

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 CASIMIRO VENEGAS,

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.

Case No. : 74241
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District Court Case
No. Elizabeth A. Brown
Clerk of Supreme Court

9
10 **APPELLANT'S OPENING BRIEF**

11 (Appeal from Judgment of Conviction- Eight Judicial District Court)

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TABLE OF AUTHORITIES

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***United States v. Olano*, 507 U.S. 725 (1993).....8**

Nevada Supreme Court:

***Barron v. State*, 105 Nev. 767 (1989).....6, 7**

***Big Pond v. State*, 101 Nev. 1, 692 P.2d 1288 (1985).....10**

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***Desert Cab Inc. v. Marino*, 108 Nev. 32, 823 P.2d 898 (1992).....9**

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ROUTING STATEMENT PURSUANT TO NRAP 28(a)(5)

NRAP 28(a) (5) mandates that an Appellant’s Opening Brief statement “shall contain.”

NRAP 17(b) provides that the Court of Appeals “shall hear and decide only those matters assigned to it by the Supreme Court.” NRAP 17(b)(1) explains that “[a]ll post-conviction appeals except those in death penalty cases and cases that involve a conviction for any offenses that are a category A felony ...” are presumptively assigned to the Court of Appeals.

Here, this matter should be assigned to the Court of Appeals pursuant to
 NRAP 17(b)(1), because Mr. Venegas is appealing his conviction of
 CONSPIRACY TO COMMIT ROBBERY (Category B FELONY);

BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B FELONY); ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony); BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B felony); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony); COERCION WITH USE OF A DEADLY WEAPON (Category B Felony); BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony) and AIMING A FIREARM AT A HUMAN BEING (Gross Misdemeanour – NRS 202.290 – NOC 51447).

STATEMENT OF ISSUES

Issue One: The State’s Closing Argument Amounted To Improperly Shifting The Burden Of Proof To Mr. Venegas, Thereby Violating His Right To A Fair Trial.

Issue Two: The Trial Court Erred When It Failed To Suppress Inflammatory Remarks And Other Similar Conduct That Unfairly Prejudiced Mr. Venegas.

Issue Three: Mr. Venegas’s conviction should be reversed for cumulative error.

STATEMENT OF THE CASE

Petitioner, CASIMIRO VENEGAS, was charged with committing the crimes of CONSPIRACY TO COMMIT ROBBERY (Category B FELONY – NRS 200.380, 199.480 – NOC 50147); BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B FELONY – NRS 205.060-NOC 50426); ROBBERY WITH USE OF A DEADLY WEAPON (Category B

1 Felony – NRS 200.380, 193.165 – NOC 50138); BATTERY WITH USE OF A
2 DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM
3 (Category B felony – NRS 200.481 – NOC 50226); ATTEMPT MURDER WITH
4 USE OF A DEADLY WEAPON (Category B Felony – NRS 200.010, 200.030,
5 193.330, 193.165 – NOC 50031); COERCION WITH USE OF A DEADLY
6 WEAPON (Category B Felony – NRS 207.190, 193.165 – NOC 53160);
7 BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony – NRS
8 200.400.2 – NOC 50151) and AIMING A FIREARM AT A HUMAN BEING
9 (Gross Misdemeanour – NRS 202.290 – NOC 51447).

10 Mr. Venegas had his preliminary hearing on March 3, 2016 and was bound
11 over to district court as charged. AA V I 011. Mr. Venegas entered a not guilty
12 plea to all charges on March 4, 2016. AA V I 013.

