IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH JUNIOR BARLOW

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 77055

DEATH PENALTY CASE

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Douglas Herndon, District Judge
District Court No. C-13-290219-1

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction and two sentences of death, pursuant to jury verdicts. The jury convicted appellant Keith Barlow of two counts of first degree murder with use of a deadly weapon, and one count each of burglary while in possession of a firearm, home invasion while in possession of a deadly weapon, and assault with use of a deadly weapon. The judgment of conviction was filed on September 26, 2018. 17 ROA 3883. A timely notice of appeal was filed the same day. 17 ROA 3910. This Court has jurisdiction over this appeal under NRS 177.015 and NRS 177.055.

II. ROUTING STATEMENT

Pursuant to NRAP 17(a)(1), this death penalty case is assigned to the Nevada Supreme Court.

III. STATEMENT OF THE ISSUES

A. Whether the jury selection process was unconstitutional.

1. Whether the district court's limitations on voir dire deprived Keith of his right to an impartial jury in violation of Morgan v. Illinois.

2. Whether he district court violated Keith's rights by allowing the State to improperly challenge prospective jurors in violation of Batson v. Kentucky.

3. Whether the district court erroneously denied Keith's challenge for cause of a potential juror, resulting in a jury which was not impartial.

B. Whether significant errors during the culpability trial require the granting of a new trial.

1. Whether the district court abused its discretion by allowing an unqualified "expert" to provide testimony about tool mark analysis.

2. Whether the district court erroneously instructed the jury.

3. Whether there was pervasive prosecutorial misconduct in the culpability trial.

C. Whether significant errors during the penalty trial require the granting of a new trial.

1. Whether the aggravating circumstance of great risk of death is invalid.

2. Whether evidence in aggravation was admitted in violation of Keith's rights to cross-examination and confrontation.

3. Whether the State committed prosecutorial misconduct during the penalty phase of the trial.

4. Whether the district court refusal to allow a defense argument on a mandatory jury instruction, which was fully supported by long-standing Nevada law, evidenced a lack of knowledge of Nevada's death penalty scheme, and violated Keith's constitutional rights to a fair penalty trial.

D. Whether Nevada's death penalty is unconstitutional.

1. Whether Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty.

2. Whether the death penalty is cruel and unusual punishment.

3. Whether executive clemency is unavailable.

E. Whether the judgment should be vacated based upon cumulative error.

IV. STATEMENT OF THE CASE

On June 5, 2013, the State filed an Information charging Appellant Keith Barlow with two counts of first degree murder, and one count each of invasion of the home while in possession of a deadly weapon, burglary while in possession of a deadly weapon, assault with a deadly weapon, possession of a firearm by an ex-felon, unlawful possession of an electronic stun device, and attempt unlawful use of an electronic stun device. 1 ROA 59. Keith entered a plea of not guilty to the charges. 1 ROA 185.

On July 1, 2013, the State filed its Notice of Intent to Seek Death Penalty. 1 ROA 82. The State alleged aggravators of (1) prior violent felony (battery with use of a deadly weapon); (2) prior violent felony (attempt murder); (3) prior violent felony (assault with use of a deadly weapon); (4) great risk of death to more than one person; (5) felony murder (burglary or invasion of the home); and (6) multiple murders in this proceeding. 1 ROA 82. On May 31, 2018, the State filed its notice of evidence in aggravation. 7 ROA 1381.

In response to a pretrial petition for a writ of habeas corpus, the State announced that it did not intend to proceed on the charge of attempted unlawful use of an electronic stun device. 2 ROA 281, 298. The charge was dismissed. 2 ROA 317, 375. An Amended Information was filed on February 3, 2015. 2 ROA 356.

Prior to trial, the State informed the district court that it had offered Keith a negotiation of two counts of first degree murder with a stipulation of life with the possibility of parole on each count, and Keith had declined that negotiation. 6 ROA 1223. The offer was withdrawn prior to trial. 6 ROA 1223.

Trial began on June 18, 2018.[1] 7 ROA 1519. The jury was selected on June 22, 2018. 11 ROA 2325. On June 27, 2018, Keith filed objections to the State's proposed culpability phase jury instructions. 12 ROA 2756 - 13 ROA 2763. He also submitted proposed instructions. 13 ROA 2765.

The jury returned its verdicts for the culpability phase of the trial on June 28, 2018. 14 ROA 3210; 15 ROA 3284. The jury found Keith guilty of home invasion while in possession of a deadly weapon, burglary while in possession of a firearm, first degree murder with use of a deadly weapon (Woods), first degree murder with use of a deadly weapon (Cobb), and assault with a deadly weapon. 14 ROA 3210-13; 15 ROA 3285-88. Special verdicts for the murder counts noted the jury found Keith guilty of each count under both premeditated and felony-murder theories. 14 ROA 3211-12. The State dismissed Counts 6 and 7. 15 ROA 3290.

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[1]On the seventh day of trial, Keith had a medical issue involving glucose issues and very low blood pressure. The trial was briefly postponed and then resumed. 13 ROA 2770.

The jury's verdicts for the penalty phase were returned on July 6, 2018. 16 ROA 3633; 17 ROA 3828. The jury returned verdicts of death for both counts, and found for both counts the aggravators of prior violent felony (battery with a deadly weapon); prior violent felony (attempt murder); prior violent felony (assault with a deadly weapon in this case); great risk of death; felony murder based upon burglary or home invasion in this case; and conviction for more than one offense of murder in this case. 16 ROA 3640; 17 ROA 3828-31. The jury found the following mitigators: Keith served his country in the military and received an honorable discharge; his daughters love their father; and he sought help from the VA hospital and Southern Nevada Mental Health for his mental health issues. 16 ROA 3635-36; 17 ROA 3829-30. The jury did not find numerous other mitigating circumstances that were submitted by defense counsel, including mitigation concerning his difficult childhood. 16 ROA 3635-38.

The sentencing hearing took place on September 26, 2018. 17 ROA 3894. After hearing argument from counsel and objections concerning the PSI, the district court announced its sentencing decisions, as reflected by the judgment of conviction below. 17 ROA 3894-3904.

The judgment of conviction was filed on September 26, 2018. 17 ROA 3883. The district court sentenced Keith to serve a term of 72 to 180 months for count 1; a

concurrent term of 72 to 180 months for count 2; a term of death, with a consecutive term of 8 to 20 years for a deadly weapon enhancement on count 3, to be served consecutively to count 2; a term of death, with a consecutive term of 8 to 20 years for a deadly weapon enhancement on count 4, to be served consecutively to count 3, a term of 28 to 72 months for count 5 to be served concurrently to count 4. He was given 2,033 days credit for time served. 17 ROA 3883-86. A warrant of execution, and an order of execution, were filed on September 26, 2018. 17 ROA 3887, 3891. An order staying execution was filed the same day. 17 ROA 3892.

The clerk filed its Notice of Appeal on September 26, 2018. 17 ROA 3906. Keith filed his Notice of Appeal the same day. 17 ROA 3910.

V. STATEMENT OF THE FACTS

The State charged Keith Barlow with two counts of first-degree murder and other offenses. Its theory at trial was that on February 2, 2013, Keith confronted his former girlfriend, Danielle Woods, and her new boyfriend, Donnie Cobb, at Donnie's apartment at 2140 South Paradise, in Las Vegas, early in the morning, and that he later that day returned to the apartment and shot them both, resulting in their deaths. 11 ROA 2509. Keith entered a plea of not guilty to all of the charges.

On February 2, 2014, at 6:52 a.m., a 911 operator received a call from Danielle. 12 ROA 2572-73; 33 ROA 7257 (noting Exhibit 186 - DVD of 911 call). Officers

arrived at her apartment shortly after the 911 call. 12 ROA 2572 (Officer Dewreeds); 12 ROA 2604 (Officer Perkett). When contacted at the front gate of the apartment complex, Danielle seemed nervous, scared, shaky, and was breathing heavily. 12 ROA 2574, 2609. Donnie would not leave his apartment. He was upset, angry and fearful. 12 ROA 2575.[2]

Officers took reports from Danielle and Donnie. Danielle told them that she was walking back from 7-Eleven when Keith confronted her, tried to grab her, and said she was leaving with him. 12 ROA 2576, 2609. She said there was a scuffle and that he was trying to take her away. Danielle said Keith took out a taser and pushed it on her neck as he was forcing her towards his car.[3] 12 ROA 2576, 2610. The stun gun was not activated. 12 ROA 2635. Donnie heard the commotion and came out to see what was happening. 12 ROA 2576. The officers testified that Danielle reported that Keith pulled a gun on Donnie, racked a round into the chamber, pointed at him, and made a verbal threat. 12 ROA 2576, 2611. She stated that a security guard from

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[2]Office Dewreeds did not document anything about the demeanor of Danielle or Donnie. The official report was authored by Officer Smith. Dewreeds did not have the ability to write a supplemental report. 12 ROA 2580. He did not document anything that was said by Danielle or Donnie. 12 ROA 2581. He sent an email to a former prosecutor about his recollections. 12 ROA 2602.

[3]An officer noted in his report that the neck injury could have been older and not connected to this call. He also reported "calm" and "in fear" in the place on his report for "demeanor." 12 ROA 2635.

across the street yelled over at them, and then Keith ran back to his car and drove off. 12 ROA 2576. Officer Perkett reported that Danielle said Keith said he would be back later. 12 ROA 2611. Donnie also gave a statement and his story was consistent with Danielle's. 12 ROA 2578. Danielle provided officers with Keith's address and efforts were made to contact Keith there. 12 ROA 2577. A description of Keith's clothing and vehicle was announced on the police radio so other units could look for him and his vehicle.[4] 12 ROA 2612. Danielle said Keith was wearing a tan plaid flannel jacket. 12 ROA 2633-34.

After the police left, Danielle called her sister Elise Richards. 12 ROA 2533. Danielle was upset and a little scared, but she was not crying. 12 ROA 2533. Danielle said that Keith tased her, she started screaming and yelling, and people came out of nearby businesses to help her. She said that Keith pulled a gun on Donnie and Keith said that he was going to kill her.[5] 12 ROA 2534.

At about 8:30 a.m., Danielle called her niece Tamara Herron. 12 ROA 2550. Danielle sounded scared and fearful, and said that while she was returning from 7-

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[4]It was the end of the shift for Dewreeds and Perkett, so other officers took over and continued the investigation. 12 ROA 2614. Perkett had the ability to write his own report, but did not do so. 12 ROA 2617.

[5]Defense counsel renewed their objection to this testimony on hearsay and Crawford grounds, 12 ROA 2535. The court noted the continuing objection. 12 ROA 2536.

Eleven, Keith pulled up his car and tried to force her into the car with a stun gun. She said she started screaming, Donnie came out, and Keith pulled a pistol on Donnie. 12 ROA 2551. Tamara told Danielle to call the cops and she said she did. 12 ROA 2552.

After the initial incident, Officer Smith responded to the scene and then returned to the police station to write a report about the confrontation. 12 ROA 2619-20, 2624. He received a call from dispatch saying that there were shots fired at the same location. 12 ROA 2624. He arrived at the apartment complex, which was a short distance away, at around 9:15 a.m. 12 ROA 2625. He tried to call Danielle and Donnie, but they did not answer their phones. 12 ROA 2626. Officers eventually responded to Apartment 203. 12 ROA 2627. They found that the apartment door was slightly cracked and there was damage to the door jam. 12 ROA 2627. Smith had not noticed the damage during his earlier visit to the apartment. 12 ROA 2627. Officers went inside and discovered two deceased persons inside. 12 ROA 2628. Smith recognized the people as Danielle and Donnie. 12 ROA 2631.

Latanya Dabbs, who lived in the same apartment complex, testified that a little before 9:00 a.m., while taking her trash to the dumpster, she heard a sound and thought someone had just kicked in a door. 12 ROA 2642. She saw an African-American man going down the steps. 12 ROA 2642-43. He walked out the front gate of the apartment complex. 12 ROA 2642. She thought he was wearing a plaid jacket.

12 ROA 2643. She looked for a door that had been kicked in, but did not see one. 12 ROA 2645. In her statement to the police, she said that the man was going up the stairs. 12 ROA 2647. She could not remember it at the time of trial. 12 ROA 2647. In her statement, she said the jacket was multi-colored with red specks. 12 ROA 2651. After the police arrived, she found out about the shooting and told officers what she saw. 12 ROA 2645.

Crime scene analysts processed the apartment. 12 ROA 2655, 13 ROA 2897; 18 ROA 3923 (diagram). There was a partial footwear impression on the door and there was damage to the frame. 12 ROA 2664, 2694; 13 ROA 2923, 2930. Paperwork, including an eviction notice, belonging to Donnie was found in the apartment. 12 ROA 2665-66, 2689. A table was kicked over. 12 ROA 2666. Danielle's purse and other items of value were found inside. 12 ROA 2667. The apartment had not been ransacked. 12 ROA 2668.

Two bodies were found in the living room. 12 ROA 2668. Donnie was on the couch. 12 ROA 2669. He had an ashtray in his left hand and a cigarette lighter in his right hand. Danielle was in a sitting position between the chair and the couch with her legs crossed. Her arms were up around her shoulders and her head, leaning onto the chair and her shoulder. She did not have anything in her hands. 12 ROA 2670. She had an injury to her front left forehead. 12 ROA 2671.

Eight expended shells were found inside the apartment. 12 ROA 2666, 2668-69, 2671, 2689-95. All had a headstamp of Blazer .40 Smith and Wesson. 12 ROA 2687. Two bullets traveled through the wall into a neighboring apartment and then out the window of that apartment. 12 ROA 2690.

Video clips were recovered from a nearby massage parlor which had a motion sensor video recorder. 13 ROA 2787. The video showed a person walking northbound on the westside sidewalk of Paradise at 8:57 a.m. 13 ROA 2787. The video did not depict anyone who was recognizable. 13 ROA 2788.

Dr. Roquero testified that he was not the medical examiner who conducted the autopsy, but he reached an opinion about the cause of death for Donnie and Danielle after reviewing the autopsy records. 13 ROA 2872-74. Photographs from the autopsies were presented. 13 ROA 2877-94. Danielle was shot in the left chest and the left side of the head. 13 ROA 2878, 2881. There was also a graze gunshot wound on the left back of her head and her right thumb. 13 ROA 2882, 2884. There was no evidence of soot or gunpowder stipple on Danielle's body. 13 ROA 2884. Donnie was shot in the right arm and chest, and the left arm. 13 ROA 2887-89. Donnie was also shot in the abdomen and thigh. 13 ROA 2889-90. Bullets and bullet fragments were recovered during the autopsies. 12 ROA 2698 (Donnie's shoulder); 2700 (Danielle's

wrist). The medical examiner could not determine the order of the infliction of the bullet wounds. 13 ROA 2880-81.

Police went to the apartment identified as belonging to Keith, which was 1856 North Decatur, No. 102. 13 ROA 2768. Keith was not seen there. 13 ROA 2789. They obtained a search warrant and conducted a search. 13 ROA 2789. They found a gun cleaning kit for .40 caliber, .41 caliber, and 10 mm. guns. 13 ROA 2793-94. They also found paperwork and medication in Keith's name. 13 ROA 2792. There was a title and keys for a 2000 Acura Legend. 13 ROA 2793, 2797. They recovered an Olympus recording device. 13 ROA 2805. Documents showed possible phone numbers for Keith of 702-762-8627 and 702-490-8058. Officers applied for a pen register, but it had the wrong name for the judge (Barlow, which should have been Judge Barker) and the wrong phone number (490-8050). 13 ROA 2806. No clothing was seized during the search of the apartment. 13 ROA 2821.

The day after the shooting, officers went to 2068 North Nellis Boulevard and located a silver 2000 Acura Legend. 12 ROA 2723, 2730. Keith exited a nearby apartment and was arrested. 12 ROA 2724; 13 ROA 2795. There was not a search warrant for the Nellis apartment, but a detective obtained consent from two residents of the apartment to search it. 13 ROA 2810. Keys to the car were seized. 13 ROA 2811, 2816.

A detective looked in the car window and saw a large-frame handgun. 13 ROA 2797. A crime scene analyst photographed the car and the position of the gun, and then opened the car and recovered the gun which was under the driver's front seat. 12 ROA 2731-44; 13 ROA 2798. It was a Ruger P94 .40 caliber semi-automatic handgun, with a magazine containing five rounds of P94 .40 caliber Smith and Wesson ammunition. 12 ROA 2731-34. The analyst did not review a search warrant prior to entering the car and removing the gun, and did not know if one existed. 12 ROA 2745-46. He took direction from the homicide detective. 12 ROA 2745. The detective authorized the seizure because the gun was in plain view and because the car was going to be towed, with a potential that items inside would slide, which might cause problems in recovering it from under the seat. 13 ROA 2799. The detective testified there was a search warrant for the car. 13 ROA 2799. The gun was not listed on the return for the search warrant. 12 ROA 2749, 13 ROA 2816. After the gun was removed, the car was sealed and it was towed to the crime lab. 13 ROA 2819. The gun was processed for DNA and fingerprints. 12 ROA 2735, 2748.

A search of the car was conducted. 13 ROA 2901. Officers found a stun gun, numerous gloves, a green rag, and a white towel, and a live round of a Blazer .40 caliber Smith and Wesson ammunition. 13 ROA 2904-10. There was a payroll check from a company which was involved in the abatement of asbestos, and the gloves

which were recovered could be consistent with that type of work. 13 ROA 2918. Other items, such as a Tyveck suit were also consistent with that work. 13 ROA 2919. Crime scene analysts also recovered a receipt from Arco AM/PM gas station, at 850 North Decatur Blvd., for February 3, 2013, at 6:11 a.m.[6] 13 ROA 2912, 2914-16. The search warrant return did not indicate that any clothing was impounded. 12 ROA 2822. The stungun was swabbed for potential DNA. 13 ROA 2906.

In response to a jury note, a detective testified that a 9 mm clip would not hold .40 caliber shells/bullets. 13 ROA 2827. The detective was not aware of whether someone had access to the car prior to the police finding it. 13 ROA 2827-28.

Forensics was conducted. Keith's fingerprint was found on the gun magazine. 14 ROA 3004. DNA testing was done, which showed that Keith's DNA was consistent with DNA found on the taser handle and magazine. 13 ROA 2974, 2979. No DNA was recovered from the Ruger handgun. 13 ROA 2980. No conclusions could be made regarding DNA swabs from the head and the probes of the taser. 13 ROA 2973. Ballstics testing was conducted which showed the eight casings found at Donnie's apartment were consistent with the gun found in the car. 14 ROA 3011, 3042. It was a Model P94, .40 Smith and Wesson caliber firearm. 14 ROA 3012. The

[6]A video recording from the gas station was played for the jury. 13 ROA 2947, 2950; 33 ROA 7257.

gun fit both a 9 millimeter and a .40 millimeter caliber magazine.[7] 14 ROA 3014. The bullets recovered during the autopsies were damaged, so many comparisons could not be made. 14 ROA 3036-39. Examinations of others which were impounded were inconclusive. 14 ROA 3040.

The gun was registered to Keith's former friend Malcolm Winston. 13 ROA 2861; 18 ROA 3925. Malcolm purchased the gun in November, 2012, and Keith was with him when he bought it. 13 ROA 2861-62. Malcolm put the gun in his second bedroom. 13 ROA 2863. He realized the gun was missing around Thanksgiving. 13 ROA 2864. He did not give Keith permission to have his gun. 13 ROA 2864. He did not have any more contact with Keith after he realized the gun was missing. 13 ROA 2864. He did not file a police report about the missing gun until February 5, 2013. 13 ROA 2864.

Danielle's sister Elise testified that Danielle introduced her to Keith around 1996. 11 ROA 2526. Danielle was in an on-again-off-again relationship with Keith from 1996 to 2013. See also 12 ROA 2543, 2554 (testimony of Tamara, Elise's daughter).

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[7]Barlow's counsel objected to the testimony of the State's ballistics expert. 14 ROA 3016, 3022. The examiner had given her opinion about ballistics in court 33 or 34 times. 14 ROA 3032. The district court found her qualified to testify and found that the science was good. 14 ROA 3032. Details are discussed below.

Elise learned at the end of 2012, that Danielle and Donnie were in a relationship and she had moved in with him. 11 ROA 2527. Donnie and Danielle had been dating for about six months. 12 ROA 2538, 2544. There was an incident involving Donnie and Danielle, following which she asked Keith to pick her up at the 7-Eleven near Donnie's apartment. 12 ROA 2538, 2553. Donnie was arrested after jumping on Danielle. 12 ROA 2555.

