IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH JUNIOR BARLOW, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 77055

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

JONELL THOMAS
Nevada Bar #004771
Chief Deputy Special Public Defender

NAVID AFSHAR
Nevada Bar #014465
ALZORA B. JACKSON
Nevada Bar #002255
MONICA TRUJILLO
Nevada Bar #011301
Deputies Special Public Defender
330 South 3rd Street
Las Vegas, Nevada 89155
(702) 455-6562

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH JUNIOR BARLOW, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 77055

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

Because Barlow appeals convictions for which he was sentenced to death, the appeal is presumptively assigned to the Nevada Supreme Court. See NRAP 17(a)(1).

STATEMENT OF THE ISSUES

1. Whether Barlow was allowed to life qualify the jury.
2. Whether State violated the rule announced in Batson v. Kentucky.
3. Whether the district court erred in denying Barlow's challenge for cause of juror Nickerson.
4. Whether the district court erred permitting Anya Lester to testify as an expert.
5. Whether the jury instructions provided were an accurate statement of the law.
6. Whether the State committed prosecutorial misconduct.
7. Whether the great risk of death aggravating circumstance was invalid.
8. Whether the confrontation clause applies during a capital penalty hearing; and whether hearsay is admissible during a capital penalty hearing.

9. Whether the State committed prosecutorial misconduct during the capital penalty hearing.
10. Whether the district court erred in not allowing Barlow to misstate the law.
11. Whether the Nevada death penalty is unconstitutional.
12. Whether Barlow's Judgment of Conviction should be vacated based upon cumulative error.

STATEMENT OF THE CASE

On June 5, 2013, the State filed an Information in district court charging Keith Barlow ("Barlow") with one (1) count of INVASION OF THE HOME WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.067); one (1) count of BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony – NRS 205.060); two (2) counts of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165); one (1) count of ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); one (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360); one (1) count of UNLAWFUL POSSESSION OF AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357); and one (1) count of ATTEMPT UNLAWFUL USE OF AN ELECTRONIC STUND DEVICE (Category C Felony – NRS 202.357, 193.330). 1 Appellant's Appendix ("AA) 0059.

On July 1, 2013, the State filed its Notice of Intent to Seek the Death Penalty. AA0082. On May 31, 2018, the State filed its Notice of Evidence in Aggravation. 7 AA1381.

On August 23, 2014, Barlow filed a Petition for Pre-Trial Writ of Habeas Corpus. 1 AA0196. On October 10, 2013, the State filed its Return to Writ of Habeas Corpus. 2 AA0253. In its Return, the State announced that it did not intend to proceed on the charge of Attempt Unlawful Use of a Stun Device. 2 AA0280. The district court granted Count 8 of the Petition as unopposed, and denied the remainder of the Petition. 2 AA0317.

On February 3, 2015, the State filed an Amended Information charging Barlow with one (1) count of INVASION OF THE HOME WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.067); one (1) count of BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony – NRS 205.060); two (2) counts of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165); one (1) count of ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); one (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360); and one (1) count of UNLAWFUL POSSESSION OF AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357). 2 AA0356.

On May 14, 2018, Barlow filed a Motion to Strike Alleged Expert Anya Lester (Sanko) and Request for an Evidentiary Hearing. 3 AA0576. On June 1, 2018, the State filed its Opposition. 7 AA1392. On June 14, 2018, the district court denied Barlow's Motion. 8 AA1477.

On June 18, 2018, Barlow's jury trial commenced. 7 AA1619. On June 28, 2018, the jury found Barlow guilty of one (1) count of Home Invasion While in Possession of a Deadly Weapon, one (1) count of Burglary While in Possession of a Firearm, two (2) counts of First-Degree Murder With Use of a Deadly Weapon, and one (1) count of Assault With a Deadly Weapon. 14 AA3210-13. Special verdicts for the murder counts showed that the jury ground Barlow guilty of each count under both premeditated and felony-murder theories. 14 AA3211-12.

On July 2, 2018, the penalty phase of Barlow's trial commended. 15 AA3295. On July 6, 2018, the jury returned verdicts of death for both counts of First-Degree Murder with Use of a Deadly Weapon. 16 AA3634-35. The jury found for all counts of aggravating circumstances submitted by the State. 17 AA3639-40.

On September 26, 2018, Barlow was adjudicated guilty and sentenced as follows: as to Count 1, Barlow was sentenced to a minimum of seventy-two (72) months and a maximum of one hundred eighty (180) months in the Nevada Department of Corrections; as to Count 2, Barlow was sentenced to a minimum of seventy-two (72) months and a maximum of one hundred eighty (180) months in the

Nevada Department of Corrections, to run concurrent to Count 1; as to Count 3, Barlow was sentenced to death, with a consecutive sentence of a minimum of eight (8) years and a maximum of twenty (20) years incarceration in the Nevada department of corrects for the deadly weapon enhancement, to run consecutive to Count 2; as to Count 4, Barlow was sentenced to death, with a consecutive sentence of a minimum of eight (8) years and a maximum of twenty (20) years incarceration in the Nevada department of corrects for the deadly weapon enhancement, to run consecutive to Count 3; as to Count 5, Barlow was sentenced to a minimum of twenty-eight (28) months and a maximum of seventy-two (72) months incarceration in the Nevada Department of Corrections, to run concurrent to Count 4. 17 AA3902-03. Barlow received 2,033 days credit for time served. 17 AA3903. Barlow was further ordered to pay $5,000.00 in restitution. 17 AA3903. The Judgment of Conviction, Warrant of Execution, Order of Execution, and Order to Stay Execution was filed the same day. 17 AA3883, AA3887, AA3891, AA3892.

On September 26, 2018, Barlow filed a Notice of Appeal. 17 AA3906.

STATEMENT OF THE FACTS

Danielle Woods ("Woods") and Keith Barlow ("Barlow") were in an on again off again relationship for a substantial period of time. 12 AA02543. At times, Woods even lived with Barlow. 12 AA2543-44. However, between July of 2012 and the time of her death (February of 2013), Woods had been dating Donnie Cobb

("Cobb"). 11 AA2527. At the end of 2012, Woods moved into Cobb's apartment with him. 11 AA2527-28

On February 1, 2013, Wood's sister, Richards, had contact with Barlow at Richard's daughter's ("Tamara") house. 11 AA2529. Tamara stated that Barlow seemed agitated and intoxicated. 12 AA2546; AA2557-58. Barlow's behavior scared Tamara. 12 AA2549. Barlow was asking for Woods, claiming that he was "fucking tired of her" and her games. 12 AA2546-47. At this time, Woods was having intermittent contact with Barlow while also seeing Cobb. 12 AA2531. When Tamara told him she did not know where Woods was, Barlow said he knew she was with Cobb. 12 AA2548. After accusing Richards and Tamara of lying to him, he requested he be paid the money he was owed from hanging Tamara's Christmas lights. 12 AA2546. Tamara gave Barlow the money she owed him and he left. 12 AA2532.

In the early morning of February 3, 2018, Woods went to a 7-11 next door to Cobb's apartment for coffee. 12 AA2551, AA2662. As Woods was leaving to return to the apartment, Barlow pulled up, tried to force Woods into his car with a stun gun, and put the stun gun up to Woods' neck. 12 AA2551. Woods began to scream loudly, and Cobb came out to see what was happening. 12 AA2551.

When Cobb approached Woods and Barlow, Barlow pulled out a gun. 12 AA02534. Barlow proceeded to tell Woods he was going to kill her. 12 AA2534.

Barlow made a verbal threat when he pulled out his gun and "racked a round into the chamber," and pointed the gun at Cobb. 12 AA2576. Woods said Barlow only left after a security guard from the other side of the street yelled over at Barlow. 12 AA2576. However, before leaving, Barlow said that he "would be back." 12 AA2611. Barlow further told Woods that he was going to kill her. 12 AA2534.

After the event, Woods called 9-1-1. Officer Dewreede and Officer Perkett were dispatched to the Bonita Terrace Apartments at approximately 6:52 AM. 12 AA2570, AA2605-06. Upon arriving, Officer Dewreede could not access the apartments because the living area is gated off. 12 AA2574. Officer Dewreede contacted dispatch, who contacted Woods. 12 AA2574. Woods came down to the gate where Officer Dewreede was and let him and Detective Perkett in. 12 AA2574-75. Woods was nervous, scared, and breathing heavily. 12 AA2574. In fact, Officer Perkett described Woods as "she's shaking, she's very visibly scared, she's trembling in her voice, she can't really talk to us. We have to kind of allow her to calm down. We're trying to ask her questions, but she's breathing so heavily and she's shaking that it's hard for us to communicate with her." 12 AA2609-10. Perkett further testified that Woods was "so shook up she could barely talk to us." 12 AA2610.

Woods communicated the events that transpired at the 7-11 to the Officers. 12 A2576, 12 AA2610-12. Woods further stated that Barlow had been driving a grey

sedan. 12 AA2612. Woods gave Barlow's address to Officer Dewreede as well as 911. 12 AA2577. The address Woods gave the officer matched the address that was in DMV records for Barlow. 12 AA2577. Officer Perkett put out information over the radio describing the vehicle, Barlow's clothing, and the type of firearm he may have been armed with. 12 AA2612. Officer Dewreede put in a request to have another Metro police jurisdiction conduct a patrol follow-up at Barlow's address. 12 AA2577. Approximately twenty (20) minutes later, Metro attempted to make contact with Barlow at the address. 12 AA2578. However, Barlow was not there. 12 AA2578.

At approximately 7:15-7:20 AM, Officers Smith and Johnson took over the investigation from Officers Dewreede and Perkett. 12 AA2620-22. After receiving information from the officers he was relieving, Smith went to speak with Woods and Cobb in their apartment (unit 203). 12 AA2622. At this time, the door jamb and door frame to the apartment were undamaged. 12 AA2627.

After gathering the information, Officer Smith drove back to "downtown area command" to complete the police report on the incident. 12 AA2623. Sometime before 9:00 AM, while completing the report, Officer Smith received a call from dispatch saying that there were shots fired at Woods' and Cobb's apartment. 12 AA2624, AA2627. Officer Smith was assigned and drove back to the apartment

complex. 12 AA2624-25. Officer Smith arrived at the scene approximately 10-15 minutes after the call went out. 12 AA2625.

Once he arrived, officer Smith attempted to call Woods and Cobb using the phone numbers they had listed on their voluntary statements from the earlier incident. 12 AA2626. Neither of them answered. 12 AA2626. Officer Smith then used the PA system from his vehicle to call anybody out of the apartment. 12 AA2626. Nobody responded. 12 AA2626.

Eventually a K-9 unit arrived, and the decision was made to go up to the apartment to check on the welfare of the inhabitants. 12 AA2627. Officer Smith and a few other officers approached the apartment. Once upstairs, they noticed that the door was cracked slightly open and that there was damage to the doorjamb and door frame. 12 AA2627. Said damage had not been present when Officer Smith had talked to Woods and Cobb earlier at approximately 7:00 AM. Officers entered the apartment, and saw Woods and Cobb dead inside. 12 AA2628; 12 AA2631. The scene was locked down. 12 AA2631.

Cobb was on the couch along the east wall of the living room. 12 AA2669. There was a cartridge case on the cushion south of him. 12 AA2669. Cobb was holding a lighter in one hand and an ashtray in another. 12 AA2670. Woods was "almost in a sitting position between the chair and the couch with her legs crossed, and kind of – her arms up around her shoulders and her head, leaning onto the chair

and her shoulders." 12 AA2670. Woods had nothing in either of her hands. 12 AA2670. Even before Woods was moved, it was clear that she had a gunshot wound to her front left forehead. 12 AA2671.

Crime Scene Analysts ("CSA") noticed a partial footwear impression on the door to the apartment. 12 AA2664. There was also damage to the doorframe. 12 AA2664. Pieces of the doorframe were found inside the apartment on the foyer. 12 AA2669. Inside the apartment, CSAs found multiple documents with Cobb's name on them, including an eviction notice and prescription medication. 12 AA2665, AA2689.

CSAs also found a cartridge case just inside the front entry. 12 AA2666. Six cartridge casings were found in the living room of the apartment. 12 AA2686-87. All the cartridge casings were head stamped with Blazer 40 Smith & Wesson. 12 AA2687. A seventh cartridge casing was found in Woods' hair. 12 AA2688. An eighth was found on her chest. 12 AA2688. These cartridge cases were also head stamped Blazer 40 Smith & Wesson. 12 AA2695. Two bullet holes were found in the east wall and northeast corner of the living room. 12 AA2689-90. One of the bullets travelled through the east wall, into neighboring Apartment 202, and out apartment 202's window. 12 AA2690. This bullet was never found. 12 AA2692. The trajectory of the two bullet holes showed that the shots were fired from inside the apartment. 12 AA2692-93. Two other bullet strikes were found on the couch

Cobb was on. 12 AA2693-94. Both bullets were recovered from the couch. 12 AA2693-94.

CSAs also noticed a purse sitting on a table. 12 AA2667. The purse did not appear to have been disturbed or ransacked. 12 AA2667. Other than the two individuals who were shot and a turned over table, there was no other evidence of ransacking or a robbery. 12 AA0668.

Detective Mogg was one of six (6) detectives assigned to the scene. 13 AA2776-77. In his investigation, Detective Mogg learned about the incident that had occurred earlier that morning between Woods and Barlow. 13 AA2777. Detective Mogg also spoke with Latanya Dobbs, a resident at the apartment complex. 13 AA2785. Based on that interview, Detective Mogg learned that the suspect had walked north on Paradise Road from the scene. 13 AA2785. Detective Mogg went to the businesses on the East and West sides of Paradise North of the scene. 13 AA2785. One of these businesses was the Sun City Asian massage parlor. 13 AA2785. The parlor had a camera that depicted an individual walking northbound on paradise at 8:57 AM on February 3, 2013. 13 AA2787.[1]

Detective Mogg learned that Barlow was associated with apartment number 102 at 1856 North Decatur. 13 AA2788. Detective Mogg went to that apartment. 13

[1] While the video was admitted at trial, the State acknowledged that the video does not seem to depict anyone who's recognizable. 13 AA2788.

