IN THE SUPREME COURT OF THE STATE OF NEVADA

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IVONNE CABRERA,	)	
	)	Case No. 74341
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IVONNE CABRERA, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	Case No.: **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Attorney of record for Appellant: Patricia M. Erickson

Corporation: Patricia M. Erickson, Inc.

No publically held company associated with this corporation;

Law Firm(s) appearing in District Court:

Law Office of Patricia M. Erickson;

Law Office of Bret O. Whipple.

DATED this 13th day of July, 2018.

Respectfully Submitted:

/s/ Patricia M. Erickson

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the present appeal pursuant to NRS 177.015(3). This appeal arises from the filing of the Judgment of Conviction, after a jury trial, which was entered on September 22, 2018.[1] A timely Notice of Appeal was filed on October 23, 2017.[2]

CASE ROUTING STATEMENT

According to NRAP Rule 17(a)(10), the present matter is presumptively retained by the Nevada Supreme Court. The case at bar raises an issue of first impression regarding the denial of a duress defense when a person is charged as an aider/abetter, a conspirator, and a felony murder participant. The case at bar raises a second issue of first impression regarding the application of the aggravating circumstance based upon conviction of a violent felony and the great risk of death to more than one person aggravator when the defendant is convicted of first degree murder based upon imputed or vicarious liability.

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[1] See p.2294-96 of Appellant's Appendix Volume X. Hereinafter, the referenced volume and relevant pages shall be denoted as _ AA _. For example, the relevant citation for the Judgment of Conviction is X AA 2294-96.

[2] X AA 2297-98.

Finally, based upon the fact that Ivonne Cabrera was convicted of committing four category A felonies, the case remains with this Court.

STATEMENT OF THE ISSUES

Whether precluding a duress defense to all of the crimes allegedly committed by Ivonne and overruling Ivonne's request to withdraw the duress defense jury instruction, individually or in combination, violated Ivonne's rights to due process and a fair trial as protected by the Sixth and Fourteenth Amendments?

Whether the district court's denial of Ivonne's initial severance motion and denial of her renewed requests to sever her trial from co-defendant GONZALES violated her federal constitutional right to a speedy trial, as protected by the Sixth Amendment, because GONZALES sought and obtained years of continuances of the joint trial when counsel for Ivonne Cabrera were ready and able to go to trial?

Whether the district court's decision to permit the admission of Ivonne's custodial interrogation without redacting the pervasive hearsay related through the statements and questions of the lead homicide detective was prejudicial error?

Whether the application of the aggravating circumstance premised on the conviction of a violent felony and the great risk of death to more than one person aggravator to a person whose criminal liability for first degree murder was based on a theory of aiding/abetting and conspiracy violated the Eighth Amendment of the United States Constitution?

STATEMENT OF THE CASE

Ivonne Cabrera's criminal case began on May 2, 2012 when a criminal complaint was filed in the North Las Vegas Justice Court. This complaint alleged that on April 26, 2012, JOSE GONZALES and Ivonne Cabrera committed two counts of murder with use of a deadly weapon, two counts of attempt murder with use of a deadly weapon, burglary while in possession of a deadly weapon and conspiracy to commit murder.[1]

On August 21, 2012, the date that the preliminary hearing was scheduled to commence, the prosecutor provided twelve pages of crime scene diagrams to defense counsel who had specifically requested these documents two weeks before that date. Based on the receipt of this discovery in court that day, Ivonne's counsel requested a continuance of the preliminary hearing which was denied.[2] Subsequently, Ivonne's counsel informed the Justice Court judge that he was unable to proceed with the preliminary hearing and was required to advise Ivonne to waive her right to a preliminary hearing.[3]

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1 I AA 1-4.

2 I AA 5-16.

3 Id.

On August 27, 2012, an information was filed in the district court which alleged the same crimes as were set out in the criminal complaint.[4] Ivonne was arraigned in the district court on September 6, 2012. During this hearing, Ivonne asserted her statutory right to a speedy trial.[5] A status hearing was scheduled for September 12, 2012 so that the trial judge could set the trial date.[6]

The September 12th hearing was conducted before the Honorable Kathleen Delaney who was assigned to preside over the Cabrera/Gonzales trial. At this hearing, Ivonne again asserted her desire to have her trial within sixty days.[7] Based on the fact that the state had not determined whether the death penalty would be sought against Ivonne and/or GONZALES, another status hearing was set for October 10, 2012. At this hearing the actual trial date would be announced.[8]

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4 I AA 17-21.

5 I AA 22-25.

6 Id.

7 I AA 26-34.

8 Id.

Prior to the October 10th status hearing, a motion to sever Ivonne's trial was filed.[9] On October 1, 2012, argument by Ivonne's attorneys supporting this motion was presented to the district court.[10] Because the court viewed the trial defenses as one defendant pointing the finger at the other defendant who would then point the finger back at the other, the motion was denied.[11]

On March 2, 2015, after obtaining years of additional time to complete penalty phase investigation, counsel for JOSE GONZALES filed a motion to sever his trial from Ivonne. This motion was based upon the statement that Ivonne provided to law enforcement on the date she was arrested - April 26, 2012 - almost three years earlier.[12] Based on the content of Ivonne's statement and the second prosecutor argument, the district court granted GONZALES' motion to sever.[13]

During the ongoing trial date litigation, the state decided to seek the death penalty if Ivonne was convicted of committing first degree murder.

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9 I AA 35-47.

10 I AA 72-79.

11 Id.

12 II AA 256-316.

13 II 317-334; II 335; Ivonne's trial finally began on June 26, 2017. XIV 2379.

Based on the filing date of the Information and pursuant to Rule 250, the state was required to file a notice to seek the death penalty on or before September 26, 2012. On September 25, 2012, the state filed a "Notice of Evidence in Support of Aggravating Circumstances."[14] A notice to seek the death penalty was not filed within the required time frame.

Instead, on October 4, 2012, the state filed a "Motion to File Corrected Notice of Intent to Seek the Death Penalty." In this motion, the prosecutor alleged that the required notice of intent to seek the death penalty was "mistitled" "due to a clerical error".[15] Ivonne's counsel opposed the state's motion to file a corrected notice because an original notice was never filed and the state failed to establish good cause.[16] The district court disagreed and the state was permitted to file a "Corrected Notice of Intent to Seek the Death Penalty."

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[14] I AA 48-55.

[15] I AA 80-85.

[16] I AA 97-103; I AA 116-13.

In preparing for the Ivonne's separate trial scheduled to begin on September 21, 2015, a motion to strike aggravating circumstances was filed on her behalf.[17] This motion sought to strike the aggravating circumstances which were premised on (1) convictions of a felonies involving the use or threat of violence to the person of another, and, (2) great risk of death to more than one person.[18]

Ivonne Cabrera was charged as an aider/abettor and conspirator. Consequently, application of the aggravating circumstances based on the conviction of a violent felony during the trial - in this case attempted murder with use of a deadly weapon - made anyone who engaged in murder death eligible. Application of these aggravating circumstances did not narrow the "class" of people who were eligible for the death penalty.

Additionally, the aggravating circumstance of great risk of death to more than one person relied solely on GONZALES' actions and state of mind.[19]

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[17] II AA 443-452.

[18] Ultimately, Ivonne's challenges to the first two aggravating circumstances were corrected and the random/without apparent motive was removed from the notice of intent. X AA 2263-2274.

[19] I AA 108-115.

This aggravating circumstance did not enunciate facts and/or a state of mind that established Ivonne's death worthiness. As such, this aggravating circumstance was unconstitutional were premised on the state's imputed criminal liability theory for the murders.

Permitting the state to seek the death penalty for a person, who all parties agreed, never held the gun nor shot the gun that killed two men and injured two women violated the Eighth and Fourteenth Amendments to the federal constitution and also violated the constitution of the state of Nevada.[20] Nonetheless, the district court adopted the state's argument and determined that these constitutional challenges were a matter for decision by a jury.[21]

Sixteen days after the August 19, 2015 trial readiness hearing, nine days after the district court ruled on the pretrial motions and seventeen days before the September 21, 2015 trial date, the state filed an untimely Motion to Admit Evidence of Other Crimes, Wrongs or Acts on September 4, 2015.[22]

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[20] III AA 492-524.

[21] II AA 465-473; III AA 482-491.

[22] III AA 535-546.

The filing of the state's motion, required Ivonne's counsel to request a continuance of the September 21, 2015 trial date.[23]

On September 14, 2015, the court, Ivonne's counsel and Ivonne - herself - acknowledged that this trial continuance was based on the defense's request and that, on this date, she waived her rights to a speedy trial. The trial was continued to June 27, 2016.[24]

In preparation for the June 2016 trial, a motion for the jury to view the scene of the crimes was filed on Ivonne's behalf.[25] The state's opposed this motion.[26] The opposition to the jury view motion, surprisingly, also included a motion in limine. Even though the state received notice on October 1, 2012 that Ivonne's defense to all of the charged crimes would be based on duress, nearly four years later, the state requested that Ivonne be precluded from asserting a duress defense, pursuant to NRS 194.010(8), to the capital murder charges[27]

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[23] III AA 547-564; III AA 571-74; III 575-587; III AA 592-624: III 565-570; III AA 713-14.

[24] III AA 702-712.

[25] III AA 715-720

[26] III AA 721-25.

[27] Id.

In addition to relying upon the statute, the preclusion of a duress defense was, according to the state, also required due to the common law policy that a person should allow herself to be killed by a co-defendant before acquiescing in the co-defendant's order to kill another innocent person.[28] Every opinion relied upon by the state regarding this "choice of evils" policy involved a defendant who, completely unlike Ivonne, actually and personally killed another person.[29] Nonetheless, the district court determined that Ivonne would be precluded from asserting a duress defense to the two charges of murder.[30] Based upon this ruling, the trial was continued to June 26, 2017.

Subsequently, the state filed a motion challenging Ivonne's ability to proffer a duress defense to all of the other crimes she allegedly committed. The state premised this argument on the fact that each of the other charged crimes - attempt murder, conspiracy to commit murder and burglary - required the state to prove that a murder occurred.[31]

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[28] III AA 726-733.

[29] Id.

[30] IV AA 752-53.

[31] IV AA 754-58.

After review of all pleadings and argument by counsel for the parties, the district court judge precluded Ivonne from asserting a duress defense to the remainder of the other crimes she allegedly committed.[32] On December 1, 2016, a formal order regarding this decision was filed.[33]

Jury selection began on June 26, 2017 and concluded on June 28, 2017.[34] An Amended Information for was filed which added language to the burglary while in possession of a deadly weapon charge.[35] The pertinent language of the burglary charge then stated,

> [that Ivonne Cabrera] did then and there willfully, unlawfully and feloniously enter with the intent to commit assault and/or battery and/or a felony to wit: murder, that certain building occupied by Erik Quesado Morales and/or James Headrick and/or Melissa Marin and/or Ashley Wantland, located at 2039 Webster, Apartment No. C, North Las Vegas, Nevada ...[36]

Ivonne's counsel objected to filing the Amended Information.