Elise told detectives that Danielle was with Keith one week and Donnie the next week. She did not know if Danielle and Keith were still seeing each other in 2013, but they had been in November or December of 2012. 12 ROA 2540. Danielle and Keith never stopped seeing each other, and she would be with Keith when she was mad at Donnie. 12 ROA 2531, 2541. Tamara was aware that Danielle had been with Keith a couple of days or a week prior to February 3rd. 12 ROA 2553.

On Friday, February 1, 2013, Elise and Tamara had contact with Keith at Tamara's house. 11 ROA 2528, 12 ROA 2546. Keith had put up Christmas lights at Tamara's house and he was coming by to get paid for doing so. 11 ROA 2529, 12 ROA 2546, 2557. Keith asked where Danielle was and Elise and Tamara said they did not know. 11 ROA 2530; 12 ROA 2548. Keith was mad that they would not tell him where Danielle was, he got paid for his work, and he left. 12 ROA 2532, 2546, 2548.

Elise and Tamara stated that Keith was an alcoholic and he was drunk and agitated when he came over. 12 ROA 2539, 2546-47, 2557.

There was no testimony suggesting that there was footwear analysis from the door of Donnie's apartment, no shoes were recovered, and no clothing was recovered that matched the description of the suspect from the scene or the gas station video. The lead detective did not testify. There was no video or witnesses in a busy area of town, with many businesses, which assisted in identifying the suspect. Nonetheless, the jury returned a verdict of guilty on the State's charges.

During the penalty phase of the trial, victim impact evidence was presented by Donnie Cobb Jr. (15 ROA 3338-42), Demetrius Turner (15 ROA 3342-46), Deonnie Cobb (15 ROA 3346-47), Cerita Brown (15 ROA 3348-50), Frederick Blanche (15 ROA 3358-63), Tamara Herron (16 ROA 3454-58), and Elise Richards (16 ROA 3459). Tamara informed the jury that Keith and Danielle had a relationship that started about 17 years ago, which was interrupted at times, and Keith was abusive at times, so Danielle would run away from him and come to the home of Tamara and her family. Tamara claimed that Keith would break into her house and steal all of Danielle's clothes. 16 ROA 3457. She opined that Keith was controlling and mean. After they would separate Danielle would return to him. 16 ROA 3458. Elise, who was Danielle's older sister, testified that Danielle was the youngest girl in family of

12 children. She did not work, but took care of her mother and the children of her siblings. 16 ROA 3460. When Elise talked with Danielle on the morning of her death, she told Danielle to leave Keith alone and that their mother on her death bed told Danielle to leave Keith alone because he was going to be the death of you. Danielle told her that the police were looking for Keith. Elise told her to leave because Keith would come back for her. 16 ROA 3462. Her family has been torn apart since Danielle's death. 16 ROA 3463.

Craig Hooker testified that around 30 years ago, he was dating Pamela Young and came into contact with Keith. Craig claimed that Keith came to the door, uninvited, knocked and then stuck a bayonet through the door, trying to cut Pamela. Craig and Pamela's brother wrestled with Keith and pushed him out the door. 15 ROA 3364. Craig thought Pamela requested a restraining order. 15 ROA 3365. Craig claimed that four or five months later, Keith called and said he was coming over to talk to him. Keith arrived at the door and Pamela called the police. Keith left and a police officer arrived 10 or 15 minutes later. 15 ROA 3367. After the officer left, Craig armed himself with a rifle. Keith kicked in the door 10 minutes later. Craig discharged a round from the rifle, which knocked off Keith's hat, and then Keith shot at Craig with a shotgun. Ultimately, Keith shot him in the shoulder. 15 ROA 3368.

Craig grabbed a knife, told Keith he was going to kill him, and then Keith ran. 15 ROA 3369.

Detective Robert Wilson testified about Keith's criminal history. 15 ROA 3371. He testified regarding 20 separate incidents, and related documents were introduced as Exhibit 195. 15 ROA 3371-72, 18 ROA 3931. The evidence was admitted over a defense objection. 15 ROA 3372. The events included (1) a 1986 allegation involving a bayonet involving Craig Hooker and Pamela Young, for which the prosecutor's office declined to pursue charges (15 ROA 3373, 3384; 18 ROA 3932-34); (2) a 1987 allegation involving a shotgun shot to Craig's shoulder, for which Keith entered a plea of guilty to battery with a deadly weapon (15 ROA 3374, 3386; 18 ROA 3942-45); (3) a 1989 allegation involving a claim of domestic violence against Phyllis Green (15 ROA 3375; 19 ROA 4292); (4) a 1990 charge of battery domestic violence involving Phyllis Robinson (15 ROA 3376; 21 ROA 4784); (5) a 1991 charge of battery domestic violence involving Phyllis Green (15 ROA 3376; 18 ROA 3977); (6) a 1993 allegation that Keith choked Phyllis, who was then his wife, and threatened her with a kitchen knife, for which he was charged with domestic violence (15 ROA 3377; 18 ROA 3981); (7) a 1993 allegation that Keith hit Phyllis, for which he was charged with battery domestic violence (15 ROA 3377; 18 ROA 3981); (8) a 1997 allegation that Keith punched Danielle, for which he was charged

with domestic battery (15 ROA 3377; 18 ROA 3992); (9) a 1997 allegation that Keith was harassing Danielle at work, which resulted in Keith striking her co-worker, for which he was charged with battery (15 ROA 3377; 18 ROA 4012); (10) a 1997 allegation that Keith tied up Danielle with duct tape and beat her, for which he was charged with battery domestic violence (15 ROA 3377; 18 ROA 4012); (11) a 1997 allegation that Keith bit Danielle on the cheek and slapped her, for which he was charged with domestic violence (15 ROA 3378, 18 ROA 4017); (12) a 1997 allegation that Keith tried to hit Danielle's sister Mariann with a large pipe wrench, threw the pipe at her calf, and then smashed windows out of her car, for which he was charged with assault with a deadly weapon, battery with a deadly weapon, and malicious destruction of private property (15 ROA 3378; 18 ROA 4030); (13) a 1997 allegation that Keith approached Danielle and her co-worker, blocked their car, and shot the two of them with a rifle with a homemade silencer, for which he was charged with two counts of attempted murder, and for which he entered a guilty plea to one count and sentenced to a term of 88 to 220 months in the Nevada Department of Corrections (15 ROA 3378-79, 3386; 17 ROA 3861; 18 ROA 4066); (14) a 2006 allegation that Keith came home intoxicated and beat his roommate with a belt, for which he was charged with battery (15 ROA 3380; 18 ROA 4099); (15) a 2008 allegation that Keith hit his daughter Thelma with a belt and choked her with his

hands, for which he was charged and found guilty of battery domestic violence (15 ROA 3380; 18 ROA 4102); (16) a 2008 allegation that Keith picked up Danielle from work, stopped in a desert area, demanded sex, and punched her in the face when she said no, for which he was charged with battery domestic violence and attempt sexual assault (15 ROA 3380; 18 ROA 4122); (17) a 2009 allegation that Keith threatened to kill Cynthia Andrews, who was the legal guardian of his children, after she told him that she would call the police if he took his daughter out of state, for which he was charged with threats to life (15 ROA 3380; 18 ROA 4134); (18) a 2010 allegation that Keith pulled a gun on a neighbor and threatened to kill him, for which he was charged with assault with a deadly weapon and entered a guilty plea to misdemeanor assault (15 ROA 3381; 18 ROA 4145); (19) a 2011 allegation that Keith got in a fight with his daughter's boyfriend and sent an anonymous text that he would kill them both, for which he was charged with battery (15 ROA 3381; 18 ROA 4165); and (20) a 2012 allegation that Keith was upset that Danielle had a new boyfriend, got into an argument with her during which he punched her three times in the face and broke her cell phone, for which he was charged with battery domestic violence (15 ROA 3381; 19 ROA 4168). Prior to the instant case, Keith had convictions for only two felonies. 15 ROA 3387.

The detective testified that Keith had twice been sent to prison. 15 ROA 3381. Records concerning his prison history, including disciplinary write-ups, were introduced as Exhibits 196 and 197. 15 ROA 3382, 19 ROA 4174, 20 ROA 4391. His disciplinary records from the Clark County Detention Center, which involved 29 incidents over five years, were introduced as Exhibit 198. 15 ROA 3383, 21 ROA 4699. Prison records showed that Keith received his high school equivalency certificate in 1987. 15 ROA 3388. He also received other certificates for programs while in prison. 15 ROA 3389-90. Following his initial prison term, Keith continued his education and worked full-time. After living with his sister, in July of 1989, he moved in with Danielle. 15 ROA 3394. Reports noted problems he was having with domestic violence and Danielle. 15 ROA 3396. During his second incarceration, Keith attempted suicide. 15 ROA 3398.

While in the Detention Center on the current charges, Keith was attacked by another inmate. Another incident involved covering the night light inside his cell. 15 ROA 3400, 21 ROA 4701. Another disciplinary action was because he had cleaning rags in his cell. 15 ROA 3401, 21 ROA 4701. Other disciplinary actions were for similar infractions. 15 ROA 3403-08. Keith is diabetic. 15 ROA 3401, 21 ROA 4702. One of the disciplinary actions at the jail was because he complained about the time of day that the nurse came to check his blood sugar. 15 ROA 3401, 21 ROA 4702. In

2015, Keith was the subject of a battery by another prisoner and required treatment at a hospital for his injuries. 15 ROA 3402-03, 21 ROA 4703.

Keith's counsel presented mitigation evidence on his behalf.

When Keith was in seventh grade, his mother and father took him from school and drove him to a psychiatric hospital. After taking some tests, they told him that he had to stay and they left him there. 16 ROA 3507. He was terrified and was surrounded at the mental hospital with kids who had serious problems. 16 ROA 3508.

Keith had been at Ridgeway, a psychiatric hospital in Chicago in 1968 for 9 months. 16 ROA 3474. Dr. Kozubal worked at that facility in 1974. 16 ROA 3474. He was disappointed in the facility and found that it did not meet the standards in terms of professionalism and staff of other institutions. 16 ROA 3475. Most staff did not have college degrees and there was no training on psychiatric treatment. 16 ROA 3476. There was little record-keeping for persons kept in the institution before 1974. 16 ROA 3477. It was operated by politicians who focused on making money rather than providing appropriate psychiatric care. 16 ROA 3480. Keith's description of the facility as chaotic and frightening was consistent with the expert's experience. 16 ROA 3482-83. Prior to his admission, Keith had a serious injury to his private area and he had declared that no one would ever hurt him again. 16 ROA 3483. Keith's behavior at school escalated at this time, and that's how he ended up at Ridgeway.

16 ROA 3483. He had been abandoned by his mother and lost the support of his family. 16 ROA 3484. His father was rarely at home. 16 ROA 3484. When his father was home, he was abusive to Keith's mother. 16 ROA 3485. He experienced trouble in every aspect of his life, which created a "perfect storm," that resulted in his being sent to an institution, where he felt further punished instead of receiving help. 16 ROA 3486. The opportunity to help him as a teenager was lost and his anger continued to accumulate. 16 ROA 3488. His father also added to Keith's problems, by actions such as calling him a mosquito, telling a teacher in front of a class that the teacher should feel free to whoop Keith in front of the class, and holding Keith over his head as he threatened to throw him off of a third story balcony. 16 ROA 3489. The expert was familiar with people with Keith's diagnosis within prison and believed it likely that if sent to prison, Keith would end up in a geriatric unit and would adjust fine. Based upon Keith's records, he believed that Keith could be a model inmate. 16 ROA 3494.

Dr. Daniel Kozubal, a clinical psychologist, testified that he worked at various psychiatric facilities in Illinois, beginning in 1974. 16 ROA 3463-70. He reviewed Keith's records, including notes from his treatment with the Veterans Administration in Las Vegas. 16 ROA 3470. Keith was honorably discharged from the military. 16 ROA 3472. Records revealed that Keith was diagnosed with bipolar disorder in 1997.

16 ROA 3473. The report noted that he was a nasty person when he went off his medications, which were lithium and wellbutrin. 16 ROA 3474.

When Keith was released from prison in 1997, he was with his ex-wife, mother, and his 14 and 16 year old daughters. 16 ROA 3473. He told therapists at the VA that he was frustrated because his girlfriend would not work and would not contribute to the household. 16 ROA 3491. He sought help on getting out of the relationship. 16 ROA 3491.

E.K. McDaniel, a former warden with the Ely State Prison and Director of the Nevada Department of Corrections, testified that he had reviewed Keith's prison files and his record from the detention center. 16 ROA 3517. In addition to receiving his high school diploma, Keith worked in the kitchen at the prison. 16 ROA 3519; Exhibit G, 21 ROA 4719. The reports noted Keith's problems within the prison and while he was on parole. 16 ROA 3521. It noted times that he tested positive for use of cocaine. 16 ROA 3522. Keith was a typical inmate. He did not have escape attempts or gang affiliation. 16 ROA 3523. Records indicate that he began using alcohol and marijuana around age 15. 16 ROA 3525. He had a mental health history, including use of psychotropic medications. 16 ROA 3526, 3530. His primary diagnosis was bipolar disorder, which was stabilized with medication. 16 ROA 3531, 21 ROA 4738. Records from 2001 noted that his disciplinary incidents were

decreasing in frequency and severity. 16 ROA 3529. He attempted to commit suicide in 2001, by cutting his wrists. 16 ROA 3533, 21 ROA 4735. McDaniel opined that Keith could be safely housed within the prison. 16 ROA 3537.

There was an incident in 2015 in which Keith was beat up by another inmate at the detention center. 16 ROA 3542. Defense exhibits PP and QQ showed the injuries he received. 16 ROA 3543, 21 ROA 4812.

Daniel Barlow, Keith's younger brother, testified that he grew up in Montgomery Alabama, along with two sisters. Their father stayed in Chicago and would visit. 16 ROA 3547. Daniel eventually learned that he had a brother and sisters in Chicago, and Keith was one of those siblings. Daniel did not know anything about Keith's mother. Daniel met Keith when Daniel was 7 or 8 and then again when he was around 15. 16 ROA 3548. Keith also stayed with him for a few days in 2012. 16 ROA 3549. Daniel described the relationship between his mom and dad as abusive, and involved guns and threats. 16 ROA 3555-58. His dad was mean but his mom would not let him physically discipline Daniel. 16 ROA 3558. Keith is his only brother and he wants to maintain a relationship with him. 16 ROA 3559.

Dr. Richard Bailey, an historian from Alabama testified about the history of African-Americans in Montgomery, Alabama. 16 ROA 3561. Keith was born in Montgomery in 1955. 16 ROA 3562. That was the same year that Emmett Till from

Chicago was killed in Mississippi. 16 ROA 3563. Montgomery was the center of what became known as the Civil Rights Movement. 16 ROA 3564. It had also been the birthplace of the confederacy, and was a rather violent place. 16 ROA 3565. Homes were bombed and there was Klan activity. 16 ROA 3571. Keith attended elementary school at the George Washington Trenholm Elementary School, which was a poor segregated school. 16 ROA 3579. He transferred to Chicago and then returned back to this school. 16 ROA 3579. Desegregation had been ordered by the courts but was resisted, so there was intense violence. 16 ROA 3581. Chicago also had racial struggles. 16 ROA 3583. On cross-examination, Dr. Bailey acknowledged that Keith moved to Chicago at age 3 and lived in Alabama for a single school year when he was 11 years old. 16 ROA 3589.

Linda Abercrombie, Keith's older sister, testified that she was the oldest of three children born to Georgia and Daniel Barlow. 17 ROA 3685. She described their family history and identified photographs. 17 ROA 3688-94. They lived in Chicago and Alabama as children. There was a time when Daniel had a relationship with his wife's sister, Precious. 17 ROA 3695. They fought and the police were called. A child was born to Daniel and Precious about a year after Keith was born and that child, Donald, lived with them. In 1965 or 1966, when Keith's mother found out that her husband was the father, she abruptly took the kids from Chicago to Birmingham,

Alabama and left their father. 17 ROA 3697. They stayed with their grandparents for about six months and then their parents reconciled and they returned to Chicago. 17 ROA 3698. Donald and Keith looked alike and were close. 17 ROA 3699.

Linda recalled waking up at one or two in the morning with their mom screaming and hollering for their dad to stop. 17 ROA 3701. He was very forceful with her and threatened her with a gun. This made the children feel angry and powerless. 17 ROA 3702. There was a time when they all jumped on their father because he had their mom in a headlock. 17 ROA 3703.

Daniel disciplined the kids by whipping them with a belt. 17 ROA 3704. He used a thick leather belt that left welts on Linda's legs. 17 ROA 3705. Daniel also whipped Keith with a belt. 17 ROA 3706. Their father would hang them over the banister and swing them by their ankles. 17 ROA 3703. He was angry with Keith on one occasion and said he was going to throw Keith off of their third floor banister. 17 ROA 3707. Their mom sometimes hit them as well. 17 ROA 3708-09.

Keith had problems in school. 17 ROA 3711. When he was 11 or 12, he was kicked in the genitals by a neighborhood boy while he was held down by two other boys. 17 ROA 3711-12. When Linda saw him in the office, his crotch was full of blood and he was crying. Keith's behavior changed after that attack. 17 ROA 3712.

After being bullied, he was combative, out of control, and difficult to manage. They did not remove the kid who kicked him from school. 17 ROA 3713.

Keith went to a psychiatric hospital for adolescents. 17 ROA 3713. He was gone for about a year. 17 ROA 3714. When he saw his family, he was quiet and did not talk about his experiences. It was upsetting for everyone to leave him there. 17 ROA 3715. He eventually returned home and went back to school. 17 ROA 3716.

Linda and Keith got tired of the abuse and dysfunction at home and decided to join the military together. 17 ROA 3720. Linda did not pass the test, but Keith did and went into the service in 1973. 17 ROA 3725. After Keith went in the service, Linda learned that their father had another family in Alabama. 17 ROA 3720. There were two children, Danny and Elizabeth. 17 ROA 3724.

As noted above, following testimony and argument in the penalty phase of the trial, the jury returned verdicts of death for both counts of murder.

VI. SUMMARY OF THE ARGUMENT

The district court proceedings in this capital case deprived Keith of his constitutional rights at every stage of the proceedings. Jury selection failed to comply with mandates from the United States Supreme Court concerning questioning of jurors as to whether they would always impose a death sentence, discriminatory use of peremptory challenges, and the failure to grant a defense challenge for cause.

During the culpability trial, the district court allowed an unqualified expert to testify about tool mark evidence, despite its lack of scientific validity. The district court erroneously instructed the jury on burglary and evidence needed regarding the state of mind elements of the offenses. There was pervasive prosecutorial misconduct in both the culpability and penalty phases of the trial.

The penalty trial had additional errors, including an invalid aggravating circumstance of great risk of death, for which the State failed to provide sufficient notice or evidence. Evidence admitted by the State was unreliable and violated Keith's right of confrontation. Moreover, the district court prohibited defense counsel from making an argument, which was fully supported by Nevada law and a jury instruction. The judgment should be reversed based upon each of these errors and because of the cumulative impact, which rendered the trial unfair.

VII. ARGUMENT

A. The Jury Selection Process Was Unconstitutional

Keith's constitutional rights were repeatedly violated during jury selection. The district court wrongly limited voir dire on the death penalty, violated Batson v. Kentucky, and erred in refusing to grant a defense cause challenge.

. . .

1. The District Court's Limitations on Voir Dire Deprived Keith Of His Right To An Impartial Jury In Violation of Morgan v. Illinois

Keith's conviction and sentence should be reversed because his state and federal constitutional rights to due process, equal protection, a fair trial, a fair and impartial jury, and right to a jury of his peers, were violated because the district court denied him the right to life qualify the jury by questioning prospective jurors doing voir dire about whether they would consider mitigation in a case involving two victims. U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; and NRS 175.031.

Generally, the scope of voir dire and the method by which voir dire is pursued are within the district court's discretion. Morgan v. Illinois, 504 U.S. 719, 729 (1992); NRS 175.031; Morgan v. State, 416 P.3d 212, 223 (Nev. 2018) (citing Salazar v. State, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991)). This Court reviews a district court's decision concerning the scope of voir dire and the manner in which it is conducted for an abuse of discretion. Summers v. State, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986). The constitution, however, limits the trial court's discretion as to life qualification of a prospective juror. Morgan, 504 U.S. at 735.

A defendant in a capital case has a right to life qualify prospective jurors, or in other words, to question prospective jurors about whether they will always impose a death sentence. In Morgan v. Illinois, 504 U.S. at 719, 729, the United States

Supreme Court articulated that a "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do…" The Court explained:

> Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

Id. at 735 (internal citations omitted). Furthermore, "[t]he constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. Qualified jurors need not, however, be totally ignorant of the facts and issues involved." Murphy v. Florida, 421 U.S. 794, 799 (1975).