AA2788. A search warrant was acquired for the apartment. 13 AA2789. The search warrant was executed at 3:30 PM on February 3, 2012. Barlow was not present at the time. 13 AA02789. Barlow was not seen entering or leaving the apartment during the approximately one (1) hour surveillance of the apartment before SWAT arrived to execute the warrant. 13 AA2789-90. Execution of the search warrant revealed that this was in fact Barlow's apartment. 13 AA2792. Medications in Barlow's name, paperwork, paystubs, and a punched-out version of Barlow's drivers license were found, indicating that Barlow lived there. The titles to two vehicles were also found, including one which was for a 2000 Acura Legend. 13 AA2793. Further, a gun cleaning kit used to clean .40 caliber, .41 caliber, and 10-millimeter guns was found in the apartment. 13 AA2793-94.

Between 6:00 AM and 7:00 AM on February 4, 2012, Detective Mogg responded to 2068 North Nellis Boulevard, apartment 173. 13 AA2795. Barlow had been taken into custody in the vicinity of this apartment. 13 AA2795. Inside the apartment, Detective Mogg found a set of keys laying on the coffee table. 13 AA2796. After gaining the consent of the tenant of the apartment and his roommate, Detective Mogg recovered the keys. 13 AA2796-97.

Detective Mogg saw Barlow's silver Acura Legend parked out front of the apartment. 13 AA2797. When Detective Mogg looked in the window of the vehicle he saw a large-frame semiautomatic handgun partially sticking out from underneath

the driver's seat. 13 AA2797. Using the remote on the keys he recovered from the apartment, Detective Mogg opened the vehicle. 13 AA2798. The position of the gun was photographed and then the gun was recovered by CSA Fletcher. 13 AA2798. The firearm was loaded with a magazine containing five (5) Blazer .40 Smith & Wesson cartridges. 13 AA2799.

Further, a duffel bag found on the right rear passenger seat of the vehicle. 13 AA2907. Inside the duffel bag was a blue nitrile glove, a receipt, and a .40 caliber cartridge. 13 AA2907. The cartridge's headstamp was Blazer .40 Smith & Wesson. 13 AA02909. The receipt was from an ARCO AMPM gas station dated February 3, 2013 at 6:11 AM. 13 AA2912

Beta Vida, a forensic scientist with the Las Vegas Metropolitan Police Department, tested the firearm recovered from Barlow's vehicle, that magazine inside, and a taser also recovered from the vehicle for DNA evidence. 13 AA2973-2984. The DNA sample taken from the handle of the taser was consistent with Barlow. 13 AA2974. The estimated frequency of the profile belonging to an unrelated individual was rarer than one (1) in 700 billion. 13 AA2974. The DNA collected from the magazine of the firearm was also consistent with Barlow. 13 AA2984. The estimated frequency of the profile belonging to an unrelated individual was rarer than one (1) in 700 billion. 13 AA2979. While the firearm itself was swabbed, no DNA profile could be recovered. 13 AA2980.

Further, a latent fingerprint recovered from the gun magazine was identified as Barlow's right thumb. 14 AA2998; 14 AA3004. Finally, the eight cartridges and three bullets recovered from the scene of the murders were analyzed to determine whether they were fired from the firearm found in Barlow's vehicle. 14 AA3033. The analysis of the three bullets was inconclusive. 14 AA3039-40. However, all eight (8) cartridge cases were identified as having been shot from the firearm found in Barlow's vehicle. 14 AA3042. These results were verified by another independent examiner. 14 AA3050.

An autopsy was performed on both Woods and Cobb. At trial, Dr. Leonard Roquero testified regarding the autopsies of Woods and Cobb. Although Roquero did not conduct the autopsy, Roquero did review photographs, autopsy reports and x-rays at the Coroner's office to form an opinion as to the cause and manner of death. 13 AA2873-74. Regarding Woods, Roquero testified that Woods had a gunshot entry wound on the side of the left chest. 13 AA2878. The bullet went through the left side of Woods' chest, through her left lung, her heart, her right lung, and exited out the right side of her chest. 13 AA2880. Another gunshot entry wound on the left side of Woods' forehead. 13 AA2881. There was no corresponding exit wound. 13 AA2881. Instead, the bullet had traveled through her skull, and brain, and was recovered from her right lower jaw. 13 AA2881. There were also grazed gunshot wounds to the back of Woods' head, and her right thumb. 13 AA2884. Roquero

testified that the cause of death was homicide via multiple gunshot wounds. 13 AA2885-86.

Regarding Cobb, Roquero testified that Cobb had a gunshot entry wound on his right arm, with no exit wound. 13 AA2887. The bullet traveled through Cobb's arm, through his right lung, and a bullet was recovered in his left back. 13 AA2887. There was another entry wound on Cobb's left arm, which exited from the back of his left arm. 13 AA2888. A third gunshot wound was on his right forearm, with the exit wound on the back of his right forearm. 13 AA2888-89. A fourth gunshot entry wound on his upper right quadrant of the abdomen showed that the bullet traveled to Cobb's upper left quadrant of his abdomen, and exited out Cobb's left lower chest. 13 AA2889. A fifth wound with the gunshot entry wound on the side of Cobb's right thigh showed that the bullet exited the front of Cobb's right thigh, re-entered Cobb's body through his right lower abdomen, went through his colon, the left side of his diaphragm, and exited into the lower left side of his chest. 13 AA2891. Roquero testified that the cause of death was multiple gunshot wounds and the manner of death was homicide. 13 AA2893-94.

SUMMARY OF THE ARGUMENT

In his first claim, Barlow argues that the district court erred in not allowing him to ask jurors if they would always impose the death penalty when there were multiple murder victims. AOB at 32. However, Barlow was allowed to "life qualify"

the jury, and was only restricted from discussing specific factual details of the case. Barlow was not entitled to discuss the specific factual details of his case, and as such the district court did not abuse its discretion.

In his second claim, Barlow argues that the district court erred in denying his challenge made under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). However, the record shows that Barlow failed to establish a prima facie case, and that any comparison of jurors showed that the State did not engage in prohibited practices while using its peremptory challenges.

In his third claim, Barlow argues that the district court erred in denying his challenge for cause of juror Nickerson. Specifically, Barlow argues he was entitled to strike Nickerson for cause because Nickerson said he would not consider mitigating circumstances. However, a review of the record shows that Nickerson made no such statement. Instead, Nickerson merely expressed that he would not give as much weight to mitigating circumstances that occurred far in the past. As such the district court correctly denied Barlow's motion to strike this juror.

In his fourth claim, Barlow argues that the district court erred in allowing Anya Lester to testify as an expert. However, the record reveals that Lester was properly qualified and that her testimony was useful to the jury under the factors identified in Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). Therefore, the district court did not err in admitting her testimony.

In his fifth claim, Barlow argues that the district court erred in giving various jury instructions. However, each of these jury instructions was a correct statement of law, and therefore there was no error.

In his sixth claim, Barlow alleges that the State engaged in prosecutorial misconduct during its closing argument during the guilt phase of trial. However, the record shows that the State's arguments were supported by the evidence, not inflammatory, and did not comment on Barlow's right to not testify at trial. Therefore, there was no prosecutorial misconduct.

In his seventh claim, Barlow argues that the "great risk of death" aggravating circumstance was not valid. However, the State properly noticed this aggravating circumstance, it was supported by sufficient evidence, and it was not duplicitous. Therefore, this aggravating circumstance was valid.

In his eighth claim, Barlow argues that his rights under the confrontation clause were violated during the penalty hearing. Barlow further argues it was error for hearsay to be admitted during the penalty hearing. However, neither the rule against hearsay nor the Confrontation Clause apply during the penalty phase of a capital case. Therefore, Barlow's rights were not infringed.

In his ninth claim, Barlow argues that the State committed prosecutorial misconduct during the penalty phase of his capital trial. However, the State's

arguments were all proper pursuant to law. Therefore, no prosecutorial misconduct occurred.

In his tenth claim, Barlow argues that the district court erred in limiting his closing arguments as well as not allowing him to change language on the jury verdict forms. However, Barlow was asking to argue an incorrect statement of law. Barlow is not entitled to argue an incorrect statement of law. As such, the district court did not err in denying this request.

In his eleventh claim, Barlow argues that the Nevada death penalty is unconstitutional. However, each of the arguments Barlow brings under this section have already been reviewed and denied by this Court. Therefore, Barlow has not given any persuasive reason for this Court to find the Nevada death penalty unconstitutional.

In his twelfth claim, Barlow argues that cumulative error warrants a reversal of his judgment of conviction. However, there was no individual error under any claim Barlow now brings. Therefore, no finding of cumulative error can be made.

ARGUMENT

I. BARLOW WAS ALLOWED TO LIFE-QUALIFY THE JURY DURING VOIR DIRE

Barlow alleges in section 1 that it was error for the district court to deny Barlow's counsel from asking jurors whether they would always impose a sentence of death when the defendant was convicted of two homicides. AOB at 31-34, 37.

Specifically, Barlow raises issue with the district court sustaining the State's objection to Barlow's following question:

> 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 deceased in this case?

7 AA1604. The district court sustained the objection because it did not want "to ask them about the particular facts of the case and how anything really factors into their decision. Just can they be – can they be fair and impartial unless they get to that part." 7 AA1604-05.

[V]oir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. Morgan v. Illinois, 504 U.S. 719, 729, 112 S. Ct. 2222 (1992). This Court has similarly stated "[d]ecisions concerning the scope of voir dire and the manner in which it is conducted are reviewable only for abuse of discretion," Hogan v. State, 103 Nev. 21, 23 732 P.2d 422, 423 (1987) and draw "considerable deference on appeal. Johnson v. State, 122 Nev. 1344, 1355, 148 P.3d 767, 774 (2006).

"Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law." Morgan, 504 U.S. at 735, 112 S. Ct. at 2226. "A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors" would be in favor of the death penalty in

all cases following a conviction. Id. at 735-36. However, a party is not entitled to argue its case during voir dire. Oliver v. State, 85 Nev. 418, 423–24, 456 P.2d 431, 434–35 (1969) (holding that a party cannot interrogate potential jurors on issues of law during voir dire). Further, a Court need not grant such expansive use of voir dire so as to allow a party to read how a juror would vote during the penalty phase of a trial. See Witter v. State, 112 Nev. 908, 921 P.2d 886, (1996). abrogated on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). In determining whether a question is proper, the district court is given considerable deference. Johnson v. State, 122 Nev. 1344, 1355, 148 P.3d 767, 775 (2006).

To be clear, the district court allowed Barlow to life qualify the jury. In fact, the district court specifically stated:

> That's why it's got to be more generalized, that kind of presentation of can you imagine those circumstances where you could be moved to give 20 or 50 years or moved to give the death penalty, without saying, what would you do in this particular case; okay?

7 AA1606. The district court then allowed Barlow to extensively inquire about juror's views towards the death penalty and whether there were factors that would lead them to vote for or against the death penalty. See *inter alia* 7 AA1585-86 (asking whether a prospective juror would be open to considering mitigating evidence); 7 AA1601-02 (where Barlow asked if prospective juror 10 could consider all forms of punishment); AA1610-11 (where Barlow asked a prospective juror

whether a defendant's remorse would be an important factor in considering the death penalty); AA1655 (where Barlow asked a prospective juror whether there was anything they would want to consider when making a decision about life and death).

Barlow was allowed to inquire of multiple jurors whether they would be able to consider all forms of punishment in a case where there had been multiple murder victims. Barlow asked a juror, "can you imagine a situation where even where you have a homicide involving two individuals, and based upon what you hear in a penalty hearing, you could still give a verdict of less than death, depending upon what you hear of course?" 7 AA1590. Barlow further was able to question a prospective juror about whether they would always impose the death penalty where a defendant had killed more than one person. 8 AA1639-40. Barlow was also able to ask a prospective juror whether they could consider all forms of punishment where there were two deceased victims in the instant case. 8 AA1674. The record is replete with instances of Barlow asking if jurors could consider all forms of punishment where the defendant was convicted of murdering two victims. See also 8 AA1713, 8 AA1831-32, 9 AA1937-38, 9 AA1951.

Barlow examined each juror's attitude towards the death penalty by reviewing the jury questionnaires. In fact, all jurors were asked "[a]re there certain kinds of first-degree murder cases in which you would always vote for the death penalty once you were convinced the person was guilty?" 27 AA5994. All jurors were further

asked if they could consider all potential punishments if Barlow was found guilty of first-degree murder. 27 AA5995. That Barlow read and was able to use these questionnaires to determine whether any juror had prejudicial views towards the death penalty is evidenced by his challenging juror Ms. Hastings for cause. This challenge was based on Ms. Hastings having an alleged bias in favor of the death penalty. Barlow based his objection, in part, on her questionnaire answers. 8 AA1619-21.

The State itself also asked whether jurors could consider all possible forms of punishment. See *inter alia* 7 AA1570-72; 7 AA1594-95; 8 AA1635; 8 AA1651.

As such, any insinuation that Barlow was not able to life qualify the jury, even in regards to whether they would always vote to impose the death penalty where the defendant was convicted of two (2) murders, is flatly belied by the record. The only limitation placed on Barlow during voir dire was that he was not permitted to try and tie a juror to a specific position based on specific facts of the case.

However, Barlow was not entitled to ask such questions. Witter v. State, 112 Nev. 908, 921 P.2d 886, (1996). abrogated on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). In Witter, this Court found that a defendant was not entitled to ask a juror whether the existence of a statutory aggravator would lead a juror to always vote for death instead of considering all three sentencing alternatives. Id. at 915-16. In coming to this decision, this Court stated that "If Witter

were allowed to ask such a question, he would be able to read how a potential juror would vote during the penalty phase of a trial." Id. at 915.

While Barlow did not specifically couch his question in terms of asking the juror to expressly consider a statutory aggravator, he did seek to tie the juror to a position based upon the specific facts of the case. In addition, this fact was one that was further relevant to the penalty hearing as the State had listed "multiple convictions of first-degree murder" as an aggravating circumstance. As such, counsel's question was improper pursuant to this Court's logic in Witter. Therefore, the district court did not err in not permitting Barlow to ask this question of the jury.

