IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS ALEJANDRO MENENDEZ-CORDERO,

No. 74901

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from a Judgment of Conviction in Case Number CR15-1674
The Second Judicial District Court of the State of Nevada
Honorable Connie J. Steinheimer, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on December 19, 2017. 1JA 251-52 (Judgment).[1] Appellant, Luis Alejandro Menendez-Cordero (Mr. Menendez-Cordero, filed a notice of appeal from that judgment on January 16, 2018. 1JA 253-54 (Notice of Appeal). This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and on NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

This appeal is not presumptively assigned to the Nevada Court of Appeals because it involves jury-based convictions on category A felonies. NRAP 17(b)(2)(A). The Nevada Supreme Court should keep and hear this appeal because it presents at least two issues of first impression. The first issue concerns the propriety of utilizing an anonymous jury generally, and its use specifically in the instant case. The second issue concerns the failure to instruct a penalty jury of the effect of a sentencing enhancement.

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[1] "JA" in this Opening Brief stands for the Joint Appendix, which is comprised of ten volumes. The volume number of a referenced volume precedes "JA." Referenced page numbers follow "JA." Pagination conforms to the sequential rule of NRAP 30(c)(1).

III. STATEMENT OF THE LEGAL ISSUES PRESENTED

A. Empaneling an anonymous jury is an unusual measure that is warranted only where there is a strong reason to believe the jury needs protection or to safeguard the integrity of the justice system, so that the jury can perform its fact-finding function. Did the district court err in seating an anonymous jury in this case?

B. The use of uncharged prior bad act evidence is disfavored in our criminal justice system. Did the district court err in admitting such evidence where its probative value was outweighed by its prejudicial effect?

C. Without a proper jury instruction a jury may make a sentencing determination that is arbitrary and capricious. Did the failure to instruct the penalty jury of the effect of a sentencing enhancement makes its sentencing determination unreliable?

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction.[2] The State charged Mr. Menendez-Cordero with two counts of murder in the first degree with the use of a deadly weapon. 1JA 1-3 (Indictment). A jury found Mr. Menendez-Cordero guilty of both counts and, on both counts, found that a deadly weapon had been used, 1JA 235, 236 (Guilt Verdicts); 9JA 1576 (Transcript of Proceedings: Trial), and set the

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[2] This case was initially assigned to Judge Patrick Flanagan. However, Judge Connie J. Steinheimer took the case after Judge Flanagan became ill. Judge Steinheimer presided over the trial to completion, and was the sentencing judge. Judge Flanagan made pretrial rulings, two of which form issues on appeal.

penalty for both counts at life without the possibility of parole. 1JA 749, 750 (Penalty Verdicts); 10JA 1766-67 (Transcript of Proceedings: Penalty Phase).

At the subsequent sentencing hearing the district court imposed the penalties set by the jury, ordered that they be served consecutively and added a consecutive weapon enhancement of 96 to 240 months in the Nevada Department of Corrections to both counts. Finally, the district court imposed fees, assessments, and restitution attendant to the charges and proceedings. 1JA 251-52 (Judgment). Mr. Menendez-Cordero appeals.

V. STATEMENT OF THE FACTS

The following is general factual background. Additional facts necessary to the discussion of the issues on appeal are contained in the portions of this brief in which those issues are addressed.

In November 2010 Kristine Marie Yost (Kristine) was living at the Bainbridge Apartments in Sparks; she was 20 years old. She worked at the Peppermill in Reno. At that time her lifestyle consisted of working, hanging out, and doing drugs. Her drug of choice was methamphetamine. 4JA 545-49, 577-78, 619. On November 19, 2010,

Kristine was hanging out with her friend Sean (a co-worker) at her apartment. 4JA 526, 626. That evening Kristine and Sean drove her friends Crystal Moreno and Alex Gomez to Rail City, a local casino, and then came back to her apartment. Later they drove back to Rail City to pick up Crystal and Alex. This time Sean drove them back to the apartment, dropped them off, and left. 4JA 563-65, 626-28.

Back at her apartment with Alex and Crystal, Kristine heard from Kevin Melendez (Kevin), who had been over earlier in the day, asking to come back over. 4JA 565. He brought Moises Vasquez (Moises), Yesenia, and Terrell with him.[3] As they were hanging out Crystal asked Kevin to take her to Wal-Mart to buy some beer. Kristine thought she'd go with them. The others decided to wait at the apartment. 4JA 566-67. In the apartment complex's parking lot Kristine saw Elder Rodriguez (Primo) pulling into the lot in his car. Kristine and Primo had talked earlier that day about him coming over. Kristine got out of Kevin's car and walked back to her apartment with Primo and Mr. Menendez-Cordero (Luis), who was with Primo.[4] When Luis got out

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[3] Terrell Wagner (Terrell) testified that they got to Kristine's apartment sometime after midnight. 4JA 755, 764.