During voir dire, Keith's counsel attempted to ask a panelist whether if Keith were convicted of committing two homicides, would the second homicide cause the juror to render a death verdict. 7 ROA 1604.

> Ms. Jackson: For the sake of the next few questions, ma'am, if you can just bear with me, that this jury has found Mr. Barlow guilty of two

> homicides; not one, but two. At that point, does that fact alone, you believe, would render -- would cause you to want to render a death verdict simply because there's two decedents in this case?

Id. The State objected and the district court sustained the objection. 7 ROA 1605. In response, defense counsel proposed an alternate question that would only ask them about multiple victims. Id. The district court denied this request as well, explaining in part:

> …That's why it's more of a generalized, generic kind of decision on, can you be fair and open-minded, impartial, without knowing the facts of the case, because we can't go back and forth, say, well, I want to say that it's two -- it's -- we talked about this in motion practice as well.

Id.

The district court's reasoning that voir dire in a capital case is limited to a "generalized, generic kind of decision on, can you be fair and open-minded, impartial, without knowing the facts of the case" is similar to the State of Illinois's reasoning in Morgan, which the United States Supreme Court rejected:

> As noted above, Illinois suggests that general fairness and "follow the law" questions, of the like employed by the trial court here, are enough to detect those in the venire who automatically would vote for the death penalty. The State's own request for questioning under Witherspoon and Witt of course belies this argument. Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors -- whether they be unalterably in favor of, or opposed to, the death penalty in every case --

> by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

Morgan, 504 U.S. at 734-735 (citing Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985)).

As with death qualifying questions, life qualification questions cannot seek to commit a specific juror to a specific verdict on an assumed set of facts. See Johnson v. State, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (defining a "stake out" question as one which causes a juror "to pledge themselves to a future course of action and indoctrinate[s] them regarding potential issues before the evidence ha[s] been presented."). This Court recognizes, however, that a defendant in a capital case has the right to ask potential jurors whether they would always impose the death penalty on a defendant convicted of first-degree murder. Evans v. State, 117 Nev. 609, 644, 28 P.3d 498, 522 (2001) (citing Morgan v. Illinois, but finding on habeas review that the Morgan obligation was satisfied through a jury questionnaire). This Court also recognizes that a juror must be able to willing to consider the statutorily available sentences "in the case at bar." Walker v. State, 113 Nev. 853, 867, 944 P.2d 762, 771 (1997). But see Witter v. State, 112 Nev. 908, 915, 921 P.2d 886, 891-92 (1996) (finding that Witherspoon and Morgan were not violated by the district court's refusal to ask a potential juror about whether the juror would consider all three sentencing alternatives if the defendant had a prior felony conviction involving the

threat of violence), overruled on other grounds by Nunnery v. State, 127 Nev. 749, 776-77, 163 P.3d 235, 253-54 (2011).

A state may not have a death penalty scheme which mandates the death penalty by excluding the jury's consideration of mitigation. See Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality) (mandatory death penalty for first-degree murder, which was limited by statute to five categories of homicide, including killing with the intent to inflict harm on more than one person, was unconstitutional as a violation of the prohibition against the infliction of cruel and unusual punishment); Woodson v. North Carolina, 428 U.S. 280, (1976) (plurality) (mandatory imposition of the death penalty not allowed as the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the offender and the circumstances of the offense); Sumner v. Shuman, 483 U.S. 66, 77-78 (1987) (Nevada's mandatory death penalty, for persons convicted of murder while serving a life without the possibility of parole sentence, violated the Eighth Amendment because the sentencing authority must be permitted to consider any relevant mitigating evidence before imposing a death sentence). Just as the state could not have a mandatory death penalty scheme for cases involving multiple murders, so too potential jurors cannot refuse to consider mitigating evidence by having a fixed belief that death sentences must be imposed in all cases involving more than one victim.

Other states and federal jurisdictions have determined that questioning during voir dire on certain topics is allowed, even though the questions may be based upon facts related to the case. See People v. Amezcua and Flores, 434 P.3d 1121, 1133 (Cal. 2019) (approving of question, drafted by the trial judge, which asked prospective jurors "If you found a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?"); People v. Cash, 50 P.3d 332, 342-343 (Cal. 2002) (In a capital case, the trial court erred by denying the defendant the ability to inquire whether prospective jurors would automatically vote for the death penalty if made aware that the defendant had committed prior murders); Ellington v. State, 735 S.E.2d 736, 750-61 (Ga. 2012) (finding that the trial court erred in precluding voir dire questioning of prospective jurors as to whether they would automatically impose the death penalty, as opposed to fairly considering all three sentencing options, in a case involving the murder of young children; "Morgan recognized the reality that there are some prejudices that will not be adequately exposed with the basic impartiality questions, by simply asking jurors 'generally whether [they] could be fair and impartial.'"); State v. Clark, 981 S.W.2d 143, 146-48 (Mo. 1998) (reversing death sentence based upon trial court's refusal to allow voir dire based on the age of a child victim; "asking only general fairness and follow-the-law questions is insufficient and some inquiry into the critical

facts of the case is essential to the defendant's right to search for bias and prejudice); State v. Jackson, 836 N.E.2d 1173, 1188-89 (Ohio 2005) (trial court abused its discretion by refusing defense counsel's requests to advise prospective jurors that one of the murdered victims was a three-year-old child and by refusing to allow voir dire based on that fact; "prospective jurors need not be totally ignorant of the facts and issues involved to be qualified as jurors") (citing Murphy, 421 U.S. at 794, 799-800 and other cases.); United States v. Flores, 63 F.3d 1342, 1356 (5th Cir. 1995) (case-specific questions allowed court to identify juror who would not fairly consider death penalty if the victim engaged in illicit drug activity or crimes.).

In a capital case, in which the defendant's counsel was permitted to inquire about the ability of jurors to weigh all the evidence when there were multiple victims, the Supreme Court of California cautioned against using two extremes during death qualification of jurors, noting that "it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried." People v. Pearson, 297 P.3d 793, 816 (Cal. 2013). Alternatively, "it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." Id. The court found that the trial court did not err in allowing defense counsel to ask prospective jurors if they

could weigh all the evidence before deciding penalty in a case that involved multiple victims, but precluded the defense from asking the jury if they could identify and consider specific circumstances as mitigating. Id. at 412.

Keith did not ask to have the prospective jurors prejudge the mitigating and aggravating evidence, but instead limited his proposed inquiry to the critical question of whether the jurors would consider mitigation, or whether they would automatically impose a sentence of death, in a case involving two victims. Under Morgan v. Illinois, Keith's counsel was entitled to ask this limited question and without it he was unable to effectively challenge the qualifications of prospective jurors who would always impose a sentence of death in cases involving multiple victims. A defendant in a capital case is allowed to ask questions to determine whether a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Morgan, 504 U.S. at 728-29 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). Based upon the Morgan violation, the judgment of conviction here must be reversed and the case remanded for a new penalty trial. See Cash, 50 P.3d at 342-43 (trial court's refusal to allow voir dire about prior murder required reversal, even though the defendant could not identify a particular biased juror); Morgan, 504 U.S. at 729 (If even one juror who is not life qualified is empaneled, and the death sentence is imposed, the death sentence must be reversed).

The error here is structural error which eroded the entire foundation of the trial. In the alternative, the State cannot establish that the constitutional error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967).

2. The District Court Violated Keith's Rights By Allowing The State To Improperly Challenge Prospective Jurors In Violation of Batson v. Kentucky

Keith's conviction and sentence must be reversed because his state and federal constitutional rights to due process, equal protection, a fair trial, a fair and impartial jury, and right to a jury of his peers were violated by the State's purposeful discrimination during jury selection. The State's peremptory challenges of four jurors, three of whom were Hispanic and one of whom was African-American, were pretextual and exercised in violation of Batson v. Kentucky, 476 U.S. 79 (1986). U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; and NRS 6.010.

This Court reviews a trial court's rulings on discriminatory intent for an abuse of discretion. Diomampo v. State, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008). "Because the district court is in the best position to rule on a Batson challenge, its determination is reviewed deferentially, for clear error." Williams v. State, 429 P.3d 301, 306 (Nev. 2018). If an abuse occurred, it is structural error, which means

prejudice is presumed and reversal is necessary. Williams v. Woodford, 396 F.3d 1059, 1069 (9th Cir. 2005); Diomampo, 124 Nev. at 423, 185 P.3d at 1037.

Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (quotations and alterations omitted). See also Diomampo, 124 Nev. at 422, 185 P.3d at 1036.

a. Keith made a prima facie showing of purposeful discrimination.

The first step of a Batson challenge requires the party challenging the peremptory strike to establish a prima facie showing of purposeful discrimination Batson, 476 U.S. at 93. To establish a prima facie showing of discrimination, the defendant must do more than point out that a member of a cognizable group was struck. Watson v. State, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014). He must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 94. He may make this showing by demonstrating a pattern of discriminatory strikes, but "a pattern is not necessary and is not the only means by which a defendant may raise an inference of purposeful discrimination."

Watson, 130 Nev. at 776, 335 P.3d at 166. Other evidence the defendant may present to support a showing supporting the first prong includes "the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." Id. at 776, 335 P.3d at 167; Williams, 429 P.3d at 306. The standard to establish a prima facie case "is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof under Batson." Cooper v. State, 432 P.3d 202, 204-205 (Nev. 2018) (quoting Watson v. State, 130 Nev. 764, 775, 335 P.3d 157, 166 (2014); Batson, 476 U.S. at 93-94. Instead, the strike's opponent must provide sufficient evidence to permit the trier of fact to draw an inference that discrimination occurred. Id. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Id.

Keith argued in the district court that the State's peremptory challenges were used in a discriminatory manner when the State struck three Hispanic potential jurors and one African-American potential juror.[8] 11 ROA. 2467, 2469. Keith is an African-American. 18 ROA. 3994. The final venire panel consisted of thirty-two

[8]All of the State's strikes against the Hispanic and African-American potential jurors were strikes against women from these groups. It does not appear that this Court has considered the issue of combined race/gender challenges under Batson. Some courts have recognized such challenges. Robinson v. United States, 878 A.2d 1273, 1284-85 (D.C. 2005). See also United States v. Walker, 490 F.3d 1282, 1292 n.10 (11th Cir. 2007). Keith encourages this Court to do so.

potential jurors. 11 ROA. 2460. Of these, only three identified as African-American: Genese Coley, No. 0120, Virginia Hill, No. 0210, Melania O'Conner, No. 0354. 26 ROA. 5925, 27 ROA. 6195, 30 ROA. 6810. The final venire consisted of seven Hispanics: Rodolfo Gonzalez, No. 0035; Omar Salcedo, No. 0338.; Rebecca Hernandez Muniz, No. 0040, Idoleia Williams, No. 0047, Brittany Bejarano, No. 0104, Janelly Ramos, No. 0107, and Christine Osio, No. 0110. 23 ROA. 5115, 5175, 5249-50; 8 ROA. 1645; 30 ROA. 6750, 11 ROA. 2415; 26 ROA. 5774-75, 5805, 5850. The remainder of the panel consisted of three Asian jurors, eighteen Caucasian jurors, and one juror identified as Caucasian / Filipino. 24 ROA 5460; 25 ROA 5625, 5715 (Asian panelists); 22 ROA 4965; 23 ROA 5145, 5160; 24 ROA 5265, 5340, 5415; 25 ROA 5550, 5610, 5685; 26 ROA 5835, 5955, 5865; 27 ROA 6105; 28 ROA 6345, 6360; 29 ROA 6645; 30 ROA 6705, 6780 (Caucasian panelists); 23 ROA 5115, 5175, 5250; 26 ROA 5775, 5805, 5850, 6750 (Hispanic panelists); 27 ROA. 5985 (Caucasian / Filipino panelist); 33 ROA 7265(jury list). The district court denied Keith's claim, ruling that he did not establish the first prong of the Batson challenge as there was no evidence of systematic exclusion by the State. 11 ROA 2468, 2472.

In Cooper, this Court analyzed the percentage of the State's peremptory challenges against the percentage of each cognizable group within the venire. Cooper, 432 P.3d at 202, 205. See also Watson, 335 P.3d at 168 (approving of a method that

compares the percentage of "peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire"). In Cooper, the panel consisted of 13.04 percent African-Americans. Id. There, the State used 40 percent of its peremptory challenges to remove 67 percent of African-Americans on the panel. Id. This Court concluded that this was disproportionate when taking into account the composition of the panel before and after the strikes. Id. at 205. Ultimately, this Court found that based on the totality of the circumstances, the numbers were sufficient to give rise to an inference of purposeful discrimination. Id.

Here, African-Americans comprised 9.4 percent of the venire panel, with the State using 11 percent of its challenges to remove 33 percent of African-Americans. 26 ROA. 5925, 27 ROA. 6195, 30 ROA. 6810. Hispanics represented 21.8 percent of the venire panel, with the State using 33 percent of its challenges to remove 42 percent of Hispanics. 33 ROA 7265(jury list). Thus, the State used 44 percent of its challenges to remove 42.8 percent of Hispanics and 33 percent of African-Americans from the panel. Id. Of the remaining Hispanics, two were struck by the defense and two remained. Id. The remaining two African-American jurors were left on the panel - one was selected on the final jury and one was selected as an alternate. Id., 15 ROA 3294. The final panel of fourteen jurors included two African-Americans, three

Asians, two Hispanics, six Caucasians, and one juror who identified as Filipino / Caucasian. 11 ROA 2325.

Although "numbers alone may not give rise to an inference of discriminatory purpose," Keith established an inference of purposeful discrimination based on the percentage of peremptory strikes used against members of a cognizable group, along with the composition of the venire panel before and after strikes. Cooper, 432 P.3d at 205 (citing Fernandez v. Roe, 286 F.3d 1073, 1078 (9th Cir. 2002)) (stating prima facie case established where prosecutor used 29 percent of peremptory challenges to remove 57 percent of a targeted group that only comprised 12 percent of the venire and other authority). See also Shirley v. Yates, 807 F.3d 1090, 1101 (9th Cir. 2015) ("The fact that a prosecutor peremptorily strikes all or most venire members of the defendant's race-as was the case here-is often sufficient on its own to make a prima facie case at Step One."); Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 223 (1997) ("When a significant proportion of peremptory challenges exercised by the State is used to remove members of a cognizable group, it tends to support a finding of purposeful discrimination."). Because Keith established that the totality of the circumstances gave rise to an inference of discrimination, the district court erred in denying his challenge on the first step and reversal is warranted.

. . .

b. The district court erred in its handling of Keith's Batson challenge and made improper findings.

Even if this Court finds that the mathematical percentages were insufficient to establish the first step of Batson, the district court erred in its handling of the Batson challenge. Cooper 432 P.3d at 205 (because the district court erred at step one, the record was inadequate for the reviewing court to consider step two of the Batson analysis.)

Specifically, the district court's reasoning for denial was inadequate and based on an incorrect legal standard. Id. at 203 (finding that "when a Batson objection is erroneously rejected at step one and the record does not clearly reflect the State's reasons for its peremptory strikes, whether because the district court did not inquire into them after ruling against the defendant on step one or because the State declined to provide its reasons unless the district court first made a finding of a prima facie case under step one, the appellate court cannot proceed to steps two and three for the first time on appeal.")

As in Cooper, here, the district court denied the Batson challenge at the first step. Cooper 432 P.3d at, 205; 11 ROA 2472. In Cooper, the district court failed to make findings for its denial - a closer examination of the record here indicates that although the district court provided reasoning, the reasons were inadequate. 11 ROA 2472.

The State used four of its eight peremptory challenges to remove three Hispanic venire members and one of the three African-American jurors in the venire. In response to the Batson challenge, the district court initially found that a Batson challenge based on mixed ethnicities and races was invalid. 11 ROA. 2463. However, the district court allowed defense counsel to proceed. Id. The defense made two distinct arguments for meeting the first prong: that the State was engaging in a pattern of striking jurors based on the fact they were Hispanic and African-American, and that the percentage of the State's strikes in comparison with the targeted group's percentages on the panel indicated that it was being done in a discriminatory manner. 11 ROA 2469.

Prior to the district court's finding on the first step, the State interjected, arguing that there were other minorities that they did not eliminate and that the remaining makeup of the jury was diverse.[9] 11 ROA 2471.

The State's argument was not only belied by the record but lacks basis in case law. The district court denied the first step, primarily because it found that the

[9]The State further argued that they had to use one of their peremptory challenges on the last four jurors because the State claimed they were all minorities. 11 ROA 2470. This is belied by the record. Ms. Garcia, one of the remaining four jurors the State claimed were all minorities, identifies as Caucasian on her questionnaire. 11 ROA. 2471.

remaining venire panel was diverse. 32 ROA 7208. Beyond this, the district court did not make specific findings and applied the incorrect legal standard when it noted:

> The Court: Well, the first part of it is establishing systematic exclusion, not just that there's been an exclusion of, you know, one or more people of a racial minority, but that there is a pattern of exclusion of racial minorities and that's when it shifts to them to establish race neutral reasons, once we've established that there was a pattern.

11 ROA 2468 (emphasis added).

The systematic exclusion that the trial court referenced is the standard for establishing the third prong of a fair cross section challenge to the venire panel, not the standard for the first step of a Batson challenge. Morgan, 416 P.3d at 217. Furthermore, while a pattern is one way to show the first step of a Batson challenge, it is not the only way. Watson at 335 P.3d at 166. The defendant may also show "[d]isproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." Id.

Keith made a specific argument, supported by evidence, to support his Batson claim. However, the district court did not properly address the claim. Instead, it allowed the State to interject before the court had ruled on the first prong of the Batson challenge. The district court incorrectly noted that there are "so many folks left that are African-American…" 11 ROA 2468. As the record reflects, only two

African-American venire panelists were left after the State made their challenges, with one being selected as an alternate. 11 ROA 2325. Furthermore, the State argued that the defense had dismissed a Hispanic juror to support their claim that they were not systematically targeting minorities. 11 ROA 2470.

Ultimately, the district court denied Keith's challenge at the first step, citing the remaining diversity of the panel as the primary reason. 11 ROA 2471.

Even though other members of a protected class may ultimately serve on the jury, "[e]ven a single instance of race discrimination against a prospective juror is impermissible." Flowers v. Mississippi, 139 S.Ct. 2228, 2242, 204 L.Ed.2d 637, 654 (2019); Snyder, 552 U.S. at 478 (citing United States v. Vazquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose")); accord Ali v. Hickman, 584 F.3d 1174, 1193 (9th Cir. 2009). Other courts have also found that "it is misguided to infer that leaving some members of cognizable racial groups on a jury while striking the only African-American member proves the prosecutor's strike was not racially motivated. Batson is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury." City of Seattle v. Erickson, 398 P.3d 1124, 1130 (Wn. 2017) (citing State v. Saintcalle, 309 P.3d 326 (Wn. 2013)). In addition, a Batson violation can occur if even one juror is struck. "A single

invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." Batson, 476 U.S. at 95 (internal quotations and citations omitted). "Though a pattern is informative, it is not necessary." Erickson, 398 P.3d at 1130. See also Sanchez v. Roden, 753 F.3d 279, 299 (1st Cir. 2014) (finding that a state court unreasonably applied Batson's first prong by failing to consider all of the circumstances and instead relying on the fact that the prosecutor had allowed some African Americans to be seated on the jury).

Additionally, Keith challenges the district court's finding that a Batson challenge cannot be made based on combining panelists of different ethnicities or races. 11 ROA 2463. A Batson challenge may be based on the exclusion of both Hispanic and African-American jurors. "[T]he court will look to the prosecution's pattern of peremptory challenges for both Hispanic potential jurors and African American jurors, looking at the circumstances of the prosecutor's challenges as a whole." Fernandez v. Roe, 286 F.3d 1073, 1077-79 (9th Cir. 2002). See also Burks v. Borg, 27 F.3d 1424, 1426-27 (9th Cir. 1994) (where the state exercised their peremptory strikes against three African Americans and two Hispanics, both parties conceded that the defense established a prima facie showing under Batson.); Diomampo, 124 Nev. at 427, 185 P.3d at 1039 (reversing, based in part on a Batson

challenge that consisted of two African-American jurors and two Hispanic jurors, and the finding that two of the four constituted Batson violations.)

As in Cooper, the district court's handling of the first step of the Batson challenge was incorrect and failed to address whether Keith had established that under the totality of the relevant circumstances the State's peremptory challenges evinced an inference of racial discrimination. As such, the district court committed structural error and reversal is warranted.

c. A comparative juror analysis shows that the State discriminated during jury selection.