To the extent the district court erred in not permitting Barlow to ask this question of the juror, such an error was harmless. Although Barlow claims that such an error is structural, his cited authority clearly states that a reversal is only required where the Defendant is deprived of an opportunity to life qualify the jury. See People v. Cash, 28 Cal. 4th 703, 722, 50 P.3d 332, 342 (2002)[2] (holding that "such error may be harmless," and that a reversal was only warranted where the lower court barred "any voir dire beyond facts alleged on the face of the charging document" and "created a risk that a juror who would automatically vote to impose the death penalty" was thereby empaneled); Morgan v. Illinois, 504 U.S. 719, 736, 112 S. Ct.

[2] The State would also note that this case is not binding on this Court.

2222, 2233 (1992) (holding: "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.").

Here, as the State argued above, Barlow was clearly allowed to life qualify the jury. Further, while Barlow was prohibited from asking prospective juror 10 one question, Barlow was still able to ask this same juror whether she could consider all forms of punishment. 7 AA1601-02. In fact, despite having this one question objected to, Barlow was able to gather enough information about prospective juror 10 to move to strike her for cause. 8 AA1619. While the judge ultimately denied Barlow's motion to strike, this juror was not empaneled onto the jury. 11 AA2474. As such, Barlow cannot show that the district court prohibiting him from asking this question caused a prejudicial juror to be placed onto the jury. Therefore, any error was harmless, and this claim should be denied.

II. THE STATE DID NOT VIOLATE THE RULE ANNOUNCED IN BATSON V. KENTUCKY

The United States Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The Supreme Court subsequently extended Batson to hold that its prohibition also applies to discrimination based on gender (J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994)) and ethnic origin (Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859

(1991)). Batson also applies to criminal defendants and forbids their exercise of peremptory challenges to remove potential jurors on the basis of race, gender or ethnic origin. United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000) and Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348 (1992). Furthermore, there is no requirement that the defendant and the excluded juror be of the same race. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

In Purkett v. Elem, 514 U.S.765, 766-67, 115 S.Ct. 1769, 1770-71 (1995), the United States Supreme Court pronounced a three-part test for determining whether a prospective juror has been impermissibly excluded under the principles enunciated in Batson. Specifically, the Court ruled:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible.

Purkett, 514 U.S.at 766-767, 115 S.Ct. at 1770-1771.

The Nevada Supreme Court adopted the Purkett three step analysis of a Batson claim in Doyle v. State, 112 Nev. 879, 921 P.2d 901, 907-908 (1996); and Washington v. State, 112 Nev. 1067, 1071, 922 P.2d 547, 549 (1996). Accordingly,

the opposing party's exercise of its peremptory challenge is governed by a Purkett analysis.

In deciding whether or not the requisite showing of a prima facie case of racial discrimination has been made, the court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire examination. Batson, 476 U.S. at 96-97, 106 S.Ct. at 1723, Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 222 (1997), Doyle, 112 Nev. at 887-888, 921 P.2d at 907. However, "the mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under Batson's first step; "something more" is required." Watson v. State, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014).

In step two, assuming the opposing party makes the above described prima facie showing, the burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett, 514 U.S. at 767, 115 U.S. at 1770. "The second step of this process does not demand an explanation that is persuasive or even plausible." Purkett, 514 U.S. at 768, 115 U.S. at 1771. "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Id.; Doyle, 112 Nev. at 888, 921 P.2d at 908.

In step three, "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination."

King v. State, 116 Nev. 349, 353, 998 P.2d 1172, 1175 (2000). At this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. Purkett, 514 U.S. at 768, 115 U.S. at 1771. What is meant by a legitimate race-neutral reason "is not a reason that makes sense, but a reason that does not deny equal protection." Purkett, 514 U.S. at 769, 115 U.S. at 1771, Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1999). "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 123 S.Ct. 1029 (2003). Nevertheless, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768, 115 U.S. at 1771, Doyle, 112 Nev. at 889, 921 P.2d at 908.

Lastly, in reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court. Hernandez, 500 U.S. at 364, 111 S.Ct. at 1868-1869, Doyle, 112 Nev. at 889-890, 921 P.2d at 908, Thomas v. State, 114 Nev. at 1137, 967 P.2d at 1118, Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997). The reasoning for such a standard is the trial court is in the position to best assess whether from the "totality of the circumstances" that racial

discrimination is occurring. "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 500 U.S. at 367, 111 S.Ct. at 1870. In conclusion it should be noted that although much of the case law cited to from which the aforementioned principles are drawn refer to the defendant, generally, as the party opposing the peremptory challenge, McCollum ensures that Batson applies to all parties including criminal defendants. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct, 2348 (1992).

In the instant case, Barlow objected at trial to the State's use of peremptory challenges on Idoelia Williams, Rebecca Hernandez-Muniz (Hispanic females), Virgie Hill (an African-American female), and Salcedo (a Hispanic male). 11 AA2461-62, 2466-67.

The district court correctly found that Barlow did not establish a prima facie case for discrimination below. At trial, Barlow argued that the State's strikes had been discriminatory because the State used four of its eight peremptory strikes against women, two (2) who were Hispanic and one (1) who was African-American. 11 AA2468. Contrary to Barlow's claims in his Opening Brief, Barlow made no record at trial regarding the percentage of women, Hispanics, or African-Americans who were removed at trial. His entire argument regarding the prima facie case was

that the State excluding these individuals was sufficient to establish a prima facie case for discrimination. 11 AA2467-71.

Unsurprisingly, this argument failed in district court. The State noted at trial that it had used five (5) of its peremptory challenges on Caucasians. 11 AA2470. The district court noted that the current jury panel consisted of four (4) Caucasian females, two (2) Caucasian males, two (2) Asian men, one (1) Asian female, two (2) African American females, two (2) Hispanic females, and one (1) Hispanic male. 11 AA2471. The district court also took note of the distribution of the State's peremptory challenges, finding that State used its peremptory challenges on four (4) white males, one (1) white female, one (1) Hispanic male, two (2) Hispanic females, and one (1) African-American female. 11 AA2471. Given the fact that the State was not using its peremptory challenges to seemingly discriminate against any one given group, the district court found that Barlow had not met his burden under the first prong of Batson and denied the challenge. 11 AA2471-72.

Barlow now argues that the district court erred because "defendant may also show '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." AOB at 47. While Barlow is correct that he could have pointed to any of these factors in establishing a prima facie case, the fact is Barlow did not point to any of these factors at trial. While

he attempts to make some of these arguments now, none of these arguments were brought before the district court. Given that the district court was not presented with these arguments, and given that these arguments are meritless (as the State will discuss below) the district court did not err in denying Barlow's Batson challenge.

Barlow brings a series of new arguments on appeal. Barlow argues that when viewed in the context of the number of jurors of each protected group present on the panel, the State's peremptory challenges establish a prima facie case of discrimination. AOB at 42-44. As support for his claim, Barlow cites Cooper v. State, 432 P.3d 202, 204-05 (Nev. 2018) and Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 223 (1997) for the proposition that this Court should analyze the percentage of the State's peremptory challenges against the percentage of each cognizable group within the venire. AOB at 42.

Barlow first argues the State "used 11 percent of its challenges to remove 33 percent of African Americans." AOB at 43.[3] Further, African-Americans made up 9.4% of the venire panel. However, as Barlow readily admits, there were only three African-Americans on the panel. AOB at 42. While the point discussed in Cooper and Libby is well taken, the instant case shows why such logic can be lacking in certain proceedings. Given that there were only three African American jurors, there

[3] For the sake of this argument, the State is adopting the percentages offered by Barlow in his Opening Brief. As the State argued earlier, these percentages were never calculated or discussed in district court.

was simply no way the State could have disqualified an African American juror in a manner where the percentage of challenges used was proportional to the effect on the panel. In such an instance, these numbers fail to tell the whole story, are misleading, and at a bare minimum, must be supplemented with other information. Here, as mentioned above, the State made no attempt to strike the other two African American members of the panel. Further, the State used only one (1) peremptory strike against an African American, while using five (5) against Caucasians. Therefore, the record shows that this argument is insufficient to make a showing of racial discrimination.

Further, Barlow argues the State used thirty-three (33) percent of its strikes to remove forty-two (42) percent of Hispanic jurors. Hispanics made up 21.8% of the jury venire. Such a proportion is similar to the proportion this Court deemed acceptable in Watson, where the state used 66% of its strikes to strike against women, who after for-cause strikes, made up 56% of the jury venire. Watson, 130 Nev. at 778, 335 P.3d at 168. In both this case and Watson, there was approximately a ten-percentage point gap between the percentage point gap between the percentage of strikes used, and the percentage of the venire the group made up. Given that this Court found in Watson that such a discrepancy, without more, did not merit a prima facie case for discrimination, the State submits that the same should be true here.

Barlow also alleges the district court erred in considering how many members of protected classes were still on the jury, as "even a single instance of race discrimination against a prospective juror is impermissible." AOB at 48 (*citing*: Flowers v. Mississippi, 139 S.Ct. 2228, 2242, 204 L.Ed.2d 637, 654 (2019)). While the legal principle Barlow cites to is correct, his interpretation of it in the instant case is flawed. This legal principle means that if one instance of discrimination against a protected class is shown, it is structural error. It does not mean that the district court must implicitly accept that any member of a protected class who is stricken was stricken for a discriminatory reason and is therefore impermissible. See Watson v. State, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014). Barlow is asking this Court to assume discriminatory intent based on the strike alone when it was his burden to demonstrate a prima facie case of discriminatory intent. Barlow's argument only follows if this Court and the Court below are required to assume prosecutors are racist. Such an expansive reading of Batson is both unsupported and offensive. Barlow never showed that any member was stricken for discriminatory reasons. Therefore, these cases cited are irrelevant to the instant proceedings.

Similarly, Barlow claims that the district court erred because "though a pattern is informative, it is not necessary." AOB at 49 (*citing*: City of Seattle v. Erickson, 398 P.3d 1124, 1130 (Wn. 2017). While this standard was similarly echoed by this Court in Watson v. State, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014), it does not

help Barlow here. Just because a pattern is not necessary does not mean that its absence is sufficient to sustain a Batson challenge. It is Barlow's burden to show a prima facie case of discrimination. While this burden is not onerous, it is his burden all the same. Barlow failed to make any legitimate argument evidencing this prima facie case at trial besides the fact that some members of a protected class had been stricken. However, the fact that these strikes could make a prima facie case was belied by the remaining diverse jurors, as well as the fact that the State had stricken jurors in a non-discriminatory manner. Given that the pattern of strikes belied Barlow's only argument, it was not error for the district court to deny the Batson challenge.

Barlow next argues that the district court erred in finding that a Batson challenge cannot combine panelists of different ethnicities or races. AOB at 49. In support of the notion that such aggregating can be done, Barlow cites three cases, all of which can be distinguished from the instant case. Barlow first cites Fernandez v. Roe, 286 F.3d 1073 (9th Cir. 2002). In Fernandez, the Court said that a prima facie case for discrimination against African Americans could be made based, in part, on the fact that the prosecutor had already been reprimanded in the trial for striking too many Hispanic jurors. Id. at 1078-79. The Court further addressed the challenges to each group separately. Id. As such, the Court was not claiming that these groups could be aggregated for one general finding that a prima facie case had been

established, but was rather simply examining the scope of the prosecutor's conduct before coming to a finding. Barlow next cites Burks v. Borg, 27 F.3d 1424 (9th Cir. 1994). However, in Burks, the State conceded that a prima facie case for discrimination had occurred. Id. At 1427. The State has made no such concession in the instant case. Further, the Court eventually found that there was no Batson violation, therefore discrediting Barlow's assertion. Id. at 1428. Finally, Barlow relies on Diampono v. State, 124 Nev. 414, 185 P.3d 1031 (2008). However, while this Court considered Batson challenges against jurors of multiple different races in Diampono, there is nothing in the case that states that the challenged juror's races could be combined into one suspect class for the sake of examining a prima facie case of discrimination.

The State would further note that such an aggregating practice makes no intuitive sense. There is no quota for how many individuals of each race must make up a jury. To allow Barlow to aggregate the various characteristics (be it race, sex, or national origin) of every stricken juror would ensure that a Batson claim could be made no matter who the other party struck. Such a reality would force the State to only consider such characteristics when exercising peremptory strikes in order to ensure that a perfect proportion of each class was represented. Such a notion is not only contrary to the aims of Batson (which dictate these factors should never be a consideration) but is abhorrent to a legal system where we prize a juror's faithful

execution of their duty above all else. Defendants are not entitled to draw the boundaries of what constitutes a protected class on a case by case basis in an effort to undermine their lawful convictions.

Barlow spends pages 50-55 of his Opening Brief engaging in a comparative juror analysis in a fruitless attempt to show that State discriminated during jury selection. Such an argument was never presented before the district court. As such, the district court made no findings regarding whether the jurors were similarly situated. As such, these claims are waived.

However, to the extent the claim is not waived, none of the jurors Barlow compares were similarly situated. Barlow first claims the State practiced discrimination by striking juror Raymond Johnson for having a felony conviction, while not striking jurors Pornpot Chamnong and Charles Meyers for having felony convictions until after questioning (and in fact juror Chamnong was never stricken). AOB at 52.

NRS 6.010 states:

> A person who has been convicted of a felony is not a qualified juror of the county in which the person resides until the person's civil right to serve as a juror has been restored.

All three men indicated they had been charged with a felony at some point in their lives. 8 AA1792-95. However, Mr. Chanmong indicated that his civil rights had been restored 8. AA1793-94. Mr. Meyers likewise indicated that he had certain

rights restored, as well as that the case had been dismissed. 8 AA1795-96. However, Mr. Johnson never indicated that any of his civil rights had been restored. Further, when the State asked Mr. Johnson if the case had ever been lowered to a misdemeanor, Mr. Johnson said it had not. 8 AA1791-92. As such, Mr. Johnson was the only individual of the three who was clearly not qualified as a juror. The State asked for Mr. Johnson to be released not because they were discriminating against him, but because Mr. Johnson could not, by law, serve on the jury. NRS 6.010. Since the other two men's answers indicated they may have had their right to serve on a jury restored, they were not dismissed, as further questioning was needed to determine whether they could be struck for cause. These men were not similarly situated, and there is no inference of discrimination by the State.

