IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS ALEJANDRO MENENDEZ-CORDERO,

No. 74901

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

At trial, evidence revealed that on November 20, 2010, Luis Alejandro Menendez-Cordero (hereinafter, "Menendez-Cordero"), a member of the international MS-13 gang, shot and killed two party-goers, Kevin Melendez and Moises Vazquez, because his gang was disrespected. The jury found him guilty of two counts of murder in the first degree and determined that he should be sentenced to life in prison without the possibility of parole.

Menendez-Cordero raises three issue on appeal. He argues the district court abused its discretion when it: (1) decided to empanel an anonymous jury, (2) admitted evidence of his consciousness of guilt, and (3) refused his proposed jury instruction during the penalty phase of the

trial. The record reveals that the district court's decisions were not arbitrary or capricious. In fact, each decision was well reasoned and within the bounds of the law. As such, Menendez-Cordero is not entitled to any relief and the judgment of conviction in this case should be affirmed.

II. STATEMENT OF LEGAL ISSUES[1]

A. Whether the district court abused its discretion by empaneling an anonymous jury, where the record shows it was necessary to enable the jury to perform its fact-finding function without interference and where the court adopted reasonable safeguards to minimize any infringement to Menendez-Cordero's fundamental rights?

B. Whether the district court abused its discretion when it determined that the probative value of the consciousness of guilt evidence substantially outweighed the danger of unfair prejudice and admitted the evidence with a limiting instruction?

C. Whether the district court abused its discretion when it declined to provide a penalty instruction that was unnecessary, argumentative, and an incomplete statement of law?

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[1] The State agrees with Menendez-Cordero's Statement of Jurisdiction, Routing Statement, and Statement of Case, as such the matters will not be repeated herein. *See* NRAP 28(b).

III. STATEMENT OF FACTS

The State generally agrees with Menendez-Cordero's recitation of the factual background concerning the night of the murders. The issues in this case turn on discreet pretrial and post-trial rulings. The State will provide additional facts as necessary in the argument section below.

IV. SUMMARY OF ARGUMENT

Menendez-Cordero asserts that the district court abused its discretion in this case when it: (1) decided to empanel an anonymous jury, (2) admitted evidence of his consciousness of guilt, and (3) refused his proposed jury instruction during the penalty phase of the trial. Menendez-Cordero's arguments are unsupported by the record.

First, Menendez-Cordero argues that the district court abused its discretion when it empaneled an anonymous jury in this case. The parties agree that a district court's decision to empanel an anonymous jury is an issue of first impression in Nevada. The parties also agree on the guidelines that should inform this Court's review the district court's decision in this case. However, contrary to Menendez-Cordero's arguments, the record in this case contains ample support for the district court's decision to empanel an anonymous jury. An anonymous jury was necessary to guarantee a

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fair trial and the district court's decision did not infringe upon Menendez-Cordero's fundamental rights.

Menendez-Cordero next argues that the district court abused its discretion when it admitted his recorded statements of a threatening nature about the State's witness Elder Rodriguez, who drove Menendez-Cordero to the party on the night of the murders. Menendez-Cordero asserts there was no evidence that the threat was actually communicated to Elder Rodriguez and the evidence was too prejudicial. Menendez-Cordero's arguments are misplaced. The district court properly evaluated the threats and admitted them during trial as evidence of Menendez-Cordero's consciousness of guilt.

Finally, Menendez-Cordero argues the district court abused its discretion when it rejected his proposed penalty phase instruction regarding the sentencing structure for the deadly weapon enhancement. Menendez-Cordero's instruction was unnecessary and confusing because the district court, not the jury, is required to impose the sentence for the deadly weapon enhancement. Further, Menendez-Cordero's proposed instruction was not a complete statement of law. The district court properly informed the jury that it would sentence Menendez-Cordero for the deadly weapon enhancement at a later date. Therefore, the district

court did not abuse its discretion when it rejected Menendez-Cordero's proposed instruction.

V. ARGUMENT

A. The District Court Did Not Abuse its Discretion When it Empaneled an Anonymous Jury

1. Factual and Procedural Background

Approximately one month before trial, on August 31, 2017, the State filed a motion to limit the disclosure of discovery and protect witnesses. Respondent's Appendix (hereinafter, "RA") at 1-18. The State filed the motion because it learned that in July and August, Menendez-Cordero was providing his court papers and discovery to known members of MS-13. *Id*. at 2-3. Menendez-Cordero was also having concerning conversations with MS-13 members. *Id*. Some of the conversations involved references to a prior murder case and a snitch. *Id*. at 3-4. Menendez-Cordero asked his associates to study the people and the photos that were in his court papers. *Id*. at 3. A particularly concerning conversation occurred on August 30, 2017. It was an I-Web visit where Menendez-Cordero discussed sending a "message" to a witness in this case in order to get him not to come to court.[2]

[2] The State submitted documentary evidence to support its motion when it was filed. The State, ultimately, moved for admission of portions of the August 30, 2017 I-Web discussion as evidence of consciousness of guilt in this case. The representations the State made in its motion were

Id. at 4-5. The State discovered that Menendez-Cordero was attempting to send a message Elder Rodriguez—the State's witness who took Menendez-Cordero to the party on the night of the murders. *Id.; see also* 7 Joint Appendix (hereinafter, "JA") at 1253 (Elder Rodriguez testified at trial that he took Menendez-Cordero to the party with him). The district court granted the State's Motion and specifically ordered, among other things,