In Miller-El v. Dretke ("Miller-El II"), 545 U.S. 231, 239 (2005), the Supreme Court "made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." Snyder, 552 U.S. at 478. Among other factors to be considered in determining whether a race-neutral justification for a peremptory challenge is merely pretextual, this Court considers the disparate questioning by the prosecutors of minority and non-minority prospective jurors. Diomampo, 185 P.3d at 1036& n.18 (citing Ford v. State, 122 Nev. 398, 405, 132 P.3d 574, 578-79 (2006)). Additionally, "the State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence

suggesting that the explanation is a sham and a pretext for discrimination." Miller-El II, 545 U.S. at 246 (quoting Ex parte Travis, 776 So.2d 874, 881 (Ala. 2000)).

Keith urges this court to conduct a comparative juror analysis even though one was not conducted by the district court. Although Keith's Batson claim was denied at the first step, a comparative analysis by this Court is still warranted on appeal. See e.g., Miller-El II, 545 U.S. at 241 n. 2 (finding that a comparative juror analysis by appellate court is appropriate for analyzing whether a prosecutor's proffered justifications were pre-textual, even where the analysis was not performed at trial); Snyder, 552 U.S. at 483 (conducting comparative juror analysis based on the cold record); Kesser v. Cambra, 465 F.3d 351, 360-61 (9th Cir. 2006) (en banc); United States v. Collins, 551 F.3d 914, 921 (9th Cir. 2009).

In its analysis of a Batson challenge, this Court considers several factors, including the similarity of answers to voir dire questions given by minority prospective jurors who were struck and answers by nonminority prospective jurors who were not struck, as well as the disparate questioning by the prosecutors of minority and nonminority prospective jurors. Hawkins v. State, 127 Nev. 575, 578, 256 P.3d 965, 967 (2011).

For purposes of this Court conducting a comparative juror analysis, the Record on Appeal contains both the questionnaires and the voir dire. See 22 ROA 4918 - 32 ROA 7168 (questionnaires); 7 ROA 1519 - 11 ROA 2440 (voir dire).

An example of disparity in questioning of minority and non-minority prospective jurors is seen when examining questions asked after the district court inquired as to whether jurors had any prior felony convictions. 8 ROA 1791. Three jurors who claimed they had felonies responded, Raymond Johnson - No. 0079, Pornpot Chamnong - No. 0088, and Charles Meyers - No. 0099. 8 ROA 1792. Mr. Johnson, who identified as Africa-American, explained that he was convicted of possession of a controlled substance in Chicago in 1984. Id. The district court inquired if it was ever lowered or if it remained a felony, to which Mr. Johnson responded that he "didn't think so." Id. Mr. Chamnong, who identified as Asian responded that he had an auto felony conviction that was never reduced, but he had it sealed and his civil rights were restored. 8 ROA 1793. Mr. Meyers, who identified as Caucasian, responded that he was convicted of burglary and retail theft in Texas in 1980. 8 ROA 1795. During a bench conference regarding a venire panelist immediately before Mr. Johnson, defense counsel inquired what the district court should do regarding Mr. Johnson. 8 ROA 1842. The State requested that he be dismissed because there was no point in questioning him. Id. Although defense

counsel agreed to dismiss him, the State never inquired if he had his civil rights restored. Id. In contrast, before confirming Mr. Chamchong had his voting rights restored, the State conducted a thorough voir dire examination with him, including questioning him about his conviction. 9 ROA 1906. At a later bench conference, the district court indicated that Mr. Chamchong did not show up in the SCOPE system. 9 ROA 1958. The State argued that even if he had been convicted in Nevada, it had been over six years so there was no grounds to kick him and that because it happened in 1980, it would not show up in the SCOPE system. 9 ROA 1959. Subsequently the State conducted voir dire with Mr. Meyers, who stated he had been convicted of a felony in Texas in 1980. 8 ROA 1795, 25 ROA 5745. Just like Mr. Johnson, Mr. Meyers had a conviction in another state in the 1980s. Id. Unlike Mr. Johnson, the State did not request to have Mr. Meyers automatically kicked off. Instead, the State conducted extensive voir dire with him. 9 ROA 1969. It was never confirmed whether he had his voting rights restored in Nevada. However, with Mr. Johnson, prior to conducting voir dire, or attempting to find out if he had his civil rights restored, or if he was even actually convicted of a felony, the State immediately sought to have him removed. 9 ROA 1842.

Another example of disparity is seen in comparison of Hispanic panelist Idoelia Williams and Filipino/Caucasian panelist Erika Bowman. The State used a

peremptory challenge against Ms. Williams, No. 0047, even though she favored the death penalty. Specifically, Ms. Williams stated she would "always" vote to give the death penalty for terrorists, child molesters, "etc." 8 ROA 1697. She indicated that she has friends on the Las Vegas Metropolitan Police Force and had a friend who was murdered in a case that involved domestic violence. 8 ROA 1693. Based on her answers, Ms. Williams would seem like the ideal juror for the State. Comparing Ms. Williams with Ms. Bowman, No. 0146, the reason to remove Ms. Williams seems all the more discriminatory. Ms. Bowman and Ms. Williams were about the same age. 8 ROA 1690,10 ROA 2135, 23 ROA 5250, 27 ROA 5985. Like Ms. Williams, Ms. Bowman had someone close to her murdered - specifically, her cousin. 10 ROA 2130. Ms. Bowman had been kidnapped, robbed, and almost raped by a Lyft driver. 10 ROA 2137. Their views on the death penalty were similar. Ms. Williams was stricken by the State while Ms. Bowman was not. 33 ROA 7265(jury list).

Another venire panelist the State would have had difficulty providing a race neutral reason for striking was African-American panelist Virginia Hill, No. 0210. Like Ms. Bowman, Ms. Hill also had a cousin who was murdered. 10 ROA 2218. Ms. Hill was open to the death penalty, particularly in case of mass murderers. 10 ROA 2226. Although Ms. Hill stated she felt that people of color are more disproportionately targeted by law enforcement, she had not personally been a victim

of such and stated that she would not hold it against law enforcement. 10 ROA 2221. Ms. Hill worked in revenue auditing for the Venetian. 10 ROA 2228.

There are strong similarities evident when comparing Ms. Hill with panelist Melanie Strain Placke, No. 0073, who identified as Asian. Ms. Placke also worked in gaming auditing. 10 ROA 2049. She also indicated that the death penalty was appropriate in some instances. 10 ROA 2054. However, she was less supportive of the death penalty than Ms. Hill, going so far as to say that she did not believe in the death penalty, but would follow the judge's instructions. 9 ROA 2060. Ms. Hill seemed like a stronger choice for the State because she expressed stronger support for the death penalty than Ms. Placke and because she had a family member murdered. The fact that Ms. Hill was removed from the panel through the State's peremptory challenge, while Ms. Placke was not, is further example that the State had a discriminatory purpose in its peremptory challenges

These examples demonstrate that a comparative analysis is necessary on appeal. Taken in combination with the mathematical proportion of the venire compared with the State's strikes, the record not only shows a systematic pattern of discrimination towards Hispanics and African-Americans - in particular Hispanic and African American women - but also evidence of disparate treatment.

3. The District Court Erroneously Denied Keith's Challenge For Cause Of A Potential Juror, Resulting In A Jury Which Was Not Impartial

Keith's conviction and sentence should be reversed because his state and federal constitutional rights to due process, equal protection, a fair trial, and a fair and impartial jury, were violated by the district court's improper denial of his challenge for cause of a juror, resulting in a biased jury. U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; and NRS 175.031.

In reviewing whether the district court properly denied a challenge for cause, this Court reviews for an abuse of discretion. Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (overruled on other grounds by Farmer v. State, 405 P.3d 114 (Nev. 2017)). See also Wainwright v. Witt, 469 U.S. 412, 430 (1985) (reviewing courts are to accord deference to the trial court).

The State or defense may make a challenge for cause to any member of the venire whose views would prevent the juror from adjudicating the facts fairly, and challenges for cause must be tried by the district court. See NRS 175.036. The test for determining whether a juror should be excused for cause is whether their "[v]iews would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions or oath." Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001) (citing Wainwright, 469 U.S. at, 424)).

Here, Keith had a valid challenge for cause that was erroneously denied and as a result, Keith was unable to use a peremptory challenge on another biased juror. When questioned about mitigation, Mr. Nickerson, No. 0037, indicated that the further away in time childhood events occurred, the less likely he would be to consider them. 8 ROA 1663. The specific exchange regarding his views on childhood as mitigation were:

> Ms. Trujillo: And in a situation where a person was not provoked, to use your words, or without provocation -
>
> Prospective Juror No. 37: Um-hum.
>
> Ms. Trujillo: -- killed someone, the fact that possibly that person had a bad childhood, it probably wouldn't matter to you; is that fair to say?
>
> Prospective Juror No. 037: The further the connection from the event, the less likely I'd be willing to consider it.
>
> Ms. Trujillo: Okay. And when you say further the connection, I specifically used childhood, so anything in childhood probably wouldn't matter in deciding whether or not -- what punishment you would impose?
>
> Prospective Juror No. 037: I'd have to agree with that, yes.

8 ROA 1663.

The defense challenged Mr. Nickerson for cause, arguing he was mitigation impaired. 8 ROA 1722. In denying the challenge, the district court misapplied the standard for considering mitigation, finding that the juror did not say he would not

consider all mitigation, but would give less weight to some consideration than others. 10 ROA 2177. The district court's findings are belied by the record. The defense later objected that because of the district court's denial, they had to use a peremptory challenge on Mr. Nickerson. 11 ROA 2489.

As this Court noted in Burnside v. State, 131 Nev. 371, 384, 352 P.3d 627, 651 (2015):

> "It is well established that the sentencer in a capital case must consider all mitigating evidence presented by the defense." Thomas [v. State, 114 Nev. 1127, 1149, 967 P.2d 1111, 1125 (1998)]; See Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) (noting that sentencer may determine weight to be given mitigation evidence, but it "may not give it no weight by excluding such evidence from [its] consideration").

See also Leonard, 117 Nev. at 65, 17 P.3d at 405 (A juror should be dismissed if his views on mitigation would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath) (citing Witt, 469 U.S. at 424; Adams v. Texas, 448 U.S. 38, 45 (1980)).

Mr. Nickerson stated that he would be "less likely to consider" mitigation the further in time it was removed from the crime. He did not say he would give it less weight in consideration but that he might not consider it at all, depending on the age of the evidence. 8 ROA 1663. The State had an opportunity to request to traverse but did not do so. Despite his refusal to consider childhood mitigation, the district court denied the cause challenge. 8 ROA 1723. Given that Keith was 63 at the time of his

trial; his childhood would certainly be further away in time. 17 ROA 3859. The prospective juror's answers established that he would not have considered Keith's childhood as mitigation. Accordingly, he would not have considered all mitigation as required under this Court's rulings. See also Morgan, 504 U.S. at 721; Eddings, 455 U.S. at 114-15.

Because Keith was forced to use a peremptory challenge on a juror who the district court should have dismissed for cause, the analysis turns to whether the final impaneled jury was impartial. If the actual empaneled jury is impartial, the "[f]act that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury." Blake v. State, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). A district court's abuse of discretion in improperly denying a challenge for cause is reversible error only if it results in an unfair empaneled jury. Id. See also United States v. Martinez-Salazar, 528 U.S. 304, 317 (2000).

The final empaneled jury was not impartial because one of the final panelists, Darlyne Gonzales, No. 0239, stated on her questionnaire that she would always vote for the death penalty if the murder was premeditated. 28 ROA 6354. Keith did not challenge this juror for cause.

However, here, Keith objected to the panelists being on the jury and indicated that were defense counsel not forced to expend all their peremptory challenges, including a juror who should have been dismissed for cause, they would have used one on Ms. Gonzales. 11 ROA 2489.

When the defense attempted to question Ms. Gonzales about her position that she would always vote for the death penalty if she found the murder was premeditated, the State objected. 10 ROA 2286. After agreeing on the form of the question, it was still unclear what the juror's views actually were. Based solely on her questionnaire however, she would always impose the death penalty when the murder was premeditated. 28 ROA 6354. Nothing in voir dire rehabilitated her on this issue. As such, she would obviously be unable to consider all mitigation if defendant were convicted of first degree murder if the jury found it was premeditated, which is what ultimately happened here. 14 ROA 3211.

Because Ms. Gonzales could not consider mitigation in the event of a specific verdict or finding if the crime was premeditated, her views would prevent or substantially impair her ability to be impartial and apply the law and as such, she was biased. Sayedzada v. State, 419 P. 3d 184, 191 (Nev. Ct. App. 2018) (citing United States v. Torres, 128 F.3d 38, 45-48 (2d Cir. 1997); Sanders v. Sears-Page, 131 Nev. 500, 507, 354 P.3d 201, 206 (Ct. App. 2015) (Court noted that bias, or bias in fact,

arises where the juror demonstrates a state of mind that prevents the juror from being impartial)). Her inclusion on the assembled jury resulted in a jury panel that was not impartial.

The district court's abuse of discretion in improperly denying a challenge for cause resulted in a juror who was not impartial on the panel and caused Keith to be prejudiced on his right to a fair and impartial jury. The presence of a single biased juror who should have been dismissed following a challenge for cause can be the basis for reversal. See Thompson v. State, 111 Nev. 439, 443, 894 P.2d 375, 377 (1995). Keith requests that his conviction be reversed and this proceeding be remanded for a new penalty trial.

B. Significant Errors During The Culpability Trial Require The Grant of A New Trial

1. The District Court Abused Its Discretion By Allowing An Unqualified "Expert" to Provide Testimony About Tool Mark Analysis

Keith's state and federal constitutional rights to due process of law, equal protection, a fair trial, and a reliable sentence were violated by the district court's decision to admit testimony regarding tool mark analysis and failing to perform its role as gatekeeper for admission of expert testimony, as mandated this Court. U.S. Const. Amends. V, VI, & XIV. Nev. Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court reviews a district court's decision to allow expert testimony for an abuse of discretion. Higgs v. State, 126 Nev. 1, 18-19, 222 P.3d 648, 659 (2010). The standard for expert admissibility in Nevada was explained in Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008):

> (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark, 124 Nev. at 498, 189 P.3d at 650 (citing NRS 50.275).

Beyond the three requirements for admissibility of expert testimony, this Court has re-emphasized the latitude district court judges retain to admit or deny expert testimony, within the parameters of NRS 50.275. The district court judges are tasked with being the gatekeepers of the admissibility of expert testimony. Higgs, 126 Nev. at 17-18, 222 P.3d at 658-59.

a. Ms. Lester was not qualified and her testimony did not assist the trier of fact as it was not the product of a reliable methodology.

Keith's counsel filed a pretrial writ of habeas corpus, in part challenging the admission of the firearm and tool mark evidence, as well as Ms. Lester's qualifications to testify as an expert within that field. 1 ROA 196, 209. During the preliminary hearing, Ms. Lester admitted that in part, the determination regarding the

similarities of the ammunition and firearms is subjective. 2 ROA 209. During argument on the writ, the State acknowledged that the nature of firearm and tool mark analysis is subjective but compared it to fingerprint analysis. 2 ROA 314. Ultimately, the district court allowed Ms. Lester's testimony finding there was sufficient foundation laid at the preliminary hearing regarding her training, experience, and education; although the district court did not make specific findings on defense counsel's arguments. 2 ROA 318.

Prior to trial, Keith's counsel filed a motion to strike Ms. Lester's testimony and requested an evidentiary hearing. 3 ROA 576. The State opposed the motion. 7 ROA 1392. The district court heard argument prior to trial, and without providing clarification, ruled that Ms. Lester was qualified to testify. 7 ROA 1477.

The fundamental problems presented not just by firearm and tool mark testing, but also with Ms. Lester as an expert within that field became more apparent during trial. During her testimony, Keith's counsel again objected to her testifying because it was improper expert testimony. 14 ROA 3016. In addition, while the State was conducting direct examination, the district court interjected, asking the witness questions that the State admitted it was planning to ask. Keith's counsel argued that this unfairly prejudiced the defense by giving the appearance that the district court was aiding the State's direct examination, thereby assisting the prosecution meet its

burden. 14 ROA 3022. After the State's direction examination, the parties approached the bench, and the district court again ruled that the witness was qualified as an expert. 14 ROA 3023.

1. The State's Expert Was Not Qualified

In Higgs, this Court noted the factors the district court may take into consideration concerning the qualifications of an "expert," including "whether she had formal schooling, proper licensure, employment experience, and practical experience and specialized training." Higgs, 126 Nev. at 19, 222 P. 3d at 659 (citing Hallmark, 124 Nev. at 498-500, 189 P.3d at 650-51). Applying these standards to determine if the expert is qualified, this Court noted the expert's science degree, employment with the FBI's toxicology department, and specialized knowledge and training with regard to succinylcholine testing, in finding that the district court acted within its discretion in ruling that the expert met the qualification requirement. Id.

Like the expert in Higgs, Ms. Lester has a science degree, specifically in forensic science. 4 ROA 880. However, her educational background plays no significant role in her field of expertise. 14 ROA 3063. When asked about the chemistry, biology, and physics courses she took in college, Ms. Lester noted that none of those were used for the firearms and tool mark examinations. Id. Because she testified as an expert on firearm and tool mark testing, her background in this area is

relevant. Ms. Lester testified that she primarily received training through an 18 month LVMPD training course which included 2500 hours of training. 3 ROA 619. However, although the nature of that training included mock cases in which she performed comparisons of fired components of ammunition, it also consisted of touring firearm and ammunition facilities and off-site training, including firearms armor courses put on by the manufacturers. 3 ROA 618. During trial, Keith's counsel posited the following analogy regarding the off-site training Ms. Lester received:

> Q: So it's like me taking the tour of the Coca Cola plant in Atlanta. I take the tour, I drink some Coke, I look around, I see how Coke is made; very similar type thing; yes?

14 ROA 3077.

Furthermore, Ms. Lester indicated she was not familiar with the scientific standard of "a reasonable degree of reasonable certainty":

> Q: I know you're anxious. You're raring to go. Are you to testify to a reasonable degree of scientific certainty --
>
> A: Um --
>
> Q: -- that that evidence came from that weapon?
>
> A: I would not use that terminology, no, because what -- I don't know what that means, reasonable degree of scientific certainty. What -- what does that even mean? I don't know.

14 ROA 3083.[10]

Ms. Lester's lack of knowledge regarding a reasonable degree of scientific certainty is alarming for a purported expert. Combined with the lack of relevant education to her field of expertise, it is apparent that Ms. Lester was not qualified to testify as an expert. Accordingly, she did not meet the first prong under NRS 50.275 and the district court abused its discretion in allowing her testimony.

2. The Testimony Did Not Assist The Trier Of Fact

Ms. Lester's testimony was also inadmissible because it did not assist the jury. The second inquiry about the admissibility of expert testimony is "whether his or her expected testimony will assist the trier of fact in understanding the evidence or determining a fact in issue." Hallmark, 124 Nev. at 500, 189 P.3d at 651. Expert witness testimony "will assist the trier of fact only when it is relevant and the product of reliable methodology." Id. at 499-500, 189 P.3d at 651.The district court should consider whether the proffered opinion is "(1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5)

[10]Ironically, the State cited Ms. Lester's testimony to a "reasonable degree of scientific certainty" in their Return to Keith's Pretrial Writ of Habeas Corpus, in support of their argument that she was qualified. 2 ROA 284. Surprisingly, by the time of trial, Ms. Lester apparently not only forgot that she had testified to a reasonable degree of scientific certainty, under oath, but also forgot what the standard itself meant or was. 14 ROA 3083.

based more on particularized facts rather than assumption, conjecture, or generalization." Higgs, 126 Nev. at 19-20, 222 P.3d at 660 (citing Hallmark, 124 Nev. at 499-502, 189 P.3d at 651-52). Furthermore, if the expert witness has formed his or her opinion "based upon the results of a technique, experiment, or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment, or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute." Hallmark, 124 Nev. at 502, 189 P.3d at 652 (noting that these factors are not exhaustive, may be accorded varying weights, and may not apply equally in every case.)