[4] Luis was also known as "Apo," which is short for Apocalypto. 4JA 692.

of Primo's car he wasn't wearing a shirt; he put on a hoodie and handed Kristine a jug of water. Kristine noticed a "MS-13" tattoo on his stomach. 4JA 569-73.[5]

After they walked into her apartment Kristine put the jug of water on a bar counter. Everyone there greeted each other and then found a place to sit; Primo and Luis took the couch while most of the others sat around the dining room table, ready to play cards. 4JA 578, 584, 587-88; 7JA 1255-57. When Kevin and Crystal returned from Wal-Mart about twenty minutes later, 4JA 591, Kevin said hello to Primo and Luis, had a quick conversation with Primo, and then sat on a barstool next to Kristine, who was sitting at the table. 4JA 592-94. At some point while playing cards Kristine saw Luis follow Primo out of the apartment. Primo had walked out first; Kristine thought that he was just going outside to smoke a cigarette. 4JA 594-95. Primo never came back into the apartment. 4JA 597. Luis did come back in, 4JA 597, and Kristine described what happened next this way:

Kristine had met him at least five times before this evening, but called him "Apple," a misunderstanding of his nickname. See 4JA 557-58, 692.

[5] Other evidence suggested that Luis's stomach tattoo was fresh, and it hurt him to cover it. See 4JA 733 (stating that Luis "did not want to cover [the tattoos], because it hurt him.").

> We were sitting at the table and we were playing cards. And I—I look at Kevin and he stands up and he looks behind him and he says, oh, shit, what the fuck? And he's—I see fire crackers. That's what I thought they were fire crackers fly past me. And I see Kevin and Moises bump into each other and they fall and I'm in the kitchen and I see the defendant—I had my hands up and I see the defendant holding the gun and he's standing there holding the gun and I still see the smoke coming out of the gun.

4JA 596 (paragraph break omitted).

Kristine, who had moved to the kitchen to hide behind a cabinet, 4JA 596-97, saw Luis standing there saying something. But she couldn't hear him because of the ringing in her ears. She saw Luis run out of the apartment. Kristine ran to the door and closed and locked it behind him. 4JA 597-98, 634. Similarly, Terrell testified that he saw Luis—who he did not know and described him as wearing a zipped up hoodie, 4JA 766-67—go outside and then come back with a gun and start shooting. Terrell testified that Luis pointed the gun at him, but all he heard was "clicks." He also heard Luis say something in Spanish and then watched him run away. 4JA 769-70, 781. Terrell called 911. 4JA 771. By now everyone was panicking, screaming. Kristine went to Kevin and Moises who were lying on the ground or slumped against a wall. She called 911

twice. Alex ran out of the apartment and Kristine again locked the door. She called Primo and screamed "What the fuck?" 4JA 599-600, 633, 635. When she called Primo he was on his way to a 7-11 to get some beer. He couldn't understand her; she was yelling, kind of hysterical. 7JA 1258-59. He didn't know what was going on. 7JA 1265. So he started making his way back to the apartment, but the police had blocked off the roads. And the police would not let him get his car, so he left the area on foot. 7JA 1259, 1265-66. He never heard from Luis or saw him again after that night. 7JA 1260.

When the police arrived they initially secured the scene and placed Kristine and others in handcuffs, which were removed after it was determined there was no reason to detain them. 4JA 650-51, 655, 659; 6JA 1005-06, 1011-13. In the meantime, officers made sure that there were no threats inside the apartment and attended to Kevin and Moises. 4JA 652-55, 661-62; 6JA 1006-08. Both Kevin and Moises were taken to Renown Medical Center, but both died from their injuries. 4JA 682-83, 685, 687. Autopsies performed on Kevin and Moises concluded that Kevin had died as a result of multiple gunshot wounds; the manner of death was homicide, 5JA 815-24, and that Moises had died as a result

of a penetrating gunshot wound to the right cheek; the manner of death was homicide. 5JA 824-30.

Primo had been identified as a "subject" who had been present during the shooting. Sparks Detective Jason Woodard contacted him and brought him to the Sparks police station for an interview. During that interview he identified Luis as the possible shooter. 4JA 680-81, 689-92. In an attempt to locate Luis, the detective traveled to an address in Sacramento, California on December 1, 2010, and again on December 6, 2010. Although Luis was not found there, the detective did speak with an individual—identified only as SA-1290 (a confidential informant)—at that location during his second trip to Sacramento. 4JA 698-701, 703, 711-12. According to Detective Woodard, SA-1290 said that Luis had gotten some tattoo work done on his forehead after the shooting. 4JA 701-02. Based on information from the informant, the search for Luis extended into the greater Los Angeles area. 4JA 703-04.