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[32] IV AA 759-767; IV AA 768-784.

[33] IV AA 785-86.

[34] XIV AA 2379-2395.

[35] IV AA 880-83.

[36] Id. Emphasis added.

Because the new language tracked the language of the burglary statute, the district court permitting the pleading to be filed.[37]

The state began calling witnesses on July 5, 2017 and rested on July 10, 2017.[38]

Several witnesses were called to testify during Ivonne's case in chief. Ivonne's counsel sought to elicit testimony from JOSE GONZALES who had been convicted, sentenced and did not have an appeal pending.[39] GONZALES was transported to court from High Desert State Prison.[40]

After the district court required GONZALES to take the stand, he refused to identify himself and refused to answer any questions. Ultimately, the district court found that Mr. GONZALES was unavailable as a witness.

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[37] IV AA 893.

[38] XIV AA 2379-2395.

[39] On April 12, 2017, JOSE GONZALES pleaded guilty to two counts of First Degree Murder with Use of a Deadly Weapon and two counts of Attempt Murder with Use of a Deadly Weapon. IV AA 803-812 and IV 787-802.. Even though Mr. Gonzales was the actual killer, he was sentenced to life WITH the possibility of parole as well as consecutive sentences for the attempt murder pleas. IV AA 878-79.

[40] V 1155-57.

When Ivonne's counsel sought to introduce GONZALES' judgment of conviction and a portion of his sentencing transcript, the district court denied admission of those documents. After Ivonne concluded her testimony, the defense rested on July 17, 2017.[41]

On the afternoon of July 18, 2017 the jury returned from their deliberations and found Ivonne guilty of committing conspiracy to commit murder, two counts of first degree murder with use of a deadly weapon, two counts of attempt murder with use of a deadly weapon and one count of burglary while in possession of a firearm.[42]

Ivonne's penalty hearing was conducted on July 19 and July 20, 2017.[43] On July 20th, the jury found that the state had proven the existence of all five of the aggravating circumstances. The jury also determined that seven mitigating circumstances existed.[44]

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41 VIII AA 1779.

42 IX AA 2008-2012.

43 IX AA 2013-2262.

44 X AA 2263-2274.

Ultimately, the jury decided that the sentence of life without the possibility of parole should be imposed for the commission of each count of first degree murder.[45]

On September 11, 2017, the district court, consistent with the jury's special verdict, sentenced Ivonne to life without the possibility of parole for the commission of each count of first degree murder and a consecutive forty-eight to one hundred twenty months for the use of a deadly weapon associated with each count of first degree murder.[46] The trial judge chose to follow Ivonne's request that all of the sentences should be concurrent to each other.[47] Therefore, the life without possibility of parole with a consecutive forty-eight to one hundred twenty months is Ivonne's controlling sentence.

The judgment of conviction was filed on September 22, 2017 and the notice of appeal was timely filed on October 23, 2017.[48] This appeal follows.

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[45] Id.

[46] X AA 2294-96.

[47] X AA 2275-2293.

[48] X AA 2294-96 (Judgment of Conviction) and X AA 2297-98 (Notice of Appeal).

STATEMENT OF FACTS

On April 24, 2012, Eric Morales, Melissa Marin, James Headrick and Ashley Wantland lived at apartment C at 2039 Webster Avenue in North Las Vegas. On this date, Morales lent Ivonne a car to drive because he was in an accident while he was driving Ivonne's car which was towed from the scene of the accident.[49]

During the very early morning hours of April 26, 2012, Ivonne drove this borrowed car to pick up her friend Loca who was at Patrick Robles trailer. When Ivonne arrived at the trailer, she expected Loca would get in the car with her. Unexpectedly, Smokey rather than Loca got in the car with Ivonne.[50]

After Smokey got in the car, Ivonne saw that he had a gun.[51] Ivonne knew that when Smokey was up all night smoking methamphetamine, he could easily become extremely violent.[52]

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[49] VII AA 1611-12 and 1615-16.

[50] VII AA 1624.

[51] VII AA 1625.

[52] VII AA 1626.

Ivonne decided to return the borrowed car to Morales at the Webster residence.[53] Ivonne thought that dropping off the car would result in Smokey leaving her at the Webster residence.[54] After arriving at the Webster residence, Ivonne got out of the car, went to the front of the apartment and knocked on the door.[55] When no one answered the door, Ivonne tapped on the window, Ivonne realized that Smokey had gotten out of the car and followed her to the residence. When no one answered the tap on the window, Ivonne decided she was going to leave the keys for the car and walk back over to Patrick Robles' trailer.[56]

As Ivonne began to walk away from the apartment, Smokey pulled out his gun and pointed it at Ivonne. Smokey told Ivonne to go around to the back of the apartment. Smokey followed right behind Ivonne and pointed the gun at her back.

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[53] VII AA 1625.

[54] VII AA 1630.

[55] XI AA 2319-2320.

[56] VII AA 1630.

When they both reached the back side of the apartment, Smokey saw that the bathroom window was open and used a wooden head board, which was leaning on the outside wall of the bathroom, to boost himself into the bathroom.[57]

Once Smokey was through the bathroom window, Ivonne decided that she needed to get away from Smokey and leave the vicinity of the apartment. Unfortunately, Ivonne had farther to travel - from behind the residence - to get to the parked car and Smokey was at the front door just as Ivonne got around to the front of the apartment.[58] Smokey used his gun to force Ivonne into the apartment.[59] Smokey then shot Morales, Marin, Headrick and Wantland. Morales and Headrick were killed. Marin and Wantland were seriously injured.

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[57] VII AA 1630-31 and XIII AAA 2368-69.

[58] XI AA 2323 and XI AA 2321-2322.

[59] VII AA 1631-33.

ARGUMENT

I. Precluding a duress defense to all of the crimes allegedly committed by Ivonne and overruling Ivonne's request to withdraw the duress defense jury instruction, individually or in combination, violated Ivonne's rights to due process and a fair trial as protected by the Sixth and Fourteenth Amendments

Throughout the trial litigation of Ivonne's case, there was never any question that co-defendant JOSE GONZALES personally shot and killed the two men and shot and seriously injured the two women at the Webster residence.[60] Moreover, the state never alleged that Ivonne's criminal liability was other than imputed liability as an aider/abettor, conspirator and/or participant in a felony murder.[61] From the date of her arrest on April 26, 2012, it was crystal clear that Ivonne would rely on a duress defense to every criminal charge.[62]

However, presentation of a duress defense to the murder of James Headrick and the murder of Erick Morales was precluded by the district court.[63]

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60 VIII AA 1797 and 1799.

61 I AA 1-4, I AA 17-21 and IV AA 880-83.

62 I AA 72-79.

63 IV AA 752-53.

Additionally, the state persuaded the trial judge to preclude Ivonne from presenting a duress defense regarding all of the other non-murder crimes she allegedly committed.[64]

After persuading the district court that duress was not a defense to any crime Ivonne allegedly committed, on the first day that evidence was going to be adduced in the trial, the state filed an Amended Information.[65] Ivonne's counsel objected to the filing of the Amended Information based upon the fact that she did not have the time to compare the original information with the amended pleading and had no idea how the proposed amendment would impact on Ivonne's defense.[66]

After the objection, the prosecutor informed the court that the requested amendment added the crimes of assault and/or battery as additional purposes underlying the illegal entry element of the burglary charge.

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[64] IV AA 785-86.

[65] IV AA 880-83. The parties had already been in the court room conducting jury selection for three days prior to the date the Amended Information was filed. XIV AA 2379 -2381.

[66] IV AA 891.

The prosecutor also asserted that the new language reflected the exact language of the burglary statute.[67] The district court agreed, overruled the defense objection and the Amended Information was filed.[68]

Based upon the lack of time to consider how the new charging document impacted on the defense case, Ivonne's counsel immediately began to seek permission from the trial court to present a duress defense to the assault and/or battery aspects of the burglary. As soon as Ivonne's counsel began this argument, the prosecutor broke in and informed the court that he agreed there could be a duress defense to the new aspects of the burglary charge.[69]

As the trial was winding down, Ivonne's counsel submitted a duress defense jury instruction. Subsequently, the defense realized that arguing a duress defense to only the assault and/or battery aspects of the burglary charge would be too confusing for the jury and not helpful to Ivonne. Therefore, the defense requested that the duress defense instruction be withdrawn.

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[67] IV AA 892.

[68] IV AA 893.

[69] IV AA 893-94.

Rather than withdrawing the affirmative defense instruction, the trial judge agreed with the state's argument and the duress instruction was provided to the jury. Based upon the inclusion of this instruction, the state used the jury instruction as a sword to convince the jury that Ivonne was guilty of all the charges.[70]

Consequently, each of these decisions, either alone or in combination, denied Ivonne's federal constitutional rights and her convictions should be reversed and the case remanded to the district court for a new trial.

A. The district court's decision to preclude Ivonne from offering a defense of duress to every crime she allegedly committed violated her right to due process and a fair trial as protected by the Sixth and Fourteenth Amendments

How did Ivonne who never had possession of the gun used to kill two men and seriously injure two women, who obviously did not - herself - shoot any of the victims, who did not directly participate in the killings/injuries lose her complete defense to every single crime charged?

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[70] The timing of the filing of the Amended Information, the prosecutor's immediate recognition that a duress defense could be mounted to the assault/battery aspects and the state's argument against the withdrawal of the duress instruction, clearly, but unfortunately, establish that Ivonne's counsel fell into a trap set by the state.

First, the state convinced the trial court to ignore the constitutional challenges Ivonne raised regarding the application of NRS 194.010(8) to the two capital murder charges. Then, the state convinced the trial court - without citation to any decision by this Court - to preclude duress as a defense to attempt murder, burglary while in possession of a firearm and conspiracy to commit murder. Consequently, the district court also precluded a duress defense to the felony murder allegation.

How was this extraordinary extension of NRS 194.010(8) to non-murder crimes attained? The prosecution argued, and the trial judge agreed, that the "state [was] required to prove the **intent to commit murder**" in order to convict Ivonne of the crimes of attempt murder, conspiracy to commit murder and burglary while in possession of a deadly weapon. Based upon this "intent", the district court concluded that duress could not be a defense to all of those crimes.

The constitutionality of both of the district court's decisions regarding the application of NRS 194.010(8) to the capital murder charges and to the non-murder charges present a question of first impression.[71]

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[71] It appears that this Honorable Court has only considered NRS 194.010 in conjunction with a duress defense in two published opinions (Browning v. State, 120 Nev. 347, 361, 91 P.3d 39, 49 (2004) and Jorgensen

1. When Ivonne's criminal liability was imputed and based on the killings/shootings committed by JOSE GONZALES, application of NRS 194.010(8) to Ivonne's case, which precluded a duress defense to the two murder charges, was an unconstitutional denial of her right to present a defense which is guaranteed by the Sixth and Fourteenth Amendments.