Barlow next claims that Idoelia Williams and Erika Bowman were similarly situated. AOB at 53. Barlow is incorrect. While Williams and Bowman were approximately the same age, there were key differences between the two women. Question 47 on the jury questionnaire was:

> In deciding whether a Defendant should live or die each juror must make a unique, individualized choice between the death penalty, life in prison without the possibility of parole, or life in prison with the possibility of parole after 20-50 years. Do you feel you can make such a decision, i.e. about whether a defendant should live or die and return that verdict in open court?

Williams indicated she could not do this, while Bowman indicated she could. 23 AA5260, 27 AA5995. Further, Williams had been previously arrested for a DUI, while Bowman reported no criminal history. 23 AA5255-56, 27 AA5990-91. In addition, Williams indicated that she believed the criminal justice system does not always work, and stated that criminal cases take too long to do justice. 23 AA5256. Bowman made no such statements. Finally, Williams indicated on her questionnaire that she could not sit as a fair and impartial juror because she is a woman of strong faith and "sometimes tend to rely on the higher power vs. the law." 22 AA5262. Bowman, on the other hand, indicated she could be a fair and impartial juror. 27 AA5996.

A review of the record makes clear then that Williams had a criminal history, conflicted feelings towards the criminal justice system, and doubts about her own ability to serve as an impartial juror. Bowman had none of these potential issues. As such, the women were not similarly situated, and no inference of discrimination can be drawn.

Finally, Barlow argues that Ms. Hill was similarly situated to Ms. Placke. AOB at 54-55. However, as Barlow freely admits, Ms. Hill had stated that she believed the justice system was, at least in some circumstances, biased towards African-Americans. AOB at 54-55, 10 AA2221, 27 AA6201. Given that Barlow is African-American, the State had concerns regarding whether Hill could set these

opinions aside in serving as a fair juror on this case. Ms. Placke on the other hand, expressed no such misgivings about the justice system. As such, these two individuals were not similarly situated, and no inference of discrimination can be made.

Barlow has failed to show that the district court abused its discretion in denying his Batson challenge at trial. The only argument Barlow presented at trial was that the State had used four (4) of its peremptory challenges against individuals who were either Hispanic or African-American. Given the dearth of support for his claim, the district court correctly found that Barlow had failed to establish a prima facie case of discrimination under the first step of a Batson challenge pursuant to Purkett. Barlow attempts to atone for his faulty argument below by raising a series of new arguments on appeal. Besides being the improper time to raise these claims, Barlow's claims have no merit. Therefore, this claim should be denied.

III. THE DISTRICT COURT DID NOT ERR IN DENYING BARLOW'S CHALLENGE FOR CAUSE OF JUROR NICKERSON

Pursuant to NRS 175.036, either party may make a challenge for cause to any member of the venire whose views would prevent the juror from adjudicating the facts fairly. Such challenges are to be tried by the district court. NRS 175.036. This Court reviews the denial of a challenge for cause for 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)). The operative question is "whether a

prospective juror's views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id.

"It is well established that the sentence 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). However, a juror is under no obligation to give equal consideration to each possible form of punishment in a capital case. See Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001). Likewise, a juror need not be persuaded by mitigating evidence, he need only be willing to consider it in coming to his ultimate determination. See Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S. Ct. 869, 877, 71 L. Ed. 2d 1 (1982).

Barlow alleges that the district court erred in denying his for cause challenge to Mr. Nickerson (juror 037). AOB at 57. Specifically, Barlow alleges that Mr. Nickerson indicated he would not consider the mitigating evidence of childhood experiences.

Barlow is incorrect. Nickerson first stated that he would be willing to consider all aggravating and mitigating circumstances before coming to a decision on what penalty to impose. 8 AA1660. Nickerson and defense counsel then had the following exchange during voir dire:

> 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.

8 AA1663.

Barlow attempts to construe these responses as Mr. Nickerson indicating that he would never consider Barlow's childhood in coming to a sentencing decision. However, the clear meaning behind Mr. Nickerson's statements are that the further removed in time the acts were, the less weight he would give them in his determination. Mr. Nickerson, as a juror, would have been perfectly entitled to assign any amount of weight to any piece of mitigating evidence (or aggravating) evidence. All that matters is that he would have considered it. Mr. Nickerson indicated that he would, but that the weight he would assign the evidence would be minimal if it occurred a long time ago. 8 AA1660, 16663. Mr. Nickerson's statements indicate that how important this mitigating evidence was would depend, at least in part, on how far removed it was from the commission of the crime. Such

a statement inherently shows a willingness to consider the evidence, as no such determination could be made without consideration.

The district court's logic was similar when denying Barlow's for cause challenge of Mr. Nickerson. The district court stated:

> Well, there's a difference between saying I won't consider mitigation and saying things that are further—that are further removed from the event, are less important to me. So he's not somebody I viewed in the totality of the questionnaire and in-court questioning that was telling me anything based on what's happened so far, that he was substantially impaired in his ability to do the job we're asking him to do. So based on the totality of the record that's before me, I would deny a challenge for cause on him and allow him to continue on.

8 AA1723.

As such, the district court properly applied the relevant standards when denying Barlow's challenge. Further, the district court's decision was in line with the relevant law of this jurisdiction. Therefore, the district court did not abuse its discretion in denying Barlow's for-cause challenge.

However, to the extent the district court did err, such an error was harmless. If the jury actually seated is impartial, the fact 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).

Here, the jury seated was impartial. Barlow's only allegation regarding an impartial jury is that due to Barlow having to use a peremptory strike on Mr. Nickerson, he was not able to use one on Darlyne Gonzalez. AOB at 59. Barlow claims this led to a biased jury because Ms. Gonzalez "could not consider mitigation in the event of a specific verdict or finding the crime was premeditated…" AOB at 60.

Such a claim is belied by the record. First, if Barlow was truly concerned that Gonzalez could not consider all forms of punishment, he could have moved to strike her for cause. See Morgan v. Illinois, 504 U.S. 719, 735, 112 S. Ct. 2222, 2226, (1992) (standing for the proposition that a juror who cannot consider all forms of punishment cannot sit as a fair juror). Barlow has presented no reason why he chose not to do so. A review of the record shows that it was likely because any concern over Gonzalez's answers in her questionnaire were cured during voir dire.

Ms. Gonzalez's questionnaire originally stated that she would always vote for the death penalty if the murder was premeditated. 28 AA63544. However, Ms. Gonzalez further indicated there was no kind of first-degree murder for which she would always vote for the death penalty. Id. Such contradictory answers imply the juror may have been confused about the language presented, and as such this questionnaire is of little probative value in determining Ms. Gonzalez's feelings towards the death penalty.

During voir dire however, Ms. Gonzalez stated multiple times that she would consider all the evidence (including mitigating evidence) before coming to a decision. 10 AA2282-83. Further, when asked if she would only vote for the death penalty if she found a murder was premeditated, Ms. Gonzalez responded that just because she agreed with the death penalty, that didn't mean that the outcome of the sentence would be the death penalty. 10 AA2289. Ms. Gonzalez further indicated yet again that she would have to hear all available evidence before coming to a decision. Id.

As such, even if it was error for the district court to deny Barlow's for cause challenge of Mr. Nickerson, Barlow has failed to establish that a biased jury was empaneled as a result because Ms. Gonzalez was perfectly well suited to serve as an unbiased and fair juror. Therefore, this claim should be denied.

IV. THE DISTRICT COURT DID NOT ERR IN PERMITTING ANYA LESTER TO TESTIFY AS AN EXPERT

NRS 50.275 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

A district court's admission of expert testimony is reviewed for an abuse of discretion. Perez v. State, 129 Nev. 850, 856, 313 P.3d 862, 866. There is no abuse of discretion when substantial evidence supports a district court's decision under the

Hallmark factors. "Substantial evidence is that which a reasonable mind might consider adequate to support a conclusion." Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (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." Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). Further, "in determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." Id. At 499.

However, not every factor is applicable in every case, and the weight accorded to each factor varies from case to case. Higgs v. State, 125 Nev. 1043, 17, 222 P.3d 648, 658 (2010).

Various courts have found that ballistics analysts can be qualified as experts. See United States v. Hicks, 389 F.3d 514, 526 (5th Cir.2004) ("[T]he matching of spent shell casings to the weapon that fired them has been a recognized method of

ballistics testing in this circuit for decades."); United States v. Scheffer, 523 U.S. 303, 313, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (stating that "the analysis of fingerprints, ballistics, or DNA" assist juries whereas polygraph testing does not). These courts have also found that testimony regarding ballistics testing was both relevant and reliable. Id.

Barlow alleges it was error for the district court to admit testimony by Ms. Lester, the State's ballistics expert witness. Barlow's argument is two-fold. Barlow argues that Ms. Lester was not qualified to testify as an expert witness. AOB at 64. Barlow also argues that the testimony did not assist the trier of fact. AOB at 66. Barlow does not argue that the testimony was not limited to matters within the scope of the witnesses specialized knowledge.

A. Lester Was Qualified to Proffer Expert Testimony

Barlow alleges that Lester was personally not qualified to testify as an expert. AOB at 64. However, Lester is employed as a forensic scientist with the Las Vegas Metropolitan Police Department. 14 AA3009. Lester had a degree in Forensic Science. Id. Lester had undergone a comprehensive training consisting of two thousand five hundred (2,500) hours of training over eighteen (18) to twenty-four (24) months. While Barlow has repeatedly attempted to paint this training program as a series of field trips (AOB at 65), the reality is that this training consisted of taking multiple classes, training under experienced examiners, touring firearm

manufacturing facilities, and completing various assignments out of training manuals. 14 AA3010. Further, at the end of this training, Lester was forced to pass a series of competency tests before being allowed to conduct her own casework. 14 AA3010.

Lester also testified that she had periodically undergone proficiency testing since 2011 to ensure that she was qualified to be practicing her job. 14 AA3010. Lester has never failed a proficiency examination. Id. Lester further testified that over the course of her career and her training, she had looked at thousands and thousands of discharged casings. 14 AA3051.

Given this evidence, there is no serious doubt about Lester's qualification as an expert under NRS 50.275. Therefore, the district court did not abuse its discretion in ruling that she was qualified.

B. Lester's Testimony Assisted the Trier of Fact

Lester's testimony assisted the trier of fact. An expert's testimony will assist the trier of fact when it is relevant and the product of reliable methodology. Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the 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) based more

on particularized facts rather than assumption, conjecture, or generalization. Id. At 500-02. Where an expert forms their 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. Id. at 500-02.

Barlow's primary argument under this factor is that this Court should not recognize firearm marker analysis as a field for which any individual may be qualified to testify as an expert witness. Barlow cites to no Court that has taken such an absurd stance, and instead relies only upon reports issued by The National Research Counsel and the Presidential Council of Advisors on Science and Technology. AOB at 66-69. According to Barlow, these reports detail the shortcomings of the ballistic testing sufficient to make it not helpful to the trier of fact.

In fact, Barlow's reliance on these reports is so total that he neglects to analyze Lester's testimony according to the factors articulated in Hallmark. Instead, Barlow makes the conclusory statement that "her testimony revealed that her conclusions were not sound based upon these factors." AOB at 67. At best, Barlow's argument only points towards ballistics not being generally accepted in the scientific

community (which the State is not conceding is the case). However, this is only one of nine factors the Court is instructed to consider when weighing whether ballistics is based upon a reliable methodology. A review of Lester's testimony reveals that the methodology used to link Barlow to the shootings easily meets the test set for in Hallmark.

First, ballistics is a recognizable field of expertise. This Court on multiple occasions has considered cases where ballistic experts were allowed to testify as expert witnesses. See *inter alia*, Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994); Byford v. State, 116 Nev. 215, 222, 994 P.2d 700, 705 (2000); Sanborn v. State, 107 Nev. 399, 403, 812 P.2d 1279, 1282 (1991).[4] Further, Lester testified that she is accredited by the American Society of Crime Lab Directors' international standards. 14 AA3076. The existence of such an accrediting body lends credence to the notion that this is a recognizable field of expertise. Further, Lester testified to using the AFTE theory of identification. 14 AA3093. This theory of identification is further used by firearms examiners, forensic scientists, and examiners from the FBI. 14 AA3093. As such, ballistics is clearly a recognizable field of expertise.

Second, Lester's opinion was testable and was tested. Lester's opinion was formed by conducting tests by firing test cartridges from Barlow's gun and using the

[4] These cases are offered not to suggest that this Court has already addressed this issue in a published opinion, but rather to illustrate the widespread use of ballistics experts in trials.

AFTE theory of identification to examine whether the markings left on the test casings matched the marks left on the casings recovered at the scene. 14 AA3020-36. Her results were further supported by an independent ballistics expert reconstructing the experiment and coming to the same findings. 14 AA3050. Further, her findings went through an additional verification process, a technical review process, and an administrative review. 14 AA3081-82. Therefore, Lester's findings were testable and were tested.

Third, Lester's findings were subject to peer review. As articulated earlier, Lester's findings have to be corroborated by an independent examiner, and undergo a thorough review process. 14 AA350, 3081-82. In addition, Lester testified that there are ongoing studies regarding ballistics and the science behind it. 14 AA3092-93. As such, the work is subject to peer review. Further, while Lester's opinions were not published, this portion of the factor should carry minimal weight, as it would be rare for a forensic analyst's work in relation to a charged crime to be published in an academic journal.

Fourth, ballistics is generally accepted in the scientific community. While Barlow attempts to attack the scientific underpinnings of ballistics with reference to various reports, Lester testified at trial that there is not a consensus regarding the accuracy of these reports. Specifically, Lester testified that OSACS, the FBI, Attorney General Loretta Lynch, and the National Association of Attorneys General,

all disagreed with the PCAST Report. 14 AA3102-03. Such support indicates support in the scientific community, and at worst, this factor is neutral.