SA-1290 testified at trial and told the jury that he had been a MS-13 member and that he had helped Luis. 4JA 728-30. Specifically, that on or about November 20, 2010, Luis called to tell him that he was going to Los Angeles and wanted to stay at the informant's house until

he got picked up. 4JA 731-32. According to SA-1290, Luis told him that he had committed a double murder and that he was going to Los Angeles to leave for El Salvador. 4JA 732. SA-1290 testified that Luis told him that he had gone to a party with Primo, that other gang members were already there, and that one of them had disrespected MS-13 by saying to him: "Fuck MS-13." SA-1290 added that Luis told him that he left the apartment and got a gun out of Primo's car, That he then came back in and shot the person who had disrespected MS-13 in the head, and shot the person next to him as well. According to SA-1290, Luis said that he wanted to kill as many people as he could but his gun jammed. Thereafter he started to run. 4JA 733-35, 750. SA-1290 testified that Luis had fresh tattoos on his forehead. 4JA 735, 737.[6] He said that it was common for a member of MS-13 to get a tattoo

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[6] State witness Charles Payne testified that he was a tattoo artist and that on November 20, 2010, he was contacted by his ex-wife's sister and a person named Carlos and asked to perform some tattoo work on Luis for $500.00. He agreed and did the work at his home shop. 7JA 1155-58. He tattooed Luis's head; specifically, he did a MS-13 tattoo (the "M" on one side of the forehead and the "S" on the other side); and the letters "CLCS" in the center across his forehead. 7JA 1160-62. In other testimony provided by an FBI agent, the jury was informed of the significance of these tattoos. For example "CLCS" stands for "Criminal Lil Cycos Salvatruchos." 8JA 1151.

"[w]hen you've done a job for them, for Mara."[7] By "job" he meant "[b]asically kill." 4JA 736. SA-1290 testified that Luis got picked up from his house on that day, and he never saw him again. 4JA 740.

On March 18, 2011, a semi-automatic gun was found in a bush on El Rancho Drive, near the Bainbridge Apartments. 6JA 1013-15, 1018, 1040. The gun was rusted, dirty and weathered. 6JA 1015. There were bullets in the magazine and one jammed in the chamber. 6JA 1018-20. The make of the gun was a Woodsman Colt .22-caliber. 6JA 1025. Later, this gun was linked to the shooting that had occurred on November 20, 2010 at Kristine's apartment. 6JA 1028 and *Id.* at 1046-79; 7JA 1100-36 (testimony of Kerri Heward, Director of the Washoe County Sheriff's Office Forensic Division). Ms. Heward noted some difficulty in test-firing the gun: it "had intermittent problems firing the cartridges from the magazine into the chamber, but it fired normally." 6JA 1079; and 7JA at 1130-31 (noting that she would have to reseat the magazine after firing one or two rounds).

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[7] "MS" stands for Mara Salvatrucha. "Mara is a [Spanish] slang word which literally means gang. Salvatrucha, one word however it is composed of two separate words, in the Spanish Salva refers to Salvador. Trucha is a [slang] word that ... means alert. So the literal meaning of Mara Salvatrucha is that [it] is a gang, a Salvadorean gang that is alert." 8JA 1340 (testimony of FBI Agent Blaine Freestone).

Blaine Freestone, a special agent with the FBI, provided some historical information on the origin and nature of MS-13, which he called one of the primary gangs in Central America, more specifically in El Salvador, Guatemala and Honduras. 8JA 1332,1337. MS-13 started as a result of violent civil unrest in El Salvador in the late 1980's. Migrants who had been granted asylum in the United States found themselves preyed upon by local gangs in Los Angeles. MS-13 was formed to provide protection; it has morphed into something else. 8JA 1340-41. Additionally, Agent Freestone testified that respect is essential to a person's standing as a MS-13 gang member. And if one is disrespected, it necessitates or requires retaliation against the person who caused the disrespect. 8JA 1345.[8] Agent Freestone also provided testimony concerning Luis's tattoos, and the significance of certain characters and letters. 8JA 1348, 1350-61.

Over objection, Agent Freestone testified concerning some communications that took place between Luis and persons located in El Salvador while Luis was in custody. 8JA 1362-75. The majority of one

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[8] The State did not charge a gang enhancement, but offered this testimony on the question of motive under NRS 48.045(2). See *Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78-79 (2004).

particular call was not "nefarious in any way." 8JA 1375. But, in that one conversation, Luis states that he needs a favor, "I need you guys to buy a brain"—or cellphone. 8JA 1370-71. And, according to the agent's interpretation, asks that a message be sent telling the proposed recipient not to come to the trial. 8JA 1371 ("So when you send the message, tell him not to show up. Not to show up on the day that I have to arrive there in front of the main man."—which the agent interpreted as "for this person not to show up to court in front of the Judge."). And the agent said that the phrase—"him or his boss ... could be broken ["quebrar"] in an instant"—suggested that he (the recipient) or possibly his wife could be killed. 8JA 1373. There was no evidence presented however that anyone actually acted on this request for a favor, or that the intended recipient (Primo) ever learned of it. See 8JA 1376-77 (suggesting that this "message" was never actually sent).

