464 (1991) (emphasis added) (internal citations omitted).

Second, courts which have addressed this issue have declined to make an exception to the general rule that the State may use its peremptory challenges for any reason.

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[9] Appellant concedes this. AOB at 87.

NRS 175.051(1) provides eight peremptory challenges to both the State and the defense in a case charging an offense punishable by death. The United States Supreme Court has held that the use of peremptory challenges to exclude a potential juror on the basis of race is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The same is true for gender (J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994)) and ethnic origin (Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859 (1991)). Batson also applies to criminal defendants and forbids their exercise of peremptory challenges to remove potential jurors on the basis of race, gender or ethnic origin. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348 (1992).

Outside of these minor considerations, "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried." Batson, 476 U.S. at 89, 106 S. Ct. at 1719 (internal citations and punctuation omitted). Batson reaffirmed this general rule. Brown v. North Carolina, 479 U.S. 940, 107 S.Ct. 423 (O' Connor, J., concurring in the denial of certiorari).

This Court has never addressed whether the State may use peremptory challenges to strike jurors for cause who have concerns about the death penalty. Courts who have considered this question have found no error. State v. Allen, 323 N.C. 208, 372 S.E.2d 855, 863 (1988), *reversed on other grounds* Allen v. North

Carolina, 494 U.S. 1021, 110 S. Ct. 1463 (1990) (holding that "it was not error under the Constitution of the United States [or the Constitution of North Carolina] for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty but were not excludable pursuant to *Witherspoon*"); Brown, 479 U.S. at 941, 107 S.Ct. at 424 (O'Connor, J., concurring in denial of certiorari) ("Permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors ... in exercising peremptory challenges simply does not implicate the concerns expressed in Witherspoon."); Bowles v. Sec'y for Dep't of Corr., 608 F.3d 1313, 1317 (11th Cir. 2010) ("Because clearly established federal law, as determined by holdings in Supreme Court decisions, does not prohibit prosecutors from using their peremptory strikes to remove venire members who are not ardent supporters of the death penalty, the district court correctly denied Bowles relief on this claim.").

This Court should similarly decline to find error. The State was free to use its peremptory challenges in any way that was consistent with Batson and its progeny. The State requests that this Court follow the overwhelming amount of other courts to have considered this issue.

In sum, Appellant has failed to show that the district court abused its discretion during the jury-selection process. Each juror which Appellant now claims was dismissed in violation of Witherspoon made clear either that he or she would hold

the State to a higher burden or would be unable to judge Appellant's guilt at all. Furthermore, the State acted appropriately when it used its peremptory challenges. With these facts, the district court acted within its discretion. Relief under this claim should be denied.

VII. APPELLANT DOES NOT HAVE THE RIGHT TO ARGUE LAST DURING THE PENALTY PHASE.

Appellant argues that the district court abused its discretion by declining to allow his trial counsel to argue last during the penalty phase of the trial. AOB at 88-91. This claim fails because Nevada requires the State to conclude argument.

NRS 175.141(5) provides:

> When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the State, *must* open and *must* conclude the argument.

(emphasis added).

It is axiomatic that the use of the word *must* imposes a duty. The axiom holds true here—"the State shall argue last, as this court has *repeatedly* noted." Blake v. State, 121 Nev. 779, 800, 121 P.3d 567, 580 (2005) (emphasis added). This Court's repeated holding is based on the plain language of NRS 175.141, which this Court has recognized divests the district court of the "authority to grant" a defendant's motion to argue last. Witter v. State, 112 Nev. 908, 922-23, 921 P.2d 886, 896 (1996), overruled on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235

(2011). Furthermore, if a district court were to grant a motion to argue last, it would "unfairly disadvantage the prosecution." Id. The district court was bound by this precedent, and it could not act in a way directly foreclosed by this Court in Witter and Blake. NEV. CONST. Art. VI § 6.

Appellant acknowledges this Court's prior holdings and asks this Court to overrule them. AOB at 89-90. This Court should decline. It has previously held that it is "'loath to depart from the doctrine of stare decisis' and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 130 Nev. ___, ___, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013)).

There are no compelling reasons to overturn this Court's precedents here when they are merely enforcing the plain language of NRS 175.141(5). Appellant has not challenged the Nevada statute at all. Instead, he ignores it, citing Kentucky's statute in its place. AOB at 89. As the State makes clear elsewhere in this brief, Kentucky statutory law does not set the constitutional floor. In Nevada, Nevada law governs.

Furthermore, the continued vitality of this Court's precedents is supported by the recognition that the burden which the State carries during the guilt phase of trial continues to the penalty phase. The State has to prove both that the existence of aggravating factors beyond a reasonable doubt and that the mitigating factors

presented by the Appellant do not outweigh them. Allowing Appellant to argue last would unfairly disadvantage the State as this Court correctly recognized in Witter, 112 Nev. at 922-23, 921 P.2d at 896. Nothing has changed in the years since Witter to rebut that recognition of prejudice to the State which would result if the Appellant were able to argue last despite the State having the burden.