Standard of review: This court applies a *de novo* standard of review to constitutional challenges.[72] It is presumed "that statutes are constitutional," so "the party challenging a statute has the burden of making a clear showing of invalidity."[73]

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v. State, 100 Nev. 541, 544, 688 P.2d 308, 310 (1984)). Additionally, this Honorable Court discussed NRS 194.010 and duress in two unpublished opinions (Wesley v. State, 2013 WL 203616, docket no. 57473 filed 01.16.2013 - unpublished disposition and Zozaya v. State, 126 Nev. 772, docket no. 54395 filed 05.07.2010 - unpublished disposition).

Not one of these four cases addressed the constitutionality of the preclusion of duress, pursuant to NRS 194.010(8), to capital murder charges. And none of these cases discussed the preclusion of a duress defense to non-capital offenses for any reason much less based on the fact that the state was required to prove the "intent to commit murder" in order to prove that a person was guilty of non-capital offenses.

[72] See State v. Colosimo, 122 Nev. 950, 954, 142 P.3d 352 (2006).

[73] State v. Castaneda, 126 Nev. 478, 481, 245 P.3d 550, (2010).

(a). Application of NRS 194.010(8), a state evidentiary/procedural rule, to preclude the presentation of a duress defense to all of the crimes allegedly committed by Ivonne violated the Sixth and Fourteenth Amendments

A duress defense requires a person commit a criminal act and have the requisite mental state so that the conduct violates the literal language of a law. Nonetheless, the conduct is excused because:

> [t]he rationale of the defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Nor is it that the defendant has not engaged in a voluntary act. Rather it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused.[74]

In Nevada, the defense of duress is codified in NRS 194.010. This statute states, in pertinent part, that:

> All persons are liable to punishment except those belonging to the following classes:
>
> 8. Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

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[74] Dixon v. United States, 548 U.S. 1, 15 fn 5 (citing 2 LaFave § 9.7(a), at 73).

NRS 194.010(8) completely precludes presentation of any evidence of duress when a person is charged with capital murder. Section 8 of this statute violates the Sixth Amendment.

The Sixth Amendment guarantees the accused person "an opportunity to be heard—a right to [a] day in court".[75] This right is a "fundamental element of due process of law" and the Fourteenth Amendment requires the States to recognize and implement this right during a criminal trial.[76]

The United States Supreme Court has addressed the scope of the constitutional right to present a defense in a trio of cases: Washington v. Texas,[77] Chambers v. Mississippi,[78] and Rock v Arkansas.[79] Each case involved a situation, like Ivonne's, where the state relied on an evidentiary/procedural rule as a basis for excluding crucial defense evidence.

For example, in Washington, the Court held that state evidentiary rules could not permissibly be used to prevent the testimony of an accomplice who

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[75] 388 U.S. 14, 18, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967)(citing In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.2d 682 (1949).

[76] Washington, 388 U.S. at 19.

[77] Id.

[78] 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

[79] 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

would have testified that he fired the fatal shot as the petitioner was attempting to leave the premises.[80] Similarly, in Chambers, the Court held that state hearsay rules could not be used to exclude the confessions of another person - - McDonald - - where the petitioner's defense to murder charges was that McDonald had actually performed the killing.[81] Likewise, in Rock, the United States Supreme Court held that Arkansas' per se prohibition on hypnotically-refreshed testimony infringed impermissibly on a criminal defendant's right to present a full and complete defense.[82]

NRS 194.010(8) is an evidentiary/procedural state statute. This rule completely precludes the admission of any evidence supportive of a duress defense to capital murder charges. Washington, Chambers and Rock concluded that state procedural/evidentiary rules which denied "a fundamental element of due process of law" were unconstitutional because the rules denied the right to present critical testimony and evidence to establish a defense.[83]

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[80] Washington, 388 U.S. at 19-23.

[81] Chambers, 410 U.S. at 301-05.

[82] Rock, 483 U.S. at 61-62.

[83] Washington, 388 U.S. at 19. See also, Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151, 60 L.Ed.2d 738 (1979) ("Regardless of

Given Ivonne's opposition to the state's motion to preclude a duress defense, the trial court should have applied the federal constitutional principles of these three cases.[84] After applying these constitutional principles, the district court should have denied the state's requests to preclude presentation of a duress defense to all of criminal acts that Ivonne allegedly committed.

Unfortunately, the district court's order utterly failed to address Ivonne's federal constitutional challenge. As the rights, protected by the Sixth and Fourteenth Amendments, were denied by the district court's decision to entirely preclude a duress defense to all criminal charges, this Honorable Court should reverse all of Ivonne's convictions.

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whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment."); see also Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (holding that the defendant's right to present a defense was denied by the exclusion of evidence).

[84] III AA 726-733.

(b). Application of NRS 194.010(8) to a person who never had a gun in her hand and never shot any one but was alleged to be an aider/abettor was unconstitutional

NRS 194.010(8) was enacted in 1911. Although the statute has been amended six times since 1911, the language of section 8 has never changed.[85] In contrast, the application of the Sixth and Fourteenth Amendments to criminal trials has significantly evolved since 1911 yet the constitutionality of section 8 has never before been questioned. Application of NRS 194.010(8) in a case where the accused was alleged to be an aider/abettor to capital murder was challenged in the district court and it is now before this Honorable Court as a question of first impression.

There isn't any history available to determine why the legislature decided that duress was not a defense to crimes punishable by death. However, given the enactment date, it can be surmised that section 8 was intended to codify the common law policy that duress was unavailable in cases of intentional killing which were deemed to be capital offenses in 1911. This policy has been referred to as a "choice of evils" policy.

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[85] See Addendum Exhibit "A" (initial language of NRS 194.010); Addendum Exhibit "B" (revision in 1979); Addendum Exhibit "C" (revision in 1981); Addendum Exhibit "D" (revision in 2001); Addendum Exhibit "E" (revision in 2003); and, Addendum Exhibit "F" (revision in 2015).

This common law policy precludes a duress defense when a person kills an innocent because the actual killer's life was being threatened by another. The rational for precluding the duress defense is based on the recognition that in a situation where the harm is equal - innocent killed vs threatened actual killer being killed - the threatened actual killer ought to sacrifice her own life rather than escape the threatened harm by murdering the innocent.[86] "It is this balancing of harms that generally precludes the use of duress as a defense to murder."[87]

Based on this concept of balancing the harms, in Ivonne's case, this policy should only have applied ***if*** Ivonne had the gun in her hand and, based upon the threat to her life by JOSE GONZALES, she shot and killed James Headrick and Erick Morales. That is clearly not what happened.

On April 26 2012, only JOSE GONZALES had a gun. Only JOSE GONZALES shot that gun. And only JOSE GONZALES caused the deaths of Headrick and Morales.[88]

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[86] See Perkins, Criminal Law 951 (1969), citing 4 Blackstone, Commentaries 30.

[87] Pugliese v. Com., 428 S.E.2d 16, 26 (Va. Ct. App. 1993)(Emphasis added); see also, Arnold v. Com, 560 S.E.2d 915, 917 (Va. Ct. App. 2002).

[88] VIII AA 1797 and 1799.

Only five state appellate courts have decided that a duress defense is unavailable to a person, like Ivonne, charged with committing murder as an aider and abettor or pursuant to an accomplice theory of liability.[89] In reaching this conclusion, not one of these courts engaged in any real analysis regarding the common law policy and how that policy applied to the facts underlying the aider/abetter or accomplice liability. Rather, the courts simply enunciated the policy and then concluded that duress cannot be a defense.

If the courts engaged in an actual analysis of the common law policy when applied to persons charged with vicarious liability for murder, the courts would have to recognize and answer the question of how can a policy require a person, like Ivonne, who does not actually kill anyone be required to give up her life? The courts would have to recognize and answer the question of how can a policy require a person, like Ivonne, who does not actually kill anyone be required to give up her life when another person, like JOSE GONZALES, pulls the trigger of a gun and kills people like Headrick and Morales?

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[89] See State v. Ellison, 140 P.3d 899, 917 (Ariz. 2006); People v. Vieira, 106 P.3d 990, 1005–06 (Cal. 2005), as modified (May 26, 2005); Wright v. State, 402 So.2d 493, fn. 8 at 498 (Fla.App. 1981); People v. Calvillo, 524 N.E.2d 1054, 1059 (Ill. App. Ct. 1988); State v. Dissicini, 316 A.2d 12, 15 (N.J. App. Div. 1974) and People v. Dittis, 403 N.W.2d 94, 95 (Mich. Ct. App. 1987).

The courts would have to answer the question of how can a policy require a person, like Ivonne, who does not have a gun nor any other weapon and cannot prevent the actual shooter, like JOSE GONZALES, from killing people, like Headrick and Morales, be required to give up her life? If the courts actually engaged in an analysis of the application of the policy to an aider/abetter, the courts would recognize that those persons, like Ivonne, are more like the innocent persons actually killed by people like JOSE GONZALES.

In Ivonne's case, the district court was asked to recognize that the "choice of evils policy" should not apply because Ivonne did not actually kill anyone and could not stop GONZALES from killing Headrick and Morales. The district court did not engage in this analysis.

Rather, the district court ruled, in part, that:

> The Court is ... confident because duress cannot, as a matter of law, negate the elements of first degree murder, it would not be possible for it to negate the requisite intent for one charged with aiding and abetting a first degree murder. See, e.g., People v. Vieria, 35 Cal.4th 264, 290 (2005)(citing People v. Anderson, 28 Cal.4th 767, 784 (2002)).[90]

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[90] IV AA 752-53.

The language of the district court's order and the direct citation to People v. Viera clearly establish that the preclusion of the duress defense for Ivonne was based on the district court's acceptance of the minority view of the effect of duress on the commission of a crime. Only California and West Virginia discuss duress in terms of negating the mental state ie the intent associated with the criminal act.[91] California courts explicitly, and West Virginia courts impliedly, rely upon the duress defense's immediacy requirement to negate "an element of the crime - the intent to commit the act." Because of the "immediacy and imminency of the threatened harm" a defendant "does not have time to form criminal intent."[92]

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[91] See People v. Vieira, 35 Cal. 4th 264, 289–90, 106 P.3d 990, 1005–06 (Cal. 2005), as modified (May 26, 2005)("duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first degree murder"); see also, People v. Petznick, 114 Cal. App. 4th 663, 676, 7 Cal. Rptr. 3d 726, 735 (Cal. Crt. App. 2003), as modified on denial of reh'g (Jan. 14, 2004)(the defense of duress negates the intent or capacity to commit the crime charged) and State v. Tanner, 171 W. Va. 529, 532, 301 S.E.2d 160, 163 (1982)(an "act which would otherwise constitute a crime may be excused on the ground that it was done under compulsion or duress, since the necessary ingredient of intention ... is then lacking")

[92] People v. Heath, 255 Cal. Rptr. 120, 125 (Cal. Ct. App. 1989).

