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 REPLY BRIEF

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Anonymous jury

In *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 221 P.3d 1240 (2009), this Court was asked to determine whether juror questionnaires used in jury selection are subject to public disclosure. This Court concluded that "juror questionnaires used in jury selection are, like the jury-selection process itself, subject to public disclosure." 125 Nev. at 855, 221 P.3d at 1245. This "presumption of openness" can be overcome, this Court said, "only if the district court identifies a countervailing interest to public access and demonstrates, by specific findings, that closure *is necessary* and *narrowly tailored* to serve a higher interest." *Id.* (italics added). Although writing in the context of the public right of access to criminal proceedings, the Court's approach in *Stephens Media* provides a framework for the cautious use of an anonymous jury in criminal trials.

In *Stephens Media* this Court extended the recognized presumption of openness applicable to voir dire proceedings to preliminary juror questionnaires; agreeing with the Ohio Supreme Court "that because juror questionnaires merely facilitate and expedite

oral voir dire, they are a part of the overall voir dire process and presumed to be accessible as part of the criminal proceeding." 125 Nev. at 861, 221 P.3d at 1249 (citation omitted). This Court added:

> [j]uror questionnaires perform a valuable function in the jury selection process by expediting and assisting a district court's voir dire. Moreover, the use of juror questionnaires does not implicate a separate and distinct proceeding. Rather, use of the questionnaire is merely a part of the overall voir dire process, subject to public access and the same qualified limitations as applied to oral voir dire.

Id. The "public right of access to criminal proceedings is not absolute," and the presumption of openness can be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 125 Nev. 861-62, 221 P.3d at 1249 (internal quotation marks omitted). In *Stephens Media*, this Court adopted the following balancing test:

> a district court may refuse access to juror questionnaires only after it (1) make[s] specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the questionnaires and (2) consider[s] whether alternatives to total suppression of the questionnaires would have protected the interest of the accused. The district court's order *must not be broader than necessary, rather it must be*

narrowly tailored to protect the defendant's fair trial rights.

125 Nev. at 862-63, 221 P.3d at 1250 (italics added, internal quotation marks and citations omitted, alterations in the original). The first prong requires a district court to "articulate the overriding interest at stake and detail specific findings to support the limitation of access to criminal proceedings and court documents." 125 Nev. at 863, 221 P.3d at 1250. The second prong requires a district court to consider "alternative methods of protecting a defendant's fair trial rights before ordering complete suppression of the questionnaires." 125 Nev. at 866, 221 P.3d at 1252.

Using *Stephens Media* as a guide, for the purpose of an anonymous jury a district court must be required to articulate the overriding interest at stake and detail specific findings to support the limitation of a defendant's access to his or her juror questionnaires. Additionally, the district court must be required to consider alternative methods of protecting that interest apart from complete suppression of the juror questionnaires. That is, any limitation on the production of the juror questionnaires must be narrowly tailored to the circumstances giving rise to the concern for an anonymous jury.

Here, as noted in the opening brief, the district court did not detail specific findings to support complete suppression of the juror questionnaires. Rather the district court rested its order on unsupported conjecture, *i.e.*, MS-13 has a pattern of violence, "which *could* cause a juror reasonable fear of his or her own safety," and "based on the defendant's tattoos that he is involved with the MS-13 gang, which has the capacity to harm jurors," and one fact: the defendant was facing "two lengthy prison sentences should he be convicted." Appellant's Opening Brief at 18-19, 24-25. While the latter fact is true, the first two claims assert nothing more than inchoate risk.

The State answers that the district court's ruling is supported by events resulting in pretrial rulings limiting Mr. Menendez-Cordero's contact with civilian witnesses. Respondent's Answering Brief (RAB) at 5-8. But even if the district court's "findings" in this case satisfy the first prong, the district court's failure to even consider alternative methods apart from complete suppression of the juror questionnaires as required as a second prong is error. One alternative that was available to the district court for example, should suffice. Just as the district court entered an order limiting Mr. Menendez-Cordero's contact to only

his attorneys, the court could have ordered counsel to use the juror questionnaires in voir dire and to not share them with Mr. Menendez-Cordero. Such an approach would have honored the presumption of openness and would have allowed Mr. Menendez-Cordero's counsel the ability to conduct voir dire and to exercise meaningful peremptory challenges.