Moreover, other states to address this issue have reached different conclusions on the order of argument during the penalty phase of a hearing. People v. Bandhauer, 66 Cal. 2d 524, 531, 426 P.2d 900 (1967); People v. Caballero, 102 Ill. 2d 23, 47–48, 464 N.E.2d 223, 235 (1984) (expressly rejecting California law). Appellant has provided no authority to suggest that states like Nevada who allow the State to argue last violate the defendant's Due Process rights.

In fact, at least one out-of-state authority Appellant cites for the proposition that the defendant has a right to argue last held the exact opposite. In State v. Jenkins, 15 Ohio St. 3d 164, 214-15, 473 N.E.2d 264, 307-08 (1984) Jenkins argued that he had a right to argue last during the penalty phase of his trial. Contrary to Appellant's assertions, the Ohio Supreme Court expressly held that "because the state carries the burden of proof, … it has the right to open and close during final arguments to the jury." Id. at 215, 473 N.E.2d at 308. This holding was based on R.C. 2945.10(F), which is substantially similar to Nevada's statute:

> R.C. 2945.10(F) provides that: "[w]hen the evidence is concluded * * * the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury.

Id.

The Ohio Supreme Court recognized that a district court can, at its discretion, decline to follow the "statutorily mandated order of proceedings," but held that "any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order." Id. (internal citations omitted). Jenkins failed to carry that heavy burden because the State of Ohio had a statutory responsibility to carry its burden even during the penalty stage. Id. Jenkins too was facing the death penalty. Id.

Randolph has similarly failed to show any abuse of discretion. Just like in Ohio, the State has an affirmative duty to prove aggravating factors beyond a reasonable doubt when it seeks the death penalty. Accordingly, even if the district court did have discretion to grant Appellant's motion, it would not have been an abuse of discretion to deny it. Nevada, however, is not Ohio, and this Court has directly said that district courts have no discretion and no authority to deviate from NRS 175.141(5) and grant a motion to argue last. Witter, 112 Nev. at 922-23, 921 P.2d at 896.

In sum, this Court's predisposition to follow its precedents should govern here. Appellant has failed to provide any compelling reasons to retreat from this Court's holdings, especially when doing so would require this Court to act contrary to a Nevada statute the constitutionality of which Appellant has not challenged.

Yet even if this Court were to find that the district court abused its discretion by following the plain language of NRS 175.141(5) and this Court's prior precedents, any error was harmless and should be disregarded. NRS 178.598. The California case on which Appellant relies recognized that "there is no reasonable probability that the sequence of closing argument alone would affect the result." People v. Bandhauer, 66 Cal. 2d 524, 531, 426 P.2d 900 (1967); AOB at 89. The same is true here.

Nothing in the record can be used to support a finding of harm from the district court's denial of Appellant's motion. The sole harm which Appellant alleges stems from being unable to respond to an argument made by the State in its rebuttal. AOB at 90-91. Appellant relies on Skipper v. South Carolina, 476 U.S. 1 (1986), but the case is inapposite to the issue here. AOB at 90.

Skipper faced the death penalty. Skipper, 476 U.S. at 3, 106 S. Ct. at 1670. During the sentencing hearing, he was precluded from presenting mitigating evidence about his good behavior in prison. Id. "[T]he only question before [the Court was] whether the exclusion from the sentencing hearing of the testimony

petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." Id. at 4, 106 S. Ct. at 1671. The Court held that it did. Id. That is not this case.

The circumstances under which Appellant was sentenced differ from Skipper by several orders of magnitude. Unlike in Skipper, where the defendant facing the death penalty was precluded from even calling witnesses who could present the jury with mitigating evidence, Appellant was able to present any mitigating evidence that he wanted. Moreover, Appellant is not even alleging that there was any evidence that he was unable to present during the sentencing phase. Instead, the only error alleged by the opening brief is Appellant's inability to rebut the State's argument during its rebuttal that Dr. Roitman, a psychiatrist hired by Appellant, had missed the fact that Appellant was a psychopath and a sociopath. AOB at 90. This is belied by the record, however, because the State was merely repeating the argument it made in its closing argument. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Dr. Norton Roitman testified that Appellant was neither a psychopath nor a sociopath, but a narcissist. 23 AA 4917. During direct examination, Appellant spent

considerable time asking Roitman about his interactions with Appellant. Id. at 4891-94. When the State cross-examined Roitman, it specifically addressed "specific criteria" enumerated in the DSM-IV for determining if someone was a sociopath. Id. at 4905-17. It showed that Roitman had failed to conduct a thorough investigation through collateral sources before diagnosing Appellant. Id. The point that the State was trying to make was obvious—under any objective analysis of the DSM-IV standards, Appellant is a psychopath and a sociopath. It was so clear, in fact, that Appellant explicitly asked Roitman on redirect whether Appellant was either, and Roitman testified that while sociopathy and psychopathy overlap with narcissism, his ultimate diagnosis, they are not the same. Id. at 4917.