Luis was eventually arrested and brought back to the United States. After his arrest, he was brought back to Sparks and interrogated. He made no admissions or confessions, and generally denied any involvement in the crime. 7JA 1267-87; 8JA 1300-30. Luis

did not testify at trial, and his counsel did not call any witnesses. 8JA 1409-10, 1412.

The jury found Luis guilty on both counts and found that a deadly weapon had been used in the commission of the offenses. 9JA 1576. At a subsequent penalty hearing the jury set the penalty for both offenses at life in the Nevada Department of Corrections without the possibility of parole. 10JA 1766-67.

VI. SUMMARY OF ARGUMENT

The seating of an anonymous jury is an unusual measure that is warranted only where there is a strong reason to believe the jury needs protection or to safeguard the integrity of the justice system, so that the jury can perform its fact-finding function. Nothing in this case plainly warranted an anonymous jury.

Mr. Menendez-Cordero, who was identified as being a member of MS-13, was charged with two counts of first degree murder, with the use of a deadly weapon. The State did not charge a gang enhancement. Without first consulting with counsel Judge Flanagan decided *sua sponte* to seat an anonymous jury in this case. When he, during a pretrial hearing, told counsel of his decision to seat an anonymous he

did not state any findings in support of that decision, but indicated that he would so after hearing from counsel. But later, at the prodding of a prosecutor, Judge Flanagan provided three reasons in support of an anonymous jury: (1) MS-13 "has a pattern of violence, which could cause a juror reasonable fear of his or her own safety," (2) the defendant "is facing two lengthy prison sentences should he be convicted," and (3) "based on the defendant's tattoos that he is involved with the MS-13 gang, which has the capacity to harm jurors." These findings actually boil down to just two: (1) the defendant is facing two lengthy prison sentences, if convicted; and (2) the defendant, as evidenced by his tattoos, is a member of the MS-13 gang, which has the capacity to harm jurors. Judge Flanagan's findings—either as stated by him or as broken down into two parts—were insufficient to support the use of an anonymous jury in *this* case as none of them constitute a strong reason to conclude in *this* case that the jury needed protection (or that the fact-finding function of the jury was in jeopardy).

Because the seating of an anonymous jury implicates two constitutional rights—a defendant's presumption of innocence and the defendant's ability to conduct an informed voir dire examination and to

challenge effectively the seating of individual jurors—the improper use of an anonymous jury in this case was error sufficient to warrant a new trial.

Next, at trial the district court allowed the admission of prior bad act evidence. The district court allowed the State to present evidence of a possible "in-direct" threat made by Mr. Menendez-Cordero. Specifically, the State presented evidence of two conversations held between Mr. Menendez-Cordero (while in custody) and other persons located in El Salvador where he asked them to get a message to Primo telling him that he should not come to court (and, according to an FBI agent, suggesting that some harm may occur to his wife if he did). The State argued for its admission as evidence of consciousness of guilt that showed that Mr. Menendez-Cordero was present on the night of the murders and that he was in fact the shooter. Admission of this evidence for that purpose however was not relevant because the State had already established through at least three witnesses that Mr. Menendez-Cordero had been present and was that he was the shooter. Moreover, the probative value of the evidence was substantially outweighed by it prejudicial effect. Threat evidence coupled with gang

evidence leads to the "bad person" inference sought to be avoided by the limitations on the use of bad act evidence. Simply put, the district court erred in allowing this volatile and unnecessary evidence before the jury.

Finally, the district court erred in not instructing the penalty jury of the effect of weapon enhancements. The jury should have had this information for its use in determining the penalty for the primary offense; it should not be kept in the dark. Because the sentencing jury did not have this information to consider, at a minimum this Court must reverse and remand for a new penalty hearing where the jury is properly instructed on this point.

VII. ARGUMENT

A. Empaneling an anonymous jury is an unusual measure that is warranted only where there is a strong reason to believe the jury needs protection or to safeguard the integrity of the justice system, so that the jury can perform its fact-finding function. The district court erred in seating an anonymous jury in this case.

Background

At a pretrial motions hearing held on September 19, 2017, Judge Flanagan told the parties that he was "contemplating calling an anonymous jury in this case." 1JA 119-20 (Transcript of Proceedings: Pretrial Motions). In fact, he had already made that decision:

> The prospective jurors will be identified by badge number only. And I'm working with the jury commissioner to sift that information out and we'll make a full record of that at the same time we're meeting on ... other pretrial matters.

Id. at 120.