On the other hand, seven state appellate courts as well as the United States Supreme Court have recognized that duress does not negate the mental state element or any other element of a criminal charge.[93] Basically, these jurisdictions recognize that a criminal act has occurred and the accused intended to commit the act. Nonetheless, a threat of serious bodily injury or death - duress - excuses or justifies the intentional act.

This Honorable Court has not determined whether duress negates the intent to commit a crime or excuses or justifies commission of a criminal offense.

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[93] See Dixon v. United States, 548 U.S. 1, 6, 126 S. Ct. 2437, 2441, 165 L. Ed. 2d 299 (2006); see also State v. Glass, 455 So. 2d 659, 663 (La. 1984)(duress defense justifies otherwise criminal conduct); City of Missoula v. Paffhausen, 289 P.3d 141, 155 (Mont. 2012)(duress is not based on the principle that a defendant's intent is negated); State v. Percival, 394 P.3d 979, 985 (N.M. Crt. App. 2017)("duress does not negate an element of the charged offense but instead excuses intentional conduct"); State v. New, 640 S.E.2d 871, 873 (S.C. 2007) (same); Rodriguez v. State, 368 S.W.3d 821, 824 (Tex. App. 2012)(duress is a justification which does not negate any element of the offense, including intent; it only excuses what would otherwise constitute criminal conduct");State v. Riker, 869 P.2d 43, 52 (Wash. 1994)(duress "does not negate an element of an offense, but pardons the conduct even though it violates the literal language of the law."); Moes v. State, 284 N.W.2d 66, 71 (Wis. 1979)(same).

Because duress is an affirmative defense,[94] it is submitted that the conclusion that duress excuses or justifies the commission of a crime is the more reasoned position which this Court should adopt.

As the district court entirely precluded Ivonne from presenting a duress defense to the two capital murder charges based on the illogical minority position that duress negates intent, it is submitted that application of NRS 194.010(8) violated Ivonne's federal constitutional rights to due process and a fair trial as protected by the Sixth and Fourteenth Amendments. Therefore, Ivonne's capital murder convictions should be reversed and the case should be remanded to the district court for a new trial.

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[94] In Perez v. State, 127 Nev. 1166, 373 P.3d 950 (docket no. 53114 filed 09.29.2011 unpublished disposition), this Court recognized that duress is an affirmative defense which requires the defendant to produce a preponderance of evidence to support the defense.

(c). Application of NRS 194.010(8) to a person who never had a gun in her hand and never shot any one but was alleged to be a participant in a felony murder, based upon the commission of a burglary, was unconstitutional

(i) Precluding a duress defense to the non-murder crimes

Prior to Ivonne's trial, the state requested the district court enter uncharted and unsupported waters and conclude that duress was not a defense to the burglary, attempt murder or conspiracy to commit murder charges. The state asserted that the burglary charge was based on the allegation that Ivonne entered the Webster residence with the intent to commit murder. Without citation to **any** authority, the state then asserted that "[i]n this unique situation, the state is required to prove an intent to kill for all of the charges in the Information. As such, duress should not apply to any of the charged" crimes.[95]

Although Ivonne provided the district court with reasons why the state's position was untenable, the district court granted the state's motion.[96]

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[95] IV AA 755.

[96] IV AA 759-767. See also, IV AA 768-784.

The court's order specified that "[t]he Court does not find that duress is available to negate the intent and the intent element is available."[97] The Court also found that:

> The State has asserted that each crime charged in the Information, underlying this case, is associated with the allegation that Ms. Cabrera committed the crime of murder. Therefore, the State will be required to prove an intent to commit murder in order to prove the intent element of each crime charged. As the defense of duress is not available to the charge of murder, it is not available to every criminal offense alleged in the Information.[98]

The district court's preclusion of a duress defense to attempt murder, burglary and conspiracy to commit murder was unsupported by any legal authority from any court. Moreover, the district court's decision was not even supported by the language of NRS 194.010(8) which specifically precludes duress when the crime is punishable by death. Attempt murder, burglary and conspiracy to commit murder can not be punished by death. Thus, the district court's decision was completely contrary to the statutory language of NRS 194.010(8).

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[97] IV AA 786. This language seems to reflect the district court's prior reliance on the minority view espoused by California and West Virginia that duress negates intent ie. the immediacy of the threat precludes a defendant from forming the required criminal intent. As argued, the majority holding that duress excuses or justifies the intentional act is the more reasoned approach to why duress is a defense to crimes.

[98] Id.

Furthermore, the weight of authority clearly establishes that duress excuses the commission of all crimes other than intentional murder.[99] Additionally, a duress defense has specifically been recognized as appropriate when the crimes of treason, kidnapping, arson, robbery, breaking and entering with intent to steal, forgery and perjury are being prosecuted.[100] Finally, thirteen State Legislatures and several states have recognized duress is a complete defense to all crimes even murder.[101]

The district court's decision to preclude duress as a defense to attempt murder, burglary and conspiracy to commit murder was not supported by any legal authority. It is submitted that the application of NRS 194.010(8) violated Ivonne's federal constitutional rights to due process and a fair trial as protected by the Sixth and Fourteenth Amendments.

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[99] See State v. St. Clair, 262 S.W.2d 25, 27 (Mo. 1953)(citing Nall v. Commonwealth, 271 S.W. 1059 (Ky. Ct. App. 1925) and 15 Am.Jur., Criminal Law, § 318, p. 16).

[100] See, State v. Toscano, 378 A.2d 755, 761 (N.J. 1977)(collecting cases).

[101] See, Com v. Vasquez, 971 N.Ed.2d 783 , 791 (Mass. 2012)(collecting statutes from Alaska, Connecticut, Delaware, Hawaii, New York, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas and Utah); see also, MacKool v. State, 213 S.W.3d 618, 623 (Ark. 2005)(duress is a complete defense to all crimes including murder and does not mitigate murder to manslaughter).

Therefore, Ivonne's convictions for attempt murder, burglary while in possession of a firearm and conspiracy to commit murder should be reversed and the case should be remanded to the district court for a new trial.

(ii) Precluding the duress defense to felony murder

In the case at bar, the state alleged that Ivonne was guilty of first degree felony murder because the killing of Headrick and Morales was committed during a burglary.[102] During the litigation of the state's motion to preclude a duress defense to all of the offenses, the state espoused that is was not seeking a ruling from the district court regarding duress and felony murder.[103] However, the state also argued that based on the manner in which the burglary was charged - entering with the intent to commit murder - duress could not be a defense for the burglary and, ultimately, could not be a defense to felony murder.[104]

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102 See IX AA 1982.

103 IV AA 757.

104 IV AA 779.

As noted in the preceding argument, the weight of authority recognizes that duress is a defense to all crimes other than intentional murder. Consequently, Arkansas,[105] California,[106] Colorado, Florida,[107] Illinois,[108] Kansas,[109] Maryland,[110] Mississippi,[111] Ohio,[112] Oklahoma,[113] and Virginia[114] specifically recognize that duress is a defense to felony murder. Moreover, five states implicitly recognize that duress is a defense to felony murder.[115]

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[105] See, MacKool, 213 S.W.3d at 623 (2005)

[106] See, People v. Wilson, 114 P.3d 758, 774 (Cal. 2005).

[107] See, Rodriguez v. State, 174 So.3d 502, 507 (Fla. Dist. Ct. App. 2015).

[108] See, People v. Serrano, 676 N.E.2d 1011, 1015 (Ill. App. Ct. 1997).

[109] See, State v. Hunter, 740 P.2d 559, 569 (Kan. 1987).

[110] See, McMillan v. State, 51 A.3d 623, 635 (Md. App. 2012).

[111] See, Banyard v. State, 47 So.3d 676, 682 (Miss.2010).

[112] See, State v. Getsy, 702 N.Ed.2d 866, 884 (Ohio 1998).

[113] See, Tully v. State, 730 P.2d 1206, 1210 (Okla. Crim. App. 1986).

[114] See, Arnold v. Com., 560 S.E.2d 915, 918 (Va. Ct. App. 2002).

[115] See, State v. Johnson, 138 A.3d 1108, 1113 (Conn. App. 2016); State v. Cox, 879 P.2d 662, 667 (Mont. 1994); People v. Campos, 108 A.D.2d 751, 752 (N.Y. App. Div. 1985); State v. Gay, 434 S.E.2d 840, 854 (N.C. 1993); and, State v. Robinson, 622 S.W.2d 62, 73 (Tenn Ct. App. 1980).

Very few states conclude that duress is not a defense to felony murder and those states all appear to rely upon their state statutes.[116]

Ivonne's jury was informed that "the gist of the crime of Burglary is the unlawful entry with criminal intent." Therefore, if Ivonne entered the Webster residence with the intent to commit an assault, battery or murder, she committed burglary.[117] The jury was also told that a killing committed during a burglary is deemed to be first degree murder and that this concept is known as felony murder.[118]

The district court stated that the fact that the burglary charge was based on the intent to murder made it irrelevant whether duress could be a defense to felony murder.[119] Nonetheless, the district court expanded the reasoning of NRS 194.010(8) to apply to burglary when it was alleged that the crime required proof of an intent to murder.

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[116] See, State v. Ellison, 213 Ariz. 116, 131, 140 P.3d 899, 914 (2006)(relying on A.R.S. § 13–412(c); Moore v. State, 697 N.E.2d 1268, 1273 (Ind.Ct.App.1998) (citing Ind.Code § 35–41–3–8); State v. Rumble, 680 S.W.2d 939, 942 (Mo. 1984)(citing Section 562.071.2); and, State v. Ng, 750 P.2d 632, 636 (Wash. 1988)(citing Rev.Code Wash. § 9A.16.060 (2)).

[117] IX AA 1969.

[118] IX AA 1982.

[119] IV AA 780.

Consequently, duress was not a valid defense to the felony murder.

It is submitted that the application of NRS 194.010(8) violated Ivonne's federal constitutional rights to due process and a fair trial as protected by the Sixth and Fourteenth Amendments. Therefore, Ivonne's conviction for felony murder should be reversed and the case should be remanded to the district court for a new trial.

B. The district court's denial of Ivonne's request to withdraw the duress defense jury instruction violated Ivonne's right to due process and a fair trial as protected by the Sixth and Fourteenth Amendments

On July 12, 2017, after the evidentiary portion of the defense's case in chief was concluded, the district court and counsel for the parties discussed the jury instructions which would be read to the jury. On Ivonne's behalf, her counsel submitted a duress defense jury instruction.[120] The prosecutor requested additional language regarding the requirement that there was no reasonable opportunity to escape be added to the proposed instruction.[121]

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120 XI AA 2308 and VIII AA 1819-1820.