Both in its closing argument and in its rebuttal, the State argued that Roitman's testimony lacked credibility. Id. at 4969-72, 5002-03. These arguments were meant to discredit testimony from a witness Appellant called. Because the State argued that under the appropriate standard Appellant was a psychopath and a sociopath in its initial closing argument, Appellant cannot now say that "the jury was left with the prosecutor's diagnosis of [Appellant's] mental condition with no opportunity for [Appellant] to respond[.]" AOB at 91. There was an opportunity. Appellant simply did not take it. Appellant never objected to the State's arguments, and failed, in his own closing, to address Dr. Roitman's testimony despite the State relying on it heavily as it argued for the death penalty. At most, the State's rebuttal argument

challenging Roitman's findings was cumulative considering it made the same argument again during its rebuttal. Skipper does not apply here.

For this issue, accordingly, Appellant has accordingly failed to show that (1) the district court abused its discretion by following statutorily mandated procedure and this Court's prior holdings; (2) that this Court's precedents should be overturned; or (3) if there was error that it was anything more than harmless.

VIII. THE NEVADA DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Appellant challenges the constitutionality of the death penalty in several ways, each of which has been raised and squarely rejected by this Court on multiple occasions. This Court should reaffirm the constitutionality of the death penalty.

This Court has "repeatedly upheld Nevada's death penalty." Leonard v. State, 117 Nev. 53, 83, 17 P.3d 397, 416 (2001). Leonard provided a list of multiple cases addressing the issue. Id. That list has only continued to grow since 2001. See Jeremias v. State, 134 Nev. __, __, 412 P.3d 43, 54-56 (2018) (en banc).

A. The Class of People Eligible for the Death Penalty is Sufficiently Narrow.

Appellant's first challenge to the constitutionality of the death penalty alleges that "Nevada law permits broad imposition of the death penalty for virtually any and all first-degree murderers." AOB at 92. This, Appellant alleges, fails to "genuinely

narrow the class of persons eligible for the death penalty" as required by the United States Constitution. Id. at 92.

"[A] State's capital sentencing scheme ... must 'genuinely narrow the class of persons eligible for the death penalty.'" Arave v. Creech, 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (quoting Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)). "Aggravating circumstances are expressly enumerated by statute, and only evidence relevant to these enumerated aggravators will serve to establish a defendant's eligibility for the death penalty." Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000), overruled on other grounds by Lisle v. State, 131 Nev. __, 351 P.3d 725 (2015). As it has with the death penalty itself, this Court has *repeatedly* rejected arguments alleging that the death penalty scheme unconstitutionally fails to narrow the class of persons eligible for death. Thomas v. State, 122 Nev. 1361, 1373, 148 P.3d 727, 735-36 (2006); Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005), overruled on other grounds by Farmer v. State, 133 Nev. ——, 405 P.3d 114 (2017); Leonard, 117 Nev. at 82-83, 17 P.3d at 415-16; Rhyne v. State, 118 Nev. 1, 14, 38 P.3d 163, 171-72 (2002). The only change to NRS 200.033 since Thomas and Weber explicitly affirmed the constitutionality of the death penalty based on its scope was a minor amendment in 2017 adding the murder of a person based on that person's "gender identity or

expression" to a list of other classes the murder for which was already an aggravating factor.

Appellant has briefed neither this minor change nor any reason why the addition of "gender identity or expression" to a statute this Court has previously upheld would suddenly render it excessively and unconstitutionally broad. The facts of this case did not provide Appellant with an opportunity to do so. He argues instead that this Court has never "explained the rationale for its decision and has yet to articulate a reasoned and detailed response to this argument." AOB at 92. This Court's failure to previously explain its rationale is not a reason to overturn precedent. This Court is "'loath to depart from the doctrine of stare decisis' and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 130 Nev. ___, ___, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013)).

Appellant has not argued any compelling reasons to overrule this Court's death-penalty precedents. The Legislature has provided a list of fifteen aggravating factors which are the "only circumstances" a jury can consider when determining if a person is eligible for the death penalty. NRS 200.033. An enumerated list of fifteen factors falls far short of covering every situation in—and for—which a criminal defendant can commit First-Degree Murder. Accordingly, the class of people eligible for the death penalty is sufficiently narrow.

B. Nevada has a functioning clemency program.

Next, Appellant alleges that the death penalty is unconstitutional because there is "no real mechanism to provide for clemency in capital cases." AOB at 93. He acknowledges that this Court rejected this argument in Nunnery v. State, 127 Nev. 749 (2011). AOB at 94. Nunnery was not alone in rejecting this argument, however, as it was also rejected in Cowell v. State, 112 Nev. 807, 919 P.2d 403 (1996) and in Jeremias v. State, 134 Nev. __, __, 412 P.3d 43, 54–55, reh'g denied (Apr. 27, 2018), cert. denied, 139 S. Ct. 415 (2018).