Ms. Lester's testimony revealed that her conclusions were not sound based upon these factors. During the preliminary hearing, she testified that there is no baseline standard she tries to reach when comparing bullets, but rather focuses on finding a pattern to indicate a match. 3 ROA 623. Also troubling about this "science" is the significant criticism it has received from one of the most credible and established scientific organizations in the country. The National Research Council, an arm of the National Academy of Sciences, released a report in 2008 through the

National Academies Press entitled "Ballistic Imagining."[11] Part of the findings regarding firearm and tool mark analysis noted that the "science" as then practiced was based on traditional firearm and tool mark analysis, which it classified as "part science and part art form." Id. at pg. 55. The report further stated that "[c]onclusions drawn in firearms identification should not be made to imply the presence of a firm statistical basis when none has been demonstrated." Id. at pg. 82. In 2009, the National Research Council released another report entitled "Strengthening Forensic Science in the United States: A Path Forward."[12] Addressing firearm and tool mark analysis, this report noted that tool mark identification tests "[h]ave never been exposed to stringent scientific scrutiny." Id. at p. 42. The report further notes that "[e]ven with more training and experience using newer techniques, the decision of the tool mark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." Id. at 154.

Although certain courts, such as the Fifth Circuit Court of Appeals, have accepted Firearm and Tool Mark Analysis as an accepted form of expertise, this Court should refrain from doing so here. Nevada should be distinguished because in United States v. Hicks, 389 F.3d 514, 526 (5th Cir. 2004), the court used the Daubert test for

[11]See full report at https://www.nap.edu/read/12162/chapter/1

[12]See full report at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf

its determination. Furthermore, the court held an evidentiary hearing whereas here, the district court simply made a conclusory finding that Ms. Lester was qualified, without listing any factors for its decision. The Fifth Circuit Court in Hicks also noted in part that the methodology was reliable because the error rate of firearm testing is zero or near zero. Id.

Subsequent to Hicks, in 2016, a report was released by the Presidential Council of Advisors on Science and Technology, finding a lack of sufficient black-box testing in relation to firearm and tool mark analysis. Of import, the report found:

> Firearms analysts have long stated that their discipline has near-perfect accuracy; however, the 2009 National Research Council study of all the forensic disciplines concluded about firearms analysis that "sufficient studies have not been done to understand the reliability and reproducibility of the methods"-that is, that the foundational validity of the field had not been established. Our own extensive review of the relevant literature prior to 2009 is consistent with the National Research Council's conclusion. We find that many of these earlier studies were inappropriately designed to assess foundational validity and estimate reliability. Indeed, there is internal evidence among the studies themselves indicating that many previous studies underestimated the false positive rate by at least 100-fold.

"Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods," at pg. 11.[13] While the PCAST report noted

[13]See full report at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

that admissibility of firearms analysis should be left to the courts, it also highlighted steps that the field of firearm tool mark analysis could take to be more reliable; however such steps were not taken in this case. Id. at 12. Despite the extensive studies, reporting, and recommendations made towards this "science," it has failed to distinguish itself as a true form of science such as DNA testing, and is more akin to bite mark analysis and other junk science. As such, firearm and tool mark analysis is not the product of a reliable methodology and was certainly not so in this case.

Even if this Court finds that despite the significant criticism firearm and tool mark analysis has received from the scientific community, it is still an acceptable and admissible form of expertise; it was still not the product of reliable methodology in the instant case. Hallmark, 124 Nev. at 502, 189 P.3d at 652 (expert witness testimony will assist the trier of fact only when it is relevant and the product of reliable methodology.)

As discussed supra, Ms. Lester suffered from many deficiencies as a purported expert but perhaps none more troubling than her self-described lack of knowledge regarding what a "reasonable degree of scientific certainty" entails. 14 ROA 3083. See Las Vegas Metro. Police Dep't v. Yeghiazarian, 129 Nev. 760, 767, 312 P.3d 503, 508 (2013) (Finding expert testimony admissible where the expert was able to calculate to a reasonable degree of scientific certainty the vehicles' starting positions,

their prebraking and impact speeds, and the general angle at which the vehicles collided).

The significant criticisms from the scientific community towards firearm and tool mark testing, combined with Ms. Lester's lack of experience, and her inability to not only state her findings to a reasonable degree of scientific certainty, while being unfamiliar with the standard itself, indicate that she was not qualified, and the testimony was not the product of relevant and reliable methodology. Accordingly, the district court abused its discretion by admitting her testimony.

b. The District Court Failed In Its Role As Gatekeeper.

This Court has stressed the discretion and latitude given the district court to admit or deny expert testimony within the parameters of NRS 50.275, because the district court judge is the ultimate gatekeeper, noting that "[w]hile the Supreme Court interpreted FRE 702 as the gate leading toward admissibility, it placed numerous factors, albeit 'flexible' ones, upon the opening of the gate and cast the trial judge in the role of gatekeeper." Higgs,126 Nev. at 14, 222 P.3d at 656.

Prior to trial, the district court heard argument on the motions regarding Ms. Lester. 7 ROA 1464, 1472. The district court found that the science of firearms and tool mark analysis, while questionable, was sound and therefore, admissible. With regard to Ms. Lester, the district court made two conclusive findings: first, that Ms.

Lester was qualified, without stating why she was qualified, and that although she did not have much experience at the time she did the testing, she had since acquired experience. 7 ROA 1478-82. Specifically, the district court stated:

> So I'm okay with the science. We don't need an evidentiary hearing on that. In regard to Ms. Lester, my sense of everything that I've evaluated is that she is qualified. You're certainly free to take her on voir dire during trial if there's anything that you feel needs to be, you know, explored a little more before they start asking the substantive questions.

7 ROA 1477. The district court's cursory findings fall short of the findings necessary for a gatekeeper of admissibility.

In Mathews v. State, 424 P.3d 634, 639 (Nev. 2018), this Court found that the district court failed to take certain factors into account in its ruling on admissibility of expert testimony. Likewise here, the district court failed to expressly consider factors relevant to the admissibility of the expert. The fact that Ms. Lester's experience was an issue, such that the passage of several years of time was given as a reason to qualify her to testify at trial, the district court should have expressly considered and stated the factors under NRS 50.275, Hallmark, and Higgs. Accordingly, the district court failed in its role as gatekeeper.

When the district court abuses its discretion on an error of admissibility, the question turns to whether such error was harmless. Robins v. State, 106 Nev. 611, 620, 798 P.2d 558, 563 (1990). The analysis rests on whether the erroneous

admission of evidence had a "[s]ubstantial and injurious effect or influence in determining the jury's verdict" Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). When determining if the error is harmless or prejudicial, this Court will consider "[w]hether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

In Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987), this Court declined to reverse where an expert testified as to the truthfulness of the victim and identified the defendant as the perpetrator. As part of its harmless error analysis, the Court noted that the evidence against the defendant, including a confession to the arresting officer, was overwhelming. Id. Unlike Townsend, there was no confession here. Further, the State relied on Ms. Lester's testimony during closing argument. 15 ROA 3256, 33 ROA 7309-10. The State described Ms. Lester's process and techniques in calling Ms. Lester's method "a pretty good reference standard" and declared that "there were no discrepancies" in comparing the casings. 15 ROA 3257.

Here, there were no eyewitnesses that placed Keith at the scene at the time of the shooting. The 9-1-1 call at issue was made hours before the shooting and did not establish that he committed the murders, as opposed to the earlier offenses. Given the

lack of evidence against Keith, Ms. Lester's findings undoubtedly played a significant role in tying Keith to the shootings. The charges here are severe, and the quality and character of the error on the district court's part, both in allowing Ms. Lester to testify and abdicating its duties as gatekeeper, were avoidable and unfairly prejudiced Keith.

Keith requests his conviction be reversed and this matter be remanded for a new trial.

2. The District Court Erroneously Instructed The Jury

Whether a jury instruction accurately states the law is reviewed de novo. Gonzalez v. State, 366 P.3d 680, 684 (Nev. 2015). Jury instruction errors which are of a constitutional magnitude are reviewed under the harmless error standard. Id. This standard requires reversal unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Chapman, 386 U.S. at 24.

a. A Burglary Instruction Was Invalid

The district court instructed the jury about the intent element of burglary in Instruction No. 9.

> The intention with which entry was made is a question of fact which may be inferred from the defendant's conduct and all other circumstances disclosed by the evidence.
>
> Every person who unlawfully breaks and enters any apartment may reasonably be inferred to have broken and entered or entered it with intent to commit an assault, and/or a battery, and/or a felony therein, unless the unlawful breaking and entering or unlawful entry is explained

> by evidence satisfactory to the jury to have been made without criminal intent.

14 ROA 3172. Keith objected to this instruction. 12 ROA 2758.

The district court relied on Flynn v. State, 93 Nev. 247, 250, 562 P.2d 1136, 1136 (1977) and NRS 205.065 in support of the instruction. 14 ROA 3121. In Flynn, this Court briefly considered a sufficiency of the evidence claim concerning the defendant's intention. The case did not address jury instructions on this issue and this Court did not hold that this language would be proper for a jury instruction.

This instruction was unnecessary as the jury was specifically instructed on direct and circumstantial evidence. 14 ROA 3200. The jury was also instructed that the jury could "infer the existence of a particular state of mind of a party or a witness from the circumstances disclosed by the evidence." 14 ROA 3181. There was no need to single out the entry element from other elements of the offenses.

This instruction, which mirrors the language of NRS 205.065 in the second paragraph, unconstitutionally shifted the burden of proof to the defendant and violated the fundamental requirement that the State prove every element of the offense beyond a reasonable doubt and it created an unconstitutional presumption. Keith recognizes that this Court held to the contrary in White v. State, 83 Nev. 292, 295-96, 429 P.2d 55-57 (1967), but this holding should be overruled under Patterson v. New York, 432 U.S. 197, 210 (1977) (Due Process requires the State to prove

beyond a reasonable doubt all of the elements included in the definition of the offense for which the defendant is charged); Mullaney v. Wilbur, 421 U.S. 684, 702 & n.31 (1975) (The State bears the ultimate burden of persuasion beyond a reasonable doubt, even in cases in which presumption or permissive inferenced are applicable and due process requirements apply); and In re: Winship, 397 U.S. 358 (1970). At a minimum, the instruction should have ended after "therein" and the "unless clause" should have been stricken.

In the district court, Keith proposed an alternative instruction, which added the following language to the State's proposed instruction:

> This is only an inference which the jury may consider, but is not obligated to presume against the defendant. The burden of proving every element of the offense beyond a reasonable doubt, including intention, is always placed on the State of Nevada.

12 ROA 2758. This instruction would have clarified the State's burden, but the district court refused to instruct the jury with the additional language. 14 ROA 3122.

The instruction given was confusing, misleading, and relieved the State of its burden of proving every element of the offense beyond a reasonable doubt. This instruction was likely applied to the felony murder and home invasion charges. Given the lack of evidence on the intent element, and the unconstitutional presumption created by the instruction, the State cannot establish beyond a reasonable doubt that

the erroneous instruction was harmless error. These convictions should therefore be vacated.

b. The State of Mind Instructions Were Misleading

The district court instructed the jury about the state of mind elements of the offenses in Instruction No. 18.

> The prosecution is not required to present direct evidence of a defendant's state of mind as it existed during the commission of a crime. The jury may infer the existence of a particular state of mind of a party or a witness from the circumstances disclosed by the evidence.

14 ROA 3181. Keith objected to this instruction. 12 ROA 2760.

In the district court, the State cited to Miranda v. State, 101 Nev. 562, 568, 707 P.2d 1121, 1125 (1985), in support of this proposed instruction. 12 ROA 2760. Miranda concerned a claim of sufficiency of the evidence and did not involve a jury instruction concerning the jury's consideration of evidence.

This proposed instruction was duplicative of other instructions and minimized the State's burden of proving the *mens rea* element of the offenses. See e.g. 14 ROA 3200 (defining direct and circumstantial evidence). This instruction allowed the jury to return a verdict of guilt based upon speculation, unfounded assumptions and unknown inferences rather than proof that Keith acted with specific intent. Patterson, 432 U.S. at 210; Mullaney, 421 U.S. at 702 & n.31; and Winship, 397 U.S. 358.

In the district court, Keith asked that the instruction be modified to inform the jury that "the State must nevertheless meet its burden of proving, either by direct or circumstantial evidence, that Mr. Barlow acted with the *mens rea* elements defined in each offense and that if the State fails to do so that Mr. Barlow is entitled to a verdict of not guilty." 12 ROA 2760. The district court refused this instruction. 14 ROA 3123. The modification was necessary to accurately instruct the jury about the State's burden of proof. The failure to either omit the instruction given, or to modify it as requested by Keith, minimized the State's burden of proof and misled the jury. As the State cannot establish beyond a reasonable doubt that this error was harmless error, the conviction must be reversed.

For the same reasons, the district court erred in instructing the jury about the intention to kill in Instruction No. 19:

> The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

14 ROA 3182. Keith objected to this instruction, but the district court overruled the objection. 14 ROA 3127.

In the district court, the State cited to Dearman v. State, 93 Nev. 364, 566 P.2d 40 (1977), as support. 13 ROA 2762. Once again, this case concerns an appellate court's sufficiency of the evidence claim and does not address whether this is a proper

instruction for the jury. This proposed instruction should have been rejected because it singled out a particular piece of evidence to the exclusion of others and because it is duplicative of other instructions concerning intent and the jury's consideration of evidence.

In the district court, Keith offered additional language to be included in the instruction:

> The State continues to have the burden of proving the intent to kill beyond a reasonable doubt. If it fails to do so, you must find Mr. Barlow not guilty of the offense.

13 ROA 2762. The district court did not give the requested instruction. For the reasons stated above, the given instruction was error and a new trial is warranted.

3. There was Pervasive Prosecutorial Misconduct In The Culpability Trial

Keith's state and federal constitutional rights to due process of law, equal protection, and a fair trial were violated because of prosecutorial misconduct during the culpability phase of the trial. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"When considering claims of prosecutorial misconduct, this court engages in a two step analysis. First, [this court] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [this court] must determine whether the improper conduct warrants reversal." Valdez v. State, 124

Nev.1172, 1188, 196 P.3d 465, 476 (2008) (citing United States v. Harlow, 444 F.3d 1255, 1265 (10th Cir. 2006)). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of a constitutional dimension, then [this Court applies] the Chapman v. California, 386 U.S. 18, 24 (1967) standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, [this Court] will reverse only if the error substantially affects the jury's verdict." Id. (citing Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); Harlow, 444 F.3d at 1265).

"Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct." Valdez, 124 Nev. at 1189, 196 P.3d at 477. "For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." Id. (citing Chapman, 386 U.S. at 21, 24; Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000)). "Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due

process." Id. (internal quotations to Darden v. Wainwright, 477 U.S. 168, 181 (1986) and Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) omitted).

"Harmless-error review applies, however, only if the defendant preserved the error for appellate review." Valdez, 124 Nev. at 1190, 196 P.3d at 477 (citing United States v. Olano, 507 U.S. 725, at 731-32(1993)). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this 'allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.'" Id. (quoting Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002)). "When an error has not been preserved, this court employs plain-error review." Id. (citing Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his substantial rights, by causing actual prejudice or a miscarriage of justice. Id. (citing Green, 119 Nev. at 545, 80 P.3d at 95 and Olano, 507 U.S. at 734).

a. There Was No Factual Basis For The Prosecutor's Argument About The Sequence of Bullets And The Inflammatory Rhetoric Was Improper.

During closing arguments, the prosecutors made several arguments that were inflammatory and unsupported by the evidence. Specifically, during the first closing argument, the prosecutor argued:

> As you can see from the – the picture here, the shot to the head, do you remember what the medical examiner said as – when this entry wound – there was no exit wound. Do you remember where he said that bullet was recovered from? Down in her right jaw. That's a downward trajectory across her face. And the way she's sitting, somebody had to come – shot right above her and – and – [objection based upon arguing facts not in evidence, which was overruled] From above. If she was standing and somebody comes in and shoots, if it were to hit her head right there, it either would have exited from the back straight, maybe up a little bit, if the hand's a little bit lower than the head, or been recovered from the back of the head.
>
> This was a targeted killing and that right there is the evidence that she was the target. So when you look at Donnie, he had shots and some that like kind of sewed through his body, in and out, in and out, but she had the kill shot to the head.

15 ROA 3246-47. This same type of argument was made by the second prosecutor during the rebuttal argument:

> I mean, the guy doesn't – Mr. Cobb doesn't even have a chance to put down his lighter. He walks through that door. She stands up, kicks over the table. He shoots her right through her chest, because there's no way she was shot that way while she was down in the position she's found in. He fires the second round at her that hits her and grazes the back of her head and goes into the wall, and then he unloads on Donnie Cobb, saving one bullet to execute Danielle Cobb – or Danielle Woods.

15 ROA 3276-77. Keith's counsel objected to the argument about saving one bullet and the sequence of the shots. 15 ROA 3277. The district court sustained the objection. 15 ROA 3277. The prosecutor continued:

> The medical examiner can't tell you sequencing, but the physical evidence at the scene can. You know she's in that position when she gets the bullet into her head. That's what we call the *coup de gras*, and that's what we call first degree murder.

15 ROA 3277.

The medical examiner testified that he could not sequence the multiple bullet wounds in a victim. 13 ROA 2880-81. There was no eyewitness to the offense. Likewise, there was no expert testimony establishing the order of the events or the movements which took place inside the apartment. Although the district court sustained an objection to this portion of the rebuttal argument, the prosecutor ignored the ruling and continued the inflammatory argument and the district court overruled an objection to this argument during the first closing argument. 15 ROA 3246-47.

The State, when giving its closing argument to the jury in the trial phase, "may not argue facts or inferences not supported by the evidence." Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (citing Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)). Facts or inferences not supported by the evidence include statements with "no purpose other than to arouse the jurors' emotions," Id. at 109, 734 P.2d at 702, and statements "designed to appeal to the jury's sympathies." Rose v. State, 123 Nev. 194, 210, 163 P.3d 408, 419 (2007). The United States Supreme Court has stated that a prosecutor cannot engage in "improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88 (1935). Prosecutorial misconduct during closing arguments may deprive a defendant of his right to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The

Fourteenth Amendment to the U.S. Constitution guarantees a state criminal defendant due process of law, and due process includes the right to a fair trial. See Darden v. Wainwright, 477 U.S. 168 (1986). When determining whether prosecutorial misconduct amounts to a deprivation of this right, the Supreme Court has stated that the "relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden, 477 U.S. at 181 (quoting Donnelly, 416 U.S. at 643). See also United States. v. Payne, 2 F.3d 706, 712 (6th Cir. 1993) (finding misconduct based upon comments that had the ability to mislead the jury as well as ignite strong sympathetic passions for the victims and against the defendant).

The prosecutors' arguments about its theories as to how shots were fired, the positions of the people in the apartment, and especially their use of the terms "execute," *"coup de gras*," and "kill shot" were unsupported by the evidence, inflammatory, and were designed to arouse the emotions of the jurors. The rebuttal closing argument was especially prejudicial because it occurred immediately before the jury's deliberations. The State cannot establish that these arguments were mere harmless errors which did not violate Keith's constitutional rights. To the contrary,

he was substantially prejudiced by these arguments due to their inflammatory nature and the lack of evidence concerning the events at issue.[14]

b. The Prosecutor Commented On Keith's Silence, In Violation Of The Fifth Amendment.

Immediately prior to the jury's deliberations, at the close of the prosecution's rebuttal argument, the prosecutor argued:

> Ladies and gentlemen, there's only one way to look at this evidence. And there's at least one person in this room who knows who executed Donnie Cobb and Danielle Woods, and I suggest to you, if you do your job, you'll go back to that room, you'll think about it for a little while, and you'll come back here and tell that person you know, too. Thank you.

15 ROA 3277.

A prosecutor's direct comment on a defendant's failure to testify, violates the defendant's constitutional right against self-incrimination. Bridges v. State, 116 Nev. 752, 764-64, 6 P.3d 1000,1008-09 (2000) (citing Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991)). See also Griffin v. California, 380 U.S. 609, 613-14

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[14]The prejudice from the improper and inflammatory arguments was exacerbated by the charged atmosphere in the courtroom. The record shows that members of the victims' families audibly gasped during opening statements. 12 ROA 2566. Later, during testimony in the culpability phase of the trial, while the parties were at a bench conference discussing admissibility of a photograph, the prosecutor left another photo on a video display, which was viewable to the jury. 12 ROA 2676-78; Exhibit 51; 33 ROA 7271. Family members in the courtroom cried in response. 12 ROA 2678. They were admonished, but it was noted that jurors dabbed their eyes based upon the extended viewing of the photograph. 12 ROA 2682.