On October 2, 2017—the morning of the start of trial—one of the prosecutors reminded Judge Flanagan that the judge wanted to put on the record his reasons for empaneling an anonymous jury. 2JA 292 (Transcript of Proceedings: Pretrial Motions). Referencing *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003), *Id.* at 293-94, Judge Flanagan had the prosecutor present testimony from Special Agent Freestone purporting to track factors identified in *Shryock*. *Id.* at 295-97. Judge Flanagan then made these three findings: (1) MS-13 "has a pattern of violence, which could cause a juror reasonable fear of his or her own safety," (2) the defendant "is facing two lengthy prison sentences should he be convicted," (3) "based on the defendant's tattoos that he is involved with the MS-13 gang, which has the capacity to harm jurors." *Id.* at 298. Judge Flanagan then said "in order to protect the defendant's constitutional rights, I'm simply going to instruct the jury that they are to be identified by number, not because of the type of

trial here, not because of anything the defendant has done, but to protect them from harassment by the media." *Id.*

Mr. Menendez-Cordero's counsel objected to being provided only a redacted copy of the juror questionnaires. *Id.* at 299. Earlier in the hearing Judge Flanagan announced that he would let counsel look at some of the redacted juror questionnaires in his jury room over the lunch hour "for the purpose of simply determining whether or not you have any challenges for cause right now." *Id.* at 292-93.[9] Those unredacted juror questionnaires were "not to leave the premises." *Id.* at 293. Defense counsel objected noting that an hour over lunch was "not a sufficient period of time." *Id.* at 299. Defense counsel asked to be able to review the unredacted questionnaires over the afternoon and suggested that the prospective jury panel be brought back the next morning. *Id.* at 299-300, and 301. Counsel also objected to the use of numbers instead of names because it would give the panel "the impression that there is extra danger and that [Mr. Menendez-Cordero] is part of that extra danger and it prejudices his right to a fair trial, specifically, his

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[9] There were approximately 22 questionnaires that the parties were actually allowed to look at over the lunch hour. The other 99 unredacted questionnaires were not provided to them. See 2JA 307.

presumption of innocence." *Id.* at 299-300. Judge Flanagan denied both requests. *Id.* at 300 (stating on the last point that counsel did not "have any evidence that the jury is going to assume guilt simply because they're referred to by a number, as opposed to name."[10]), and 301-02. It appears however, that neither Judge Flanagan nor Judge Steinheimer provided the jurors with Judge Flanagan's proposed explanation as to why they were being referred to by a number and not by name. See 2JA 330-78 (Judge Steinheimer) (initial jury selection on October 2, 2017); 3JA 382-494 (Judge Flanagan) (jury selection on October 3, 2017); and 3JA 498-501, 514-35 (Judge Steinheimer) (opening statements held on October 4, 2017).

Standard of Review and Discussion

The empaneling of an anonymous jury is reviewed for abuse of discretion. *United States v. Shryock*, 342 F.3d at 970-71 (collecting cases); *United States v. Dinkins*, 691 F.3d 358, 371 (4th Cir. 2012) (collecting cases), *cert denied* 568 U.S. 1177 (2013).

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[10] Seemingly contradicting the court's reason for telling the jury why numbers were being used instead of names; "media harassment": "The idea is to insulate the defendant to the extent I can from any adverse inference that may be drawn by the use of the jury numbers as opposed to names."). 2JA 298.

The propriety of empaneling an anonymous jury is a question of first impression in Nevada. A reference to an anonymous jury is found in *Stephens Media v. Eighth Judicial Dist. Court*, 125 Nev. 849, 869, 221 P.3d 1240, 1254 (2009) (citing *In re Baltimore Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988) ("recognizing the great risk of the public losing confidence in the justice system if a criminal defendant is tried by an anonymous jury")).

"The term 'anonymous jury' does not have one fixed meaning. A jury generally is considered to be 'anonymous' when a trial court has withheld certain biographical information about the jurors either from the public, the parties, or both." *Dinkins*, 691 F.3d at 371.[11] The Ninth Circuit has recognized that "empaneling an anonymous jury is an *unusual* measure that is warranted only where there is a strong reason to believe the jury needs protection or to safeguard the integrity of the justice system, so that the jury can perform its factfinding function." *Shryock*, 342 F.3d at 971 (italics added, citation omitted). The Fourth Circuit agrees. See *Dinkins*, 691 F.3d at 372 (same) (adding that an

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[11] See 2JA 306-07, and 315-16 (renewing objection to the anonymous jury and noting the lack of background information on any of the prospective jurors).

anonymous jury "must be plainly warranted by the particular situation presented.") (citation omitted).