121 VIII AA 1819.

After the defense agreed to add this language to the duress defense instruction, the district court concluded that the amended instruction would be provided to the jury.[122]

Subsequently, counsel for Ivonne requested the duress defense jury instruction be removed.[123] The request to remove the jury instruction was based on several facts. First, the duress defense was only applicable to the assault and/or battery aspects of burglary. Second, the jury instructions that would be provided to the jurors were extremely complicated and the limitation of the duress defense would only confuse the jurors. Based upon these facts, counsel decided that the defense would not argue duress in any manner.[124]

After the district court decided to withdraw the duress defense instruction, the state argued that the concept of duress would still need to be addressed because Ms. Cabrera relied on the concept of duress during her interview with the police.[125]

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122 VIII AA 1820.

123 VIII AA 1844.

124 VIII AA 1846.

125 VIII AA 1846-47.

Ivonne's counsel argued that mere presence - which focused on Ivonne's mental state - provided a sufficient explanation for the words Ivonne spoke during her custodial interview. Regardless of the fact that Ivonne's counsel would not present any argument regarding duress, the district court did not remove the duress defense instruction.[126]

> Duress is an affirmative defense.[127]
>
> The affirmative defense of duress is, on its face, a confession-and-avoidance or "justification" type of defense. This is so because 'this justification, by definition, does not negate any element of the offense, including culpable intent; it only excuses what would otherwise constitute criminal conduct.[128]

Because duress is an affirmative defense, the defendant has the burden of presenting evidence to establish defense by a preponderance.[129]

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[126] VIII AA 1848-49. See also, IX AA 1997 (duress jury instruction).

[127] See, State v. Fukusaku, 946 P.2d 32, 51 (Haw. 1997); People v. Lemons, 562 N.W.2d 447, 453 (Mich. 1997); State v. Charlton, 338 N.W.2d 26, 28 (Minn. 1983); Alford v. State, 806 S.W.2d 581, 586 (Tex. App. 1991).

[128] Rodriguez v. State, 368 S.W.3d 821, 824 (Tex. App. 2012).

[129] See, Perez v. State, 127 Nev. 1166, 373 P.3d 950 (docket no. 53114 filed 09.29.2011 unpublished disposition); see also, Fukusaku, 946 P.2d at 51; and, Thornburg v. State, 699 S.W.2d 918, 920 (Tex. App. 1985).

There is no authority which permits the prosecution to use the affirmative defense of duress as a sword to convict a defendant who is not arguing that duress justifies the criminal action. Nonetheless, that is exactly what happened during the state's rebuttal closing argument when the prosecutor argued:

> Oh wait. There's duress. Except for when you look at the duress instructions, where are you at? Duress is not a [defense] for murder, attempt murder burglary with intent to commit murder, conspiracy to commit murder. It's only a defense to burglary on an assault or battery theory.
>
> But what do you have to prove to prove duress? The defendant has to prove that she was in fear of her life. And so what's the ridiculousness of that argument? ... But let's not talk about her defense, because there isn't a defense. There is no defense in this case to burglary, the felony murder and the first degree murder.[130]

The district court should have removed the duress defense jury instruction when Ivonne told the court that a duress would not be argued. By accepting the prosecutor's argument that facts of duress were introduced through Ivonne's custodial interview, which the state admitted into evidence, a defense was transformed into a sword of guilt.

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130 IX AA 1934-35.

Ivonne's federal constitutional right to due process and a fair trial, as guaranteed by the Sixth and Fourteenth Amendments, were violated. Ivonne's convictions for all of the crimes should be reversed and the case should be remanded to the district court for a new trial.

II. The district court's denial of Ivonne's initial severance motion and denial of her renewed requests to sever her trial from co-defendant GONZALES violated her federal constitutional right to a speedy trial, as protected by the Sixth Amendment, because GONZALES sought and obtained years of continuances of the joint trial when counsel for Ivonne Cabrera were ready and able to go to trial

Standard of review: Denial of a request to sever two trials is reviewed for an abuse of discretion.[131] However, the denial of the federal constitutional right to a speedy trial is reviewed *de novo*.[132]

NRS 174.165(1) establishes that trial courts are permitted to sever the trials of joined defendants if joinder is prejudicial to one of the defendants. Severance should be granted if "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants."[133]

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131 Chartier v. State, 124 Nev. 760, 764, 191 P.3d 1182, 1185 (2008).

132 United States v. Molina-Solorio, 577 F.3d 300, 304 (5th Cir. 2009)(citing United States v. Sutcliffe, 505 F.3d 944, 956 (9th Cir.2007).

133 Chartier, Nev. 124 at 764.

Moreover, the district court must continue to review the joinder of defendants for trial and sever if it becomes apparent that the joinder is prejudicing one of the defendants.[134]

In the case at bar, the denial of Ivonne's October 1, 2012 motion to sever and denial of her numerous renewals of the request to sever compromised Ivonne's specific trial right - the Sixth Amendment right to a speedy trial - as established below. Consequently, the trial court's failure to sever Ivonne's trial from GONZALES was an abuse of discretion.

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. "[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. [The] right has its roots at the very foundation of our English law heritage."[135] The Sixth Amendment's speedy trial provision applies to state criminal cases pursuant to the Fourteenth Amendment.[136]

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[134] See Chartier, Nev. 124 at 765.

[135] Klopfer v. State of North Carolina, 386 U.S. 213, 222–23, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1 (U.S. 1967).

[136] Stabile v. Justice's Court of Las Vegas Twp., 83 Nev. 393, 395, 432 P.2d 670, 671 (1967)(citing Klopfer v. State of North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

When a speedy trial challenge is raised, the court should make a threshold determination regarding the length of the post-charging delay. If there is a lengthy time between the request for a speedy trial and the trial, the United States Supreme Court has established a four prong balancing test which assesses: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of her right; and (4) prejudice to the defendant.[137] There can be no doubt that the district court's failure to grant Ivonne a severance and the granting of numerous lengthy trial continuances based upon GONZALES' need for additional time to complete his penalty phase investigation fulfills all aspects of the Barker balancing test.

A. Length of the delay in this case was excessive.

On August 27, 2012, an information was filed in the district court which alleged that JOSE GONZALES and Ivonne Cabrera committed two counts of murder with use of a deadly weapon, two counts of attempt murder with use of a deadly weapon, burglary while in possession of a firearm and conspiracy to commit murder.[138]

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[137] Barker v. Wingo, 407 U.S. 514, 531-32, 92 S.Ct. 218, 33 L.Ed.2nd 101 (1972). This Court adopted the four prong balancing test in State v. Robles-Nieves, 129 Nev. 537, 545, 306 P.3d 399, 405 (2013).

[138] I AA 17-21.

Ivonne was arraigned in the district court on September 6, 2012. During this hearing, Ivonne asserted her statutory right to a speedy trial. A status hearing was scheduled for September 12, 2012 so that the trial judge could set the trial date.[139]

The September 12th hearing was conducted before the Honorable Kathleen Delaney who was assigned to preside over the Cabrera/Gonzales trial. At this hearing, Ivonne again asserted her desire to have her trial within sixty days.[140] Based upon the fact that the state needed to determine whether the death penalty would be sought against Ivonne and/or GONZALES, another status hearing was set for October 10, 2012.[141]

Prior to the October 10th status hearing, a motion to sever Ivonne's trial from the co-defendant's trial was filed.[142] On October 1, 2012, argument regarding this motion was presented to the district court.

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139 I AA 22-25.

140 I AA 26-34.

141 Id.

142 I AA 35-47.

Specifically, the court was informed that,

> This past April 26th, [co-defendant Jose] Gonzales killed two people. The factual issue in this case is whether Ms. Cabrera intended to be part of that killing. It is uncontested that she was present. It is uncontested that [Ms. Cabrera and co-defendant Gonzales] both returned in the same car. The factual issue is why she did that. ...
>
> [Ms. Cabrera's defense is] mutually antagonistic because [she] was present [at the crime scene]. Not just present because she was forced to be present but she observed the entire shooting. She is going to be able to point a finger at Mr. Gonzales and explain to you exactly how he painstakingly killed two people and wounded two other individuals. She was there. There is no question about that.
>
> [Ms. Cabrera] will point the finger at [GONZALES] and say he's the one who did it. I saw him go into the room. I heard the shooting....
>
> The fact of the matter is [Ms. Cabrera] is going to testify that the reason she was forced to go along or the reason she went with him is because she was scared of him, because she knew of his character. She knew of his prison record. She knew the gangs that he was involved with. She was afraid of him. She heard of the violence he had been involved with. ... She knew that she could be beaten up and she could be the next victim if she didn't if she didn't do exactly what she was told to do.[143]

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[143] I AA 72-79.

Basically, the district court was informed that Ivonne's counsel intended to introduce a significant amount of evidence, including other bad acts and/or crimes, regarding GONZALES which would result in Ivonne's counsel acting as a second prosecutor at the time of trial.[144]

The district court denied Ivonne's motion to sever.[145] In denying severance, the court stated that,

> as long as the non-invoking party [GONZALES] is not unreasonably requesting continuances that work to the prejudice against the other defendant [Ms. CABRERA], the fact that one has invoked and one has not alone is not enough to sever [the trials].[146]

At the next hearing conducted to schedule the trial date, Ivonne's counsel informed the district court that they would be prepared to go to trial in May of 2013. When the court determined that the trial should commence in August of 2013, counsel for GONZALES were not available to litigate the trial as they were involved in a different capital trial.

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144 Id.

145 Id.

146 Id.

So, the court scheduled the joint trial to begin, more than one year after the denial of severance, on October 7, 2013.[147]

On July 3, 2013, GONZALES' counsel filed a motion to continue the trial based upon the need to travel to Mexico and complete additional penalty phase investigation.[148] At the hearing on GONZALES' motion, after explaining the procedural posture of the case for the district court judge, Ivonne's renewed her motion for severance which was denied.[149] The co-defendant's motion to continue the trial was also denied.[150]

However twenty-eight days later, GONZALES' counsel filed a renewed motion to continue trial which was supported by a sealed declaration from his counsel.[151] At the hearing on the renewed motion, the trial judge made it clear that she was going to grant GONZALES' request for additional time for investigation.[152]

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147 I AA 86-96.