(1965) (comment on the refusal to testify is a remnant of the inquisitorial system and violates the Fifth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (the Fifth Amendment applies to the states through the Fourteenth Amendment). Even if the remark was an indirect reference, it would be impermissible if "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." Bridges, 116 Nev. at 764, 6 P.3d at 1008 (internal quotations omitted) (citing Harkness and United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

Although there was no objection to this argument, it was highly improper and deprived Keith of his substantial rights, caused actual prejudice, and was a miscarriage of justice. The prejudice from the comment on Keith's decision to remain silent and not testify was exacerbated by the prosecutor's directive to the jury "to do its job" by finding that Keith "executed" Danielle and Donnie. See United States v. Sanchez, 176 F.3d 1214, 1224-25 (9th Cir. 1999) (conviction reversed based upon prosecutorial misconduct, including argument that it was the jury's duty to find the defendants guilty). Given the lack of direct evidence and marginal physical evidence, and the gravity of the charges, reversal is warranted.

C. Significant Errors During The Penalty Trial Require The Grant Of A New Trial

1. The Aggravating Circumstance Of Great Risk Of Death Is Invalid

Keith's state and federal constitutional rights to due process of law, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment were violated by use of an invalid aggravator of great risk of death to more than one person. U.S. Const. amend. V, VI,VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21. NRS 177.055(2) requires this Court to review every death sentence and, in part, to consider whether the evidence supports the finding of an aggravator or aggravators.

The aggravator of "great risk of death to more than one person" is invalid because there is insufficient evidence to support it, the State presented a theory for which no notice was provided, and it is duplicative. NRS 200.033(3) provides as an aggravator that:

> The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

In its Notice of Intent to Seek Death Penalty, the State alleged that this aggravator existed because Keith shot and killed Danielle and Donnie while they were standing approximately four feet from each other, and that both were visible

when he engaged in a course of action, closely related in time and place, which would normally be dangerous to the lives of more than one person. 1 ROA 89. This same assertion was included in the State's Notice of Evidence In Support of Aggravating Circumstances. 7 ROA 1384-85.

At trial, however, the State gave another explanation, by arguing that the aggravator could be based on a theory that a bullet went through the wall of the apartment and through the window of a neighboring apartment, out into a courtyard, which may have placed the lives of others on the other side of the courtyard in danger. 17 ROA 3773. The State acknowledged that "nobody knows the trajectory of the bullet once it left and went through the window, but it could have gone anywhere. The person standing outside of the window just walking past could have been put at risk if there was somebody there." 17 ROA 3773, 3781. The State also argued that the aggravator could be based on the fact that both Danielle and Donnie were shot. 17 ROA 3774, 3781.

a. The State Did Not Provide Sufficient Notice Of This Aggravator.

No notice was provided of the State's "bullet in the courtyard" theory. SCR 250(4)(c) provides that Notice of Intent to Seek Death must "allege all aggravators which the State intends to prove and allege with specificity the facts on which the State will rely to prove each aggravating circumstance"). See also Redeker v. Eighth

Judicial Dist. Ct., 122 Nev. 164, 168, 127 P.3d 520, 523 (2006) (the State was not allowed to amend a Notice of Intent even if the defendant had full knowledge and understanding of the specific facts the State would rely on to prove this aggravator); Hidalgo v. Eighth Judicial Dist. Court, 124 Nev. 330, 337, 184 P.3d 369, 375 (2008). ("SCR 250(4)(c) provides that the notice of intent to seek death 'must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.'"). "Furthermore, 'a defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself.'" Id. (quoting Redeker, 122 Nev. at 168-69, 127 P.3d at 523). "The notice of intent must provide a simple, clear recitation of the critical facts supporting the alleged aggravator, presented in a comprehensive manner." Id. at 339, 184 P.3d at 376. Terms used in a notice of intent must not be impermissibly vague. Id.

The State's Notice of Intent and Notice of Evidence in Aggravation provided no notice of the State's theory about the bullet in the courtyard. It was improper for the State to present this theory and that aggravator cannot be based upon this theory.

b. There Is Insufficient Evidence To Support This Aggravator.

There is insufficient evidence to support the State's theory that persons other than Danielle and Donnie were in great risk of danger and there is insufficient evidence to support a finding that Keith "knowingly" created such a risk.

Although the State argued that other people could have been in danger based upon a bullet that traveled through a wall, through a window, and into a courtyard, there was no evidence that the bullet retained any deadly capacity after traveling through the wall and window. Moreover, there was no evidence that there were people in the courtyard or on nearby sidewalks. Likewise, there was no evidence that Keith purposefully shot through the apartment wall, had any knowledge that the bullet would travel through a window, or had any knowledge that people might be nearby. Under these facts, insufficient evidence exists to support the aggravator. See Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987) (use of great risk of death aggravator improper where defendant shot seven bullets at his ex-wife, five entered her body and two passed through the wall of an adjacent apartment, but there was no evidence that other persons were present in the apartment where defendant shot the victim, that any neighbor was at immediate risk of death, or that defendant knew of any other person in close proximity); Leslie v. State, 114 Nev. 8, 21, 952 P.2d 966, 975-76 (1998) (invalidating great risk of death aggravator where defendant's first

bullet fired over the murder victim's head and into a wall of a storage room occupied by two clerks but no evidence showed beyond a reasonable doubt that defendant knew the two clerks were in the storage room).

This aggravator requires that the State prove beyond a reasonable doubt that the murder was committed by a person who **knowingly** created a **great risk** of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person. Under the State's "bullet in the courtyard" theory, the aggravator was established only by guesswork that Keith inadvertently created a theoretical, slight possibility of a minor injury to one or more persons who may have possibly been outside in the parking lot. This "evidence" falls far short of proof beyond a reasonable doubt.

c. This Aggravator Is Duplicative

This aggravator cannot be based upon the shots fired at Danielle and Donnie as the jury returned a special verdict for an aggravator based on that allegation. Specifically, the jury found a conviction for more than one offense of murder in the instant case based upon these same facts. 16 ROA 3640; 17 ROA 3831. Stacking of aggravators is invalid under Nevada's weighing process. Servin v. State, 117 Nev. 775, 788-89, 32 P.3d 1277, 1287 (2001). See also Stringer v. Black, 503 U.S. 222 (1992); United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996); Allen v.

Woodford, 395 F.3d 979, 1012-13 (9th Cir. 2004) (adopting McCullah's holding – double counting of aggravators based on the same facts creates the risk of unconstitutional sentencing).

For each of these reasons the aggravator is invalid and Keith's sentence of death must be vacated as the State cannot establish beyond a reasonable doubt that the jury would have found Keith eligible for the death penalty in the absence of this aggravator. Likewise, the State cannot establish beyond a reasonable doubt that the jury would have sentenced Keith to death, following a weighing of valid aggravating and mitigating evidence and consideration of other matter evidence, had this aggravating circumstance not been included. The sentences of death must therefore be vacated.

2. Evidence In Aggravation Was Admitted In Violation of Keith's Rights to Cross-Examination and Confrontation

Keith's state and federal constitutional rights to due process of law, equal protection, a fair trial, confrontation, and cross-examination were violated by a district court's admission of testimonial hearsay evidence during the penalty trial. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"Questions concerning the admissibility of evidence during the penalty phase of a capital murder trial are generally left to the trial judge's discretion." Emil v.

State, 105 Nev. 858, 864, 784 P.2d 956, 960 (1989). The district court's construction or interpretation of the rules of evidence is a question of law subject to de novo review. United States v. Sioux, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004). Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. United States v. Lillard, 354 F.3d 850, 853 (9th Cir. 2003). Whether a defendant's Confrontation Clause rights were violated is a question of law that must be reviewed de novo. Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Constitutional error is harmless only when the State establishes beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24. This Court reviews the record on appeal to determine whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor. NRS 177.055(2)(c).

During trial, Keith objected to the admission of hearsay evidence, other than the charging document, guilty plea agreement, and judgment of conviction, as evidence in support of aggravators and other matter evidence. 15 ROA 3296. This objection was based upon Crawford v. Washington, 541 U.S. 36 (2004) and the right of confrontation. Id. The State relied upon this Court's opinion in Summers v. State, 122 Nev. 1326, 1327, 148 P.3d 778, 779 (2006), as authority for admission of this evidence. 15 ROA 3301. The district court overruled the defense objection. 15 ROA

3308, 3356. Extensive hearsay evidence was admitted, concerning both aggravators and other matter evidence, by the State during the penalty portion of the trial. 15 ROA 3371-81 (Detective Robert Wilson's testimony about Keith's criminal history); 18 ROA 3931-19 ROA 4173 (Exhibit 195, which includes documents concerning 20 different allegations); 15 ROA 3382 (testimony about prior prison and jail disciplinary records); 19 ROA 4175-21 ROA 4718 (Exhibit 196-98, which includes prison and jail records which were admitted without a non-hearsay foundation). Over a defense objection, the district court instructed the jury that hearsay is admissible in a penalty trial. 15 ROA 3439; 16 ROA 3599-3600. The State relied extensively on hearsay evidence during its closing arguments. 17 ROA 3777-81; 18 ROA 3930 (Exhibit 195).

The Sixth Amendment right of confrontation applies to capital penalty trials. The use of hearsay evidence must therefore not be permitted to obtain a sentence of death against a capital defendant. Keith recognizes that in Summers, 122 Nev. at 1327, 148 P.3d at 779, this Court held to the contrary in finding that Crawford, 541 U.S. at 68, does not apply to evidence admitted during a capital penalty trial. See also Burnside v. State, 352 P.3d 627, 654 n. 9 (Nev. 2015) (affirming Summers). Keith respectfully urges this Court to overrule Summers.

The Sixth Amendment limits the admission of testimonial hearsay statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. Crawford, 541 U.S. at 68-69. The language of the Sixth Amendment clearly states that confrontation is required "in all criminal prosecutions." In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the United States Supreme Court clarified that defendants facing sentencing proceedings are entitled to constitutional protections and that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584 (2002) applied the rationale of Apprendi to capital cases and the finding of death eligibility, including the finding of aggravators.

Several federal courts considering this issue have found that the right of confrontation applies to the eligibility phase of a capital trial. See United States v. Jordan, 357 F.Supp.2d 889, 902-03 (E.D.Va. 2005) (a federal district court judge found that the government could not introduce a witness's grand jury testimony and other statements during the eligibility phase of the capital proceeding); United States v. Johnson, 378 F.Supp.2d 1051, 1061 (N.D. Iowa 2003) (the "constitutional safeguards" of the Confrontation Clause should apply to the eligibility phase just as they apply to the trial phase). In United States v. Mills, 446 F.Supp.2d 1115, 1135

(C.D. Cal. 2006), a California federal district court went one step further by finding that the Confrontation Clause applies to both the eligibility and selection phases of a capital trial. This decision was followed in United States v. Concepcion Sablan, 555 F.Supp.2d 1205, 1221 (D.Colo. 2007). See also United States v. Stitt, 760 F.Supp.2d 570, 581 (E.D. Va. 2010) (applying the Confrontation Clause to both the eligibility and selection portions of the penalty phase and declining to bifurcate as it would be necessary if there were different evidentiary standards).

Some state courts also recognize that the Confrontation Clause applies during the penalty portion of a capital trial. See State v. McGill, 140 P.3d 930, 942 (Ariz. 2006) (the Confrontation Clause applied to hearsay evidence used to establish an aggravating factor but not other aspects of a capital penalty trial); Rogers v. State, 948 So.2d 655, 663-65 (Fla. 2006) (finding Crawford violation in a capital penalty phase based upon admission of statements to a police officer and deposition testimony without a showing of the witness's unavailability); Pitchford v. State, 45 So.3d 216, 251-52 & n. 100 (Miss. 2010) (deciding the issue based upon the Mississippi constitution); State v. Bell, 603 S.E.2d 93, 115-16 (N.C. 2004) (admission of a police officer's testimony to establish an aggravator violated Crawford); Russeau v. State, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005) (Confrontation Clause violated based upon admission of jail disciplinary records).

See also State v. Berget, 826 N.W.2d 1, 20 & n.11 (S.D. 2013) (finding that the Confrontation Clause does not apply to the selection phase of a capital penalty trial, but specifically declining to endorse this rule for the eligibility phase); Pepson & Sharifi, *Two Wrongs Don't Make A Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 Akron L. Rev. 1 (2010). Keith submits that these courts are correct in finding that the Confrontation Clause applies during a capital penalty trial.

The hearsay evidence that was introduced during the penalty trial was significant both in volume and in impact. Keith was unable to cross-examine his accusers as to these allegations. He urges this Court to overrule Summers by finding that this evidence was improperly introduced and to remand this matter for a new penalty trial.

The prejudice from admission of this testimony was overwhelming. As noted above, hearsay evidence, including testimonial hearsay evidence, was presented by the State concerning aggravating circumstances. 7 ROA 1381-90 (State's Notice of Evidence in Support of Aggravating Circumstances). Keith's counsel objected to this evidence under Crawford. 15 ROA 3296, 3299, 3301, 3372, 15 ROA 3439-41. The district court overruled the objections. 15 ROA 3308. The State presented extensive testimony through Detective Robert Wilson, including testimonial hearsay evidence

which was relevant to the alleged aggravating circumstances. 15 ROA 3370. Specifically, the detective testified about police reports which were involved in Keith's convictions for battery with use of a deadly weapon and attempted murder. 15 ROA 3373, 3378-79. The detective also testified about police reports which were involved in Keith's conviction for attempt murder. 15 ROA 3373. Although judgments of conviction were admitted in support of these aggravators, and testimony was presented by the alleged victim as to one aggravator, the inflammatory nature of the allegations in the police reports rendered this evidence especially prejudicial.

The prejudice from testimonial hearsay, which was introduced as "other matter" evidence, over Keith's objection, was also prejudicial. 15 ROA 3296, 3299, 3301, 3372. Specifically Detective Wilson testified abut 20 separate incidents and testified from police reports about these matters. 15 ROA 3371. As set forth in the Statement of Facts above, the detective recited from police reports which claimed that Keith had engaged in various criminal acts, even though Keith was not convicted of nearly all of the offenses, and live testimony from actual witnesses, which would have provided the opportunity for cross-examination, was not presented at trial as to nearly all of the allegations. 15 ROA 3371-77, 3387. These inflammatory allegations included multiple claims of domestic violence causing injuries, battery, attempt sexual assault, threats to life, and assault with a deadly weapon. 15 ROA 3374-81.

The detective also read from reports alleging misconduct by Keith while he was in prison, including 16 write-ups. 15 ROA 3381-82. Disciplinary records, involving 29 alleged incidents, from Keith's pretrial incarceration in this case were also presented through reports introduced by the detective. 15 ROA 3383.

The admission of this evidence was highly prejudicial and was emphasized by the State during closing arguments. 17 ROA 3771-72, 3777-81, 3805, 3808; 33 ROA 7280, 7288-95 (State's powerpoint presentation). The State cannot establish beyond a reasonable doubt that this was merely harmless error. Rather, the hearsay evidence constituted a lengthy portion of the State's evidence and argument in support of the death sentences. Reversal is therefore warranted.

3. The State Committed Prosecutorial Misconduct During the Penalty Phase of The Trial.

Keith's conviction and sentence should be reversed because his state and federal constitutional rights to due process, equal protection, and a fair trial were violated by the State committing prosecutorial misconduct during the closing argument of the penalty phase. Keith's constitutional rights were also violated by the district court's failure to provide a remedy in response to the misconduct. U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; NRS 200.033.

This Court reviews claims of prosecutorial misconduct in two steps: first, it determines whether the prosecutor's conduct was improper, and second, if the conduct was improper, it determines whether the misconduct warrants reversal, Valdez, 124 Nev. at 1188, 196 P.3d at 476; Rimer v. State, 131 Nev. 307, 333, 351 P.3d 697, 714 (2015). Furthermore, this Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. Id. Typically, failure to object to instances of prosecutorial misconduct precludes appellate review. Rose v. State, 123 Nev. 194, 208, 163 P.3d 408, 418 (2007). However, this Court will review the prosecutorial misconduct for plain error if the error: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings. Id. at 208-09, 163 P.3d at 418. When determining if prosecutorial misconduct resulted in deprivation of a fair trial, this Court asks whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. Rudin v. State, 120 Nev. 121, 136, 86 P.3d 572, 582 (2004).

a. The State Committed Prosecutorial Misconduct By Misstating The Legal Standard For Mitigation

In Boyde v. California, 494 U.S. 370, 384 (1990) the United States Supreme Court noted that "[a]rguments of counsel generally carry less weight with a jury than do instructions from the court." However, arguments by counsel which "[m]isstate

the law are subject to objection and to correction by the court. Id. at 385 (internal citations omitted).

During the penalty phase rebuttal, the State gave the jury a very specific definition for mitigation:

> First, it's not the mere fact, the existence of a fact that makes it mitigation. It's does that fact exist and should that be something we consider, or you consider, to give a sentence less than death.
>
> And ask yourself about some of his mitigation. Some of it, I would suggest to you, just – just is not even a fact. . . .

17 ROA 3805.

They prosecutor continued this theme:

> And they suggest to you -- so when you go through these – and I'm not going to go through each and every one of these – but ask yourself one, is it a fact, but two, is it a fact that should somehow affect you judgment? And there's sort of this elephant in the room, right? Like mitigation can be anything. He had a bad childhood, is how I'll -- I'll group the first 18 years of his life.
>
> You know, look, if he had a good childhood, could that be mitigation, if a jury decides of being – having a good childhood is a reason not to give death; I guess that could be mitigation. . . .

17 ROA 3805-06.

Keith's counsel did not immediately object to this argument, but did object prior to the jury's deliberations. 17 ROA 3810. In any event, the State's misconduct should be considered as a matter of plain error based upon the substantial prejudice

to Keith and should be considered under this Court's mandatory review of the death sentences.

The State's definition of mitigation runs contrary to the current state of the law. As this Court noted in Watson:

> "The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence." Boyde v. California, 494 U.S. 370, 377 (1990). Mitigation evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. 586, 604 (1978); see NRS 200.035; accordingly, mitigation is not limited to evidence "which would tend to support a legal excuse from criminal liability," Eddings v. Oklahoma, 455 U.S. 104, 113 (1982). See Browning v. State, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008) (acknowledging that capital penalty hearing is focused on defendant's character, record, and circumstances of offense); McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998) (same).

Watson v. State, 130 Nev. 764, 782, 335 P.3d 157, 171 (2014).

As arguments made by counsel which misstate the law are subject to correction by the court, Keith's counsel objected before the jury retired to deliberate regarding counsel's misstatement of mitigation and other issues raised. Boyde, 494 U.S. at 384; 17 ROA 3810. The district court did not find that an admonishment was warranted and excused the jury to deliberate as counsel and the court continued argument on the objection outside their presence. 17 ROA 3812, 3823-25. Keith's counsel argued that the prosecutor's argument trivialized mitigation, mischaracterized mitigation as

"excuses," and used rhetoric to disparage defense counsel. 17 ROA 3824-25. Ultimately the district court overruled Keith's objections and denied any curative relief. 17 ROA 3826.

The State's characterization of mitigation was incorrect and as such, was improper. Furthermore, since the judge failed to correct the State, the jury would likely assume that there was nothing wrong with the State's definition. The impact of statements made by counsel, and rulings made by the district court can have a lasting effect upon jurors and can render a trial fundamentally unfair. See Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 714-16, 220 P.3d 684, 700-01 (2009); Arizona v. Washington, 434 U.S. 497, 512 (1978). As mitigation is crucial to a defendant in a capital phase, the State's argument, combined with the district court's failure to correct the record was prejudicial and the State cannot establish that it was harmless beyond a reasonable doubt.

The prejudicial impact of the argument is reflected by the sentences of death and also by the lack of mitigating circumstances found by the jury, despite the uncontested evidence supporting them. Of the forty-one suggested mitigating circumstances, the jury only selected three: that Keith served his country in the military and received an honorable discharge, Keith's daughters love their father, and that Keith sought help from the VA hospital and Southern Nevada Mental Health for

his mental issues. 16 ROA 3635-37. Some of the uncontested mitigating factors that the jury did not select included his placement in a mental institution as a minor child, during which he did not receive treatment for his mental disorders; his witnessing of physical abuse by his father of his mother; his physical abuse by his father; his diagnosis of mental health disorders while in prison; parental abandonment; and numerous other factors which should have been considered by the jury as mitigation. 15 ROA, 3400-3408; 17 ROA 3635-38, 3713; 18 ROA 4092, 4097, 20 ROA 4408, 4500, 4560.

The prosecutor's argument minimalized important factors concerning Keith's life that were relevant to the sentencing decision. The definition of mitigation argued by the prosecutor was substantially different than that approved of by the United States Supreme Court and this Court as well as the instructions given by the district court. The State's mocking attitude toward mitigation trivialized its meaning and rendered the entire proceeding unfair. Keith's sentence of death should be reversed because of the prosecutorial misconduct and its prejudicial impact on the jury.

b. The State Committed Prosecutorial Misconduct By Asking The Jury To Give Keith The Death Penalty To Prevent Him From Harming Prison Guards And Other Inmates.