Fifth, Lester's opinions were based on particularized facts rather than assumptions. Lester's opinions were made after examining the casings found at the crime scene, test firing casings from Barlow's firearm, and then comparing the marks between the two groups of casings. 14 AA3012-16. In fact, Lester testified in detail regarding the exact procedure she used to come to her expert opinions. 14 AA3012-29.

Sixth, the technique which Lester employed was controlled by known standards. As Lester testified multiple times, her lab follows the ATFE method of identification. See e.g. 14 AA3020, 3066.

Seventh, the testing conditions were similar to the conditions at the time of the incident. In both instances, casings were fired from a gun, recovered, and analyzed.

There is conflicting information regarding whether there is an established rate of error regarding ballistics examinations.[5] However, given that Lester's findings

---

5 See Obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf; see also archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2009/review/2009_07_review01.htm

were corroborated by an independent examiner, and then subject to a rigorous review process, it seems likely that the error rate would be low given these precautions to protect reliability. 14 AA3050, 14 AA3081-82.

Finally, the experiment Lester conducted in comparing the casings was proffered specifically for the purpose of the present dispute, i.e. proving that the casings at the crime scene were fired from the firearm found in Barlow's vehicle. 14 AA3009, 3012-13.

After a thorough review of the factors articulated in Hallmark, it is clear that Lester's testimony was the product of a reliable methodology. Further, various courts have agreed with this conclusion, finding that ballistics employs a reliable methodology. See United States v. Hicks, 389 F.3d 514, 526 (5th Cir.2004) ("[T]he matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades."); United States v. Scheffer, 523 U.S. 303, 313, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (stating that "the analysis of fingerprints, ballistics, or DNA" assist juries whereas polygraph testing does not). The State would further note that Barlow fails to cite a single instance where any court, in any jurisdiction, has held that ballistics analysis is not based on a reliable methodology.

Therefore, Lester's testimony was the product of a reliable methodology. Since the testimony was also relevant, the testimony assisted the trier of fact, and

this factor weighs in favor of Lester qualifying as an expert witness. Since the district court also did not abuse its discretion in ruling that Lester was qualified to proffer this testimony, the district court did not abuse its discretion in admitting Lester's expert testimony. Therefore, this claim should be denied.

C. The District Court Did Not Fail in Its Role as a Gate Keeper

Barlow adds in an argument alleging that the District Court failed in its role as a gate keeper. AOB at 71. Construed liberally, Barlow is alleging that it was error for the district court not to more thoroughly articulate its findings when denying Barlow's Motion to Strike Ms. Lester's testimony. AOB at 71.

However, Barlow fails to articulate which factors under NRS 50.725 the district court allegedly failed to consider. Since Barlow discusses only Lester's experience in this section, the State presumes Barlow takes issue with the district court's rulings with respect to whether Lester was qualified under NRS 50.275(1) due to the fact that "her 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…" AOB at 72.

However, a review of the record shows that the district court took all necessary factors into consideration. Barlow conveniently leaves out the exact portion of the district court's ruling where he discusses his consideration of Lester's relevant experience. The district court stated:

> 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 you feel needs to be, you know, explored a little more before they start asking the substantive question.
>
> …
>
> I also think that she basically is entitled to have however many years under her belt now since this happened and she testified, as to when she's testifying now. We don't limit somebody to say whatever expertise they have and whatever things they've done before they get in front of the jury, because the jury is evaluating her whenever she testifies in this trial, and whatever knowledge and experience she has at the moment, to decide whether what she has to say is credible or not. They don't say, well, we only want to know what you knew back in 2013.
>
> I've had a number of experts testify and admit on the stand, you know, I made an error in this back when I did it before, or I've done, you know, something – I do something different now, and so I would reevaluate what I did before. She can certainly be questioned about that, and if she thinks there's some error or a better way to do things since she first did it, she can talk about that.
>
> So I don't think it's a fatal error to say she was a little less experienced back then, that she is now, and so therefore, the examination and testimony is somewhat poisoned and can't be, you know, cured in any way; A, I don't think its poisoned; but B, I think that the accumulation of experience that somebody has is brought to bear when they testify at whatever time they're going to testify.

7 AA1478-79. When Barlow's counsel went on to State that it was her belief that experts' qualifications should be "frozen in time" to the point she conducted the analysis, the Court went on to state:

> With Ms. Lester, doing the evaluation that she did at that time doesn't freeze it in time, because that thing can constantly be revisited all the way up until trial. And at trial, they're evaluating her and the credibility of what she has to say about the evaluation not – there's nothing specific to when she did it about the evaluation, it's just in 2018 when the jury's hearing it that they have to evaluate it. So I don't think the frozen in time analysis applies to her.

7 AA1482-83.

The State also notes that Barlow challenged Lester's qualifications in a Pre-trial Petition for Writ of Habeas Corpus. In ruling that Lester was qualified as an expert at that stage, the district court stated:

> However, the Court finds that there was sufficient foundation laid at the Preliminary Hearing as to her education, training and experience for testimony to be admissible, and it would be up to a reasonable trier of fact to determine the weight, if any, to be given which was the Justice of the Peace, and, if this case does go to trial the jury.

2 AA0318.

The record is clear that the district court considered Lester's education and training sufficient to qualify her as a witness. Therefore, this claim should be denied.

D. Any Error Was Harmless

To the extent it was error for the district court to admit Lester's expert testimony, any such error was harmless, as it did not affect Barlow's substantial rights. See Mathews v. State, 134 Nev. 512, 516, 424 P.3d 634, 639 (2018). "The exclusion of a witness' testimony is prejudicial if there is a reasonable probability that the witness' testimony would have affected the outcome of the trial." Lobato v.

State, 120 Nev. 512, 521, 96 P.3d 765, 772 (2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

While Lester's testimony was used to link the firearm recovered in Barlow's vehicle to the cartridges found in the victims' apartment, the evidence against Barlow was overwhelming even without this evidence. First, Barlow had threatened and assaulted Woods and Cobb the morning of the day he eventually killed them. 12 AA2534, AA2576. Following this encounter, Barlow pointed a gun at the two victims and said he would be back. 12 AA2576, AA2611.The jury heard testimony that after this first encounter with Barlow, Woods called her sister Elise Richards and said Barlow was going to kill her (Woods). 12 AA2534. Further, the firearm found in Barlow's car was consistent with the type of firearm that would have fired the .40 Smith & Wesson Blazer cartridges found at the murder scene. 13 AA2799. In fact, an additional .40 Smith & Wesson Blazer cartridge was found Barlow's car. 13 AA2907-09. In addition, Barlow had been looking for Woods earlier that week, and had seemed angry while expressing that he knew she was with Woods. 11 AA2529, 12 AA2546-48. The State also introduced evidence that Barlow's fingerprints and DNA were found on the magazine of the firearm recovered from his vehicle. 13 AA2979, 2984; 14 AA2998, AA3004.

As such, the State introduced overwhelming evidence of Barlow's guilt. Therefore, any error in the admission of Lester's testimony was harmless, and this claim should be denied.

V. THE JURY INSTRUCTIONS PROVIDED WERE AN ACCURATE STATEMENT OF THE LAW

This court reviews de novo whether a jury instruction is a correct statement of the law. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). This Court reviews a district court's refusal to give a jury instruction for an abuse of discretion or judicial error. Id.

A. The Burglary Instruction Provided Was Valid

Barlow first argues that the Jury Instruction nine (9) was invalid. AOB at 74. Barlow argues that this instruction shifted the burden of proof from the State to Barlow. AOB at 75.

NRS 205.065 states:

> Every person who unlawfully breaks and enters or unlawfully enters any house, room, apartment, tenement… may reasonably be inferred to have broken and entered or entered it with intent to commit grand or petit larceny, assault or battery on any person 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.

Jury Instruction 9 stated:

> 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 AA3172.

The second paragraph of the jury instruction is a near exact replica of the statute announcing the status of the law in this jurisdiction. The first paragraph of the instruction merely explains the context for why the second paragraph is being provided. There is no legitimate argument that this jury instruction is an incorrect statement of law. Therefore, the jury instruction was valid.

Barlow also claims that this law impermissibly shifts the burden of proof to a defendant. However, this Court has already found NRS 205.065 does not relieve the State of its burden, as it requires the State to prove that the entry was unlawful. White v. State, 83 Nev. 292, 296, 429 P.2d 55, 57 (1967). The Court further stated that creating a statute that allows for the establishment of inferences from facts proven by the State is clearly within the province of the legislature. Id.

Barlow's argument that this holding should be overruled is not persuasive. The cases Barlow cite merely stands for the proposition that the State bears the

ultimate burden of proof at trial. None of these cases hold or even claim that the existence of presumption or inference relieves the State of this burden. See Patterson v. New York, 432 U.S. 197, 210-12 (1977) (stating: "We thus decline to adopt as a constitutional imperative… that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused."); Mullaney v. Wilbur, 421 U.S. 684, n. 31 (1975) (indicating that presumptions and inferences are permissible as long as they satisfy due process requirements"); In re: Winship, 397 U.S. 358, 364 (1970) (stating merely that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which is charged"). As such, the logic this Court adopted in White is sound, and still in accordance with the state of the law.

Further, the instructions Barlow now proposes the district court should have given are harmful to defendants and considerably more convoluted than the instruction the district court provided. Barlow first argues that the instruction should have "ended after therein' and the unless clause' should have been stricken." AOB at 76. Such an instruction actually prejudices defendants. The unless clause states an avenue for defendants to show that breaking and entering a building does not constitute burglary. Specifically, if the defendant adequately shows that he acted without criminal intent, then he cannot be convicted of burglary. Removing this

clause does nothing more than eliminate a potential avenue of relief. It would not affect the State's burden of proof in any way, as the instruction would still allow for the inference of intent.

Barlow also argues that, in the alternative, the following language should have been added to the State's instruction:

> This is only an inference which the jury may consider, but it 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.

AOB at 76. However, the instruction given already stated that it is only an inference. Further, jury instruction thirty-six (36) expressly discussed that the burden of proof was on the State, and that Barlow was to be presumed innocent until proven guilty. 14 AA3199. As such, this language would have been duplicitous, and its inclusion was not necessary.

Given that the jury instruction given was an accurate statement of the law and did not place the burden of proof upon Barlow, the district court did not abuse its discretion in admitting the jury instruction.

However, to the extent the error given was an error, the error was harmless. As articulated above, Barlow's chief complaint regarding the jury instruction was that it impermissibly shifted the burden of proof. However, jury instruction thirty-six (36) expressly stated that the burden of proof was on the State and that Barlow

was to be presumed innocent until proven guilty. Jurors are presumed to follow the district court's instructions. Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

Further, there was considerable other evidence that Barlow entered the victims' apartment with the intent to commit a felony. Barlow broke into the apartment with enough force to damage the doorjamb and door frame. 12 AA2627. Barlow was carrying a firearm. 12 AA2687, 2798-99, 14 AA3042. Further, Barlow had threatened the victims earlier that day, battered one of the victims, and had articulated over the days prior to the incident that he was looking for one of the victims. 12 AA2534, AA2576; 11 AA2529; 12 AA2546-48. At least one of the victims weas shot before they even had time to move, evidencing that Barlow began firing his weapon as soon as he broke down the door. 12 AA2670. This evidence strongly suggests that Barlow was the individual who broke into the apartment, and that he did so with the intent to commit a felony therein.

In addition, it is worth noting that Barlow's theory of defense during the guilt phase seemed to be that it was not Barlow who committed the murders. 15 AA3261-70. Nowhere during Barlow's closing was it argued that the individual who kicked in the door and shot Cobb and Woods did not possess sufficient intent to constitute a burglary. Id. As such, even if the statement of law offered were incorrect, any error was harmless because Barlow never argued that the individual who committed the

crime lacked the intent to commit a burglary. Therefore, to the extent the jury instruction was given in error, the error was harmless. This claim should be denied.

B. The State of Mind Instruction Provided Was Valid

Barlow next argues that jury instruction eighteen (18) was given in error. AOB at 77.

This Court stated in Miranda v. State, 101 Nev. 562, 568, 707 P.2d 1121, 1125 (1985)[6] that:

> 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, and the jury may infer the existence of a particular state of mind from the circumstances disclosed by the evidence.

Jury Instruction eighteen (18) stated:

> 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 AA3181.

Once again, the jury instruction was a near exact replica of the law of this jurisdiction. Barlow attempts to circumvent this by manufacturing the distinction that Miranda dealt with the standard for sufficiency of the evidence, and not a jury

[6] This case was overruled on other grounds by Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006).

instruction concerning the jury's consideration of the evidence. However, such a distinction is unpersuasive. Sufficiency of the evidence inherently deals with whether a jury could find beyond a reasonable doubt whether a crime had been committed. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In stating that this is the standard to be referenced when making such a determination, this Court stated that this is the law regarding how a jury may consider the evidence of mens rea. As such, the jury instruction was a correct statement of law.

The State would further note that Barlow does not even offer a competing standard for how the jury should be instructed to consider mens rea evidence. Instead, Barlow merely asserts that the following addendum should have be added onto the end of the instruction:

> The State must nevertheless meet its burden of proving, either by direct or circumstantial evidence, that Mr. Barlow acted with 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.

AOB at 78.

Once again, such an addition would have been duplicitous. Despite Barlow's assertion that the instruction as provided "allowed the jury to return a verdict of guilt based upon speculation, unfounded assumptions and unknown inferences," the instruction clearly stated that the jury may infer the existence of a state of mind from the circumstances disclosed by the evidence. As such, the jury instruction does no

more than state that the State can prove mens rea through either direct or circumstantial evidence. Barlow's addition then is nothing more than a restatement of the jury instruction and jury instruction thirty-six (36). 14 AA3181.

Barlow once again insists that the jury instruction provided relieved the State of its burden of proof. However, as argued above, the instruction, in combination with jury instruction thirty-six (36) clearly charged the State with proving Barlow's State of mind through either direct or circumstantial evidence. 14 AA3181, 3199.