Appellant has not addressed why this Court should revisit Nunnery, Cowell, or Jeremias; instead, he acknowledges that Nunnery controls and then asks this Court to reconsider. AOB at 94. This Court has held that it is "'loath to depart from the doctrine of stare decisis' and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 130 Nev. ___, ___, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013)). The opening brief fails to carry its burden of demonstrating compelling reasons to overrule its precedent. Appellant claims that since "1973, well over 100 people have been sentence to death in Nevada," and no one has been granted clemency. AOB at 93. Even assuming arguendo that this were true, it remains as true today as it was when Nunnery was decided in 2011 and Cowell in 1996. This Court held in those cases that the clemency program did not offend the Constitution.

Because Appellant has failed to provide any compelling reasons to hold otherwise, this Court should affirm Nunnery's validity.

Moreover, there is a functioning clemency program in Nevada. Jeremias, 134 Nev. at __, 412 P.3d at 54–55. Appellant's argument has been presented *verbatim* to this Court and squarely rejected. Jeremias v. State, Opening Brief, Docket No. 67228, 2015 WL 5928543 (Nev.), at 43. Appellant has provided no reason why this Court should come to a different conclusion than it did in Jeremias when presented with the same exact argument. Jeremias, 134 Nev. at __, 412 P.3d 43, 54–55. Nevada has established a Board of Pardons Commissioners consisting of the "Governor, the justices of the Supreme Court, and the Attorney General" to consider applications for clemency. NRS 213.010. The board meets at least semiannually. Id. A person must apply for clemency, and "[e]ach application will be considered on its own merit. Inmates meeting the published minimum criteria will be subject to further review."[10] Additionally, even those applications meeting the minimum criteria may be disqualified based on:

1) The nature and severity of the crime or factors involved
2) Prior criminal history
3) Overall institutional adjustment

[10] Board of Pardons, Criteria for the Evaluation of Inmate Applications for Clemency ("Criteria") (Apr. 25, 2017), http://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/About/CriteriaEvalInmateAppsForClemency.pdf.

4) The result of institutional evaluations (psychological reports, sexual psych panel reports and/or parole or other risk assessments)

Id.

The Board has established that an inmate must "meet the published minimum criteria" by clear and convincing evidence to qualify for further review:

> The applicant has within his or her capacity, made exceptional strides in self-development and self-improvement. The inmate has made responsible use of available rehabilitative programs to address treatment needs;
>
> The applicant is suffering from a critical illness or has a severe and chronic disability, which would be mitigated by release from prison;
>
> The applicant's further incarceration would constitute gross unfairness because of basic inequities involved, including:
>
> - The severity of the sentence received in relation to the sentences received by codefendants or in relation to other offenders serving sentences for crimes with similar characteristics;
> - The extent of the applicant's participation in the offense;
> - A history of abuse suffered by the applicant at the hands of the victim that significantly contributed to or brought about the offense.

Id.

Appellant makes the unsupported, bare assertion that he is "informed and believes" that only a single death sentence has ever been commuted in Nevada. AOB at 93. From this, Appellant concludes that the clemency program "in practical effect" does not exist. Id. at 94. Appellant's argument is fatally flawed.

First, Appellant fails to suggest that there has ever been a meritorious clemency application from a person sentenced to death that was rejected. The Board has established guidelines that must be followed by everyone seeking clemency, *including* those sentenced to death. Without first demonstrating that there have ever been applications which meet the guidelines, it is impossible to say that clemency is not available. The guidelines might be harsh, but so are the crimes on which death penalties are based.

Second, even if Appellant had provided some information about previous clemency applications, it is the State's position that the clemency program can be available and function constitutionally even if no one has yet been granted clemency. Niergarth v. State, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989) (recognizing that "a prisoner has no due process right to clemency"). The State does not seek the death penalty for anything but the most severe crimes, and, as discussed above, the Board's Criteria explicitly allows it to consider the severity of the crime in making a clemency determination. Appellant has not shown that his right to due-process had been violated merely because no one has previously been eligible for clemency.

This Court should reaffirm its prior holdings which found that there is a functioning, constitutionally sufficient clemency program in Nevada.

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C. Nevada's Method of Execution is Constitutional.

Appellant next argues that Nevada's method of execution is unconstitutional because it fails to conform with exactness to Kentucky's method of execution. AOB at 95-97.