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consistent with the evidence presented to the district court during the consciousness of guilt pretrial hearing on the matter on October 2, 2017, as well as testimony at trial. The evidence revealed that during the I-Web visit, Menendez-Cordero spoke with a woman named Bertha Arias and multiple males who included know associates of MS-13. He provided the males with a phone number and asked the men to write it down. 2 JA at 268. Menendez-Cordero asked the men to buy a "brain" (a slang term for cell phone or cell phone chip) and to tell the individual with the phone number not to arrive on the day that he was going to show up in front of the "main man" (meaning judge). *Id*. at 267-268. Menendez-Cordero told the men to give the guy the message that if he does show up, his female boss (meaning wife, mother, or girlfriend, depending on interpretation) could be broken quickly (meaning easily killed). *Id*. at 268-269. Menendez-Cordero told the men that this "son of a bitch" could change the play (or change the outcome of the case). *Id*. at 269. The phone number mentioned in the call was traced to Elder Rodriguez. *Id*. at 280.

The State is contemporaneously moving to transmit the trial exhibits of the August 30, 2017 I-Web visit, as well as an August 31, 2017 jail call where Menendez-Cordero follows up on his request to send Elder Rodriguez a message. Both were admitted at trial as evidence of Menendez-Cordero's consciousness of guilt, but as discussed above, they support the district court's decision to empanel an anonymous jury as well. *See* Trial Exhibits 133 and 134. Both were in Spanish, but were translated to the jury by Agent Freestone. *See* 8 JA 1363-1367. The State is also contemporaneously moving to transmit the official transcript of the August 30, 2017 I-Web visit, which was admitted at trial. *See* Trial Exhibit 135.

that Menendez-Cordero could not have contact with civilian witnesses, either directly or indirectly. RA at 30-31.

On September 19, 2017, during a pretrial motions hearing, the district court raised the issue of possibly empaneling an anonymous jury. 1 JA 18, 119-120. The district court indicated that it was looking into the matter and would take the issue up at the next pretrial motions hearing. *Id.* at 120. The district court said:

> While we're talking about jurors, I am contemplating calling an anonymous jury in this case. 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 those other pretrial matters, probably the Friday before. I want to give everybody enough time to make their record.
>
> *Id*. at 119-120.

Menendez-Cordero did not object or make any record with respect to the district court's comments concerning an anonymous jury on September 19, 2017. *Id.* at 120.

On September 28, 2017, the State filed an emergency motion and request for a hearing to limit Menendez-Cordero's communication to only his defense team. RA at 32-37. In the motion, the State indicated that it had discovered jail calls from Menendez-Cordero where he was attempting to contact and/or intimidate witnesses and discussing witness testimony

with MS-13 members. *Id*. at 33-34. The district court heard evidence and argument on the matter on September 29, 2017. 1 JA 140-196. The district court heard testimony about a handful of jail calls. In one call from September 26, 2017, Menendez-Cordero told the recipient that there is an active member of their side that is going to come in and testify against him. *Id*. at 150-153. Menendez-Cordero indicated he will get the recipient the guy's number. *Id*. at 151. In another call, Menendez-Cordero spoke with a local MS-13 member and discussed his court papers, made references to the witness that would testify about his tattoo, and discussed the recipient's plans to watch trial. *Id*. at 158-167. The district court ultimately granted the State's motion. *Id*. at 191-196; RA at 54-56. The district court reasoned, in part:

> Previously, this court has entered an order restricting the dissemination of discovery material to the defendant based upon the telephonic intercept of conversations between the defendant and unknown individuals in El Salvador, which reference the discovery material in this case. That discovery material appears to have provided the defendant with enough information to identify at least one of the confidential informants scheduled to testify in this case.
>
> There has been reliable information provided to the court in the course of that proceeding and this proceeding, which raises a significant concern in this court as to the safety of the witnesses and the jury and the integrity of these proceedings.
>
> 1 JA at 192-193.

On the morning of October 2, 2017, the district court held an additional pretrial motions hearing. 2 JA 255. The district court intended to address three primary matters during the hearing: exhibits, the consciousness of guilt pretrial motion, and jury pool issues. *Id*. at 257. The district court first addressed the consciousness of guilt motion and the admission of trial exhibits. *Id*. at 257-291.

The district court then addressed its concerns about the jury pool, including whether a handful of individuals had circumstances subjecting them to exclusion. *Id*. at 291-292. The district court indicated its intention to have counsel review the unredacted questionnaires over the lunch hour to determine if either party had an objection to striking certain jurors before voir dire. *Id*.

At that point, the State asked whether it would be the appropriate time to put the court's decision to empanel an anonymous jury on the record. *Id*. at 292. The district court indicated it wanted to have FBI Special Agent Blaine Freestone (hereinafter, "Agent Freestone") testify in order to make a record.[3] *Id*. After hearing Agent Freestone's testimony, the

[3] Agent Freestone previously testified in support of the State's Motion to admit evidence of Menendez-Cordero's involvement in MS-13 as motive for the murders at the September 19, 2017 pretrial motions hearing. 1 JA 52-95. He also testified earlier in the morning of October 2, 2017,

district court took judicial notice of the previous orders it issued relative to the restriction on the dissemination of discovery and limiting Menendez-Cordero's contact to only his defense team. Then the district court set forth its findings regarding the anonymous jury for the record. It stated:

> The court takes notice of -- well, the court certainly finds the statements of the defendant himself demonstrate a history or likelihood of the obstruction of justice on the part of the defendant or others acting on his behalf.
>
> The record reflects MS-13 has a pattern of violence, which could cause a juror reasonable fear of his or her own safety.
>
> The court finds that the defendant is facing two lengthy prison sentences should he be convicted. The court finds based on the defendant's tattoos that he is involved with the MS-13 gang, which has the capacity to harm jurors.
>
> Also, the court recognizes that there was a front page article in today's Reno Gazette Journal regarding this trial. Up until this point, there had been little pretrial publicity. And 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 that the defendant has done, but to protect them from harassment by the media.
>
> 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. That will be the order.
>
> *Id*. at 298-299.