The district court correctly pointed out that the standard referenced in this jury instruction has been the state of the law in this jurisdiction for over one-hundred years. 14 AA3123; Miranda, 101 Nev. at 568, 707 P.2d at 1125; Larsen v. State, 86 Nev. 451, 470 P.2d 417 (1970); Mathis v. State, 82 Nev. 402, 419 P.2d 775 (1966); State v. Thompson, 31 Nev. 209, 216, 101 P. 557 (1909). Therefore, the district court did not abuse its discretion in admitting the jury instruction.

However, to the extent the instruction was incorrect, the error was harmless. As articulated multiple times already, there is no danger the jury instruction provided misled the jury into believing the State did not have to prove every element of the offense charged. Jury instruction thirty-six (36) explicitly claimed that Barlow was to be presumed evidence, and that the burden of proof laid exclusively with the State.

Finally, the State introduced sufficient evidence to support the mens rea for the assault with a deadly weapon charge through testimony that Barlow pointed a

gun at the victim while saying "I'll be back." The victim was further to terrified to leave his apartment later when the police responded to the initial 9-1-1 call. As argued, above, the State also introduced overwhelming evidence of Barlow's intent to commit a burglary. See Section V(A).

Therefore, to the extent the instruction was given in error, any error was harmless and this court should affirm Barlow's conviction.

C. The Intent to Kill Instruction Was Valid

Barlow similarly raises issue with jury instruction nineteen (19). AOB at 78. This Court has held that:

> Intent to kill, as well as premeditation, may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce certain death, the manner of use, and the attendant circumstances.

Dearman v. State, 93 Nev. 364, 367, 566 P.2d 407, 409 (1977); see also Washington v. State, 132 Nev. 655, 662, 376 P.3d 802, 806 (2016); Moser v. State, 91 Nev. 809, 812 544 P.2d 424, 426 (1975).

In the instant case, jury instruction nineteen (19) stated:

> The intention to kill may be ascertained or deduced from the facts or 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 AA3182.

Similar to the other instructions Barlow complains of, this instruction is a near exact replica of the law in this jurisdiction. Barlow tries to draw the same distinction between the instant case and Dearman as he did between the state of mind instruction and Miranda. Specifically, Barlow argues that Dearman dealt with a sufficiency of the evidence issue, not whether the standard articulated is a proper jury instruction. AOB at 78. Once again, such an argument is not persuasive. When considering a sufficiency of the evidence argument, the Court's concern is with whether a rational jury could have found beyond a reasonable doubt that the defendant committed the charge for which he was convicted. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). By relying on this standard to guide its analysis into that question, this Court adopted this standard as the one juror's should rely on at trial. Otherwise, such a standard would be utterly inapplicable to analyzing the sufficiency of the evidence (as it would make no sense to consider a standard when determining if a jury's deliberations were reasonable, if said standard was not the one jurors were supposed to use). As such, the instruction provided was an accurate portrayal of the law.

Barlow does not provide a meaningful alternative to the instruction given. Instead he offers the conclusory assertion that jury instruction nineteen (19) "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." AOB at 79. First, it is bewildering how Barlow can claim that the instruction singles out a particular piece of evidence when the instruction explicitly states that the jury should rely on "the facts and circumstances" of the killing, before going on to give three separate examples of evidence that could be considered. Second, the instruction was not duplicative. While other jury instructions dealt with determining mens rea or in general, or for other crimes, this was the only instruction provided that explained to the jury how they were supposed to determine specifically whether Barlow possessed the intent to kill. 14 AA3163-3208.

However, to the extent the instruction was given in error, the error was harmless. The jury found Barlow guilty of Burglary. 14 AA3210. As such, this alone was sufficient for finding a conviction of first-degree murder as the jury also found that Barlow committed the killing during the commission of this Burglary. 14 AA3211. Therefore, the jury would have found Barlow guilty for first-degree murder even if they never considered whether he possessed the intent to kill under the felony murder rule. NRS 200.030(1)(b). Further, there was overwhelming evidence that Barlow acted with premeditation and deliberation in killing Woods and Cobb. Barlow had accosted and threatened Woods earlier in the day. 12 AA2551. Barlow had told Woods he was going to kill her earlier in the day. 12 AA2534. Barlow further went to Cobbs apartment, with a loaded gun, kicked down

the door, and began firing on Woods and Cobb. 12 AA2627-31. There is no reasonable argument that this was not a premeditated and deliberate act. As such, any error to this instruction is harmless, and Barlow's conviction should be affirmed.

VI. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

When considering claims of prosecutorial misconduct, this Court engages in a two-step analysis. First, the Court "must determine whether the prosecutor's conduct was improper." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Second, if the conduct was improper, the Court "must determine whether the improper conduct warrants reversal." Id.

"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." Id. at 1188-89. "If the error is of constitutional dimension, then we apply the Chapman v. California 386 U.S. 18 (1967) standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Id. at 1189. If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict. Id.

The standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'"

Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (*citing* Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001); See Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997).

A. The State's Argument Regarding the Sequence of the Bullets Was Not Improper

"A prosecutor may not argue facts or inferences not supported by the evidence." Jeffries v. State, 133 Nev. 331, 334, 397 P.3d 21, 26 (2017) (*citing*: Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). However, "the prosecutor may argue inferences from the evidence and offer conclusions on contested issues." Id. (*citing*: Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005).

Barlow first argues that the State committed prosecutorial misconduct by arguing in its closing about the sequence the bullets were fired in, as well as whether the jury could infer intent from the relative positions of the bodies/bullet trajectories. AOB, at 84. In relevant part, the State argued the following during its closing argument:

> And you look at her, I'm sure she wasn't sitting like that to watch the TV that was over here. Based on the evidence she was probably sitting in that reclining type chair, the red one next to her where her feet are at. But when the door crashes in, it's probably safe to assume she stood up in response to the crashing and barging into the apartment.
>
> ….
>
> So when she gets shot, she falls back in between the seat and the couch. And given the evidence, likely the shot that took her down was the one that went through her side, that went through her lungs and her heart, put her between the couches. Again, caught off guard. There was no conversation in there with a friend or an acquaintance or the intruder.
>
> 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 –this angle [overruled objection by Barlow's counsel]. 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 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.

15 AA3245-47.

Nothing contained in this argument constitutes prosecutorial misconduct. The State had called forensic scientist Shandra Lynch to testify regarding the positioning of the bodies in the apartment following the murder. 12 AA2667-694. The State had further called Dr. Leonard Roquero[7] to testify about the bullet wounds each victim had suffered, as well as the trajectories of said bullets once the entered the bodies. 13 AA2878-94. Nothing in this portion of the State's closing was at odds with either of these testimonies.

The State argued that based upon the body positions, as well as the trajectories of the bullets, the jury could draw certain inferences regarding the positioning of the victims at the time the murders occurred. 15 AA3245-47. Such an argument is simply an inference of the evidence introduced at trial. While Barlow is correct that there was no testimony as to the sequence of the shots (see 13 AA2880-81), he cannot argue that the trajectory of the bullet found in Woods jaw does not indicate that she was likely shot by someone who was at a higher vantage point than her head. See 12 AA2670-71 (discussing the position of Woods deceased body and the injury

[7] Dr. Roquero did not perform the autopsy for either victim. He reviewed photographs, autopsy reports and x-rays at the Coroner's office to form an opinion as to the cause and manner of death. 13 AA2873-74.

to her front left forehead); 13 AA2881 (discussing that the injury to her head was caused by a bullet that entered near her scalp and was recovered from her right lower jaw). This is in contrast to other bullet wounds she suffered that indicated she was standing upright when shot. See 13 AA2878-80.

It is neither outlandish nor an unreasonable inference that she was first shot while standing, fell, and then shot again in the head. The alternative would be that Woods was shot in the head from above, somehow had her body positioned to the same height of the shooter, and then was shot in the chest. Pursuant to Jeffries and Miller, such an argument is not prosecutorial misconduct. The district court recognized as much when it overruled Barlow's objection during this portion of the State's closing. 15 AA3246.

Barlow further takes issue with the following statements made during the State's rebuttal argument. AOB at 82-83. In relevant part, the State argued on rebuttal:

> 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 unloads on Donnie Cobb, saving one bullet to execute Danielle Cobb – or Danielle Woods

15 AA3276-77.

At this point Barlow objected, claiming that the State was arguing facts not in evidence regarding whether Barlow saved one bullet for Ms. Woods, and the sequence of the bullets fired. The district court sustained the objection. 15 AA3277. The State went on to clarify that:

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

15 AA3277.

Once again, any argument made by the State regarding trajectories of the bullets was simply a permissible inference based on the evidence. In fact, following Barlow's objection, the State clarified that it was not submitting that the sequence of the shots had been admitted into evidence, but rather that the jury could infer the sequence of shots based upon other evidence that was admitted. Further, to the extent it error to argue regarding the sequence of the shots fired, said error was cured by the sustained objection. See Valdez, 124 Nev. at 1193-94, 196 P.3d at 465 (holding that a prosecutor's question did not constitute prosecutorial misconduct and there was no prejudice because the district court sustained the objection…").

Barlow also claims that the State's use of the words "execute," "coup de gras," and "kill shot" were "unsupported by the evidence, inflammatory, and were designed to arouse the emotions of the jurors. AOB at 84.

These words occurred in the following contexts during the State's closing:

> 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, but she had the **kill shot** to the head.
>
> …
>
> He fires the second round at her that hits her and grazes the back of her head and goes into the wall, and then unloads on Donnie Cobb, saving one bullet **to execute** Danielle Cobb – or Danielle Woods
>
> …
>
> You know that she's in that position when she gets the bullet into her head. That's what we call the ***coup de grace***, and that's what we call first degree murder.

15 AA3247, 3277.

An examination of the Webster's definition reveals that execute is defined as "to put to death…" Coup de grace is define as "a decisive finishing blow or event." A kill shot is quite literally, a shot which kills. All of these terms describe the same thing, that this shot was indicative of someone intending to kill another human being.

The words chosen by the State were supported by the evidence. As the State previously articulated, the evidence was such that it was a reasonable inference that Woods was shot, fell down, and then shot again in the head. One of the State's

theories of culpability on the first-degree murder charge was that the murder committed by Barlow was premeditated and deliberate. 15 AA3249-50. The most likely reason a person would shoot another person in the head, especially after they had already been shot, is that they intended to kill them. As such, the words chosen were specifically tied to one of the State's theories of prosecution, and were supported by the evidence.

Regarding Barlow's argument that the words were inflammatory, Barlow did not object to any of this language as inflammatory at trial. As such, he has waived all but plain error review. "When an error has not been preserved, this court employs plain-error review. 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 or her substantial rights, by causing actual prejudice or a miscarriage of justice." Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Further, the language was not inflammatory. The standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (*citing* Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the

proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054. In this case, none of the terms used by the State rise to the level of being patently prejudicial. The terms accurately described Barlow's behavior, and were supported by substantial evidence. Therefore, the State did not commit misconduct, and this claim should be denied.

However, to the extent the State did commit misconduct, it was harmless. These arguments were brought to support the State's theory that Barlow was guilty of first-degree murder because the murder was deliberate and premeditated. However, the State also pursued a theory that Barlow was guilty of first-degree murder under the felony murder rule. The jury convicted Barlow of Burglary. As such, Barlow would have still been guilty of first-degree murder under the felony murder under NRS 200.033(1)(b). Therefore, since these statements only pertained to the State's premeditation and deliberation theory, Barlow would still have been convicted of first-degree murder even if the State had never made these statements. As such, this claim should be denied.

/ / /

/ / /

B. The State Did Not Comment on Barlow's Silence

Barlow further argues that the State committed prosecutorial misconduct by commenting on Barlow's decision not to testify. AOB at 85.

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, 763, 6 P.3d 1000, 1008 (2000). It is further impermissible for a prosecutor to indirectly remark on a defendant's failure to testify 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 right to testify. Id. at 763-64, 6 P.3d at 10008-09. This Court has previously found that statements that urge the jury to focus on the evidence introduced at trial does not constitute commentary on the defendant's decision not to testify at trial. Knight v. State, 116 Nev. 140, 145, 993 P.2d 67, 71 (2000).

Barlow did not object to this comment, and as such, has waived all but plain error review. 15 AA3277-78; Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). However, while Barlow is entitled only to plain error review, the argument fails no matter the standard of review. The statement Barlow now argues was a comment on his silence was:

> 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 and tell that person you know, too.

15 AA3277.

The State is uncertain as to which portion of this statement Barlow believes is a commentary on his decision not to testify at trial. Breaking it down sentence by sentence, the first sentence merely states that the evidence leads to some conclusion. The second sentence begins by saying there's only one person who knows who executed the two victims. The clear implication was that one such person was Barlow. Such an implication speaks to Barlow's guilt, not his decision not to testify. The final portion of the sentence merely asks the jury to return a verdict of guilty. No aspect of this statement comments on Barlow's decision not testify. This claim should be denied. In fact, this Court has previously held that this argument does not constitute prosecutorial misconduct, as it merely "reflects the prosecutor's conclusions based on the evidence." Taylor v. State, 132 Nev. 309, 324–25, 371 P.3d 1036, 1046 (2016)(finding that the statement: "I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed…Pearson" was not an improper statement).

To the extent this Court construes the State's argument as a comment on Barlow's decision not to testify at trial, such an error was harmless. In examining whether an error of this sort is harmless, this Court examines whether the comment was patently prejudicial. Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009

(2000). This Court has previously found the following statement to not be patently prejudicial: "Judge, I'm going to object. This is testimony. If he would like to be sworn, he had the opportunity to do that" Bridges v. State, 116 Nev. 752, 763, 6 P.3d 1000, 1008 (2000). Any statement made by the State in this case is a far cry from even the statement made in Bridges. Further, the jury was instructed that it was Barlow's constitutional right not to testify, and that they "must not draw any inference of guilt from the fact that he does not testify." 14 AA3201. As such, any error was harmless and this claim should be denied.