The Eighth Amendment "affords a "measure of deference to a State's choice of execution procedures and does not authorize courts to serve as boards of inquiry charged with determining the best practices for executions." Bucklew v. Precythe, 139 S.Ct. 1112, 1125 (2019) (internal citations and punctuation omitted). Accordingly, the Supreme Court has "yet to hold that a State's method of execution qualifies as cruel and unusual." Id. at 1124. The "Constitution has never required" that "executions … be carried out painlessly." Id. at 1127. Instead, "the law has always asked whether the punishment 'superadds' pain well beyond what's needed to effectuate a death sentence." Id.

The Supreme Court developed a two-part test in Baze v. Rees, 553 U.S. 35 (2008) (plurality opinion) to determine if a State's method of execution unconstitutionally superadds pain. A majority of the Court later found the Baze test to be controlling. Glossip v. Gross, 576 U.S. __, 135 S.Ct. 2726 (2015). First, appellants must identify "an alternative that is feasible and readily implemented." Id. at __, 135 S.Ct. at 2737. Second, the alternative must "in fact significantly reduce[] a substantial risk of pain." Id. "[A]nyone bringing a method of execution

claim alleging the infliction of unconstitutionally cruel pain must meet the Baze-Glossip test." Bucklew, 139 S.Ct. at 1129.

Bucklew "(re)confirmed" that Baze imposes a test. Id. It was first confirmed in Glossip. Id. Appellant ignores this, arguing instead that the Nevada method of execution is unconstitutional because it isn't a mirror image of Kentucky's method. AOB at 95-97. This argument is based on a fundamental and disingenuous reading of Baze, which neither suggests nor implies that Kentucky's method of execution is the minimum standard against which all other states are judged. To the contrary, the controlling opinion in Baze addresses standards that a challenge to a method of execution must first establish. A challenge to the constitutionality of a method of execution must not be "*sure or very likely* to cause serious illness and needless suffering" and must not "give rise to sufficiently *imminent dangers*." Glossip v. Gross, 135 S.Ct. 2726, 2737 (2015) (majority opinion) (internal citations omitted) (italics in original). Additionally, any challenge must "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." Id. (internal citations and punctuation omitted).

In upholding the Kentucky method of execution, the Baze plurality recognized that Kentucky, like "35 other states and the Federal Government" imposes the death penalty through "lethal injection." Id. The Court specifically addressed Kentucky's method of execution as one "believed to be the most humane available" and

"share[d] with 35 other States." Chief Justice Roberts included Nevada in that list. He also noted that "whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge." Id.

Despite this, Appellant argues that because the Nevada method of execution "falls short of the safeguards outlined in Baze," it is unconstitutional. AOB at 95. The differences between Nevada's death-penalty method of execution and Kentucky's are trivial. Appellant alleges that (1) Nevada, unlike Kentucky, does not have a requirement that the person performing the venipuncture work for a year; (2) Nevada, unlike Kentucky, requires only the Warden to remain in the execution chamber and not the Assistant Warden; and (3) Nevada, unlike Kentucky, does not require a backup injection site "that the drugs can be directed to if anything goes wrong." AOB at 95-96.

In purporting to apply Baze, Appellant completely fails to apply its test. This is fatal to his challenge—"*anyone* bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the Baze-Glossip test." Bucklew, 139 S.Ct. at 1129 (emphasis added). This Court should affirm Nevada's method of execution.

D. An injunction preventing the State from using one kind of drug does not render the entire method-of-execution constitutionally invalid.

Appellant argues that he cannot be executed because the State is currently

enjoined from using drugs as part of its lethal-injection cocktail. AOB at 97. Without citing any authority, Appellant then argues that this Court should, on that basis, vacate the sentence of death in favor of a sentence to life without the possibility of parole. Id. at 98. This Court should deny this unsupported request. NRAP 28(10)(a); Rodriguez v. State, 117 Nev. 800, 811, 32 P.3d 773, 780 (2001) (addressing the responsibility to present this Court with cogent legally supported argument). Even if the State is currently unable to carry out its punishment because of pending litigation, Appellant has not demonstrated any reason why current litigation should be used to remove a penalty imposed by a jury of Appellant's peers.

E. Death is an Appropriate Sentence Here.

Although the decision to seek the death penalty belongs to the State, the Legislature has imposed a duty on this Court to "review [the sentence] on the record." NRS 177.055; SCR 250(b)-(c). In fulfilling its duty to review the sentence, this Court "shall consider" the following factors:

> (a) Any errors enumerated by way of appeal; (b) If a court determined that the defendant is not intellectually disabled during a hearing held pursuant to NRS 174.098, whether that determination was correct; (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances; (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

NRS 177.055(2).