148 I AA 1441-46.

149 I AA 147-156.

150 Id.

151 I AA 157-184.

152 Counsel for Ms. Cabrera were required to join GONZALES' request to continue the trial. Transcript. As the court was granting GONZALES' motion, joinder in the continuance was not a wavier of Ivonne's

Therefore, the court was informed that Ivonne's counsel would have been prepared to begin trial on a February 2014 date which was available on the court's calendar. However, GONZALES' counsel were not available for that date.[153]

At the next hearing to schedule the new trial date, Ivonne's counsel reminded the trial judge that GONZALES' counsel were unable to schedule the trial in February 2014. Therefore, Ivonne's counsel were acquiescing to a June 2014 trial based solely on the fact that GONZALES' counsel would be available then.[154] The trial was then set to begin on June 23, 2014.[155]

A little over two months before the June 2014 trial, counsel for GONZALES filed another motion to continue trial based upon the need to travel to Mexico and finish their penalty phase investigation.[156]

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right to a speedy trial.

153 I AA 185-191; see also I AA 192-99.

154 I AA 192-99.

155 Id.

156 I AA 200-06.

On April 28, 2014, Ivonne's counsel again objected to GONZALES' request for a continuance and reminded the court that for all but one trial date, Ms. Cabrera's counsel had been ready to begin trial and were ready again for the June trial.[157] Based upon this fact, Ivonne's counsel requested the court to either bifurcation the guilt and penalty hearings or sever the trials which would permit Ivonne's trial to go forward on June 23, 2014.[158]

Over this objection, a status hearing was scheduled so that all counsel could review their calendars and determine a trial date sometime between November 10th and December 8th of 2014.[159]

On May 14, 2014, Ivonne's counsel informed the trial court that they were willing to change the date of another defendant's trial so that Ivonne's trial could be scheduled to begin on December 8, 2014.[160] For the third time, GONZALES' counsel asserted that they would not be able to conduct a trial on any available date between November 10th and December 8th of 2014.[161]

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157 I AA 223-242.

158 Id.

159 Id.

160 II 243-255.

161 Id.

Ultimately, the judge scheduled the joint trial to commence, again, almost one year later on May 11, 2015.[162]

On March 2, 2015, after obtaining years of additional time to complete his penalty phase investigation, counsel for JOSE GONZALES filed a motion to sever his trial from Ivonne's trial.[163] This motion was based upon the statement that Ivonne provided to law enforcement on the date she was arrested - April 27, 2012 - almost three years before GONZALES filed this motion to sever.[164]

Not only had the statement existed and been in GONZALES' counsel possession for almost three years,[165] the argument made in support of the motion to sever was almost identical to the argument that was made to the judge on October 1, 2012 when Ivonne's motion to sever was denied.[166]

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162 Id.

163 II AA 256-316.

164 Id.

165 I AA 5-16; I AA 104-07.

166 Compare I AA 72-79 with II AA 336-377.

Based on the content of Ivonne's statement and the second prosecutor argument, the district court granted GONZALES' motion to sever on March 16, 2015.[167]

The amount of time that Ivonne Cabrera was required to remain in custody pending a capital murder trial was excessive.[168] Ivonne invoked on August 27, 2012 and did not waive her right to a speedy trial until September 14, 2015.[169] Ivonne's right to a speedy trial was denied for 1,113 days. This factor weighs heavily in favor of Ivonne Cabrera.

B. The reason for the delay:

From the inception of Ivonne's case in the district court, counsel for the co-defendant requested and received four lengthy continuances of the trial date. From the inception of Ivonne's case in the district court, these continuances were based upon counsel for GONZALES' need to engage in further penalty phase mitigation investigation.

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[167] Id.

[168] On September 14, 2015, the trial judge recognized that Ivonne had invoked and was continually attempting to get to trial until that date. III AA 592-621.

[169] Id.

From the inception of Ivonne's case in the district court, her trial could not be conducted on dates that were available on the court's calendar and on the calendars of her counsel because GONZALESS' counsel were unavailable due to trials set in other cases.

From the inception of Ivonne's case in the justice court, based on Ivonne's statement which established a Bruton problem and the existence of antagonist defenses, GONZALES had the ability to file a motion to sever his case from Ivonne's case. Nonetheless, counsel for GONZALES decided that they wouldn't file a severance motion until they came to a point in time when they knew it would be impossible for them to obtain another trial continuance. It didn't matter one bit that Ivonne was requesting a speedy trial which could have been granted if GONZALES' counsel would have filed their motion to sever close in time to their first requested continuance ie October 7, 2013.

None of the 1,113 days of delay can be attributed to Ivonne.[170]

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[170] On September 14, 2015, the trial judge specified that Ivonne was not responsible for any prior delay of her trial. III AA 592-621.

While there isn't a bright line rule regarding the length of delay that violates the Sixth Amendment, "courts have generally found post-accusation delays to be presumptively prejudicial as they approach the one-year mark."[171] Clearly, 1,113 days (3.05 years) is a sufficient duration of time to be considered "presumptively prejudicial."[172]

Finally, it is recognized that in 1961, this Court decided that a "defendant cannot require a trial court to disregard the rights of his codefendants."[173] Nonetheless, this determination should not control the analysis of Ivonne's speedy trial challenge.

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[171] Doggett v. United States, 505 U.S. 647, 652 n. 1, 112 S.Ct 2686, 120 L.Ed.2d 520 (1992).

[172] Ivonne does not rely only on the "presumption" of prejudice, she suffered actual prejudice by the continued trial date as the state was able to complete after the denials of her request and renewed requests to sever her case.

[173] Application of Groesbeck, 77 Nev. 412, 416, 365 P.2d 491, 493 (1961).

First, this Honorable Court decided Groesbeck six years before the United States Supreme Court recognized that,

> [w]e hold ... that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right' ...[174]

Second, the right to a speedy trial as established by the Sixth Amendment is "one of the most basic rights preserved by our Constitution."[175] Permitting codefendants, through their counsel, to prevent a person from exercising her most basic constitutional right should not be supported by this Court.[176]

The reason for the 1,113 days of delay ie co-defendant counsel's need to conduct penalty phase investigation - weighs heavily in Ivonne's favor under the Barker test.

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[174] Klopfer, 386 U.S. at 222–23.

[175] Klopfer, 386 U.S. at 226.

[176] It is respectfully submitted that this Honorable Court should reconsider the Groesbeck holding based upon the later articulated constitutional underpinings of the Sixth Amendment.

C. The defendant's assertion of her right

There cannot be any question that Ivonne asserted her right to a speedy trial at her first appearance in the district court on August 27, 2012. There isn't any question that Ivonne continued to assert her right to speedy trial until September 14, 2015. This factor weighs heavily in Ivonne's favor in the Barker analysis.

D. Prejudice to Ivonne Cabrera:

As noted above "courts have generally found post-accusation delays to be presumptively prejudicial as they approach the one-year mark."[177] Clearly, 1,113 days (3.05 years) is a sufficient duration of time to be considered "presumptively prejudicial."

However, Ivonne is not relying solely on presumed prejudice. Rather, she is asserting actual prejudice occurred during the time frame that she was requesting a severance.

On April 14, 2014, the state announced that it was ready for trial to proceed on June 23, 2014.[178]

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[177] Doggett, 505 U.S. at 652 n. 1.

[178] I AA 207-15.

Subsequently, on July 22, 2015, the state informed the trial court that there "were no issues that the State is aware of at this point."[179] Then, again on August 19, 2015, in response to the trial court's inquiry regarding whether there was anything pending, such as the disclosure of discovery, which could effect the upcoming trial date, the prosecutor asserted "not that I'm aware of."[180] In response to a second question from the district court judge inquiring whether there was any other issue that could impact on the trial date, the prosecutor replied "not at this point."[181]

Based on the fact that the state clearly enunciated that it was ready for trial, no discovery was outstanding and no issues existed for the state, if Ivonne had been able to exercise her Sixth Amendment right to a speedy trial, the state would not have filed a motion to admit evidence of other crimes, wrongs or acts on September 4, 2015.

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179 II AA 387-397.

180 III AA 482-491.

181 Id.

The filing of this motion actually prejudiced Ivonne because the attempt murder victims were subsequently permitted to testify regarding a Walmart theft scam, the use of drugs, the existence of an unemployment card and the loss of the tools which became part of the state's motive evidence at trial.[182]

Additionally, based on the fact that the state clearly announced that it was ready to go forward with trial, if Ivonne had been able to exercise her Sixth Amendment right to a speedy trial, the state would not have subjected Ivonne's cellular telephone, which had been in the state's custody since her arrest on April 27, 2012, to forensic testing in November 2015. This testing resulted in the state being able to present text messages and the phone's internal time chronology data to support their theory of Ivonne's criminal liability.[183]

Not only was the 1,113 day delay presumptively prejudicial but Ivonne was actually prejudiced by the actions the state took after announcing ready for trial. All of these facts establish that Ivonne was significantly prejudiced by the denial of her right to a speedy trial which weighs heavily in Ivonne's favor of the Barker test.

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[182] III AA 535-546; III AA 622-657; III AA 713-14.

[183] XIII AA 2372-2378.

Ivonne has established that the trial court's denial of her initial and renewed requests to sever her trial from GONZALES was an abuse of discretion and resulted in delay that fulfilled all four factors of the Sixth Amendment speedy trial analysis. The only remedy for the denial of Ivonne's Sixth Amendment right to a speedy trial is the reversal of her convictions and dismissal of the underlying Amended Information.

III. The district court's decision to permit the admission of Ivonne's custodial interrogation without redacting the pervasive hearsay related through the statements and questions of the lead homicide detective was prejudicial error

Standard of Review: The decision to admit evidence lies within the sound discretion of the trial court. The trial court's determination will not be overturned absent manifest error.[184]

On April 27, 2012, Ivonne Cabrera was taken into custody after a traffic stop of a car in which she was a passenger. After being taken into custody, Ms. Cabrera was transported to the North Las Vegas Police Department where she was interviewed by Detective Prieto.[185]

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184 Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

185 II AA 400.

Almost immediately after the interview began, Detective Prieto advised Ms. Cabrera of her "Miranda" rights and then began to ask background questions about her family, how long she had lived in Las Vegas, her employment, a car accident that Ms. Cabrera was involved in and her boyfriend.[186]

After allowing Ms. Cabrera to explain how and why she received text information from a girl named "Patty,"[187] Detective Prieto decided it was time to get to the facts of the murder case as he knew them to be. First, Detective Prieto reminded Ms. Cabrera that he had told her (prior to the conversation being reported) that a lot of things were going to depend on what Ms. Cabrera told him and in being truthful.[188] Then Detective Prieto began to tell Ms. Cabrera "facts" that he had learned which implicated her in the murders. "I actually know that you're on (Webster) because people identified you already."[189] "People saw you leaving the apartment today."[190] "I already know that you know the guy that you went over there with."[191]

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186 See II AA 405-408.