13 Mr. Venegas's Trial lasted three days, from March 13-15, 2017, and he was
14 found guilty of the charged offenses. AA V I 013. At sentencing, Petitioner was
15 sentenced in COUNT 1 - to a MAXIMUM of SIXTY (60) MONTHS with a
16 MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS; COUNT 2 – a
17 MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole eligibility
18 of TEN (10) YEARS, CONCURRENT with COUNT 1; COUNT 3 – a
19 MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole eligibility
20 of TEN (10) YEARS, CONCURRENT with COUNTS 1,2; COUNT 4 - a
21 MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole
22 of TEN (10) YEARS, CONCURRENT with COUNTS 1,2; COUNT 4 - a
23 MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole
24 of TEN (10) YEARS, CONCURRENT with COUNTS 1,2; COUNT 4 - a
25 MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole
26 of TEN (10) YEARS, CONCURRENT with COUNTS 1,2; COUNT 4 - a
27 MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole
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1 eligibility of TEN (10) YEARS, CONSECUTIVE to COUNTS 1, 2, 3; COUNT 5 -
2 a MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole
3 eligibility of TEN (10) YEARS, CONSECUTIVE to COUNTS 1, 2, 3 and
4
5 CONCURRENT with COUNT 4; COUNT 6 - a MAXIMIM of ONE HUNDRED
6 TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-
7
8 FOUR (24) MONTHS, CONCURRENT with COUNTS 1, 2, 3, 5; COUNT 7 - a
9
10 MAXIMUM of TWENTY-FIVE (25) YEARS with a MINIMUM parole eligibility
11
12 of TEN (10) YEARS, CONSECUTIVE to COUNTS 1, 2, 3 and CONCURRENT
13
14 with COUNTS 4, 5, 6; COUNT 8 - a MAXIMIM of ONE HUNDRED TWENTY
15
16 (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24)
17
18 MONTHS, CONCURRENT with COUNTS 1, 2, 3, 4, 5, 6, 7; COUNT 9 - a
19
20 MAXIMIM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of
21
22 TWENTY-FOUR (24) MONTHS, CONCURRENT with COUNTS 1, 2, 3, 4, 5, 6,
23
24 7, 8; COUNT 10 - a MAXIMIM of SIXTY (60) MONTHS with a MINIMUM
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26 Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with
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28 COUNTS 1, 2, 3, 4, 5, 6, 7, 8, 9; COUNT 11- THREE HUNDRED SIXTY-FOUR
DAYS in the Clark County Detention Center, CONCURRENT with COUNTS 1,
2, 3, 4, 5, 6, 7, 8, 9, 10; COUNT 12 - a MAXIMIM of SIXTY (60) MONTHS with
a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS,
CONSECUTIVE to COUNTS 1, 2, 3, 4, 5, 6, 7 and CONCURRENT to COUNTS
6, 8, 9, 10, 11; COUNT 13 - a MAXIMIM of SIXTY (60) MONTHS

1 with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS,
2 CONCURRENT with COUNTS 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12; with FOUR
3 HUNDRED SEVENTY-SIX (476) DAYS credit for time served. As the \$150.00
4 DNA Analysis Fee and Genetic Testing have been previously imposed, the Fee and
5 Testing in the current case was WAIVED. The AGGREGATE TOTAL sentence is
6 SIX HUNDRED SIXTY MONTHS MAXIMIM with a MINIMUM PAROLE
7 ELIGIBILITY of TWO HUNDRED SIXTY-FOUR (264) MONTHS or
8 MAXIMIM OF FIFTY-FIVE (55) YEARS with a MINIMUM PAROLE
9 ELIGIBILITY of TWENTY-TWO (22) YEARS. AA V II 439-442.

12 STATEMENT OF THE FACTS

13
14 On January 12, 2016 Casimiro Venegas and Jose Monay-Pina (Co-
15 Defendant) robbed a 7-Eleven with BB guns. AA V I 023. The Defendants had
16 bandanas covering their face and were wearing gloves. AA V I 023-024.

17
18 On the same night after leaving the 7-Eleven the Defendants went to the
19 home of Javier Colon. AA V I 024. While Mr. Colon was asleep, the Defendants
20 went into Mr. Colon's room and attacked him. *Id.* Mr. Colon suffered injuries to
21 his head and hand. AA V I 121-124. The Defendants hit Mr. Colon in the head
22 with the BB gun and struck him in the hand with an axe. *Id.* Mr. Colon lived in a
23 shed outback of his sister's home (Adriana). AA V I 191. When the attack
24 happened, Mr. Colon's family called the police and went to see what was
25 happening. AA V I 194. Mr. Monay- Pina pointed his weapon at Adriana told
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1 her not to move or call for help. AA V I 122. One of the children did call the police
2 and the defendants were found two houses over, hiding in a back yard. AA V I
3 225. The police found cash, knives, bandanas and gloves near the defendants. AA
4
5 V I 237-239.

6 SUMMARY OF THE ARGUMENT

7 Petitioner, Casimiro Venegas, moves this Court to overturn the guilty verdict
8
9 against him, pursuant to his due process rights to a fair trial.

10 The state always has the burden of proving each element of a crime beyond
11 a reasonable doubt. *Barron v. State*, 105 Nev. 767, 778. Statements by the
12 prosecution “I do think it's interesting that we go through all these different
13 pictures, all this evidence, all these things. The defense gets up and talks to you
14 about their closing, right? Their case -- they don't show you any of the pictures,
15 right? They don't go through any of the evidence.” AA V II 415.