VII. THE GREAT RISK OF DEATH AGGRAVATING CIRCUMSTANCE WAS NOT INVALID

Barlow next argues that the Great Risk of Death Aggravating Circumstance was invalid. AOB at 87. Specifically, Barlow argues that there was insufficient notice provided for this aggravating circumstance, there was insufficient evidence to support it, and the aggravating circumstance was duplicative. AOB at 87.

The State made two arguments during it's closing argument at the penalty hearing regarding this argument. The first was that this aggravating circumstance was being presented because Woods and Cobb were in close proximity to each other at the time of the shooting, and therefore Barlow's actions caused a great risk of death to both of them. 17 AA3770-71. The second was that because Barlow committed this shooting in an apartment building (a public place), and indeed some

of the bullets went through walls into other apartments (and in one instance out a window), Barlow caused a great risk of death to others. 17 AA3773.

A. The State Provided Sufficient Notice

Barlow first argues that the theory that Barlow's actions taking place in an apartment complex caused a great risk of death to others was not sufficiently noticed. AOB at 88. SCR 250(4)(c) states:

> No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice 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.

"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." Redeker v. Dist. Ct., 122 Nev. 164, 168–69, 127 P.3d 520, 523 (2006). The purpose of this provision is to provide a defendant with notice of what he must defend against at the death penalty hearing. Hidalgo v. Eighth Judicial Dist. Court, 124 Nev. 330, 339, 184 P.3d 369, 376 (2008). This Court has found that a Notice of Intent "asserting Great Risk of Death to Others as an aggravator" was sufficient where it detailed that the aggravator was based on "the crimes committed by a defendant in a location 'which the public has access to and which several citizens are located nearby.'" Nunnery v. State, 127 Nev. 749, 780, 263 P.3d 235, 256 (2011).

The State's Notice of Intent to Seek Death Penalty listed six (6) aggravators that the State intended to argue during the penalty phase of the trial. 1 AA0082-92. The fourth aggravator was "great risk of death to more than one person." The State argued that when Barlow broke into the apartment:

> He created a great risk of death to Danielle Woods and Donnie Cobb who were standing approximately 4 feet from each other at the time he shot them from a distance no further than 8 feet. Each victim was visible to the Defendant, and when he shot and killed both victims 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 AA0089. In support, the State incorporated "the factual recitation above for the factual allegations on which the State will rely to prove this aggravating circumstance." Id.

While the State's notice originally mentions Danielle Woods and Donnie Cobb by name, it does not limit this aggravator to only the risk of death created with regards to them. This Court addressed a similar issue in Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). In Nunnery, the defendant claimed that "the great risk of death aggravator should have been stricken because the notice of intent to seek the death penalty did not specify that the aggravator was based on allegations that other persons were present near the crime scene when the shootings occurred." Id. at 780, 263 P.3d at 256. This Court denied that claim because "the notice of intent" stated "that the aggravator was based on the crimes committed by the defendant in a

location 'which the public has access to and which several citizens are located nearby.'" Id.

While the notice in the instant case did not contain identical language to the notice in Nunnery, the Notice did demonstrate that the State was primarily concerned with the course of action Barlow engaged in, and that said course of action was normally dangerous to the lives of more than one person. This is evidenced by the State's incorporation of "the factual recitation above." Said factual recitation demonstrated that the State was alleging that the shooting took place in a public place, to wit, an apartment complex. 1 AA0082-86. As such, the State made clear that one of the facts used to prove this charge was the location of the shooting. Therefore, what Barlow has characterized as a change in theory was merely the argument of additional facts (which were contained in the Notice) supporting the same theory. Given that these facts were stated directly in the Notice, the State's Notice on Intent to Seek the Death Penalty properly placed Barlow on notice of this theory surrounding this aggravator.

Further, there can be no dispute that the Notice sufficiently placed Barlow on notice of the other theory the State argued during its closing, that the close proximity of Cobb and Woods during the shooting caused a great risk of death to more than

one person.[8] As such, Barlow was sufficiently noticed of the State's theories surrounding this aggravating circumstance.

B. There was Sufficient Evidence to Support This Aggravating Circumstance

Barlow also argues that the theory that Barlow's actions taking place in an apartment complex caused a great risk of death to others was not supported by sufficient evidence. AOB at 90.

This Court has held that there may not be sufficient evidence of a great risk of death aggravator where there is no evidence that the defendant knew other individuals were in range of being harmed by his course of conduct. See Moran v. State, 103 Nev. 138, 140-41, 734 P.2d 712, 713 (1987); Leslie v. State, 114 Nev. 8, 21–22, 952 P.2d 966, 975–76 (1998). However, specific knowledge that other individuals are nearby is not necessarily required for this aggravator to be proven. Adams v. State, No. 60606, 132 Nev. 937, WL 315171 (2016) (unpublished disposition). This Court has also stated that: "[t]his aggravating circumstance contemplates the use of a weapon or device that, by the nature of its use, 'would normally be hazardous to the lives of more than one person.'" Jimenez v. State, 105 Nev. 337, 342, 775 P.2d 694, 697 (1989). This Court has also stated:

> It is of no consequence to multiple victims of a violent crime whether their deaths or injuries result from a weapon directed

[8] While the State acknowledges that Barlow claims such a theory was duplicitous, the State addresses this argument in Section VIII(C).

> at each victim specifically or by random shootings or the use of a scattergun or other weapon of broader impact.... Obviously, one who intends to commit multiple murders within a closely related time and place engages in a course of conduct inherently hazardous to the life of more than one person.

Evans v. State, 112 Nev. 1172, 1195, 926 P.2d 265, 280 (1996) (*citing*: Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993). But see also Flanagan v. State, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996) (stating: "The legislative amendment apparently requires that for murders committed after October 1, 1993, the aggravator set forth in NRS 200.033(12), rather than the one in NRS 200.033(3), be applied to cases such as this one.")

In the instant case, there was sufficient evidence introduced at trial to support this aggravator. First, unlike in Moran v. State, there was evidence that Barlow would have been aware there were people present at the apartment complex. Latanya Dobbs testified that she saw Barlow on her up to her apartment after taking out her trash. 12 AA2644, 2646-47. This is evidence that there was at least one person publicly in the vicinity of the apartment when Barlow committed the murders. Further, evidence was submitted at trial that an individual could not get into the apartment complex unless someone living there opened the gate for them. 12 AA2574-75. As such, Barlow would have needed someone to let him into the apartment, further indicating that there were people present at the apartment complex during the time he fired his gun.

Such facts would seem to make this case more similar to Adams v. State, where sufficient evidence was found to merit a great risk of harm aggravator. In Adams, this Court found the great risk of death aggravator supported by sufficient evidence based on "the proximity of Pam and Laura to each other when they were shot and the presence of three other children sleeping in the adjoining bedrooms..." Adams v. State, No. 60606, 132 Nev. 937, *3 WL 315171 (2016) (unpublished disposition). The Court found that this aggravating circumstance was supported by sufficient evidence even though Adams claimed the State failed to prove he knew other children were asleep in the house. Id. In the instant case, Woods and Cobb were in close proximity at the time of the shooting. Further, as the State argued above, there was evidence that Barlow should have known there were other people present at the apartment complex at the time he began firing shots inside the complex.

Further, there was sufficient evidence presented regarding the other theory supporting this aggravating circumstance, i.e. that Barlow and Cobb were in close proximity to each other at the time Barlow committed the murders. The two bodies were found in the same room in close proximity to each other. 12 AA2669-2670. As such, this aggravating circumstance was supported by sufficient evidence.

/ / /

/ / /

C. The Great Risk of Death Aggravating Circumstance Was Not Duplicative

Finally, Barlow argues in this section that this aggravator cannot be based upon the shots fired at Cobb and Woods because the jury returned a special verdict for an aggravator based on Barlow being convicted for more than one murder in the first or second degree. AOB at 91.

In Servin v. State, 117 Nev. 775, 791, 32 P.3d 1277, 1287-88 (2001), this Court held that it was improper to find multiple aggravating circumstances based on the same conduct. However, one year later, in Hernandez v. State, 118 Nev. 513, 529-30, 50 P.3d 1100, 1111 (2002), this Court clarified that where "the gravamen of each indicator is different… basing them both on the same facts is not improper." In Hernandez, this Court noted that in that case the same conduct gave rise to mutilation and sexual penetration. Id. at 529, 50 P.3d at 1111. The Court reasoned that in other cases, the two aggravating circumstances would not be based on the same set of facts. Id. The Court further reasoned that each aggravating circumstance protected a separate state interest. Id.

The same is true in the instant case. Even if the State were relying strictly on the same set of facts to prove both of these aggravators, that does not mean they are duplicative. First, each aggravating circumstance protects a separate state interest. The great risk of harm aggravator protects the State's interest in disincentivizing

reckless behavior, while the multiple victims aggravating circumstance protects the separate interest of disincentivizing the murder of multiple individuals.

Second, in many cases, these aggravating circumstances would be based on entirely different conduct. For instance, this jurisdiction's case law is replete with instances where a jury found the great risk of harm aggravator based on circumstances that would not give rise to the multiple victim aggravator. See e.g. Lisle v. State, 113 Nev. 540, 556, 937 P.2d 473, 483 (1997); Jimenez v. State, 105 Nev. 337, 342–43, 775 P.2d 694, 697–98 (1989); Hogan v. State, 103 Nev. 21, 24–25, 732 P.2d 422, 424 (1987). This notion is further supported by the State legislature's decision to amend NRS 200.033 in 1993 to add the multiple victims aggravating circumstance while still maintain the great risk of harm aggravating circumstance. See Flanagan v. State, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996). As such, these factors were not duplicative.

D. Any Error Was Harmless

To the extent Barlow is correct in that the great risk of harm factor was either (1) not properly noticed, (2) not supported by sufficient evidence, or (3) duplicative, any error was harmless and does not merit vacating Barlow's sentence of death.

"The Supreme Court has held that 'the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the

aggravating and mitigating evidence or by harmless-error review.'" State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 682–83 (2003), as modified (June 9, 2003) (*citing* Clemons v. Mississippi, 494 U.S. 738, 741, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). The analyses are "essentially the same" in that either should achieve the same result. Id. Such a review requires this court to "actually perform a new sentencing calculus" to determine whether "involving the invalid aggravator was harmless beyond a reasonable doubt." Id. Reweighing involves disregarding the invalid aggravating circumstances and reweighing the remaining permissible aggravating and mitigating circumstances. Id.

In the instant case, even if the great risk of harm instruction is disregarded, the jury still found five additional aggravating circumstances including: three (3) prior violent felony convictions, and that Barlow was convicted of murdering multiple victims in the underlying case. 16 AA3640. The jury found that three mitigating circumstances were established including: that Barlow received an honorable discharge from the military, that Barlow's daughter loved him, and that Barlow sought help from the VA hospital for mental health issues. 16 AA3635-3638.

Such findings show that the remaining aggravators were sufficient to maintain the verdict. The jury found that every aggravating circumstance the State provided was established. Further, all five (5) of the remaining aggravators show Barlow's extreme propensity for and tendency to commit violence against others. First, one of

Barlow's prior convictions resulted from Barlow shooting at Woods and another individual while the two individuals (victims) were sitting in her parked car at work. 15 AA3378-79. In addition, another of those prior convictions stemmed from Barlow getting into a shootout with another individual after kicking in the door to their apartment. 15 AA3365-68. Barlow had previously tried to stab this same individual with a bayonet.

The jury also heard that law enforcement had documented approximately twenty (20) different criminal incidents Barlow had been involved in. 15 AA3371. Testimony also established that Barlow had been previously charged with multiple incidents of domestic violence against Phyllis Green. 15 AA3375-76. There was further testimony that Barlow had previously tied up Woods with duct tape and beaten her. 15 AA3377. Barlow had attacked Woods' sister with a wrench, and used this same wrench to later smash the window's out of her sister's car. 15 AA3378. These are only a fraction of the violent incidents that law enforcement knew Barlow had been involved in. See 15 AA3365.

The jury was clearly concerned that Barlow was an individual who had engaged in a sustained course of terrorizing Woods, ultimately ending in murdering her and Cobb. The jury was further concerned that Barlow had spent a life-time abusing and attempting to kill others. Even without the great risk of harm jury instruction, there was still sufficient aggravating circumstances and evidence for the

jury to return a sentence of death. Therefore, any alleged error was harmless. This claim should be denied.

VIII. THE CONFRONTATION CLAUSE DOES NOT APPLY DURING A PENALTY HEARING; AND HEARSAY EVIDENCE IS ADMISSABLE DURING A PENALTY HEARING

Barlow next argues that it was error for the district court to allow the admission of testimonial hearsay evidence during the penalty trial. AOB at 93.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. Summers v. State, 122 Nev. 1326, 1331, 148 P.3d 778, 781–82 (2006). However, neither the Confrontation Clause nor the rule announced in Crawford apply at a capital penalty hearing. Id. Further, hearsay evidence is permissible at a capital penalty hearing as long as it is not supported solely by highly suspect or impalpable evidence. Nunnery v. State, 127 Nev. 749, 780, 263 P.3d 235, 256 (2011).

Barlow readily admits that this claim fails under the current state of the law. AOB at 94. Instead, Barlow argues that this Court should overrule Summers. Id. Barlow does not present any substantive reason for why this Court should chose to do so other than the fact that some Courts in other jurisdictions have found that the right to Confrontation applies during the penalty hearing of a capital case. AOB at 94-97. As a basis for this argument, Barlow cites to a number of cases illustrating

that other jurisdictions that have held that the Confrontation Clause applies to capital penalty hearings. Id. Barlow's argument is unpersuasive.

In Summers this Court stated that its analysis was guided by the Supreme Court decision in Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Summer, 122 Nev. at 1331, 148 P.3d at 1331. Williams has been relied on for the proposition that the Confrontation Clause does not apply to capital sentencing. Summers, 122 Nev. at 1332, 148 P.3d at 782. This Court noted that while other jurisdictions had questioned the holding of Williams, it was this Court's view that Williams remained good law even after the decision announced in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). This Court went on to say that "absent controlling authority overruling Williams and extending the proscriptions of the Confrontation Clause and Crawford to capital penalty hearings in Nevada, we are not persuaded to depart from our prior jurisprudence and extend to capital defendants confrontation rights under Crawford." Summers, 122 Nev. at 1332-33, 148 P.3d at 783. The Summers court also noted that this law was in accordance with the law announced by the Ninth Circuit Court of Appeals in United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir. 2006). Id. at 1332, P.3d at 782.