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concerning the State's motion to admit evidence of Menendez-Cordero's consciousness of guilt. 2 JA at 258-281.

Menendez-Cordero raised an objection to the redacted jury questionnaires for the first time after the district court made its findings. *Id.* at 299. Then counsel and the district court engaged in a discussion regarding an opportunity to review the unredacted questionnaires, how long that process would take, and whether jury selection should begin the next day. *Id.* at 299-302. The State indicated it was ready to proceed that day, despite the fact that it was not given the names or addresses of the potential jurors, because there was enough information to have a conversation with them. *Id.* at 300-301. The district court recognized that its decision actually leveled the playing field because it prevented the State from conducting background checks on the jurors and gathering information that the defense did not have. *Id.* at 301. The district court indicated that it was going to have jury selection go forward that afternoon to protect the rights of both sides. *Id.* at 302.

Menendez-Cordero objected for a second time to the redacted juror questionnaires when trial was scheduled to start that same afternoon.[4] *Id.*

[4] All the prior proceedings were completed by Judge Flanagan. However, Judge Steinheimer stepped in for him on the afternoon of October 2, 2017, because he was ill. *See* 2 JA at 317; 3 JA at 382. Judge Flanagan returned on October 3, 2017, for jury selection, but Judge Steinheimer presided over the trial starting on October 4, 2017, through the conclusion of the trial due to his illness. 3 JA at 382, 498.

at 306. The parties spent the afternoon of October 2, 2017, addressing preliminary issues with the jurors, including excusing panel members for vacation conflicts, medical reasons, and language issues. *Id*. at 335-378.

On the morning of October 3, 2017, the court told the jury panel what to expect during jury selection and trial. The court also explained why they were being identified by number. 3 JA at 382-388. Judge Flanagan said:

> Now, also this is a small community and it's not unusual for individuals to know each other, even amongst the jury pool. You may be questioning why are we using numbers instead of names. Well, some of you may have seen the newspaper yesterday. I don't know if it's in today. But as the judge here, I felt your privacy was important and I didn't want you being harassed or followed up during your time as jurors here. And so for that reason, I've selected this panel according to numbers. So you can rest assured that the newspaper reporters will leave you alone.

Id. at 387-388.

The majority of the day on October 3, 2017, was dedicated to voir dire. *Id*. at 382- 496. The court did not place any limit on counsel's ability to conduct voir dire. *Id*. at 436-485. Menendez-Cordero's counsel questioned the potential jurors during the afternoon. The record suggests she ended her questioning when she was satisfied that the panel could be passed for cause. *See id*. at 485. Menendez-Cordero did not re-raise the objection to the redacted jury questionnaires at any time on October 3, 2017, nor did counsel argue that her ability to conduct voir dire was

somehow hampered by the redacted questionnaires. *Id*. at 382- 495. Twelve jurors and two alternates were sworn as the jurors for the case at the end of the day on October 3, 2017. *Id.* at 492.

On the morning of October 4, 2017, Menendez-Cordero's counsel requested to have the redacted and unredacted questionnaires made part of the record and "renewed" Menendez-Cordero's objection to the anonymous jury. *Id*. at 513. However, Menendez-Cordero's counsel did not make a record regarding how the redactions allegedly impacted her ability to conduct a thorough voir dire. *See id.*

The redacted and unredacted forms were filed under seal with the district court after the trial. The redactions only pertained to specific identifying information for the jurors. For example, the parties were provided with the city and zip code the jurors lived in as well as their year of birth. The parties were not given the jurors' names, specific contact information (addresses or phone numbers), dates of birth, employers, or their spouses' names and contact information. The rest of the questionnaire was left unaltered—meaning the parties had access to a large amount of information for the jurors, including, length of time in Washoe County, education level, special degrees and training, occupation, spouse's

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occupation, relation to law enforcement, prior jury service, and family demographic information.[5]

2. Standard of Review and Discussion

Initially, as Menendez-Cordero recognizes, the propriety of empaneling an anonymous jury is an issue of first impression in Nevada. The same is true of the appropriate level of review on appeal. Menendez-Cordero analyzes this case by relying on a few cases from Federal Courts, but primarily relies a Ninth Circuit case, *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003). In *Shryock*, the issue was one of first impression for the Ninth Circuit as well. *Id.* at 970. The Ninth Circuit considered cases from its sister jurisdictions and adopted their guidelines for evaluating a district court's decision to empanel an anonymous jury. *See id.* at 970-973. It appears that Menendez-Cordero and the State agree that this Court should adopt the standard of review and the rule for empaneling an anonymous jury discussed in *Shryock*; however, the parties disagree about the result of that application. The State submits that when this case is

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[5] The State attempted to obtain the file stamped questionnaires from the district court; however, it declined to provide them to the State without an order. As such, the State has contemporaneously moved to transmit the juror questionnaires under seal to this Court so it can review the limited nature of the redactions.

analyzed consistent with *Shryock*, it is evident that the district court did not abuse its discretion. *See id.* at 970-973.