16
17 The State’s closing argument points out directly to the jury the Defense’s
18
19 “failure” to show any pictures or what the State believes is evidence. Such
20 comments led the jury to attribute the Defense had the burden to present evidence,
21 which created a risk that the jury failed to focus solely on whether the State proved
22 each element of the charged crimes beyond a reasonable doubt. This improperly
23 intermingles the State’s burden with Mr. Venegas’s trial rights, therefore justifying
24
25 this Court in overturning Mr. Venegas’s conviction.
26

27 The State had three children testify at trial. AA V I 189-218. One of
28

1 the children called the police during the incident while the two other children hid
2 in a bedroom. AA V I 225. The children cried throughout their testimony. AA V I
3 189-218. Unfairly prejudicial evidence is evidence that has an undue tendency to
4 suggest decision on an improper basis, often an emotional one. *Id.*; *see*
5 *also*, Advisory Committee's Notes on Fed. Rule Evid. 403. Here the jury most
6 likely made a decision based on emotion from hearing the children crying as they
7 testified when none of the children actually saw the incident take place.
8
9

10 Lastly, there existed sufficient cumulative error to overturn Petitioner's
11 conviction.
12

13 LEGAL ARGUMENT

14 **A. The State's Closing Argument Amounted To Improper** 15 **Shifting The Burden Of Proof To Mr. Venegas, Thereby** 16 **Violating His Right To A Fair Trial.**

17 The state always has the burden of proving each element of a crime beyond
18 a reasonable doubt. *Barron*, 105 Nev. at 778. Statements by the prosecution "I do
19 think it's interesting that we go through all these different pictures, all this
20 evidence, all these things. The defense gets up and talks to you about their closing,
21 right? Their case -- they don't show you any of the pictures, right? They don't go
22 through any of the evidence." AA V II 415. Which is improper as it may lead the
23 jury to the incorrect belief that the Defendant himself bore the burden of proof or
24 needed to explain certain evidence or to provide witnesses to do so. *Barron*, 105
25 Nev. at 778. As the Defendant has no such obligation, any comments that even
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1 indirectly reference the Defendant or Defense counsel not making certain
2 arguments would lead to burden shifting.

3 Defense counsel did object timely to the burden shifting from the State. AA
4 V II 415. At that time the Judge addressed the Jury stating “I remind the ladies and
5 gentlemen of the jury that the burden is on the State, and the defense is not
6 required to present any evidence.” AA V II 417. The damage had already been
7 done and the proper remedy at the time would have been a mistrial.
8
9

10 Here, as stated above, the State’s closing argument directly points the jury
11 to believe Defense counsel failed to meet their burden of proof, when the defense
12 has no such burden, which created the risk that the jury failed to focus solely on
13 whether the State proved each element of the charged crimes beyond a reasonable
14 doubt. This improperly intermingles the State’s burden with Mr. Venegas’s trial
15 rights, therefore justifying this Court in overturning Mr. Venegas’s conviction.
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18 **B. The Trial Court Erred When It Failed To Suppress**
19 **Inflammatory Remarks And Other Similar Conduct That**
20 **Unfairly Prejudiced Mr. Venegas.**

21 Generally, the Court shall reverse a conviction if the Petitioner suffered
22 actual prejudice or miscarriage of justice. *United States v. Olano*, 507 U.S. 725,
23 734 (1993). The Rules of Professional Conduct exist to deter prosecutorial
24 misconduct because it is just as much their [the Prosecution’s] “duty to refrain
25 from improper methods calculated to produce a wrongful conviction, as it is to use
26 every legitimate means to bring about a just one.” *Berger*, 295 U.S. at 88.
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1 Similarly, “while he [Prosecution] may strike hard blows, he is not at liberty to
2 strike foul ones.” *Id.*

3 Moreover, according to NRS 48.025, irrelevant evidence is inadmissible.
4 Conversely, unless prevented by another rule, all relevant evidence is admissible.
5 *Id.* This Court has held that evidence is relevant if it has any tendency to make the
6 existence of any fact that is of consequence to the determination of the action more
7 or less probable than it would be without the evidence. NRS 48.015; *see also*,
8 *Desert Cab Inc.*, 108 Nev. at 35, 823 P.2d at 899-900; *State v. Rhoades*, 6 Nev.
9 352 (1871). However, although relevant, evidence is not admissible if its probative
10 value is substantially outweighed by the danger of unfair prejudice, of confusion of
11 the issues, or of misleading the jury. NRS 48.035. For a defendant, “unfair
12 prejudice” “speaks to the capacity of some concededly relevant evidence to lure
13 the fact-finder into declaring guilt on a ground different from proof specific to the
14 offense charged.” *Old Chief v. U.S.*, 519 U.S. 172, 180, 117 S.Ct. 644, 650 (1997).
15 Stated slightly differently, unfairly prejudicial evidence is evidence that has an
16 undue tendency to suggest decision on an improper basis, often an emotional one.
17 *Id.*; *see also*, Advisory Committee's Notes on Fed. Rule Evid. 403.