When addressing its duty to consider whether a sentence of death is excessive, this Court has held that the relevant inquiry is whether the crime and defendant are of the class or kind that warrants the imposition of death. Harris v. State, 134 Nev. __, __, 432 P.3d 207, 215 (2018) (citing Dennis v. State, 116 Nev. 1075, 1085, 13 P.3d 434, 440 (2000)). In asking this question, "an inquiry into whether the death penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others similarly situated" is no longer necessary. Dennis, 116 Nev. at 1084, 13 P.3d at 440.[11]

Appellant argues that the facts in this case "are not extraordinary in comparison to other murder cases that are routinely reviewed by this Court." AOB at 98. The State, naturally, disagrees. The facts in this case are compelling: Appellant met and befriended Michael. Appellant groomed Michael, gaining his trust before approaching him with a plan where Michael would stage a burglary and kill

[11] Moreover, even if proportionality review were still appropriate, the issue is not cogently briefed as Appellant presents this Court with only a single parenthetical or a few lines for each case. Unsurprisingly, cases which took years to fully litigate are difficult to summarize in a single sentence. Thus, although Appellant is correct that in each case he cites, the defendant was not condemned to death, his failure to include the reasons *why* death was withheld paints an inherently inaccurate picture. Further, even with aggravating factors which outweigh mitigating ones, death is never a required punishment—"The law does not require the jury to impose the death penalty under any circumstances, even when the aggravating circumstances outweigh the mitigating circumstances." 24 AA 5025.

Appellant's wife. The plan, as far as Michael knew, was that the two would then split the life-insurance proceeds Appellant received because of Sharon's death. Appellant kept the real plan to himself—he would come in immediately after Sharon's killing and kill Michael in an act he would claim to be self-defense. These killings were calculated, they were premeditated, and they were pursued for only one purpose—to line Appellant's pockets with money.

Moreover, the State introduced evidence during the penalty phase that Appellant had been marrying women only to take out life insurance policies against them and planning to kill them for more than thirty years. In several of these schemes, Appellant met and groomed impressionable men to facilitate these plans. Michael was just the last in a long line of these men. 22 AA 4621-22. The State showed the jury that Appellant was prone to meet these men "take[] them under their wing, starts having a couple beers with them, starts with the questions, do you think you could kill somebody, those types of questions. Do you think you could kill somebody for money, what about splitting some life insurance policy." 21 AA 4618.

Kathryn Thomas. Kathryn Thomas, Appellant's first wife, testified first. She testified that after she divorced Appellant, she discovered that he had taken out life insurance policies in her name. 22 AA 4642. Her current husband, Stephen Thomas, testified that Appellant had approached him on "at least two occasions" about killing someone for money and how he had told Appellant that he could not do it. Id. at

4653. Appellant asked him if he would "kill somebody for $25,000" if he knew he could "get away with it." Id. Appellant called the couple after they had been married for more than seven years and told Kathryn that he wanted to have Stephen killed. Id. at 4655.

Becky Randolph. Becky was Appellant's second wife. Denise Cattoor, Becky Randolph's sister, then testified that Becky was afraid of Appellant because he was physically and mentally abusive. Id. at 4668-74. She learned that Appellant had a life insurance policy on Becky after her death. Id. at 4678. She testified that prior to Becky's death, she had gone camping with Appellant, Tarantino, and Becky. Id. at 4676. On the way home, there was a car crash, and Appellant ran off the road and hit the guardrail on the side where Becky was the passenger. Id.

Eric Tarantino, who had testified during the guilt phase as well, then testified. He went into explicit detail during the penalty phase about all the ways Appellant planned to kill Becky Randolph. Id. at 4683. The two discussed multiple scenarios wherein Becky could die, including (1) a fire; (2) an "automobile accident where the car rolled over her;" (3) a shooting; (4) a burglary; (5) a "slip and fall in the bathtub;" (6) switching Becky's medications; and (7) framing her suicide. Id.

Tarantino testified that the friendship he had with Appellant ended after Appellant asked him to kill Becky—"It was a job, it was a routine, it was every conversation was about her death. Everything that we did was in regards to her

dying." Id. at 4683-84. The two would "rehearse" Appellant's ideas, and if the rehearsal did not go according to plan, Appellant would punch or kick Tarantino. Id. at 4684-86. On a hunting outing, it became clear to Tarantino that Appellant was serious about his homicidal intentions and decided to back out. Id. at 4687-88. One of the plans involved using chloroform to render Becky unconscious in the bathtub, causing her to smash her head as she fell. Id. Appellant rehearsed this scenario by ambushing Tarantino with chloroform to see what effect it would have. Id. at 4689. He "hit the floor like a rock" and had a facial burn from the chemicals for a year afterwards. Id. Tarantino testified that there were several times when he could not make Appellant's perverse rehearsals and Appellant would respond by threatening him with weapons including, in one instance, holding a gun to his head. Id. at 4690.

On another occasion, after a night of drinking, Tarantino actually started a fire in Appellant's trailer while Becky was inside. Id. at 4691-95. It took the paramedics fifteen minutes to revive her. Id. When the fire marshal wanted to speak to him, Appellant menacingly brandished a gun throughout the conversation making Tarantino sure that if he "said the wrong thing that it was going to go off and blow" off his head. Id. at 4695-96.