During the penalty trial, the State argued:

> Ms. Jackson stood up here and suggested to you that Mr. Barlow could be safely housed. True. I don't dispute what would McDaniel is [sic]. Mr. Barlow is an old onery man. He could be safely housed[d]. She said, you know, he can live out his days. True. There's no way Mr. Barlow is ever leaving the Nevada Department of Corrections. Nobody thinks that there's any sentence other than life without or death in this case.
>
> But should he have the right to? Should he have the right to bully, spit and push around, not just the – just the the inmates, should he have the right to do that to the guards as well?

17 ROA 3808. Defense counsel immediately objected, and the district court sustained the objection. Id. Nonetheless the prosecutor continued with this argument:

> Well, go back and look at Exhibit – the – jail records. It's not just that he's onery towards other prisoners; look at who he is and ask yourself, does he have that right? Ultimately, what you decide justice is, is something we will accept. But when you go back to that room and make the vote, and before you sign your name on that line, ask youself, am I doing justice.

17 ROA 3808-09.

Later, after the jury was excused, defense counsel raised the issue again, and the district court felt that sustaining the objection was the best way to cure the harm. 17 ROA 3821.

This Court has previously held that "[e]vidence of a defendant's character and specific instances of conduct is admissible in the penalty phase where the evidence is relevant and the danger of unfair prejudice does not substantially outweigh its probative value." Harte v. State, 116 Nev. 1054, 1071, 13 P.3d 420, 431-432 (2000).

Under this test, "[e]vidence from which a jury could fairly infer that incarceration will not deter the defendant from endangering others lives is admissible to show his future dangerousness. Id. In Harte, the defendant had made a statement that he wanted to escape from his prison; this combined with his violent character was sufficient to support a future dangerousness argument during the penalty phase. Id.

Here, the State made a specific allegation that Keith would be given the opportunity to spit on prison guards and inmates and suggested that giving a sentence of death would deprive him of this opportunity. 17 ROA 3808. Unlike Harte, where the defendant's statement desiring escape was directly related to his future incarceration, there is no specific instance that is relevant in the instant matter. Although Keith was charged with spitting at an officer taking him into custody, that specific event occurred in 1990 and did not involve a corrections officer. 19 ROA 4325. Furthermore, the State did not make any specific reference to support its future dangerousness argument as in Harte.

In Castillo v. State, 114 Nev. 271, 279-280, 956 P.2d 103, 109 (1998) this Court declined to reverse despite finding some of the State's arguments improper. Specifically, during the penalty phase, the State argued about the threat that the defendant posed to future inmates. Part of this Court's decision not to reverse was

based on testimony that the defendant had assaulted other inmates on two prior occasions and breached other security regulations. Id.

Unlike Castillo, and as noted above, the record in the instant matter is void of any reference to Keith spitting at or assaulting a corrections officer. In fact the former director of the Nevada Department of Corrections testified that while Keith had some disobedience issues and problems with inmates throughout his time incarcerated, those occurred when he was younger and they were "nothing serious." 16 ROA 3523. His later behavior indicated that his disciplinary infractions were occurring less frequently as he got older. 16 ROA 3529. While Keith was alleged to have spit in 1990 while being arrested, his subsequent arrests occurred without incident.17 ROA 3862, 19 ROA 4260, 20 ROA 4412. With regards to other inmates, in one documented incident where Keith and another inmate engaged in a mutual fight, the other inmate was identified as the initial aggressor. 15 ROA 3400. In a second incident, Keith was identified as the aggressor in a non-physical argument with another inmate, with the officer who did the write up noting that the "behavior is very out of the ordinary for Barlow. He normally gives me no problem and keeps to himself…" 15 ROA 3406. In a third incident, it was actually Keith who was beat up by another inmate in 2015. 16 ROA 3542. Finally, based on his review of Keith's

records, the former director of NDOC testified that Keith could be safely housed. 16 ROA 3537, 3542.

The prejudice to Keith by the State's reference was compounded by the fact that the State did this during rebuttal, leaving the defense with no opportunity to respond. See United States v. Gleason, 616 F.2d 2, 25-26 (2nd Cir. 1979); United States v. Giovanelli, 945 F.2d 479 (2nd Cir. 1991) (concurring opinion). Because the State's argument was improper, the question turns to whether it warrants reversal under harmless error analysis. Valdez, 124 Nev. at 1188, 196 P.3d at 476.

The State cannot establish that this was harmless error given the facts of the case. Keith was 63 years old at the time of trial. 17 ROA 3859. Any sentence for Keith would mean he would never leave prison. 17 ROA 3808. The State essentially informed the jury that there would be no difference if they gave Keith a life sentence or a death sentence except that with a life sentence Keith would likely attack guards and other inmates. It is "[i]mproper to ask the jury to vote in favor of future victims and against the defendant." Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990). Thus, the State not only made an improper future dangerousness argument but asked the jurors to choose between Keith and his future victims in the form of guards and inmates.

Simply sustaining the objection did not cure the harm. Because the argument was improper, and prejudiced Keith, the State committed prosecutorial misconduct. The district court's refusal to take any action beyond sustaining the objection - without even instructing the jury to disregard the improper statement - was an abuse of its discretion, especially because the prosecutor continued the argument after the objection was sustained. 17 ROA 3808-09. Although defense counsel asked for a mistrial on that issue as well as several others related to the prosecutorial misconduct during the penalty phase, the district court denied the mistrial. 17 ROA 3826. As such, reversal is the appropriate remedy.

c. The State Committed Prosecutorial Misconduct By Improperly Comparing Keith To His Sister, Thereby Encouraging The Jury To Ignore Mitigation.

During the final closing argument, the State encouraged the jury to disregard mitigation by comparing Keith to his sister:

> They suggest to you, well, we don't know why it is that people with some bad childhood turn out good and some people with bad childhood turn out bad. But we must know that it's the bad childhood that caused the behavior? Really? I thought his sister is a pretty good example of why it is his childhood didn't affect who he was. Look at her. Fully functioning, normal human being.

17 ROA 3807. After the prosecutor completed their argument and before the jury went into deliberation, Keith's counsel objected that it was improper to compare Keith to his sister and asked for the opportunity to respond to the prosecutor's

argument, which was raised for the first time in rebuttal argument. 17 ROA 3817-18, 3823.

Keith recognizes that this Court has held, based upon NRS 175.141(5), that the prosecution is entitled to present the rebuttal argument in a penalty phase trial. Schoels v. State, 114 Nev. 981, 989, 966 P.2d 735, 740-41 (1998) (finding that State has the right to the final argument); Witter v. State, 112 Nev. 908, 922-23,921 P.2d 886, 897 (1996) (same) (overruled on other grounds, Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011)). The district court, however, violated Keith's constitutional rights by not allowing the State to raise new issues in rebuttal argument that counsel not be addressed by defense counsel.

Sending a man to death "on the basis of information which he had no opportunity to deny or explain" violates fundamental notions of due process. Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality decision). Due process entitles a defendant to a "meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986). The right to be heard is a core requirement of due process. Id. In Skipper v. South Carolina, 476 U.S. 1, 4-5, 9 (1986), the United States Supreme Court reversed a death sentence based upon the fact that the prosecutor made an argument concerning future dangerousness, but the defendant was not allowed to rebut that argument with evidence that he would not be eligible

for parole. Because the defendant was not allowed to rebut evidence and argument used against him, the defendant was denied due process. Id. See also Simmons v. South Carolina, 512 U.S. 154 (1994).

The State here was allowed to make the final argument, which resulted in Keith's death sentence, on the basis of information which he had no opportunity to deny or explain. As a matter of due process, his sentence must be reversed.

It should also be reversed because it was improper to urge the jury to sentence Keith to death based upon his sister's situation. Cf Johnson v. State, 122 Nev. 1344, 1356, 148 P.3d 767, 775 (2006) (finding a similar argument to contain improper elements and to be an improper appeal to public opinion).

Here, the key issue raised by Keith's counsel was that the State was improperly comparing Keith to his sister, thereby encouraging the jury to ignore the specific factors on his list of mitigation that included his upbringing and childhood. 15 ROA 3425. By making this argument, the State was encouraging the jury to disregard the mitigation regarding Keith's upbringing. As the jury must consider all mitigation, this was improper argument on the part of the State and does not survive harmless error analysis. Burnside, 131 Nev. at 384, 352 P.3d at 651. See also Thomas, 114 Nev. at 1149, 967 P.2d at 1125; Eddings, 455 U.S. at 114 (noting that sentencer may determine weight to be given mitigation evidence, but it "may not give it no weight

by excluding such evidence from [its] consideration"). Furthermore, the impact of the State's argument is reflected by the jury's failure to find any of Keith's traumatic childhood events to be mitigating. 16 ROA 3635.

d. The State Committed Prosecutorial Misconduct Arguing That The Jury Needed To Return A Death Verdict Because Of The Second Victim.

During the final closing argument, the State argued:

> And then think to yourself, what about the next count, right? If we were here just on the murder of Danielle Woods, and you knew what you knew about Keith Barlow, what sentence would you be imposing? Life without the possibility of parole. There's not even a question about that. Maybe even you'd be considering the death penalty considering he tried to kill her before and shot another person, with small children in the house the first time he commits his offense.
>
> Ask yourself when you do that, if you decide that, what justice does Donnie Cobb get? Right? Mr. Barlow is serving life without for the murder of Danielle Woods. What sentence does he get for Donnie Cobb? Make sure that both people here get justice.
>
> And when you do that, and you come back here and you do your job, we will respect that verdict. Thank you.

17 ROA 3809. Keith's counsel immediately objected and the matter was argued to the district court outside the presence of the jury. 17 ROA 3809.

Far from taking any action to cure the harm, the district court overruled defense counsel's objection, finding that "I don't think that there's anything that I've heard so far that's going to lead me to really admonish the jury in any way and say anything

about what was said. So let me get them outside and we can make a bigger record." 17 ROA 3811-12.

Following additional argument from counsel, the district court affirmed its prior decision:

> Understood. I'm just saying that the characterization you made was what about Donnie Cobb, what would be justice for Donnie Cobb? But I -- I think my sense is that asking the jurors to essentially walk up the ladder of moral culpability from a punishment standpoint, depending upon the nature of a case, that's not inappropriate. . . .
>
> If a case has multiple victims, is that an argument that can be made? Sure. I don't think there was anything that was said that because there's two, that automatically equates to death or you have to give him death because of one to be meaningful to the other. But you're arguing about within the confines of the nature of a case. I mean, there are quite simply multiple victims.

17 ROA 3815-16.

In Jeremias v. State, 412 P.3d 43, 53 (Nev. 2018), this Court addressed a similar argument made by the prosecution during rebuttal of the penalty phase:

> Jeremias also challenges the prosecutor's statement during rebuttal argument that if the jury imposed a life sentence for the murder of Paul, "what's the punishment for [the murder of] Brian? Because whatever you give short of death won't be a day longer in prison. And [Brian's] life is virtually meaningless by a verdict like that."

This Court disapproved of this remark. Id. "In a case with multiple victims, it is appropriate for a prosecutor to remind the jury that the loss of each victim's life should be reflected in the sentence imposed. It is inappropriate, however, to suggest

that justice requires a death sentence because the defendant killed more than one person." Id.

Despite this Court's finding, in a recent published opinion that such an argument was inappropriate, the State proceeded to make the same argument here. 17 ROA 3809. Unlike Jeremias, here the innapropriate argument was objected to and as such, the State must establish beyond a reasonable doubt that the error was harmless. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The State cannot meet this burden. Rose v. State, 123 Nev. 194, 210, 163 P.3d 408, 419 (2007) (part of prosecution's argument was for the jury to be fair to the victims as well as asking the jurors to insure the victim's receive justice.)

Other courts also look unfavorably on asking for justice on behalf of victims or providing an additional penalty for multiple victims. See e.g. United States v. Johnson, 713 F. Supp. 2d 595, 634 (E.D. La. 2010) (reversing for several reasons related to improper comments made by the prosecutor during the penalty phase of a capital proceeding, including references to providing justice for the victims and penalty imposition when there is a second victim)

Further troubling is that despite this Court's clear disapproval of this type of argument, the State commenced to do it four months after the decision in Jeremias was published. McGuire v. State, 100 Nev. 153, 155, 677 P.2d 1060, 1062 (1984)

(Despite prior condemnation of prosecutorial misconduct, the problem illustrated by this Court still persisted.)

As noted above, the prosecutor made the argument that because there are two victims, giving a second sentence of life without the possibility of parole would deprive the second victim of justice; and the district court's findings run contrary to this Court's findings in Jeremias. Therefore, because the statements were deemed inappropriate by this Court months prior to the instant case, the State made the same inappropriate argument, and because the district court failed to provide an admonishment or any other curative relief, the error was not harmless as reflected by both the verdict of death and the lack of mitigating circumstances selected by the jury. Accordingly, Keith requests that the sentences of death be reversed.

e. The State Committed Prosecutorial Misconduct By Asking The Jury To Perform Their Duty.

The State committed additional misconduct by making an improper argument by asking the jury to perform their duty. Because defense counsel did not object, the request for the jury to perform their duty is reviewed for plain error. Rose, 123 Nev. at 208, 163 P.3d at 418. As such, the error must have "(1) a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." Id. at 208-09, 163 P.3d at 418 (internal quotation marks omitted).

During the penalty phase, the State argued:

> As I said to you, and Mr. Scow has said to you, and to a certain extent, even Ms. Jackson has suggested it to you; your job in this case, the duty you took, is to do justice.

17 ROA 3802.

> If this jury decides that Mr. Barlow has not earned the penalty, the ultimate penalty, that's fine. But just be certain that when you come back here you've done your duty.

17 ROA 3803.

These arguments were improper. In United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986), relying on United States Supreme Court rulings, the First Circuit explained why this is misconduct:

> In United States v. Young, 470 U.S. 1, (1985), the Supreme Court found that a prosecutor had erred in urging a jury to "do its job." The Court said that, "That kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice, see, *e.g.*, ABA Standards for Criminal Justice . . . 3-5.8(c) and 4-7.8(c)." Id. at 18. We see no difference between urging a jury to do its job and urging a jury to do its duty, and we find that the prosecutor erred in making such an exhortation. Cases are to be decided by a dispassionate review of the evidence admitted in court. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality.

This Court also recognizes that this type of argument constitutes misconduct. In Evans v. State, 117 Nev. 609, 633-34, 28 P.3d 498, 515 (2001), overruled on other grounds in Lisle v. State, 351 P.3d 725, 732 & n.5 (2015):

> Other prosecutorial remarks were excessive and unacceptable and should have been challenged at trial and on direct appeal. In rebuttal closing, the prosecutor asked, "do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?" Asking the jury if it had the "intestinal fortitude" to do its "legal duty" was highly improper. The United States Supreme Court held that a prosecutor erred in trying "to exhort the jury to 'do its job'; that kind of pressure . . . has no place in the administration of criminal justice." "There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality." The prosecutor's words here–"resolve," "determination," "courage," "intestinal fortitude," "commitment," "duty"--were particularly designed to stir the jury's passion and appeal to partiality.

(Quoting Young, 470 U.S. at 18; Mandelbaum, 803 F.2d at 44.

Here, the State's exhortation for the jury to do its duty, combined with its references to justice for the victims, constituted improper argument. As the district court failed to take any corrective action, Keith was unfairly prejudiced.

The State's argument that giving Keith life would deprive the second victim of justice was improper. The State's argument that the jury must do its "duty" was also improper. The State cannot establish that this is mere harmless error because the effect of the State's statements was to inflame the juror's passions. Keith respectfully requests that this Court reverse his death sentences.

. . .

4. The District Court Refused To Allow A Defense Argument On A Mandatory Jury Instruction, Which Was Fully Supported By Long-Standing Nevada Law, Thereby Evidencing A Lack of Knowledge of Nevada's Death Penalty Scheme, And Violating Keith's Constitutional Rights To A Fair Penalty Trial.

Keith's state and federal constitutional rights to due process of law, equal protection, a fair trial, the assistance of counsel and right to present a defense were violated by a district court order prohibiting his counsel from presenting argument that was fully supported by Nevada law and the instructions. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court reviews the district court's rulings involving counsel's latitude during closing argument for an abuse of discretion, while it recognizes that district courts must permit defense counsel to argue any reasonable inference supported by the record facts. Glover v. Dist. Court, 125 Nev. 691, 703-05, 220 P.3d 684, 693-94 (2009); Herring v. New York, 422 U.S. 853, 857, 862 (1975) ("The right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process."). See also United States v. Sawyer, 443 F.2d 712, 713 (D.C. Cir. 1971) (a district court abuses its discretion when it "prevents defense counsel from making a point essential to the defense;" the prosecutor and defense counsel "must be afforded a full opportunity to advance their

competing interpretations [of the evidence], and to emphasize the principles of law that favor their respective positions."). De novo review applies to questions of law, including the proper interpretation of a statute. Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Court, 129 Nev. 602, 607, 309 P.3d 1017, 2012 (2013).

While settling jury instructions, a dispute arose concerning the role of a single juror in determining the weight of mitigating and aggravating evidence, and the consequences of a single juror who finds that mitigation outweighs aggravation. Keith's counsel argued that the verdict form should reflect the significance of a single juror who finds that mitigation outweighs aggravation, and then this exchange occurred:

> The Court: Okay. Having found that the mitigation outweighs any aggravating, All right. And you're proposing what now?
>
> Ms. Trujillo: If at least one of you determines that the mitigating circumstance or circumstances outweigh.
>
> Mr. DiGiacomo: This is what they want to utilize to make the argument that one person can decide which one of the four – which one of the two verdict forms you use.
>
> The Court: But, yeah, I think they collectively have to decide that mitigation outweighs aggravation. They don't have to be unanimous on which mitigator they find, but it can't be that if one of you decides that a mitigator outweighs aggravators, then nobody else can still believe that aggravation outweighs mitigation and potentially end up hung.
>
> Ms. Trujillo: And our reading of Evans is that only one person needs to decide that mitigating circumstances outweigh aggravation, and

they have to proceed to the three alternative punishments, which would be the 20 to 50, the life without, or the life with.

The Court: Or – no, or they – they just – they're hung; right? I mean, if – in your scenario, if one person says I believe aggravation – or mitigation outweighs aggravation and the other ten say we believe aggravation outweighs mitigation, then either there's movement to the left or to the right, or they end up being hung.

But I think the danger of what I hear you proposing is that the jury would believe that if one person says mitigation outweighs aggravation, then the other ten have to, as a mechanical endeavor, give up on their belief and move to the other three punishments.

Ms. Trujillo: And that –

The Court: – which is –

Ms. Trujillo: And that's our reading of Evans.

The Court: I don't think that's what Evans stands for. I think that you end up with a hung jury, but I don't think that – that they can't – they can't continue to be rooted in their belief as to what the evidence shows. I'll look at Evans again and we can take this up again tomorrow when you finish up on your mitigation instruction, but I don't – I don't – I don't believe that's what I would – I would think would be an appropriate –

Mr. DiGiacomo: – It's a reasonable –

The Court: – way to word that.

Mr. DiGiacomo – interpretation of the evidence, and it's a fight we always have that there is a way to read Evans in which they're right. No court has ever said that they're right, but there is a way because of the way they wrote Evans to make the argument that that's true.

Now, there's no case that says that's true. It's just the Evans instruction that they give you from which they make that argument. All verdicts have to be unanimous. They are trying to distinguish in Evans

> that a single juror can find mitigation that no other juror finds, and that single juror can also find that the mitigation outweighs the mitigation.
>
> The Court: Understood.
>
> Mr. DiGiacomo: But you still wind up with a hung jury at that point unless the other 11 agree.

16 ROA 3626-28. This debate continued and was then postponed to the following day. 16 ROA 3629. The district court noted that it had reviewed Evans and concluded the following as to the meaning of the case:

> I don't think that Evans stands for the idea that if one juror finds that mitigation, in that juror's mind, outweighs aggravation, that that mechanically causes all the other jurors to have to automatically decide that aggravation doesn't outweigh mitigation and they – that they can't keep deliberating and they have to eliminate the death penalty.
>
> You know, when something like that happens, there is a variety of potentialities. Once of them is they keep deliberating and one side or the other moves. The other thing is, they could compromise in some fashion and render a verdict, or there is no movement and they could just be a hung jury on that issue of getting to decide the sentence.
>
> But more importantly, in Evans, I think the language that you guys are referring to about what it means is where it says, quote, "In deciding whether to return a death sentence, the jury can consider such evidence only after finding the defendant death eligible, i.e. after it has found unanimously at least one enumerated aggravator and each juror has found any mitigators do not outweigh the aggravators."