In *Shryock*, the Ninth Circuit recognized that anonymous juries are somewhat unusual, but that they are permitted when necessary to protect the jury and the integrity of the justice system. *See id.* at 971. The court also recognized that two of a defendant's fundamental rights may be implicated when an anonymous jury is empaneled: the presumption of innocence and the right to an impartial jury. *Id.* As such, the *Shryock* court concluded that a district court may empanel an anonymous jury "where (1) there is a strong reason for concluding that it is necessary to enable the jury to perform its fact-finding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused." *Id.* (adopting the rule articulated by the First Circuit in *United States v. DeLuca*, 137 F3d 24, 31 (1st Cir. 1998)). The Ninth Circuit will review a district court's decision to empanel an anonymous jury for abuse of discretion. *Shryock*, 342 F.3d at 971. This Court should adopt the guidelines announced in *Shryock*, and it should find that the record supports the district court's decision to empanel an anonymous jury in this case. *See id.*

With respect to the first *Shryock* requirement, there was overwhelming evidence indicating that anonymity was important to safeguard the jury's fact-finding function and protect those empaneled in this case. In *Shryock*, the Ninth Circuit articulated five factors that a district court may consider to determine the need for jury protection:

> (1) the defendants' involvement with organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' 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.

Id. However, the Ninth Circuit concluded, "[t]hese factors are neither exclusive nor dispositive, and the district court should make its decision based on the totality of the circumstances." *Id*.

Menendez-Cordero argues that the district court only offered two general reasons for its decision to empanel an anonymous jury and that its reasons were insufficient to conclude that an anonymous jury was necessary in this case. *See* OB at 24. To the contrary, the district court made findings consistent with each of the five factors discussed in *Shryock*, and there is substantial support in the record for each finding. *See* 342 F.3d at 971; 2 JA 297-298.

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First, the district court found that Menendez-Cordero was involved in MS-13. 2 JA at 298. The FBI recognized MS-13 as a transnational gang as early as 2006 or 2007. 1 JA at 60-61. During the September 19, 2017 pretrial hearing, Agent Freestone discussed some of the criminal activities of MS-13, as well as the hierarchy and the organized nature of the gang. *See generally id*. at 52-95. The district court concluded Agent Freestone was an expert in the subject matter pursuant to NRS 50.275. *Id*. at 70. Menendez-Cordero told police he was in a gang. 7 JA 1273. And, he continued to communicate with known MS-13 members, even while in custody for this case. *See e.g*. RA 1-18, 32-37; *see also* 2 JA 261-272. Therefore, the record demonstrates that Menendez-Cordero was involved in MS-13 and that MS-13 is an organized criminal enterprise.

Second, the district court found that MS-13 had the capacity to harm jurors. 2 JA at 298. At the pretrial hearing and during trial, Agent Freestone discussed Menendez-Cordero's tattoos at length and the meaning the tattoos have in the MS-13 gang. 1 JA at 65-80 (pretrial testimony); 8 JA 1350-1362 (trial testimony). This included the significance of Menendez-Cordero's forehead tattoos which included horns, an "M" on the right side, and an "S" on the left side, as well as the letters "CLCS" in the middle. 1 JA at 67-69; 8 JA 1347, 1351-1353, 1358. Menendez-Cordero's forehead

tattoos were particularly important because the State offered evidence at trial that Menendez-Cordero obtained the tattoos after he committed the murders in this case to memorialize the fact that he did work for the gang and to show the world that he should not be disrespected. *See* 7 JA 1158-1162 (testimony from the tattoo artist indicating he tattooed Menendez-Cordero's forehead with a gang tattoo and identifying a picture of Menendez-Cordero with the forehead tattoo as how he looked on November 20, 2010); 8 JA at 1361-1362 (regarding the meaning of a forehead tattoo). The facts of this case support the district court's finding that the gang had the capacity to harm jurors, but the district court also had other evidence to support its conclusion, including Menendez-Cordero's discussion of a murder from another jurisdiction with a known MS-13 associate. *See* RA at 3-4. The record demonstrates the gang celebrated violence and had the capacity to harm jurors. *See e.g.* 1 JA at 64-65, 79; 8 JA at 1361-1362.

Third, the district court found that Menendez-Cordero's statements showed a history or likelihood of obstructing justice or having others obstruct justice on his own behalf. 2 JA at 298. The record supports this conclusion. Menendez-Cordero attempted to interfere with the judicial process in this very case. *See* 2 JA 262-272 (discussing the August 2017 I-Web and jail call concerning sending a message to Elder Rodriguez); *See*

also RA at 1-5, 33-34. Menendez-Cordero provided discovery to his associates. 2 JA at 262-272. He also told his associates to send a message to Elder Rodriguez because if he did not show up it would change the outcome of the case. *Id*. at 268-269. The record reveals that Menendez-Cordero's concerning conversations with known MS-13 members continued until right before trial. *See* RA at 32-37. Thus, it is evident that Menendez-Cordero was not concerned about the integrity of the trial process and he could have easily contacted jurors through his MS-13 associates if he was given their identifying information.

Fourth, the district court found that Menendez-Cordero was facing two lengthy prison sentences. *Id*. at 298. In fact, Menendez-Cordero received the maximum sentence he faced—two consecutive terms of life without the possibility of parole, with the deadly weapon enhancements on each count. *See* 1 JA at 251-252 (Judgement of Conviction).

Fifth, the district court found that while there had not been much pretrial publicity, there was a front-page article in the paper the day trial was set to begin. 2 JA at 298. The record reveals that there was a media presence in the courtroom during trial as well. *See* 3 JA 534-535 (where the court addresses media members and reminds them that they have to refrain from videotaping the jurors and witnesses). Thus, the district

court's concern about media coverage and the potential that it would subject jurors to intimidation and harassment was reasonable.