Gayna Allmon. Gayna Randolph was Appellant's fourth wife. One day, Appellant was cleaning a gun. Id. at 4720. He told Gayna that there were no bullets in it, but as he was cleaning, it fired, putting a hole in the kitchen floor not far from

where Gayna was sitting. Id. She believed that Appellant had been trying to kill her, and she left him after that incident. Id. at 4722-23.

Glenn Morrison testified that he met Appellant in Edinburgh, Indiana. Id. at 4726. Appellant was married at the time, but Glenn never met his wife. Id. at 4727. Morrison's friendship with Appellant began normally, and the two would drink and go shooting together. Id. at 4728. This dynamic changed, however, when Appellant asked Morrison if he would be willing to break into his house, shoot his wife, and shoot him (Appellant) in the leg. Id. at 4729. Appellant told Morrison that he had to shoot him to make it look "like it was a robbery." Id. at 4730. Morrison never agreed to this plan because he was concerned that Appellant would kill him in the process. Id. at 4730. Morrison's concerns were prescient—Appellant did just that to Michael.

Frances Randolph. Frances Randolph was Appellant's fifth wife. Detective Dean Kelley testified that as part of his investigation, he spoke with Hilda Harp, Frances Randolph's sister. Id. at 4820. She was married to Richard Harp, who was deceased at the time of the penalty phase. Id. at 4821. While married to Frances, Appellant discovered that Richard was in prison, and began inquiring into his "criminal background" and asking "what he was in prison for." Id. The two finally met, and Appellant requested that Richard kill Gayna. Id. at 4822. The plan to kill Gayna was the same as the plan used to kill Sharon:

> The description was laid out that they would stage a burglary of their trailer that they were living in. He specified that valuables as well as firearms and money would be taken outside of the trailer and buried.
>
> And the plan was for Richard Harp to fire a weapon through a specific location in the trailer that Mr. Randolph pointed out to him, and that at that location on the other side of the wall would be Gayna Randolph's head. So he had apparently marked out where the bed was located on the other side of the wall.
>
> Richard related to Hilda that he had taken him to the trailer and showed him all of the plan. There wasn't any indication at least at that point whether or not he agreed to do it, but they still maintained the relationship.

Id. at 4823.

Rachel Gaskins testified that her mother Frances was married to Appellant. Id. at 4759. The two lived with Appellant from the time Gaskins was five until she was fourteen. Id. Appellant and Frances would often fight. Id. at 4760. He was also physical with Frances. Id. at 4761. At some point in Appellant's relationship to Frances, a custody battle for Rachel began between Frances and the man Gaskins considered her father, Jesse Gaskins. Id. at 4765. Appellant instructed Gaskins to say that Jesse Gaskins was a pedophile—she complied, even though it was not true. Id. Frances's health deteriorated, requiring her to get surgery. Id. at 4766-70. Frances appeared fine after the surgery, and Gaskins—along with several other family members—was able to talk to her. Id. at 4766. Once those family members left, Appellant made Gaskins remain outside of Frances's hospital room as he went inside alone. Id. at 4768. Although Frances had been perfectly fine minutes before, when

Appellant emerged from the hospital room, he told Gaskins that she had died. Id. at 4769. Doctors asked if Appellant wanted an autopsy, but he declined. Id. at 4769-70. Appellant had Frances cremated, and he gave her ashes to several members of her family in pill bottles. Id. at 4793. Gaskins testified that Appellant had life-insurance policies on Frances. Id. at 4773. She later discovered that Appellant had taken out life-insurance policies on her as well and had listed himself as the beneficiary. Id. Moreover, the State introduced as evidence a letter allegedly written by Frances before the surgery which said that she wanted Gaskins to be raised by Appellant, but Frances had told others that she wanted Gaskins to go with Jesse. Id. at 4777-79. Gaskins expressed concerns about the authenticity of the letter. Id. at 4779.

Sharon Randolph. Sharon Randolph was Appellant's sixth wife, and she was murdered according to the plan which Appellant had devised over decades of planning. Without telling Sharon, Appellant took out a life insurance policy on her. 17 AA 3669. When she found out, she was extremely upset. Id. at 3670. Sharon responded by having a will made in the presence of her friend Alice Wolfe. Id. at 3670. She told Alice that if anything were to happen to her, she was to give the will to Colleen. Id. at 3672.

Then Appellant befriended Michael, just as he had befriended Richard Harp, Glenn Morrison, Stephen Thomas, and Eric Tarantino. Appellant would call Michael

multiple times every day. 18 AA 3746. The two would speak for hours at the mailbox nearly every day. Id. at 3747. The two spoke so often that Michael's family thought that Appellant might have had romantic feelings for him. Id. at 3748. The two eventually went shooting together, and Appellant provided Mike with a gun. Id.