Two constitutional amendments are infringed by the use of an anonymous jury. "[A]nonymous juries may infer that the dangerousness of those on trial require their anonymity, thereby implicating defendant's Fifth Amendment right to a presumption of innocence." *Shryock*, 342 F.3d at 971; *Dinkins*, 691 F.3d at 372 (same); and also *United States v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002) ("an anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected"). Additionally, the use of an anonymous jury "may interfere with defendant's ability to conduct voir dire and to exercise meaningful peremptory challenges, thereby implicating defendants' Sixth Amendment right to an impartial jury." *Shryock*, 342 F.3d at 971; *Dinkins*, 691 F.3d at 372 (noting that "a court's action withholding certain biographical information from the parties may affect a defendant's constitutional right to trial by an impartial jury, by hindering the defendant's ability to conduct an informed voir dire examination and to challenge effectively the seating of individual jurors") (citations omitted); *Mansoori*, 304 F.3d at 650

("juror anonymity also deprives the defendant of information that might help him to make appropriate challenges—in particular peremptory challenges—during jury selection").

Because of the fundamental constitutional rights at stake, in the Ninth Circuit (and elsewhere), the use of an anonymous jury is permissible only "*in limited circumstances*" where "(1) there is a strong reason for concluding that it is necessary to enable juror protection; and (2) reasonable safe guards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused." *Shryock*, 342 F.3d at 971 (italics added). *Shryock* identified five factors that might present a need for jury protection: "(1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer a lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment." 342 F.3d at 971. These factors are "neither exclusive nor dispositive, and the district court should make its

decision based on the totality of the circumstances." *Id.*; see also *Dinkins*, 691 D.3d at 373 (same) (and emphasizing "that a district court must always engage in a context-specific inquiry based upon the facts of the particular case before the court") (citation omitted).

Here Judge Flanagan decided, *sua sponte*, to seat an anonymous jury. By September 19, 2017, he had already been in discussions with the jury commissioner on the process and on the redacted jury questionnaire that would be given to the parties. On October 2, 2017, at the prodding of a prosecutor Judge Flanagan stated his reasons for an anonymous jury on the record. Though he gave three reasons, they really break down into two general reasons: (1) the defendant is facing two lengthy prison sentences, if convicted; and (2) the defendant, as evidenced by his tattoos, is a member of the MS-13 gang, which has the capacity to harm jurors. Judge Flanagan's findings—either as stated by him or as broken down into two parts—were insufficient to support the use of an anonymous jury in *this* case as none of them constitute a strong reason to conclude in *this* case that the jury needed protection. At best Judge Flanagan's findings may demonstrate his own concerns or feelings about MS-13 generally, but they do not constitute a "context-

specific" identification of any actual real threat to jury safety. Nor do they provide a strong reason to conclude that the jury could not perform it fact-finding function if empaneled in the normal course. Finally, they do not constitute "specific findings demonstrating the justification for restricted access, [or] the criteria and procedures on which the court relie[d] when redacting [juror] questionnaires." *Cf. Stephens Media*, 125 Nev. at 870, 221 P.3d at 1254. Although stated in a different context, a rule that can be derived from *Stephens Media* is that a district court is obligated to make specific finding on the record where it seeks to limit the public's or press's access to jury questionnaires. That rule should naturally apply with more force where the court seeks to limit the parties' access to jury questionnaires. Here, an anonymous jury was not plainly warranted.

Even where factors actually exist to warrant the empaneling of an anonymous jury, a district court must employ "reasonable safeguards ... to minimize any risk of infringement upon the rights of the accused." *Shryock*, 342 F.3d at 971. Here it appears that Judge Flanagan's proposed explanation for juror anonymity—the use of numbers and not names to avoid media harassment—was not given.

Based on this record, there was no basis for the district court to conclude that the jury in this case must be anonymous. Accordingly, this Court must reverse and remand for a new trial.

B. The use of uncharged prior bad act evidence is disfavored in our criminal justice system. Here the district court erred in admitting bad act evidence even though its probative value was outweighed by its prejudicial effect.

Background

Shortly before trial, the State filed a motion to introduce evidence of Mr. Menendez-Cordero's consciousness of guilt. 1JA 4-9 (Motion). Specifically the State sought the admission of two recorded conversations between Mr. Menendez-Cordero and a woman named Bertha Arias (and others present) where he purported to ask them to contact Elder Rodriguez (Primo) and convince him not to come to court. 1JA 5-6. The State alleged that the first conversation contained a threat that Primo's wife or mother—"depending on the interpretation"—could be killed if he didn't heed the warning. The State characterized the conversation as a "threat" and argued that it could be used to show consciousness of guilt: "This threat is relevant to show that Menendez-Cordero was present at the party where the murders of Kevin Melendez and Moises Vasquez occurred." 1JA 7 (capitalization omitted); and see

1JA 35 (Reply) (stating that this evidence was relevant regarding Defendant's presence at the murder scene and "relevant to show identity in that Menendez-Cordero is the person who shot and killed Kevin Melendez and Moises Vasquez.") (capitalization omitted). Defense counsel opposed the motion, 1JA 10-17 (Opposition) and 1JA 123-29 (Supplemental Opposition), arguing the highly prejudicial effect of such evidence. Nonetheless, at a hearing held the morning of trial the district court judge ruled that the evidence was admissible. The district judge accepted the State's reasoning and concluded that the statements had been proven by clear and convincing evidence; that the statements were "more probative than prejudicial." And ostensibly, that the statements were "relevant to the identity of the individual who shot the victims in this case." 2JA 286-87 (Transcript of Proceedings: Pretrial Motions).