In summary, it is evident that the five factors discussed in *Shryock* were met in this case. *See* 342 F.3d at 971. In addition, the totality of the circumstances in this case support the district court's conclusion that anonymity was necessary to ensure the jury could perform their fact-finding function and to protect the jury from interference. Thus, the first prong of *Shryock* was satisfied. *See id.*

The second consideration from *Shryock* is whether the district court adopted reasonable safeguards to minimize any risk of infringement upon Menendez-Cordero's fundamental rights. *See id.* Contrary to Menendez-Cordero's assertion, the district court did tell the jury that it was being identified by number to avoid media harassment. 3 JA at 387-388. As such, the concern over whether the jurors would attribute their anonymity to the dangerousness of Menendez-Cordero was eliminated. The district court's instruction alone would satisfy the second factor discussed in *Shryock*. *See* 342 F.3d at 972-973 (citing *United States v. Darden*, 70 F.3d 1507, 1533 (8th Cir. 1995), approvingly for the proposition that a district court takes reasonable precautions to ensure there is no undue prejudice to

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a defendant when the venirepersons are told they are being identified by number so the media cannot ask them questions).

In addition, the district court took other steps to ensure Menendez-Cordero's fundamental rights were not impacted in this case. Initially, with respect to the actual questionnaires, the district court limited the redactions to specific identifying information only. As the district court noted, the redactions put the parties on an even playing field because it prevented the State from running background checks on the jurors.

More importantly, though, the district court did not place a limitation on Menendez-Cordero's counsel's ability to conduct a thorough voir dire. Indeed, Menendez-Cordero's counsel questioned the panel for a number of hours. *Id*. at 485 (where Menendez-Cordero's counsel thanked the panel for "sharing a couple hours."); *see generally id.* at 436-485. During that time, counsel did not object, and never articulated how the redactions impacted her ability to perform voir dire. *See id.* The record suggests that counsel was not hampered by the redactions because she was able to formulate specific pointed questions based on the information included on redacted questionnaires. *See id.* at 456-473 (where counsel discussed answers on their questionnaires about relatives in law enforcement, occupations, and involvement in lawsuits). The record also suggests that

counsel was satisfied with the information she gathered from the panel, since she concluded questioning on her own accord. *See id*. at 485. The parties' voir dire process took almost an entire day. The district court did not rush either party or otherwise prompt them to conclude questioning before they were satisfied with the panel. *See generally id*. at 382-527. Therefore, the second *Shryock* factor is satisfied because the district court took several precautions to avoid infringing on Menendez-Cordero's fundamental rights. *See* 342 F.3d at 972-973.

Further, to the extent Menendez-Cordero contends that the timing of the district court's decision and its sua sponte nature entitle him to relief, his arguments are misplaced. While Menendez-Cordero is critical of the fact that the district court appeared to have already decided to empanel an anonymous jury on September 19, 2017, that date should not inform this Court's analysis. *See Shryock*, 342 F.3d at 971 ("In determining whether the district court abused its discretion, we may consider evidence available at the time the district court empaneled the anonymous jury, *and all relevant evidence introduced at trial.*") (*emphasis added*). As discussed above, the record reveals that the district court had ample evidence

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demonstrating the necessity of anonymity in this case.[6]

Moreover, an anonymous jury may be empaneled sua sponte. In *Shryock*, the defendant also challenged the district court's sua sponte decision to empanel an anonymous jury. 342 F.3d at 971. In rejecting the defendant's argument, the Ninth Circuit reasoned that "[b]ecause the purpose of an anonymous jury is to protect that jury and the integrity of the justice system, and is permissible so long as the district court takes reasonable precautions to safeguard the defendants' rights, no principle would distinguish an order to empanel an anonymous jury made sua sponte from one based on a party's motion." Therefore, the district court did not

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[6] While the date does not matter, the district court knew a significant amount of the information to support its decision on September 19, 2017. By that time, it had already issued an Order precluding the disclosure of discovery and protecting witness. RA at 30-31. In doing so, the district court considered evidence of Menendez-Cordero's attempt to threaten or dissuade a critical witness in this case from testifying—specifically the August 30, 2017 I-Web visit where Menendez-Cordero discussed sending a "message" to Elder Rodriguez, who took Menendez-Cordero to the party. The underlying motion offered by the State also included evidence that Menendez-Cordero shared discovery with known MS-13 members and even discussed a murder in Daily City with a known MS-13 associate. This information revealed that Menendez-Cordero was attempting to interfere with the truth finding function of the court and the trial process. As such, by September 19, 2017, the district court had enough information before it to conclude that an anonymous jury was necessary to avoid juror interference.

abuse its discretion when it sua sponte empaneled an anonymous jury in this case.

B. The District Court Did Not Abuse its Discretion When it Admitted Menendez-Cordero's Threatening Statements as Evidence of His Consciousness of Guilt

1. Factual and Procedural Background

Before trial, the State filed a pretrial motion to introduce evidence of Menendez-Cordero's consciousness of guilt. The motion indicated the State's intent to offer the threats Menendez-Cordero made in the August 30, 2017 I-Web visit, discussed above, and from a follow up jail call on August 31, 2017, regarding Elder Rodriguez, the State's witness that drove Menendez-Cordero to the party where the murders occurred. 1 JA at 4-9. Menendez-Cordero opposed the State's motion and argued that the evidence was improper bad act evidence. *Id*. at 10-16.