Several days before Appellant murdered Michael, Michael started telling people that he and Randolph would soon be coming into "about $400,000." Id. at 3751, 3796. On May 8, 2008, the two set the plan into action. Michael entered Appellant's home while Appellant was out with Sharon. Sharon had told Antoinette Beam ("Toni") that they were going to dinner and a movie that night. 17 AA 3651. The couple returned home, and Appellant let Sharon go on ahead as he stayed behind and turned up the music that was playing in his car until it was so loud that he could not hear anything happening inside the house. Id. at 3652.

After some time, Appellant entered the house, where he found Sharon lying on the ground, covered in blood. Id. In response, he ran into a room and grabbed a gun that he had hidden in the closet. 21 AA 4252 Appellant claimed that he fired several shots at Michael in the house, who then entered the garage, where Appellant shot and killed him. 17 AA 3653. In the years since Tarantino, Appellant had learned his lesson. He could not let his co-conspirator live, and for that reason he killed Michael.

Appellant's story was always the same. Each time he sought to kill a wife, he would find someone to befriend, groom, and solicit for murder. Richard Harp is "Glenn Morrison is Mike Miller, is Eric Tarantino, is Steven Thomas." 22 AA 4626.

As aggravators, the jury found Appellant guilty of both murders in the same proceeding and found that he had committed the murders to further Appellant's pecuniary interests. 23 AA 5032-33. Both aggravators are explicitly enumerated by the Legislature. NRS 200.033(5), (12). Because the Legislature has included each of the aggravators found by the jury in its enumerated list of possible aggravators, the crimes alleged by the State and found by the jury beyond a reasonable doubt are exactly the type of crimes which warrant a death penalty. The evidence presented to the jury both during the guilt phase and the penalty phase demonstrate that Appellant a danger to those around him. The death penalty, though severe, is appropriate in this case. The jury did not err.

Appellant alleges that because the State only found him to be a danger to his "wives on whom he has obtained life insurance policies," he can no longer threaten anyone. AOB at 99-100. The record belies this claim. Appellant was convicted of murdering his friend as well as his spouse. At trial, the jury heard evidence that *from prison* Appellant hired someone to kill Tarantino before he could testify in Appellant's first murder trial. 22 AA 4808-10. Appellant has callously demonstrated

that anyone who stands in the way of his interests—pecuniary or otherwise—is expendable.

Appellant cites a string of cases to demonstrate that the death penalty is inappropriate, but they are beside the point for several reasons. First, pursuant to its ethical responsibilities, the State only seeks the death penalty when it can prove aggravating factors beyond a reasonable doubt. Nevada Rules of Professional Conduct Rule 179. Accordingly, even if the facts in a given case are egregious, the State will not seek the death penalty if it believes it cannot carry its burden of proving the aggravating factors. Appellant's cases necessarily ignore this nuance as Appellant is not privy to the State's internal deliberations regarding whether to seek the death penalty.

Appellant next argues that his age and poor health weigh against the imposition of the death penalty. AOB at 99. This is unavailing, as the death penalty has been found to be constitutional even where its imposition would cause extreme pain to a particular defendant because of diseases unique to that defendant. Bucklew, 139 S.Ct. at 1120 (rejecting an as-applied constitutional challenge to the death penalty where a disease could cause the defendant's "blood pressure to spike and … tumors to rupture" during the imposition of capital punishment). Moreover, the jury rejected both Appellant's health, any chronic pain that he was in, and his age as potential mitigators when they were explicitly presented on the Special Verdict. 23

AA 5034. This Court should decline to extract mitigating factors from the cold record that the jury rejected to find.

Each attempt to demonstrate that the death penalty was excessive here fails. Appellant has demonstrated for more than thirty years that he is willing to be cold and calculating in the pursuit of his financial gain. This Court should affirm the special verdict of death.

IX. ANY ERROR IS HARMLESS BECAUSE EVIDENCE OF RANDOLPH'S GUILT WAS OVERWHELMING

Appellant's conviction must be affirmed under a harmless-error standard of review because he cannot show any of his substantial rights was prejudiced. Furthermore, given the extensive and compelling evidence at trial, any rational jury would have found Appellant guilty.

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3, 119 S. Ct. 1827, 1830 (1999)). Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). Here, the State presented extensive and compelling evidence proving

Appellant's guilt. See Supra Section I(A). Thus, any error would not have any injurious effect on the jury's verdict. Accordingly, Appellant's conviction must be affirmed.

CONCLUSION

For the reasons included in this brief, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 18th day of June, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Charles W. Thoman*
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Capital Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this Capital Brief complies with the type-volume limitations of NRAP 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 32,249 words.
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 18th day of June, 2019.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Charles W. Thoman*
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #012649
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 18, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

SANDRA L. STEWART, ESQ.
Counsel for Appellant

CHARLES W. THOMAN
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

CWT/Yu Meng/Joshua P. Prince/ed