In *In re Baltimore Sun Company*, 841 F.2d 74, 75 (4th Cir. 1988), the appellate court noted that "[w]hen the jury system grew up with juries of the vicinage, everybody knew everybody on the jury ... . So, everyone can see and know everyone who is stricken from a venire list or otherwise does not serve." Accordingly, empaneling an anonymous jury has been described as "extreme," "a last resort," "drastic," and "unusual." See *United States v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002), *United States v. Edwards*, 303 F.3d 606, 613 (5th Cir. 2002), *United States v. Sanchez*, 74 F.3d 562, 564 (5th Cir. 1996), and *United States v. Shyrock*, 342 F.3d 948, 971 (9th Cir. 2003), respectively. Thus, there must be "a strong reason for concluding that it is necessary [to use an anonymous jury] to enable the jury to perform its factfinding function, or to ensure juror protection." *Shyrock*, 342 F.3d at 971. Here

the district court's conjecture-based suppression of counsel's access to the juror questionnaires and failure to explore other alternatives to questionnaire suppression do not provide the necessary "strong reason" for using an anonymous jury; and the use of anonymous jury in this case was error sufficient to warrant a new trial.[1] See *Perez v. People*, 302 P.3d 222, 228 (Colo. 2013) (Bender, C.J., dissenting) ("[I]f jurors conflate anonymity with a criminal defendant's dangerousness, the right to a fair trial is eviscerated.") (internal quotation marks omitted, alteration in the original).

Bad act evidence / consciousness of guilt

In *Newman v. State*, 129 Nev. 222, 230, 298 P.3d 1171, 1178 (2013), this Court reminded the bench and bar that "while evidence of

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[1] In its answering brief the State offers that since it also did not have access to juror questionnaires that fact somehow "leveled the playing field" because it precluded the State's normal "background check" on potential jurors. RAB at 11. Whether or not the district court's order leveled the playing field as between the State and defense counsel is not relevant and should not distract this Court's attention from the issue at hand. Similarly, the State seeks to draw the Court's attention away from the issue presented by asserting that defense counsel did not continue to object during jury selection. RAB at 12, 13, 21-22. Prior to trial defense counsel objected to the use of anonymous jury; the objections were denied. Counsel is not obligated to "lodge futile objections[.]" *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (citing *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)).

other crimes, wrongs or acts may be admitted ... for a relevant nonpropensity purpose, [t]he use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the defendant to defend against vague and unsubstantiated charges." (internal quotation marks and citations omitted, ellipsis and alterations in the original). "Identification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step ... ." *Id.* 129 Nev. at 231, 298 P.3d at 1178. On appeal the State offers that "[a]ll evidence offered by the prosecutor is prejudicial to the defendant[,]" RAB at 32 (quoting *Holmes v. State*, 129 Nev. 567, 575, 306 P.3d 415, 420 (2013) (internal quotation marks omitted, alteration in the original), and asserts that the prior bad act evidence here was probative because "Menendez-Cordero told the police that he was not in the area at the time of the murders." *Id.*

If indeed this was the "at-issue nonpropsenity purpose for the evidence, the bulk of the evidence presented to the jury was not relevant, but highly purposed toward propensity. *Cf. Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1249-50 (2012) (modifying "the first

factor in *Tinch* [v. State, 113 Nev. 1170, 946 P.2d 1061 (1997)] to reflect the narrow limits of general exclusion"). And calling this "consciousness of guilt" evidence does not immunize its "propensity" character. *Cf. Sessoms v. Grounds*, 776 F.3d 615, 617 (9th Cir. 2015) ("An American poet wrote more than 100 years ago: 'When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.'").

Rejected jury instruction

Mr. Menendez-Cordero agrees with the State that he is not entitled to a "misleading, inaccurate, or duplicitous" jury instruction. See RAB at 36 (quoting *Dunham v. State*, 134 Nev. Adv. Op. 68, 426 P.3d 11, 13 (2018)). The State fails however to demonstrate that the jury instruction offered by him and rejected by the district court was either misleading, inaccurate, or duplicitous. While a jury is not entitled to sentence for a weapon enhancement it must make the necessary factual findings in order for the weapon enhancement to apply. And, in any event, Mr. Menendez-Cordero was not asking for the jury to sentence him on a weapons enhancement.

The State does not address the legal principle drawn from *Dean v. United States*, 581 U.S. ____, 137 S. Ct. 1170, 1174-77 (2017)—that a sentencer need not ignore the effect of sentencing enhancements when considering a sentence on a primary offense—except to attempt to draw a distinction based on the composition of the sentencer; *i.e.*, a court versus jury. RAB at 35-36. That distinction however is meaningless. Whether a sentence is imposed by a court or by a jury, it should be a rational, reasoned, and fact-based sentence. A sentence should not be made in ignorance. Accordingly, this Court should embrace the logic announced in *Dean* and remand for a new sentencing hearing.

CONCLUSION

For the reasons set forth above and in the Opening Brief, 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 26th day of November 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 2,143 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 26th day of November 2018.

/s/ John Reese Petty
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of November 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Marilee Cate, 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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