187 See II AA 409-410..

188 See II AA 410.

189 II AA 409-410.

190 II AA 410.

191 II AA 412.

"We already know you hang with this guy sometimes. You guys are friends."[192] She (Felicity) picked you up over at his house, right by his house okay? We know where he stays, okay? ... Okay so you were over there today ... Wait, You were over there today with him.[193] "No, that's the gray car that you borrowed from Melissa and them the day before."[194] Detective Prieto continued to inform Ms. Cabrera of the facts as he knew them until the end of the recorded interview.

All of the "facts" enunciated by Detective Prieto, in 70 lines of the interview, were based upon information gained from discussing the incident with other persons ie classic hearsay. Hearsay statements relating accusatory information simply should not be allowed into evidence during trial.[195] Moreover, testimony of unnamed witnesses - related by a police officer - implicating the defendant in a crime are both improper and harmful.[196]

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192 Id.

193 Id.

194 II AA 413.

195 See Keen v. State, 775 So.2nd 263, 275-76 (Fla. 2000).

196 See Hurst v. State, 842 So.2d 1041, 1043-44 (Fla. Dist. Ct. App. 2003).

This Court has recognized, in this kind of situation, that information obtained by a law enforcement officer from other persons is inadmissible hearsay. Further, this Court has specified that this kind of information cannot be admitted because it is argued that the facts are not being admitted for the truth of the matter asserted.[197]

In the case at bar, the district court should have recognized that the 71 lines of "facts" were hearsay which was not admissible during Ivonne's trial. The court's failure to require the state to redact this hearsay was error. Given, the state's reliance upon Ivonne's statement as proof of her guilt of all the crimes,[198] this Court should remand Ivonne's case to the district court for a new trial.

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197 See Deutscher v. State, 95 Nev. 669, 683-684 (1979).

198 See IX AA 1933-1941.

IV. Application of the aggravating circumstance premised on the conviction of a violent felony and the great risk of death to more than one person aggravator to a person whose criminal liability for first degree murder was premised on a theory of aiding/abetting and conspiracy violated the Eighth Amendment of the United States Constitution

Although the state requested the jury impose the death penalty at the conclusion of Ivonne's penalty phase, Ivonne was not sentenced to death. Many times in this situation, this Court chooses not to address penalty phase issues which could be considered to be "moot" given the imposition of a life without possibility of parole sentence.

However, in the case at bar, the state convinced the district court to expand the reach of a two statutory aggravating circumstances. The district court determined that is was a jury question whether these circumstances, which focus directly on the mental state of the person who actually committed the murders and the violent acts, applied to a person who was convicted of capital murder through imputed liability.[199]

The state's decision to push the envelope regarding the application of aggravating circumstances is a type of activity which is capable of repetition yet will evade this Honorable Court's review.[200]

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[199] III AA 530.

[200] Solid v. Eighth Judicial Dist. Court of State in & for Cty. of Clark, __ Nev. __, 393 P.3d 666, 670 (2017)(recognizing that the underlying petition

In similar cases, it is highly likely that the jury will choose not to impose the death penalty for an aider/abettor conspirator just as they did in Ivonne's case. Therefore, an extremely important question of law could never be decided and a person, who should not be death eligible, will be subject to the prejudicial procedures associated with the litigation of a death penalty case.[201]

Furthermore, the state's effort to expand the application of aggravating circumstances to an aider/abettor conspirator results in every single person convicted of first degree murder becoming death eligible. While this Court has previously recognized this action is unconstitutional, it is also an important issue which will arise in the future yet can avoid review by this Honorable Court.[202]

Consequently, it is respectfully requested that this Honorable Court review the following penalty phase issue.

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should be reviewed based upon the "likelihood that a similar issue will arise in the future.").

[201] See Haney v. State, 124 Nev. 408, 410–11, 185 P.3d 350, 352 (2008)(citing Miller v. State, 113 Nev. 722, 724 n. 1, 941 P.2d 456, 458 n. 1 (1997) and Binegar v. District Court, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996)).

[202] See McConnell v. State, 120 Nev 1043, 1067, 102 P.2d 606, 623 (2004).

A. The Eighth Amendment of the United States Constitution applies to all capital murder trial

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment.[203] Based upon the Eighth Amendment, courts have recognized that the death penalty is reserved for the worst of the worst murderers. In order for a state's death penalty sentencing scheme to satisfy the Eighth Amendment, the scheme must "genuinely narrow the class of persons eligible for the death penalty."[204] In Nevada, the legislature has chosen to narrow the class of persons eligible for the death penalty by enunciating specific aggravating circumstances.

When a state's capital penalty scheme is based upon aggravating circumstances, the circumstances must enable the sentencer to distinguish those who deserve the death penalty from those who do not. Therefore, the aggravating circumstance must provide a principled basis for doing this.[205]

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[203] The Eighth Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

[204] Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); see also, McConnell v. State, 120 Nev. 1043, 1067, 102 P.3d 606, 623 (2004).

[205] See Lewis v. Jeffers, 497 U.S. 764, 776, 110 Sct. 3092, 111 L.Ed.2d 606 (1990)(citing Spaziano v. Florida, 468 U.S. 447, 460, 104 S.Ct. 3154, 3162, 82 L.Ed.2d 340 (1984) ("If a State has determined that death

If the sentencer could fairly conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.[206]

A. The Eighth and Fourteenth Amendments prohibit application of the aggravating circumstances based on conviction of felony involving use or threat of violence and a great risk of harm to more than one person when first degree murder culpability is imputed from the actions of the actual killer

In the case at bar, the state stretched the application of the aggravating circumstances enunciated in NRS 200.033(2)(b)[207] and 200.033(3)[208] to a

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should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"); Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder") (footnote omitted); Maynard v. Cartwright, 485 U.S. 356, 364, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988)(STEVENS, J., concurring in judgment) ("A constant theme of our cases-from Gregg and Proffitt through Godfrey, Eddings, and most recently Zant-has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner").

[206] See Maynard v. Cartwright, 485 U.S. 356, 364, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988).

[207] Conviction of a felony involving the use or threat of violence to the person of another.

[208] Great risk of death to more than one person.

person convicted of first degree murder as an aider/abettor and/or as a conspirator. For a number of reasons, this action violated both the Eighth and Fourteenth Amendments of the United States Constitution as well as the Nevada constitutional bans against the infliction of "cruel or unusual punishments" and the deprivation of life "without due process of law".[209]

First, permitting application of the above specified aggravators to a person convicted of first degree murder as an aider/abettor and conspirators basically results in every single person convicted of first degree murder becomes death eligible.[210] Thus, these aggravating circumstances, which are supposed to narrow the class of murderers eligible for the death penalty, do not satisfy that constitutional requirement when imposed upon a person, like Ms. Cabrera, who was convicted as an aiders/abettor and conspirator.[211]

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[209] Nevada Constitution Article 1 sections 6 and 8(5).

[210] If the state can allege application of the challenged aggravating circumstances against an aider/abettor and/or conspirator, in the case at bar, then every single aggravating circumstance enunciated in NRS 200.033 would become applicable to every single person convicted of first degree murder.

[211] See McConnell, 120 Nev at 1067)(recognizing that (1) Nevada's definition of felony capital murder is not narrow enough to not require further narrowing of death eligibility, and (2) the felony murder aggravator does not provide sufficient narrowing to satisfy constitutional requirements because the aggravator covered the vast majority of felony murders).

Therefore, the application of NRS 200.033(2)(b)(conviction of a felony involving the use or threat of violence to the person of another) and 200.033(3)(great risk of death to more than one person), to Ivonne violated the Eighth and Fourteenth Amendments.

Second, because the death penalty is reserved for the worst of the worst murderer, whether a person is constitutionally eligible for the death penalty depends upon the culpability of that person. A defendant's intention - and thus her moral guilt - is critical to assessing the degree of a person's criminal culpability.

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious the offense, and, therefore, the more severely it ought to be punished.[212]

The blameworthiness and moral culpability of a person who did not personally kill and is convicted of first degree murder as an aider/abettor and conspirator is significantly diminished.

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[212] Tison v. Arizona, 481 U.S. 137, 156, 107 S.Ct. 1676, 95 L.ED.2d 127 (1987).

Thus, the penological justifications for the death penalty - retribution and deterrence - apply to aiders/abettors and conspirators with lesser force.[213] Unless the imposition of the death penalty on an aider/abettor and conspirator "measurably contributes to one or both of these [penological] goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering;' hence an unconstitutional punishment." Because the state failed to prove that Ms. Cabrera killed, intended James Headrick and Erik Morales should be killed or even believed these two men might be killed, the state's ability to seek the imposition of the death penalty in her case violated the Eighth and Fourteenth Amendments.

Third, contrary to NRS 200.033(4) which permits imposition of the death penalty on a non-killer if the person knew or had reason to know life would be taken or had reason to know lethal force would be used - neither of the specified aggravators contain any comparable language which limit the circumstances when the aggravators apply to an aider/abettor and conspirator.

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[213] See Atkins v. Virginia, 536 U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)(citing Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)(plurality); see also Roper v. Simmons, 543 U.S. 551, 571, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Further, neither of the specified aggravating circumstances requires a jury find that a non-killer has a more culpable mental state than the ordinary murderer.[214] Therefore, the challenged circumstances do not limit the death penalty to those "whose extreme culpability makes them the most deserving of execution."[215] Application of conviction for a violent felony and great risk of death to more than one person to Ivonne's case violated the Eighth and Fourteenth Amendments.

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[214] The felony murder aggravator has been found to be constitutional solely because it limits application of the death penalty to a non-killer who has a more culpable mental state ie. knew life would be taken or lethal force would be used.

[215] Kennedy v. Louisiana, 554 U,S, 407, 420, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008).

CONCLUSION

Based upon the numerous constitutional violations which impacted both the guilt and penalty phase of Ivonne Cabrera's trial, this Honorable Court should reverse all of her convictions and remand the case to the district court for a new trial.

DATED this 13th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X7 in size 14 Arial font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaces, has a typeface of 14 points or more, and contains 14,697words and I will be submitting a motion requesting permission to file a brief which contains 697 more words that permitted.

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 the 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.

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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 13th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of July, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Addendum Exhibit “A”

Revised Laws of NV 1912

6267. Persons punishable.

SEC. 2. The following persons, except as provided in the next section, are liable to punishment:

1. A person who commits in the state any crime, in whole or in part.

2. A person who commits out of the state any act which, if committed within it, would be larceny, and is afterwards found in the state with any of the stolen property.

3. A person who, being out of the state, counsels, causes, procures, aids or abets another to commit a crime in this state.

4. A person who, being out of the state, abducts or kidnaps, by force or fraud, any person, contrary to the laws of the place where the act is committed, and brings, sends or conveys such person into this state.

5. A person who commits an act without the state which affects persons or property within the state, or the public health, morals or decency of the state, which, if committed within the state, would be a crime.

6268. All persons capable of committing crime, except following.

SEC. 3. All persons are liable to punishment except those belonging to the following classes:

1. Children under the age of eight years;

2. Children between the ages of eight years and fourteen years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness;

3. Idiots;

4. Lunatics and insane persons;

5. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.