Standard of Review and Discussion

The Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). Here the district court judge abused his discretion in admitting this evidence. First unlike in *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), *overruled on other grounds by Lisle v.*

State, 131 Nev. Adv. Op. 39, 351 P.3d 725, 732 n.5 (2015), and other cases relied upon by the State, there was no evidence that any threat actually materialized to Primó. At trial Primo testified that he had not seen or heard from Mr. Menendez-Cordero after that night. And there was no evidence that he was ever contacted by anyone on behalf of Mr. Menendez-Cordero. Second, the predicate that was laid by the State and accepted by the district court as to the relevance of the evidence—*i.e.*, that it was necessary and relevant to place Mr. Menendez-Cordero at the scene and to show him as the shooter absolutely oversells the relevance and value of this evidence. Consider this: At trial both Kristine and Terrell identified Mr. Menendez-Cordero as the shooter. Additionally, the State presented testimony from a confidential informant, SA-1290, that Mr. Menendez-Cordero had told him that he had committed a double murder. So even if Primo had not testified, the fact that Mr. Menendez-Cordero was at the party and was the shooter was established by other evidence. Yet, the objected to evidence was presented to the jury even *after* Primo had testified.

Third, the district court's perfunctory conclusion that the probative value of the evidence outweighed its prejudicial effect cannot

survive this Court's scrutiny. The State went out of its way to argue that the admission of consciousness of guilt evidence was not subject to prior bad act analysis. See 1JA 130-32 (Reply). But hedging its bet the State added that even if it were subject to that analysis, "evidence that the Defendant threaten the witness who brought him to the party where the shooting occurred is prejudicial as it implicates his guilt in the crime but such evidence is not unfairly prejudicial." 1JA 132-33 (Reply). But how can that be? The proffered rationale for its relevance—it places Mr. Menendez-Cordero at the scene and identifies him as the shooter—is, as noted above, work that was done by other evidence. At best this evidence was cumulative evidence; particularly where, as here, it was presented well after Kristine and Terrell and SA-1290 and others had testified. The fact is the State's argument to the district court was a "Potemkin Village" argument—a façade designed to hide the fact that the evidence was actually being offered just to reinforce to the jury that Mr. Menendez-Cordero is a bad person.[12] This purpose is an improper

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[12] The prejudicial nature of this evidence is underscored by the other MS-13 gang evidence presented in this case. The State had already established Mr. Menendez-Cordero's membership in MS-13, and had already put on gang "motive" evidence through the informant's testimony as well as through the testimony of an FBI special agent.

one. *Walker v. State*, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000) (noting that the use of uncharged bad acts to convict and defendant is heavily disfavored in our criminal justice system; the principal concern being that "the jury will be unduly influenced by the evidence, and thus convict the accused because the jury believes the accused is a bad person.") (citation omitted); *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1131-32 (2001), *holding modified by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008) (stating that a prosecutor "seeking admission of this volatile evidence must do so in the pursuit of justice and as a servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. Thus, [i]t is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.") (internal quotation marks and footnotes omitted, alteration in the original).

Because there was no pressing need for this volatile evidence, other than to place Mr. Menendez-Cordero in a bad light, its conceded prejudicial effect far outweighed its probative value and the district

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Butler v. State, 120 Nev. 879, 889, 102 P.3d 71, 78-79 (2004).

court erred in ruling the evidence admissible. This Court should reverse and remand for a new trial.

C. Without a proper jury instruction a jury may make a sentencing determination that is arbitrary and capricious. Here the failure to instruct the penalty jury of the effect of a sentencing enhancement makes its sentencing determination unreliable.

Background

Defense counsel offered the following instruction for the penalty phase of the trial:

> The deadly weapon enhancement as applied to the sentence you impose in this case will impose a minimum one year to a maximum twenty year, consecutive sentence. Either of the parole eligible alternatives have twenty-year minimum sentences before parole eligibility begins. The enhancement means that if you impose a parole-eligible sentence, the defendant could not become eligible for parole consideration before he served the minimum sentence imposed in prison.
>
> Nevada enacted truth in sentencing laws in 1995. Those laws require that a defendant sentenced to a year in prison, or a term of years, serve 365 days for each year imposed. The defendant will not be given a reduction in his sentence for "good time" credits. He will be given credit for time served since his arrest in this case. However, no credits other than for the time already spent in custody will be deducted against the minimum sentence which you impose.