17 ROA 3747.

Defense counsel confirmed that that language is part of the Evans instruction, along with an instruction that says "If you do not decide unanimously that at least one aggravating circumstance has been proved beyond a reasonable doubt, or it at least

one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence[.]" 17 ROA 3748. They also stated their intention to argue that principle because it was in the jury instructions, it was in Evans, it has been approved by this Court, and it has not been overruled. 17 ROA 3748. Defense counsel also cited to Mills v. Maryland, 486 U.S. 367 (1988), as support for the Evans instructions. The district court, in accord with the State's arguments, precluded defense counsel from arguing the Evans instructions to the jury. 17 ROA 3748-50, 3755. The district court explained that under its interpretation of Evans, if the jurors could not reach an agreement about the weighing of aggravating and mitigating circumstances, there would be a hung jury. 17 ROA 3755. Neither the State nor the district court cited any authority supporting the hung jury position or overruling Evans. 17 ROA 3748-56.

The district court abused its discretion by refusing to allow defense counsel to argue a critical aspect of Nevada's death penalty scheme, which was fully supported by the jury instructions and long standing authority from this Court.

In Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001), overruled on other grounds, Lisle v. State, 351 P.3d 725, 732 n.5 (2015), this Court provided instructions which are to be given in capital penalty trials. Those instructions were given in this

case. 16 ROA 3647. Included in those instructions are key aspects of Nevada's death penalty scheme:

> If you find unanimously and beyond a reasonable doubt that at least one aggravating circumstance exists and each of you determines that any mitigating circumstances do not outweigh the aggravating, the defendant is eligible for a death sentence. At this point, you are to consider all three types of evidence, and you still have the discretion to impose a sentence less than death. You must decide on a sentence unanimously.
>
> If you do not decide unanimously that at least one aggravating circumstance has been proven beyond a reasonable doubt or if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence. Upon determining that the defendant is not eligible for death, you are to consider all three types of evidence in determining a sentence other than death, and you must decide on such a sentence unanimously.

Evans, 117 Nev. at 636, 28 P.3d at 516-17; 16 ROA 3647. These instructions were well established when Evans was issued and they have been given in every capital case since Evans. This critical case has never been overruled on the issue of the consequence of a jury in which one or more, but not all, jurors find that mitigation outweighs aggravation.[15]

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[15]Nevada is not alone in recognizing the role of a single juror in capital cases. In the vast majority of states with the death penalty, and in the federal system, if a jury does not reach a unanimous verdict as to the weighing of aggravators or mitigators, or the sentence, a sentence of life in prison is automatically imposed. See Arkansas (Ark. Code Ann. §, 5-4-603(c) (2019)), Colorado (Colo. Rev. Stat. § 18-1.3-1201(2)(d) (2018)), Florida (Fla. Stat. § 921.141 (2019)), Georgia (O.C.G.A. § 17-10-31(c) (2019)), Idaho (Idaho Code § 19-2515(7)(b) (2019)), Kansas (K.S.A. § 21-6617(e) (2019)), Louisiana (La.C.Cr.P. Art 905.8 (2019)), Mississippi (Miss. Code Ann. § 99-19-101(3)(c) &

The State argued in the district court that the consequence of a less than unanimous jury on the issue of whether mitigation outweighs aggravation is a hung jury, rather than consideration of sentences other than the death penalty. 17 ROA 3748-56. The State failed to cite a single case holding that a hung jury is the proper result in this situation. Likewise, the State failed to explain what the Evans instruction

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§ 99-19-103 (2019)), New Hampshire (N.H. RSA 630:5(IX) (2019)), North Carolina (N.C. Gen Stat. § 15A-2000(b) (2018)), Ohio (ORC Ann. § 2929.03(D)(2) (2017)), Oklahoma (21 Okl. St. § 701.11 (2019)), Oregon (ORS § 163.150(1), (2) (2019)), Pennsylvania (42 Pa. Cons. Stat. Ann. § 9711(c)(1)(v)(2019)) , South Carolina (S.C. Code Ann. § 16-3-20(C) (2019)), South Dakota (S.D. Codified Laws §23A-27A-4 (2019)), Tennessee (Tenn. Code Ann. § 39-13-204(h) (2019)), Texas (Tex. Code Crim. Proc. Art. 37.071.2(g) (2019)), Utah (Utah Code 76-3-207(5)(c) (2019)), Virginia (Virginia Code § 19.2.264.4(D) (2019)), Washington (Wa. Rev. Code Ann. §§ 10.95.060(4), .080(2) (2019)), Wyoming (Wyo. Stat. Ann. § 6-2-102(d)(ii) (2019), U.S. Government (18 USCS §3594 (2019)). A couple of states have an entirely different system, in which a judge imposes a sentence based upon a jury finding of aggravating circumstances. See Montana (MCA 46-18-305 (2019)), Nebraska (Neb. Rev. Stat. §§ 29-2520(4)(f), (g) (2019)). In a few states, the judge determines the penalty if the jury is not unanimous. See Indiana (Ind. Code Ann. § 35-50-2-9(f), Missouri (Mo. Rev. Stat. § 565.030 (2019)(4). In Alabama, a judge may sentence a defendant to death if at least 10 jurors vote for death, or to life imprisonment without the possibility of parole if a majority of jurors recommend that sentence, and otherwise the state may retry the defendant. See Ala. Code § 13A-5-46(f) (2019). In Arizona, the State may retry the defendant once in the event of a hung jury on the finding of aggravators or the sentence. See A.R.S. §§ 13-752(J), (K) (2019). In California, the State may retry the defendant once if the jury is unable to reach a unanimous verdict and the judge has the discretion to either impose a life sentence or impanel a new jury if the jury is again unable to reach a verdict. See Cal. Pen. Code §§ 190.4(a), (b) (2019). In Kentucky, the state may retry the defendant in cases in which the jury is not unanimous. Skaggs v. Commonwealth, 694 S.W.2d 672, 681 (Ky. 1985), vacated in part on other grounds, Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000).

means if it does not mean what it says and failed to offer any authority that would support its reasoning.[16]

Evans and Nevada's death penalty scheme are consistent with precedent from the United States Supreme Court, which emphasizes the role of the individual juror in making decisions about mitigation evidence and the weighing of mitigating and aggravating evidence. See Kansas v. Marsh, 136 S.Ct. 633, 642 (2016) ("Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy."); Mills v. Maryland, 486 U.S. 367, 371-73 (1988) (reversing death sentence based upon confusing jury instructions which could have negated the principle that under Maryland law, so long as "one juror believes there exists a mitigating factor, and that this factor is not outweighed by the aggravating circumstances, and if such juror continues to adhere to his or her position, the sentence will not be death"). Thus, the argument that defense counsel intended to make to the jury, but was prohibited by the district court from doing so, was fully

[16]This Court recently reaffirmed that the Evans instructions correctly state the law concerning Nevada's death penalty scheme. Haberstroh v. State, 2015 Unpub. Lexis 1115 *13-14 & n.2, 2015 WL 5554576, Docket No. 62466 (Nev. 9/28/2015) (unpublished decision), but this decision was issued prior to January 1, 2016, so it is not relied upon here. NRAP 36(c)(3).

supported by rulings from the United States Supreme Court recognizing this constitutional right in capital cases. The prohibition on a central component of the defense closing argument requires the granting of a new penalty trial.

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. . . .

Herring, 422 U.S. at 858.

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Id. at 862. The district court's order prohibiting argument on the instruction, which was fully supported by long-established law violated Keith's constitutional right to present a closing argument. The State cannot establish beyond a reasonable doubt that the error was harmless.

D. Nevada's Death Penalty Is Unconstitutional

Keith's state and federal constitutional rights to due process of law, equal protection, and right to be free from cruel and unusual punishment were violated

because the death penalty is unconstitutional. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Nevada's Death Penalty Scheme Does Not Narrow The Class Of Persons Eligible For The Death Penalty.

Under contemporary standards of decency, death is not an appropriate punishment for a substantial portion of convicted first-degree murderers. Woodson v. North Carolina, 428 U.S. 280, 296 (1976). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000); Arave v. Creech, 507 U.S. 463, 474 (1993); McConnell v. State, 121 Nev. 25, 30, 107 P.3d 1287, 1289 (2005). "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually any and all first-degree murderers.

In the United States Supreme Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), the Court recognized the role of aggravating circumstances in narrowing the group of individuals who are death-eligible and to quell the arbitrary and

capricious use of the death penalty. Id. at 197-98. The state legislatures were left with the responsibility of defining aggravating circumstances or factors which would limit the death penalty to the few cases in which capital punishment is imposed from the many in which it is not. Id. at 188. This narrowing requirement remains as a hallmark of Supreme Court jurisprudence on the death penalty. See Godfrey v. Georgia, 446 U.S. 420 (1980). Aggravating circumstances are required so that "capital punishment [cannot] be imposed in any murder case." Id. at 422-23. Without narrowly defined aggravators, the sentence cannot make "a principled distinction between those who deserve the death penalty and those who do not." Lewis v. Jeffers, 497 U.S. 764, 776 (1990).

Despite this long standing requirement, Nevada does not narrow the scope of first degree murder cases for which the defendant is eligible for the death penalty through a carefully defined list of aggravating circumstances. Following the United States Supreme Court's decision in Gregg v. Georgia, the Nevada legislature amended NRS 200.033 to provide for seven aggravating circumstances.[17] 1977

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[17]

1. The murder was committed by a person under sentence of imprisonment.

2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.

Statutes of Nevada, Page 1542, Chapter 585, SB220. This list of aggravating circumstances, however, has more than doubled over the past four decades. NRS 200.033 now provides for 15 aggravating circumstances[18] and nearly every murder

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3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while the person was engaged, or was an accomplice, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, forcible rape, arson in the first degree, burglary or kidnaping in the first degree.

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effect an escape from custody.

6. The murder was committed by a person, for himself or another, for the purpose of receiving money or any other thing of monetary value.

7. The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For purposes of this subsection "peace officer" means sheriffs of counties and their deputies, marshals and policemen of cities and towns, the chief and agents of the investigation and narcotics division of the department of law enforcement assistance, personnel of the Nevada highway patrol, and the warden, deputy warden, correctional officers and other employees of the Nevada state prison when carrying out the duties prescribed by the warden of the Nevada state prison.

[18]

1. The murder was committed by a person under sentence of imprisonment.

2. The murder was committed by a person who, at any time before

a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:

(a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or
(b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.

For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or
(b) Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

6. The murder was committed by a person, for himself or herself or another, to receive money or any other thing of monetary value.

7. The murder was committed upon a peace officer or firefighter who was killed while engaged in the performance of his or her official duty or because of an act performed in his or her

official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or firefighter. For the purposes of this subsection, "peace officer" means:

(a) An employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department, but whose normal duties require the employee to come into contact with those offenders when carrying out the duties prescribed by the Director of the Department.

(b) Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

8. The murder involved torture or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive.

10. The murder was committed upon a person less than 14 years of age.

11. The murder was committed upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability, sexual orientation or gender identity or expression of that person.

12. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the

case in Nevada could have one or more aggravating circumstances applied. In addition to the incredible number of aggravating circumstances, this Court has broadly construed many of the statutory aggravators. See e.g. Riley v. State, 107 Nev.

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commission of the murder. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his or her conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.

(b) "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

15. The murder was committed with the intent to commit, cause, aid, further or conceal an act of terrorism. For the purposes of this subsection, "act of terrorism" has the meaning ascribed to it in NRS 202.4415.

205, 216, 808 P.2d 551, 558 (1991) (providing for multiple aggravators under NRS 200.033(2) for prior crimes of violence); Jeremias, 412 P.3d at 55 (broadly construing murder committed to avoid arrest to include situations in which arrest was not imminent and arrest for offenses involved in the murder as opposed to prior offenses); Byford v. State, 116 Nev. 215, 240-41, 994 P.2d 700, 716-17 (2000) (broadly construing NRS 200.033(8)'s definition of mutilation to include postmortem efforts to destroy evidence in addition to gratuitous injury to a body, and broadly construing torture aggravator to acts committed by a co-defendant without requiring proof of intent to torture by the defendant); Bennett v. State, 106 Nev. 135, 142, 787 P.2d 797, 801 (1990) (allowing multiple aggravators for felony murder predicate offenses), overruled on other grounds, Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002); Parker v. State, 109 Nev. 383, 393, 849 P.2d 1062, 1068-69 (1993) (applying "under sentence of imprisonment" aggravator to probation). The broad interpretation of the laundry list of aggravators further violates the Supreme Court's narrowing requirement.

The arbitrariness and unusual application of the death penalty is reflected by Justice Breyer's dissenting opinion in Glossip v. Gross, 135 S.Ct. 2726 (2015). Of particular relevance here is the fact that between 2004 and 2009, only 35 counties throughout the United States imposed five or more death sentences, and between

2010 and June 22, 2015, only 15 counties in this country imposed five or more death sentences. Id. at 2761, 2779, 2780. The fact that Keith has the misfortune to live in Clark County, which was one of the very few counties identified by Justice Breyer as still imposing the death penalty for both of these time periods, demonstrates the arbitrariness of the sentence imposed in this case. See also Jordan v. Mississippi, 585 U.S. ___, 138 S. Ct. 2567, 2569-2570 (2018) (Breyer, J. dissenting); Fair Punishment Project, *Too Broken to Fix: Part 1, An In-depth Look at America's Outlier Death Penalty Counties."* (August 2016).

Keith recognizes that this Court has repeatedly affirmed the constitutionality of Nevada's death penalty scheme. See Leonard v. State, 117 Nev. 53, 83, 17 P.3d 397, 416 (2001) and cases cited therein. Nonetheless, this Court has never explained the rationale for its decision and has yet to articulate a reasoned and detailed response to this argument. This issue is presented here both so that this Court may consider the full merits of this argument and so that this issue may be fully preserved for review by the federal courts.

2. The Death Penalty Is Cruel And Unusual Punishment.

Keith's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the death penalty is cruel and unusual punishment under the Eighth and Fourteenth

Amendments. See Glossip v. Gross, 132 S.Ct. 2726, 1755-81 (2015) (Breyer J., dissenting).

Keith acknowledges that the United States Supreme Court has not yet found the death penalty to be unconstitutional. See Bucklew v. Precythe, __ U.S. __, 139 S.Ct. 1112, 1122-23 (2019). The fact that capital punishment is allowed under the Constitution, however, does not mean "that the American people must continue to use the death penalty. The same Constitution that permits States to authorize capital punishment also allows them to outlaw it." Bucklew, 139 S.Ct. at 1122-23. The debate is reserved for their people and their representatives. Id. at 1123, 1134. In assessing whether a punishment violates the Eighth Amendment, the constitutional test is "intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." Gregg, 428 U.S. at 175 (plurality opinion of Justice Stewart). See also McCleskey v. Kemp, 481 U.S. 279, 319 (1987) ("It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.'") (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J. dissenting).

Nevada's legislature, however, has not affirmatively voted to retain the death penalty in over four decades. "In 1977 the Nevada Legislature passed and the Governor approved Senate Bill No. 220, which established the procedures by which

capital punishment may be imposed in this state." Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000) (citing S.B. 200, 59th Leg. (Nev. 1977) (overruled on other grounds by Lisle v. State, 131 Nev. 356, 362, 351 P.3d 725, 732 (2015)). There has not been a vote to retain, or repeal, Nevada's death penalty scheme since 1977. Nevada has changed significantly between 1977 and 2019. The vote taken in 1977, which established Nevada's current death penalty scheme, no longer reflects the Nevada community. Much has changed in this state in the last 44 years. Contemporary standards require that the death penalty be reassessed.

The Eighth Amendment's prohibition on cruel and unusual punishment derives from "the evolving standards of decency that mark the progress of a maturing society." Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). There are substantial reasons why the legislature should have reconsidered the death penalty. For example, the financial costs of the death penalty far exceed the costs of life in prison. See Terance D. Miethe, UNLV Dept. of Criminal Justice (2012), *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys*, available at https://files.deathpenaltyinfo.org/legacy/documents/ClarkNVCostReport.pdf (last visited 8/16/2019). There have also been substantial problems with lethal injection

in Nevada. See Nev. Dep't of Corr. v. Eighth Judicial Dist. Court, 2018 Nev. Unpub. Lexis No. 396, Docket No. 74679 (Nev. May 10, 2018); Nev. v. Eighth Judicial Dist. Court, 2018 Nev. Unpub. Lexis No. 1143, Docket no. 76847 (Dec. 13, 2018); State v. Alvogen, Inc., Docket No. 77100.The apparent inability of the Nevada Department of Corrections to lawfully obtain drugs necessary to perform lethal injection, and the tens of thousands, or perhaps hundreds of thousands, spent in litigation over this matter, should be the subject of review by the legislative body which has designated lethal injection as the means of execution. The failure to the legislature to consider these, and many additional arguments about whether the death penalty is consistent with Nevada's community standards violates the state and federal constitutions.

Keith recognizes that this Court has found the death penalty to be constitutional, but urges this Court to overrule its prior decisions and presents this issue to preserve it for federal review.

3. Executive Clemency Is Unavailable.

Keith's death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. Nevada law provides that prisoners sentenced to death may apply for clemency to the State Board of Pardons Commissioners. See NRS 213.010. Executive clemency is an essential safeguard in a state's decision to deprive an individual of life, as indicated by the fact that every one of the 38 states

that has the death penalty also has clemency procedures. Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 294 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part). Having established clemency as a safeguard, these states must also ensure that their clemency proceedings comport with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Nevada's clemency statutes, NRS 213.005-213.100, do not ensure that death penalty inmates receive procedural due process. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As a practical matter, Nevada does not grant clemency to death penalty inmates. Since 1973, well over 100 people have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 2016 (April 2018, NCJ 251430). Keith is informed and believes and on that basis alleges that since the reinstatement of the death penalty, only a single death sentence in Nevada has been commuted and in that case, it was commuted only because the defendant was intellectually disabled and the Supreme Court found that the intellectually disabled could no longer be executed. It cannot have been the legislature's intent to create clemency proceedings in which the Board merely rubber-stamps capital sentences. The fact that Nevada's clemency procedure is not exercised on behalf of death-sentenced inmates means, in practical effect, that it does not exist.

"'Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been

exhausted.'" Harbison v. Bell,556 U.S. 180, 192 (2009) (quoting Herrera v. Collins, 506 U.S. 390, 411-12 (1993)). "Far from regarding clemency as a matter of mercy alone, [the Court has] called it the fail safe in our criminal justice system." Id. (internal quotations omitted). Keith recognizes that in Jeremias, 412 P.3d at 54-55, this Court held that "[c]lemency is not required to make a death penalty scheme constitutional." Keith submits that Jeremias should be overruled as to this issue as it is contrary to controlling precedent from the United States Supreme Court in Harbison and Herrera. In Jeremias, this Court also held that clemency is available through the pardons board. Id. Jeremias failed to address, however, the fact that the clemency process has not played any meaningful role in review of Nevada's capital cases. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring that Keith's death sentence be vacated.

E. The Judgment Should Be Vacated Based Upon Cumulative Error

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors

violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996))."The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this appeal requires reversal of the judgement. Keith incorporates each and every factual allegation contained in this appeal as if fully set forth herein. The cumulative effect of these errors demonstrates that the trial deprived Keith of fundamental fairness and resulted in a constitutionally unreliable verdict. Whether or not any individual error requires the vacation of the judgment, the totality of these multiple errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Keith. For example, the combined effect of prohibiting voir dire on whether a prospective juror would consider mitigation in a case involving two homicides, the Evans instructional error, and the prosecutor's argument that the death penalty must be given to give value to

the lives of both homicide victims, acted to deprive Keith of both his constitutional right to a fair and impartial jury as well as his right to a fair trial. The quantity and the character of the errors, and the gravity of the crime charged, warrant reversal. See Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). He requests that this Court vacate his judgement and/or sentences and remand for a new trial.

VIII. CONCLUSION

For the reasons set forth above, Keith submits that his judgment of conviction should be vacated and the case remanded for a new trial. In the alternative, he contends that errors occurring in the penalty trial require reversal of the sentences of death and a new penalty trial. Finally, he contends that the death penalty should be vacated.

DATED this 18th day of December, 2019.

Respectfully submitted,

/s/ JONELL THOMAS

By:_____
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CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect Office 11 in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(B)(I). The relevant portions of the brief are 35,697 words.

4. 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 on is to be found. I understand that I may be subject to sanction

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

DATED this 18th day of December, 2019.

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_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 18th day of December, 2019, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

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