6. Persons who committed the act charged without being conscious thereof.

7. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence;

8. Married women, unless the crime be punishable with death, acting under the threats, command, or coercion of their husbands; *provided*, it appear, from all the facts and circumstances of the case, that violent threats, command, or coercion were used;

9. Persons, unless the crime be punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

Proceedings against defendants over 18 and under 21 years of age, see sec. 737.

6269. Who considered of sound mind.

SEC. 4. A person shall be considered of sound mind who is neither an idiot or lunatic, or affected with insanity, and who has arrived at the age of fourteen years, or before that age, if such person knew the distinction between good and evil.

Opinion of witnesses, not experts, as to the sanity of a defendant is admissible in evidence if the witnesses have had sufficient observation to enable them to form a belief upon the question, without giving in detail the facts upon which their opinions are based. State v. Lewis, 20 Nev. 333 (22 P. 241).

The real question to be determined by the jury is as to defendant's sanity or insanity, at the time of the homicide. Testimony as to condition of mind at times previous and subsequent thereto is admissible solely upon the ground that it tends to show the mental condition at the time of the homicide. Idem.

A person who had known accused for four months, had seen him every day during that

Addendum Exhibit “B”

2. If the [widow] *surviving spouse* or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance, or such allowance may be apportioned in such manner as may be just.

1979

Assembly Bill No. 246—Assemblymen Hayes and Coulter

CHAPTER 89

AN ACT relating to criminal responsibility; removing a special provision for married women; and providing other matters properly relating thereto.

[Approved March 23, 1979]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 194.010 is hereby amended to read as follows:

194.010 All persons are liable to punishment except those belonging to the following classes:

1. Children under the age of 8 years.
2. Children between the ages of 8 years and 14 years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.
3. Idiots.
4. Lunatics and insane persons.
5. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.
6. Persons who committed the act charged without being conscious thereof.
7. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.
8. [Married women, unless the crime be punishable with death, acting under the threats, command or coercion of their husbands; provided, it appear, from all the facts and circumstances of the case, that violent threats, command or coercion were used.

9.] Persons, unless the crime [be] *is* punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

Addendum Exhibit “C”

adverse to the person charged with a public offense, such person shall remain in the custody of the administrator of the mental hygiene and mental retardation division subject to further examinations in the future or until discharged therefrom according to law.]

(b) Incompetent, but there is substantial probability that he will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future and finds that he is dangerous to himself or to society, he shall recommit the defendant.

(c) Incompetent, but there is substantial probability that he will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future and finds that he is not dangerous to himself or to society, he shall order that the defendant remain an outpatient or be transferred to outpatient status under the provisions of NRS 178.425.

(d) Incompetent, with no substantial probability of attaining competency in the foreseeable future, he shall order the defendant released from custody or if the defendant is an outpatient, released from his obligations as an outpatient if, within 10 days, a petition is not filed to commit the person pursuant to NRS 433A.200. After the initial 10 days, the defendant may remain an outpatient or in custody under the provisions of this chapter only as long as the petition is pending unless the defendant is involuntarily committed pursuant to chapter 433A of NRS.

4. No person who is committed under the provisions of this chapter may be held in the custody of the administrator of the mental hygiene and mental retardation division longer than the longest period of incarceration provided for the crime or crimes with which he is charged or 10 years, whichever period is shorter. Upon expiration of the applicable period, the defendant must be returned to the committing court for a determination as to whether or not involuntary commitment pursuant to chapter 433A of NRS is required.

SEC. 11. NRS 194.010 is hereby amended to read as follows:

194.010 All persons are liable to punishment except those belonging to the following classes:

1. Children under the age of 8 years.
2. Children between the ages of 8 years and 14 years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.
3. Idiots.
4. Lunatics and [insane] persons [.] *who committed the act or made the omission charged in a state of insanity.*
5. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.
6. Persons who committed the act charged without being conscious thereof.
7. Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.
8. Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe,

their lives would be endangered if they refused, or that they would suffer great bodily harm.

SEC. 12. NRS 433A.280 is hereby amended to read as follows:

Addendum Exhibit “D”

3. A defendant who has been ordered to pay expenses of his defense and who is not willfully or without good cause in default in the payment thereof may at any time petition the court which ordered the payment for remission of the payment or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due or modify the method of payment.

4. The money recovered must in each case be paid over to the city, county or public defender's office which bore the expense and was not reimbursed by another governmental agency.

5. Upon the request of a defendant, if the court finds that the defendant is suitable to perform supervised <<-work for the benefit of the community,->> <<+community service, +>>the court may allow the defendant to pay all or part of any expenses incurred by the county, city or state in providing him with an attorney by performing supervised <<-work for the benefit of the->> community <<+service +>>for a reasonable number of hours, the value of which would be commensurate with such expenses incurred. The <<-work->> <<+community service +>>must be performed for and under the supervising authority of a county, city, town or other political subdivision or agency of the State of Nevada or a charitable organization that renders service to the community or its residents. The court may require a defendant who requests to perform community service to deposit with the court a reasonable sum of money to pay for the cost of policies of insurance against liability for personal injury and damage to property or for industrial insurance, or both, during those periods in which he performs the <<- work,->> <<+community service, +>>unless, in the case of industrial insurance, it is provided by the authority for which he performs the <<- work.->><<+ community service.+>>

Sec. 17. NRS 193.150 is hereby amended to read as follows:

<< NV ST 193.150 >>

1. Every person convicted of a misdemeanor shall be punished by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both fine and imprisonment, unless the statute in force at the time of commission of such misdemeanor prescribed a different penalty.

2. In lieu of all or a part of the punishment which may be imposed pursuant to subsection 1, the convicted person may be sentenced to perform a fixed period of <<-work for the benefit of the->> community <<+service+>> pursuant to the conditions prescribed in NRS 176.087.

Sec. 18. NRS 193.210 is hereby amended to read as follows:

<< NV ST 193.210 >>

A person is of sound mind <<-who is not an idiot and->> who has arrived at the age of 14 years, or before that age if he knew the distinction between good and evil.

Sec. 19. NRS 194.010 is hereby amended to read as follows:

<< NV ST 194.010 >>

All persons are liable to punishment except those belonging to the following classes:

1. Children under the age of 8 years.

2. Children between the ages of 8 years and 14 years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.

3. <<-Idiots.->>

<<-4.->>Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.

<<-5.->> <<+4. +>>Persons who committed the act charged without being conscious thereof.

<<-6.->> <<+5. +>>Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.

<<-7.->> <<+6. +>>Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

Addendum Exhibit “E”

Sec. 34. NRS 51.295 is hereby amended to read as follows:

<< NV ST 51.295 >>

1. Evidence of a final judgment, entered after trial or upon a plea of guilty , ~~or guilty but mentally ill,~~ but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, is not inadmissible under the hearsay rule to prove any fact essential to sustain the judgment.

2. This section does not make admissible, when offered by the State in a criminal prosecution for purposes other than impeachment, a judgment against a person other than the accused.

3. The pendency of an appeal may be shown but does not affect admissibility.

Sec. 35. NRS 193.210 is hereby amended to read as follows:

<< NV ST 193.210 >>

A person is of sound mind who is not affected with insanity and who has arrived at the age of 14 years, or before that age if he knew the distinction between good and evil.

Sec. 36. NRS 193.220 is hereby amended to read as follows:

<< NV ST 193.220 >>

No act committed by a person while in a state of ~~insanity or~~ voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his ~~insanity or~~ intoxication may be taken into consideration in determining the purpose, motive or intent.

Sec. 37. NRS 194.010 is hereby amended to read as follows:

<< NV ST 194.010 >>

All persons are liable to punishment except those belonging to the following classes:

1. Children under the age of 8 years.

2. Children between the ages of 8 years and 14 years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.

3. Persons who committed the act charged or made the omission charged in a state of insanity.

4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.

~~4.~~ 5.Persons who committed the act charged without being conscious thereof.

~~5.~~ 6.Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.

~~6.~~ 7.Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

Sec. 38. NRS 200.485 is hereby amended to read as follows:

<< NV ST 200.485 >>

1. Unless a greater penalty is provided pursuant to NRS 200.481, a person convicted of a battery that constitutes domestic violence pursuant to NRS 33.018:

(a) For the first offense within 7 years, is guilty of a misdemeanor and shall be sentenced to:

(1) Imprisonment in the city or county jail or detention facility for not less than 2 days, but not more than 6 months; and

(2) Perform not less than 48 hours, but not more than 120 hours, of community service.

Addendum Exhibit “F”

2015 Nevada Laws Ch. 168 (A.B. 124)

NEVADA 2015 SESSION LAWS

REGULAR SESSION OF THE 78TH LEGISLATURE (2015)

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

Ch. 168

A.B. No. 124

CRIMES AND OFFENSES—CHILDREN AND MINORS—SENTENCE AND PUNISHMENT

AN ACT relating to punishment for crimes; revising the minimum age at which a child may be punished under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, the minimum age at which a child may be punished for a crime is 8 years of age. (NRS 194.010) This bill raises the minimum age at which a child may be punished to 10 years of age unless the child is charged with murder or certain sexual offenses.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED
IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Sections 1–3. (Deleted by amendment.)

Sec. 3.5. NRS 48.061 is hereby amended to read as follows:

<< NV ST 48.061 >>

1. Except as otherwise provided in subsection 2, evidence of domestic violence and expert testimony concerning the effect of domestic violence, including, without limitation, the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence that is offered by the prosecution or defense is admissible in a criminal proceeding for any relevant purpose, including, without limitation, when determining:

(a) Whether a defendant is excepted from criminal liability pursuant to subsection ~~7~~ **8** of NRS 194.010, to show the state of mind of the defendant.

(b) Whether a defendant in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.

2. Expert testimony concerning the effect of domestic violence may not be offered against a defendant pursuant to subsection 1 to prove the occurrence of an act which forms the basis of a criminal charge against the defendant.

3. As used in this section, “domestic violence” means the commission of any act described in NRS 33.018.

Sec. 4. NRS 194.010 is hereby amended to read as follows:

<< NV ST 194.010 >>

All persons are liable to punishment except those belonging to the following classes:

1. Children under the age of 8 years.

2. **Children between the ages of 8 years and 10 years, unless the child is charged with murder or a sexual offense as defined in NRS 62F.100.**

3. Children between the ages of 8 years and 14 years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness.

~~3.~~ **4.** Persons who committed the act charged or made the omission charged in a state of insanity.

~~4.~~ **5.** Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent, where a specific intent is required to constitute the offense.

~~5.~~ **6.** Persons who committed the act charged without being conscious thereof.

~~6.~~ **7.** Persons who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.

~~7.~~ **8.** Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

Approved by the Governor May 25, 2015.

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