The district court heard evidence and argument on the matter during the morning of October 2, 2017. 2 JA at 255- 287. The district court ordered that the statements would be admitted and asked Menendez-Cordero's counsel to prepare a cautionary instruction. *Id*. at 286-287. The court recognized that in some cases consciousness of guilt evidence could appear to relieve the State of its burden of proof, but reasoned:

> However, in this particular case, the statements made by the defendant are clear and not subject to any ambiguity. There has

> been, according to Agent Freestone, requests by the defendant to his confederates to send a message to jefita, the boss, the wife, that this ship could be killed easily, could be broken, which Agent Freestone interpreted as being killed.
>
> The other statement that the defendant said is that, quote, if he doesn't show up, it could change the play, interpreted by Agent Freestone meaning that the jury may not convict Mr. Menendez-Cordero should Mr. Elder Rodriguez not show up.
>
> And the third statement by the defendant to Bertha Arias in which he said, quote, remind these guys to send a message, close quote. Under any analysis the threats have been proven by clear and convincing evidence, they are more probative than prejudicial, and they are relevant to the identity of the individual who shot the victims in this case, and therefore, the Court will admit those three statements.
>
> Though I would like to have the defense provide me a proposed advisory jury instruction.

Id.

Prior to Agent Freestone's testimony at trial, the district court discussed a potential advisory instruction with counsel. *See* 4 JA at 669-670 (reminding counsel to submit an advisory instruction); 7 JA at 1291-1292 (confirming that what Menendez Cordero's counsel submitted would be read before the testimony). The district court read a combination of instructions submitted by Menendez-Cordero to the jury. 8 JA at 1331-1332. The relevant portion of the instruction included general and specific language to caution the jury on how to view Agent Freestone's testimony. *Id*. Generally, it recognized that the evidence may show that Menendez-

Cordero committed acts other than the ones he was on trial for, but that the jury could not consider any of the testimony to prove that he was a person of bad character or has a disposition to commit crimes. *Id*. The specific portion of the instruction addressed the gang evidence and motive. *Id.*

Agent Freestone's trial testimony concerning the content of the I-Web visit and the jail call was consistent with his pretrial testimony. *Compare id*. at 1362-1377 *with* 2 JA at 255-278. He testified that in the August 30, 2017 I-Web, Menendez-Cordero spoke with a woman named Bertha Arias and multiple males in Spanish. He provided the males with a phone number and asked the men to write it down. 8 JA at 1365-1372. Menendez-Cordero asked the men to buy a "brain" (a slang term for cell phone) and to tell the individual with the phone number not to arrive on the day that he was going to show up in front of the "main man" (meaning judge). *Id*. at 1370-1371. Menendez-Cordero told the men to give the guy the message that if he does show up, his female boss (meaning girlfriend, wife, or mother, depending on interpretation) could be broken in an instant (meaning killed). *Id*. at 1373. Menendez-Cordero told the men that this "son of a bitch" could change the outcome of trial. *Id*. at 1373. The August 31, 2017 jail call at issue was with Bertha Arias and was also in Spanish. *Id.* at 1374-1377. Menendez-Cordero told Bertha Arias to "remind those guys,"

but was interrupted at first. *Id*. at 1377. Menendez-Cordero ultimately told her to "remind them to send that message to that guy."[7] *Id*. Agent Freestone's interpretation of the statements in the August 30, 2017 I-Web and the August 31, 2017 jail call were uncontroverted at trial. *See* 8 JA at 1362-1377, 1385-1403.

2. Standard of Review and Discussion

The district court did not abuse its discretion when it decided to admit the threats against Elder Rodriguez as evidence of Menendez-Cordero's consciousness of guilt. "The decision to admit or exclude evidence, after balancing the prejudice to the defendant with the probative value, is within the discretion of the trial judge." *Kazalyn v. State*, 108 Nev 67, 71-72, 825 p.2d 578, 581 (1992) (overruled on other grounds in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000)) (citations omitted). A trial court's evaluation of the probative value and potential prejudice of evidence

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[7] Prior to testifying about the I-Web visit and the jail call at trial, Agent Freestone testified about his training and experience with the MS-13 gang and their culture. *See id*. at 1332-1362. Agent Freestone discussed gang culture concerning respect and obtaining tattoos, as well as how MS-13 members react to disrespect. *Id*. Agent Freestone provided specific context for Menendez-Cordero's MS-13 related tattoos. *Id*. This testimony was admitted pursuant to the State's prior bad act motion to show motive in this case. *See* 1 JA at 100-101.

"will not be reversed unless it is manifestly erroneous." *Lucas v. State*, 96 Nev. 428, 432-433, 610 P.2d 727, 730 (1980); *see also Holms v. State*, 129 Nev. 567, 571-572, 306 P.3d 415, 418 (2013).

As the Nevada Supreme Court recognized in *Evens v. State*, "[e]vidence that a defendant threatened a witness after a crime is directly relevant to the question of guilt and is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission." 117 Nev. 609, 628, 28 P.3d 498, 512 (2001). Thus, Menendez-Cordero's reliance on cases concerning the admission of bad act evidence is misplaced. *See* OB at 30.