18 Here, the State had Lizbeth Avina 17 years old, Samantha Avina 15 years
19 old and Cesar Avina 11 years old each testify before the jury. AA V I 189-218.
20 These are the three nieces and nephews of the named victim who were present
21 inside the home when this incident happened. AA V I 194-225. They were
22

1 present inside the home however they did not see the actual incident take place.
2 AA V I 189-218. They only testified as to what they heard their mother describe
3 about the incident. Id. Further all three children were crying throughout their
4 testimony. AA V I 189-218 It was unfairly prejudicial against Mr. Venegas for the
5 State to have three children testify when they didn't actually see anything. Further,
6 the testimony was strictly based off of what the mother saw and said during the
7 incident. AA V I 189-218. The testimony was extremely prejudicial and lacked any
8 probative value.
9

10
11 The State knew or should have known that the Jury would make an
12 emotional connection to the children even though they didn't offer any relevant
13 evidence because they did not see anything. There can be no faith in this jury
14 verdict because they were unfairly prejudiced by the inclusion of this non-
15 probative evidence. As a result, this Court must overturn Petitioner's conviction.
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18 **C. Mr. Venegas's Conviction Should Be Reversed For Cumulative**
19 **Error.**

20 Where cumulative error at trial denies a defendant his right to a fair trial, this
21 Court must reverse the conviction. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d
22 1288, 1289 (1985). In evaluating cumulative error, this Court must consider
23 whether "the issue of innocence or guilt is close, the quantity and character of the
24 error, and the gravity of the crime charged." *Id.* Even where the State may have
25 presented enough evidence to convict in an otherwise fair trial, where one cannot
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1 say without reservation that the verdict would have been the same in the absence of
2 cumulative error, then this Court must grant a new trial. *Witherow v. State*, 104
3 Nev. 721, 725, 765 P.2d 1153 (1988). “[I]t is a proud tradition of our system that
4 every man, no matter who he may be, is guaranteed a fair trial.” As stated in
5 *People v. Cahan*, 282 P.2d 905, 912 (Cal. 1955), “Thus, no matter how guilty a
6 defendant might be or how outrageous his crime, he must not be deprived of a fair
7 trial, and any action, official or otherwise, that would have that effect would not be
8 tolerated.”

11 Viewed as a whole, the combination of errors in this case warrants a reversal
12 of Petitioner’s conviction. The State’s improper burden shifting and use of the
13 children’s testimony simply for an emotional pull at the jury deprived Petitioner of
14 his right to a fair trial. Even if Petitioner would have otherwise been found guilty,
15 the aforementioned transgressions warrant a reversal for cumulative error.

18 CONCLUSION

19 Based on the arguments above, this Court should reverse Mr. Venegas’
20 conviction. It is crucial to allow the jury to make a determination on the facts of the
21 case. As a result, this Court must overturn Mr. Venegas’ conviction and grant him
22 a retrial.
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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. I hereby certify that the instant brief complies with the typeface and type style requirements of NRAP. 32 (a) (4)–(6), and that the font used is Times New Roman 14 Point in Microsoft Word.
2. I further certify that this Appellant’s Opening Brief complies with the page or type-volume limitation of NRAP 3C(h)(2) because it is proportionately spaced, has 14 point typeface and contains 3,476 words, which is within the type-volume limitation allowable by law.
3. That I have read this appellate brief, and to the best of my knowledge and belief, it is not frivolous or interposed for any improper purposes, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation.
4. That this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), requiring that 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 found.

///

///

///

1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.

4
5 Dated this 16th day of April, 2018

6 Respectfully submitted:

7 /s/ Adam L. Gill

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13 **CERTIFICATE OF SERVICE**

14 I hereby certify that I served a copy of the: **APPELLANT'S OPENING**
15 **BRIEF AND APPENDIX**, by serving a copy to the following by virtue of e-filing
16 the brief and appendix with the Supreme Court of Nevada:

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