1JA 248 (Defense Rejected Instruction–A). Counsel argued that the instruction was necessary to explain to the jury the effect of the enhancements on its sentence determination. 9JA 1566 (explaining that the "consecutive term of years is relevant to [the jury's] ultimate decision making."); and *Id.* at 1571 (suggesting that the jury may have unanswered questions concerning the enhancement penalty and arguing that the proposed instruction "provides an explanation as to the penalty range for deadly weapon enhancement as well as the practical effect upon the offender if a deadly weapon is found to have been used."). The State opposed the instruction arguing that NRS 175.552 allows a jury to sentence only on the primary offense and that it was "not within the jury's province to obviously sentence" on the enhancement; that it would be confusing to the jury to consider other possible penalties; and there was no authority for the proposed instruction. 9JA 1572-73. The district court agreed with the State and rejected the proposed instruction, stating in relevant part: "Because it is not within the province of the jury to consider the other crimes that the defendant may have been convicted of and sentenced [*sic*] on anything

other than murder, I think it is analogous they should not consider the deadly weapon enhancement." 9JA 1573.

Standard of Review and Discussion

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnotes omitted).

One instruction actually given informed the jury of the range of penalties possible in this case. See 1JA 242 (Penalty Instruction No. 6). But that instruction did not mention the weapon enhancements at all. Defense counsel's instruction would have accomplished that task. The district court rejected the proposed instruction however because it was "not within the province of the jury to consider ... the deadly weapon enhancement." 9JA 1573. But the defense did not want the jury to actually determine the appropriate sentencing weapon enhancements (and nothing in the instruction suggested as much). Rather, defense counsel merely wanted the jury to be aware of the mandatory

consecutive nature of the sentencing enhancements while considering the sentence for the predicate offenses. *Cf. Dean v. United States*, 581 U.S. ____, 137 S. Ct. 1170 (2017).

The question presented in *Dean* was whether, in calculating the sentence for a predicate offense, a court must "ignore" the fact that the defendant will serve mandatory minimums imposed because of a consecutive weapon enhancement. 137 S. Ct. at 1174. Writing for a unanimous Court, Chief Justice Roberts concluded that there was no reason for a sentencing court to ignore such information "at the front end, when determining a prison sentence for each individual sentence in a multicount case." 137 S. Ct. at 1176. And further, that "[t]he bar on imposing concurrent sentences [did] not affect a court's discretion to consider a mandatory minimum when calculating each individual sentence." 137 S. Ct. at 1177. Although *Dean* involved federal sentencing statutes and a sentencing judge (not a sentencing jury), the Court's conclusions informs this case. If a district court judge need not *ignore* the effect of sentencing enhancements when considering an individual sentence, why should a jury be *kept in the dark* on the effect

of sentencing enhancements when making its sentencing determination?

Where applicable NRS 175.552(1)(a) requires the guilt-finding jury to also serve as the penalty-jury at a penalty hearing to be held "as soon as practicable" after the guilt finding. At that hearing "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible." NRS 175.552(3). One such "other matter" can be the effect of sentencing enhancements on the ultimate sentence. The weapon enhancement under NRS 193.163 creates an "additional penalty for the primary offense" of a range of penalty that is between 1 to 20 years in the Nevada Department of Corrections. NRS 193.165(1), (4). And the imposed enhancement must "[r]un[] consecutively with the sentence imposed for the crime." NRS 193.163(2)(b). Although this is a penalty to be determined by the sentencing court and not the jury, nothing in the statute (or any other statute) prevents a sentencing jury from considering the effect of a sentencing enhancement when calculating an appropriate sentence for

the predicate offense or offenses. The district court abused its discretion in rejecting this proposed instruction.

Because the jury was kept in the dark regarding sentencing enhancements, its setting of a life *without* parole sentence on both counts is unreliable. Had the jury been properly instructed on the effect of the consecutive weapon enhancements, it might have returned a sentence of life *with* the possibility of parole on both counts. At the penalty hearing defense counsel conceded that the minimum possible penalty—a term of years—did not apply. 10JA 1758 ("We understand that this case is not a case where the minimums should apply."). Instead, they sought sentences of life *with* the possibility of parole. 10JA 1759-60. Accordingly, this Court must reverse the sentences imposed and remand for a new sentencing hearing.

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VIII. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Menendez-Cordero's convictions and remand for a new trial. In the alternative this Court must vacate the sentences imposed and remand for a new sentencing hearing.

DATED this 16th day of August 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately

spaced, has a typeface of 14 points and contains a total of 7,431 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of August 2018.

/s/ John Reese Petty
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Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of August 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

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

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