Menendez-Cordero argues the statements were inadmissible because the threats were not actually communicated to Elder Rodriguez. Yet, in Nevada, the admissibility of consciousness of guilt evidence does not depend on the actual communication of a threat to the intended recipient. In *Abram v. State*, the defendant made threatening statements about a State's witness to a fellow inmate—indicating that he was "going to get to" the witness and her child for turning State's evidence. 95 Nev. 352, 356, 594 P.2d 1143, 1145. The statements were not communicated to the witness. *Id.* The district court recognized that the threats were highly inflammatory, and were not communicated to her, but admitted the

statements as evidence of consciousness of guilt. *Id*. The Court recognized that the statements were clearly relevant to guilt. *Id*. at 356-357, 1145. The Nevada Supreme Court determined the district court did not abuse its discretion, after reviewing the district court's decision in light of the balancing test in NRS 48.045. *Id*. Thus, it is of no consequence that the threats were not communicated to Elder Rodriguez in this case. The threats became relevant the second they were made.

Menendez-Cordero argues that the district court's decision to admit his threats cannot withstand this court's (highly deferential) scrutiny for three main reasons: (1) the relevance and probative value of the evidence was low in light of other evidence offered in the case, (2) the State offered the evidence for an improper purpose, (3) and the prejudicial nature of the highly volatile evidence was overwhelming. Menendez-Cordero's arguments are without merit.

Menendez-Cordero asserts that the State oversold the value and relevance of the evidence because other witnesses identified him as the shooter and placed him at the scene, so the evidence at best was cumulative. OB at 28-29. Initially, Menendez-Cordero's argument fails because the district court is not required to exclude a piece of evidence because it may be considered cumulative. Indeed, with respect to

cumulative evidence, NRS 48.035(2) simply provides the district court the discretion to exclude the "needless presentation of cumulative evidence." Assuming for the purpose of argument that the State's consciousness of guilt evidence was cumulative because it touched on the same issues as other admitted evidence, the evidence did not rise to the level of "needless" simply because other evidence tended to show that Menendez-Cordero was the shooter. The threats were relevant because they had the tendency to prove guilt—i.e. Menendez-Cordero would not have made threats if he was not involved in the murders. *See* NRS 48.015. While witnesses placed Menendez-Cordero at the scene, he told police that he was not in Nevada at the time of the murders. *See* 7 JA at 1281. His threats indicate otherwise. They are also statements from his own mouth, as opposed to witness testimony that could be called into question through cross-examination. As such, the probative value of the threats was extremely high. *See United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995) (indicating that consciousness of guilt evidence in the form of threats is "second only to a confession in terms of probative value.").

Menendez-Cordero's next contention that the State admitted the evidence for an improper purpose is equally without merit. *See* OB 29-30. Menendez-Cordero asserts that the State's nefarious motive was evident

because the State argued admission of the evidence under NRS 48.045, as well as consciousness of guilt, and the State had already admitted MS-13 gang evidence in the case.[8] The record reveals that the State only argued for admission of the threats under NRS 48.045 out of "an abundance of caution," since Menendez-Cordero asserted that the threats were subject to such an analysis. *Compare id*. at 10-17 (Opposition) *with id*. at 132 (Reply).[9]

Further, the record does not support Menendez-Cordero's assertion that the State only admitted the threat evidence to encourage the jury to conclude that he is a bad person. Indeed, the record reveals that the State was careful in how it used the evidence at trial. *See* 1 JA 4-9; 9 JA 1535-1536. The State presented evidence on the issue and sought a pretrial ruling on its admissibility, even thought it was not required to do so. *See Evens*, 117 Nev. at 628, 28 P.3d at 512. In addition, during its closing

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[8] Menendez-Cordero does not challenge the district court's decision to admit the gang evidence as evidence of his motive in this case. Instead, he points to the admission of gang evidence to support his theory that the State only admitted his threats to "reinforce to the jury that [he] is a bad person." OB 29, n. 12.

[9] Even on appeal, Menendez-Cordero refers to the consciousness of guilt evidence as "uncharged prior bad act evidence" (OB at 3) and relies on cases addressing prior bad acts. These actions continue to demonstrate why the State offered the evidence under a consciousness of guilt theory, but also offered evidence outside the presence of the jury to satisfy *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-508 (1985).

argument the State simply discussed the threats and said, "[a]sk yourself why would this defendant make those threats in this case if he is not the person that did it?" *Id.* at 1536. Thus, the State was well within its ethical bounds when, after receiving a pretrial ruling on the matter, it offered the evidence during trial.

Finally, this Court should reject Menendez-Cordero's argument that the evidence was highly volatile and that "the prejudicial effect far outweighed its probative value." NRS 48.035(1) provides that relevant evidence must be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice...." As this Court previously recognized, "[a]ll evidence offered by the prosecutor is prejudicial to the defendant, there would be no point in offering it if it were not." *See Holmes v. State*, 129 Nev. 567, 575, 306 P.3d 415, 420 (2013). Evidence is only "unfairly prejudicial" if it encourages a jury to convict on an improper basis. *Id*. (citations omitted). In this case, the threat evidence was extremely probative, particularly when Menendez-Cordero told police that he was not in the area at the time of the murders. *See* 7 JA 1280-1281. The State offered the threat evidence through Agent Freestone's testimony. Prior to

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his testimony, the court read a limiting instruction to the jury.[10] Thus, the prejudicial nature of the evidence in this case was limited because the district court instructed the jury not to consider the evidence to prove Menendez-Cordero was a bad person. *See Holmes*, 129 Nev. at 575, 306 P.3d at 420; *see also Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) (recognizing that the Court presumes the jurors followed the jury instructions). As such, the district court did not abuse its discretion when it admitted the threats as evidence of Menendez-Cordero's consciousness of guilt because the probative value of the evidence was extremely high and the district court limited the potential that the evidence could be used for an improper purpose. *See Holmes*, 129 Nev. at 575, 306 P.3d at 420 (citing *Shlotfeldt v. Hosp. of Las Vegas*, 112 Nev. 42, 46, 910 P.2d 271, 273 (1996), approvingly for the proposition that the "substantially outweigh" requirement favors admissibility).

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[10] The court repeatedly reminded Menendez-Cordero's counsel of its option to provide an advisory instruction specifically concerning the consciousness of guilt evidence. The district court ultimately provided the instruction offered by Menendez-Cordero. The limiting instruction specifically addressed gang evidence and motive. However, the instruction also generally advised the jury that none of Agent Freestone's testimony could be considered as evidence that Menendez-Cordero was a person of bad character or had a disposition to commit crimes. 8 JA at 1331-1332.

C. The District Court Did Not Abuse its Discretion When it Rejected Menendez-Cordero's Proposed Penalty Instruction on the Deadly Weapon Enhancement

1. Factual and Procedural Background

The district court settled penalty phase instructions while the jury was deliberating on the guilt phase portion of the trial. 9 JA 1563- 1574. Menendez-Cordero offered an instruction that discussed the potential penalties associated with the deadly weapon enhancement, as well as Nevada's truth in sentencing laws. 1 JA at 248. The proposed instruction indicated that the enhancement provided a consecutive one to twenty-year sentence and stated 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." *Id*. The instruction indicated that Menendez-Cordero would have to serve 365 days for every year he was sentenced. *Id*. It also provided, "[t]he defendant will not be given a reduction in his sentence for 'good time' credits or 'work time' credits." *Id*. Menendez-Cordero did not offer any legal support for his proposed instruction. *See id*.; *see also* 9 JA at 1565-1567, 1571-1573.

The State objected to the instruction and offered to alter its primary penalty instruction to indicate that the deadly weapon enhancement would be dealt with by the court at another time. 9 JA at 1565-1566. The district

court decided to give the modified instruction that was offered by the State. *Id.* at 1566-1567; 1 JA 241. The instruction the district court gave read as follows:

> You have found the defendant in this case to be guilty of Murder in the First Degree. Therefore, under the law of this state, you must determine the sentence to be imposed upon the defendant.
>
> First Degree Murder is punishable by imprisonment in the Nevada State Department of Corrections for:
>
> 1) life with the possibility of parole; or
> 2) life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or
> 3) a term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.
>
> The Sentence for the deadly weapon enhancement will be determined by the court at a later date.
>
> 1 JA 241.

The district court indicated it rejected Menendez-Cordero's instruction because the sentence for the deadly weapon was outside the province of the jury. The district court also reasoned that it would not discuss penalty for another crime if it was charged in addition to the murder, such as burglary. *Id.* at 1567-1568, 1573. The district court concluded that the proposed instruction was not a complete statement of law and was confusing and unnecessary. *Id.* at 1573.

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2. Standard of Review and Discussion

The district court did not abuse its discretion when it rejected Menendez-Cordero's proposed instruction. This Court reviews a district court's refusal to give a jury instruction for abuse of discretion or judicial error. *See e.g. Dunham v. State*, 134 Nev. Adv. Op. 68, 426 P.3d 11 (2018). "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, 121 P.3d 582 (2005) (citation omitted). The defense "is not entitled to instructions that are misleading, inaccurate, or duplicitous." *Dunham*, 134 Nev. Adv. Op. 68, 426 P.3d at 13 (citing *Crawford*, 121 Nev. at 754, 121 P.3d at 589).

In Nevada, a jury is not permitted to sentence a defendant to the additional penalty for a deadly weapon. *See* NRS 193.165 (repeatedly referring to "the court" when discussing the additional penalty for a deadly weapon). The district court advised the jury that the sentence for the deadly weapon enhancement would be addressed by the court at a later time. *See* 1 JA at 241. As such, the district court's instruction was clear and consistent with Nevada law.

Menendez-Cordero relies on *Dean v. United States*, 581 U.S. __, 137 S.Ct. 1170 (2017), to argue that a jury should be able to consider the effect

of the sentencing enhancements when it considers an individual sentence. As Menendez-Cordero acknowledges, the *Dean* case involved a sentencing court, not a jury. OB at 34. As such, it is inapplicable to the case at hand. Further, the instruction offered by Menendez-Cordero is more consistent with argument than a neutral statement of law. Indeed, the proposed instruction highlighted the severity of Menendez-Cordero's potential sentence on a matter outside the jury's discretion. It also asserted that Menendez-Cordero would have to serve every day of that time, which suggested that the jury should sentence him less harshly for murder because the enhancement would punish him severely. Finally, the instruction offered by Menendez-Cordero was misleading and confusing because it indicated that he could not receive *any* future credit on his sentence; however, NRS 209.4465 provides otherwise.[11] Thus, the district court correctly concluded that the instruction was not a complete statement of law and was confusing and unnecessary. Therefore, the district court acted well within its discretion when it rejected the instruction. *See Dunham*, 134 Nev. Adv. Op. 68, 426 P.3d at 13.

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[11] For example, pursuant to NRS 209.4465, Menendez-Cordero could receive credit on the top end of the term of year's sentence.

VI. CONCLUSION

The district court did not abuse its discretion with respect to any of Menendez-Cordero's three assigned errors. This case should not be remanded for a new trial or sentencing. The judgment of conviction should be affirmed.

DATED: October 17, 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 Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because it contains no more than 14,000 words (the brief contains 8,567 words).

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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 17, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 17, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Chief Deputy Public Defender

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