Barlow has not shown any controlling authority that the United States Supreme Court's holding in Williams is no longer good law. Nor has he offered substantive discussion regarding why such a reliance on Williams is misplaced, or

how a reliance on Williams should lead this Court to an alternate conclusion than the one arrived at in Summers. As such, Barlow's only argument in favor of overruling Summers, is one that this Court already explicitly addressed and denied in ruling on Summers (i.e. that because some other jurisdictions find that Confrontation Clause issues apply in a capital penalty hearing, this jurisdiction should as well).

Therefore, Barlow has made no compelling or even moderately persuasive argument regarding why Summers should be overruled. Therefore, this Court should decline to do so. Given that Barlow's claim fails as a matter of law, this claim should be denied.

IX. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING THE PENALTY HEARING

The standard for prosecutorial misconduct is the same during a capital penalty phase as during the guilt phase of trial. The State summarized the status of the law regarding prosecutorial misconduct in Section VI of this brief's argument.

A. The State Did Not Misstate the Standard for Mitigating Evidence

Barlow first alleges that the State committed prosecutorial misconduct by misstating the legal standard for mitigation. AOB at 100.

"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). 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).

The State never mischaracterized mitigation evidence during its closing. Barlow complains of the following language from the State's closing:

> 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 of less than death.
>
> And ask yourself about some of his mitigation. Some of it, I would suggest to you, just – not even a fact. Like, for example, on their number 10, they put, Keith Barlow has a history of attempting suicide which demonstrates regret and remorse? His suicide attempt was in 1986.
>
> What does he have regret and remorse for in 1986? He hasn't yet shot Mr. Hooker. He hasn't yet tried to kill Danielle Woods and he certainly hasn't executed Danielle and Donnie. What evidence of remorse is there?
>
> 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 your judgment? And there's this sort of 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.

15 AA3805-06.

Barlow claims the State minimalized important factors concerning Barlow's life that were relevant to sentencing and argued an incorrect definition of mitigation. First, the State did not argue an incorrect definition of mitigation. The State began by claiming that a mitigation factor is a factor that both exists and the jury considers as weighing towards a sentence of less than death. Such a statement is correct pursuant to the law. See Watson v. State, 130 Nev. 764, 794, 335 P.3d 157, 179 n. 9 (2014) (suggesting district courts adopt the following language in instructing jury's on the definition of mitigating circumstances: "A mitigating circumstance is any factor which you believe is a basis for imposing a sentence of less than death…"). The only other statement the State made regarding the definition for mitigating evidence was that mitigation evidence could be anything. Once again, this is a correct statement of the law. See NRS 200.035 (stating: "Murder of the first degree may be mitigated by…any other mitigating circumstance").

Second, minimizing the importance of potential mitigating evidence presented by a defendant is not prosecutorial misconduct. The jury is tasked with determining the weight each circumstance presented by the defendant. While the State may not tell the jury not consider a circumstance, it is permissible to argue that a mitigating circumstance should not be given much weight. See Emil v. State, 105 Nev. 858, 868, 784 P.2d 956, 962 (1989) (finding that it was not prosecutorial misconduct to

argue that a defendant's age should not weigh in favor of a more lenient sentence when the defendant presented his age as a mitigating circumstance.).

Third, to the extent Barlow is arguing the State did not minimize the evidence, but the mitigating factors themselves, the State did not minimalize any mitigating factors. The only factors mentioned by the State in the section quoted by Barlow is the Barlow's history of suicide demonstrating remorse, and Barlow's childhood. Regarding the suicide attempt, the State was clearly arguing that Barlow had not met his burden of linking his suicide attempt to any feeling of remorse. The State identified that the suicide attempt had occurred before any known of criminal activity Barlow had engaged in. As such, it was a dubious proposition that Barlow had even established that this factor objectively existed. Such is not a commentary on the factor itself, it is a commentary on the evidence used to support it.

Regarding Barlow's childhood, the State explained to the jury that this was a factor that could be argued to support Barlow in a multitude of ways. This is not minimizing the factor; it is a correct statement of law. If Barlow had a good childhood, he would have been perfectly entitled to argue that such an upbringing should be considered a mitigating circumstance. This does not minimize the importance of the factor, but merely provides context to the jury regarding the flexibility of many circumstances in supporting a finding of mitigation. The State never said that Barlow's childhood should not be considered. The State never even

explicitly commented on the weight this factor should receive. Therefore, the State did not minimize this factor.

However, to the extent any of the State's comments are held to constitute misconduct, any error was harmless. Barlow argues that he was prejudiced by these statements because the jury only selected three of the forty-one presented mitigating circumstances. AOB at 103. However, this Court has held that: "[w]e cannot agree with, and have previously rejected, the premise that jurors are required to find proffered mitigating circumstances simply because there is unrebutted evidence to support them." Nunnery v. State, 127 Nev. 749, 782, 263 P.3d 235, 257 (2011). Further, a defendant suffers no prejudice due to a prosecutor's misstatement unless said statement was material and gave the State a cognizable advantage." Johnson v. State, 122 Nev. 1344, 1357, 148 P.3d 767, 776 (2006).

In the instant case, even if this Court were to construe the State's argument as a misstatement regarding the law surrounding mitigating evidence, the jury was given the following jury instruction:

> A mitigating circumstance is any factor which you believe is a basis for imposing a sentence of less than death. Such circumstances may include, but are not limited to: any aspect of the defendant's character, background, or record; any factor that extenuates or reduces the degree of the defendant's moral culpability, regardless of whether it constitutes a legal justification or excuse for the offense; or any desire you may have to extend mercy to the defendant…

16 AA3650. The jury was also informed that it did not need to find a single mitigating circumstance in order to return a verdict of less than death. 16 AA3648. Further, jury instruction eight stated that the death penalty was never required under any circumstances. Id. The jury is presumed to follow the instructions given. Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001).

As such, the jury was clearly informed of the correct standard regarding the definition of mitigating evidence, and the jury was made explicitly aware that the death penalty never had to be imposed. Therefore, even if the State misstated the standard for mitigating evidence, it could not have given the State any cognizable advantage. As such, any error was harmless and this claim should be denied.

B. The State Did Not Commit Prosecutorial Misconduct in Asking the Jury to Consider Barlow's History of Abusing Prison Guards and Other Inmates

Barlow next argues that the State committed prosecutorial misconduct by asking the jury to consider whether Barlow should have the right to carry out his sentence in incarceration where he could "bully, spit, and push around, not just the – just the inmates, should he have the right to do that to the guards as well?" AOB at 105.

In relevant part, the State argued the following during its closing at the penalty hearing:

> Ms. Jackson stood up there 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 ornery man. He could be safely housed. 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 rather 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 other inmates, should he have the right to do that to the guards as well.

17 AA3808.

At this point, Barlow objected, which the district court sustained. 17 AA3808. The State went on to argue:

> Well, go back and look at Exhibit—the—the jail records. It's not just that he's ornery 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 you make the vote, and before you sign your name on that line, ask yourself, am I doing justice?

17 AA3808-09.

Barlow's objection was based on the admission of facts not in evidence. 17 AA3820. Later in the proceedings the district court clarified that it sustained the objection based on these grounds, but thought that based on the evidence, there was an argument that could be made about Barlow having problems with the staff. 17 AA3820.

Despite Barlow's insistence to the contrary, this argument was not an argument regarding Barlow's future dangerousness. As the State articulated during its closing, there was no dispute that Barlow could be safely housed. The argument was a response to Barlow's argument that he should not receive the death penalty because he could be safely housed. In fact, it was Barlow's counsel who stated "[l]et him sit in prison for the rest of his life, and every time he wants to bully somebody, or spit on somebody, or push somebody around, this is what he can expect." 17 AA3798-99. The State's response was therefore not some argument that Barlow should receive the death penalty because he was a future threat to society, it was a rebuttal to Barlow's argument that incarceration was a sufficient punishment for Barlow's crimes.

Further, even if the State were arguing the future dangerousness of Barlow, such an argument would not have been improper. This Court has held that prosecutors are allowed to argue the future dangerousness of a defendant even when there is no evidence of violence independent of the murder in question." Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 64 (1997) (*citing* Redmen v. State, 108 Nev. 227, 235, 828 P.2d 395, 400 (1992), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995). In the instant case, the State would have been more than entitled to argue Barlow's future dangerousness, as Barlow had an extensive history of violence. See 15 AA3365-83. Further, as Barlow readily admits,

he had been involved in multiple violent encounters with other inmates. AOB at 107-08.

Barlow's argument that the statement was improper because it occurred on rebuttal also fails. This was not some new argument by the State concerning Barlow's future dangerousness. It was a response to Barlow's argument that incarceration was a sufficient sentence despite his crimes and history of having problems with other individuals. Further, as the district court noted, there was sufficient evidence introduced to support such a response. 17 AA3820. The State is entitled to respond to arguments made by the defendant during their closing arguments. NRS 175.141(5); Schoels v. State, 114 Nev. 981, 989, 966 P.2d 735, 740-41 (1998); Hernandez v. State, 118 Nev. 513, 526, 50 P.3d 1100, 1109 (2002) (holding: "In this case there was no error because the prosecutor was fairly responding to an earlier contention by defense counsel that Hernandez expressed remorse after he was first stopped").

However, to the extent the State's argument was in error, any error was harmless. To the extent Barlow raises issue with the State's initial characterization of the evidence regarding his altercations when in the prison system, any such prejudice from this error was cured when the district court sustained the objection. 17 AA3808; Valdez, 124 Nev. at 1193-94, 196 P.3d at 465 (holding that a

prosecutor's question did not constitute prosecutorial misconduct and there was no prejudice because the district court sustained the objection…").

To the extent Barlow raises issue with the State's characterization of the evidence regarding his altercations when in the prison system following the sustained objection, any error was harmless in light of the overwhelming evidence of guilt. "The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Castillo v. State, 114 Nev. 271, 281, 956 P.2d 103, 109-10 (1998). In Castillo, this Court held that "although a portion of the prosecutor's argument was improper, the improper portion did not unfairly prejudice Castillo in light of the overwhelming evidence of his guilt." Id. at 281, 956 P.2d at 110.

The instant case is similar to Castillo in that the evidence of guilt was overwhelming. First, Barlow had threatened and assaulted Woods and Cobb the morning of the day he eventually killed them. 12 AA2534, 12 AA2576. Following this encounter, Barlow pointed a gun at the two victims and said he would be back. 12 AA2576, 12 AA2611.The jury heard testimony that after this first encounter with Barlow, Woods called her sister Elise Richards and said Barlow was going to kill her (Woods). 12 AA2534. Further, the firearm found in Barlow's car was the same firearm that fired the .40 Smith & Wesson Blazer cartridges found at the murder

scene. 14 AA3042. In fact, an additional .40 Smith & Wesson Blazer cartridge was found Barlow's car. 13 AA2907-09. In addition, Barlow had been looking for Woods earlier that week, and had seemed angry while expressing that he knew she was with Woods. 11 AA2529, 12 AA2546-48. The State also introduced evidence that Barlow's fingerprints and DNA were found on the magazine of the firearm recovered from his vehicle. 13 AA2979, 2984, 14 AA2998, AA3004. As such, the State introduced overwhelming evidence of Barlow's guilt. Therefore, any error was harmless, and this claim should be denied.

C. The State Did Not Commit Prosecutorial Misconduct When It Compared Barlow to His Sister

Barlow next argues that the State committed prosecutorial misconduct when it compared Barlow to his sister. AOB at 109. In relevant part, the State argued during closing:

> 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 AA3807.

These statements do not constitute prosecutorial misconduct. The State's argument was in response to Barlow's closing argument that the jury should find that his childhood was a mitigating factor. 17 AA3796-97. The State's argument was

that the jury should not give this factor the weight that Barlow argued they should. As evidence, the State pointed to an individual raised in a similar situation who had never gone on to commit a murder. This statement did not instruct the jury to disregard the factor, it did not interject personal opinion into argument, and it did not disparage defense counsel or mitigation. All it did was argue the weight to be given to this circumstance. Further, evidence that such a comparison is not improper can be seen in the fact that it was Barlow's counsel that first raised the inference that his sister, who was raised in similar conditions, did not go on to become a murderer. 17 AA3789-90.

Barlow attempts to analogize this case to Johnson v. State, 122 Nev. 1344, 148 P.3d 767 (2006). However, in Johnson, the Court's concern was not with comparing the defendant to other individuals with similar upbringings, but with the prosecutor claiming that if the jury found in the defendant's favor it would be "disrespectful to the members of South Central L.A." Id. at 775, 148 P.3d at 775. The Court reasoned that such a statement improperly injected public opinion into the deliberative process. Id. In the instant case, the State made no such remark. As such, the instant case is readily distinguishable from Johnson, and its persuasive value is minimal if not nonexistent.

Barlow also attempts to analogize his case to Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669 (1986). However, Skipper considered an instance where a

defendant was denied the opportunity to present evidence at his capital penalty hearing. Id. at 3-4, 106 S. Ct at 1670. Barlow was never denied this opportunity, nor has he even alleged as much. As such, Barlow's case is readily distinguishable from Skipper, and the case is not persuasive in the instant case.

Further, the State's argument was not, as Barlow alleges, "a new issue" raised in rebuttal for the first time. AOB at 110-11. As the State detailed above, this argument was in response to Barlow's closing. In fact, it was Barlow who first made a comparison between Barlow and his sister. 17 AA3790. Barlow's counsel then went on to highlight a myriad of issues she believed worked in combination with Barlow's childhood that made him end up as a murderer. 17 AA3790 (stating that "How come one sibling eats all the same food, sleeps in the same bed, same philandering, abusive father, becomes an outstanding citizen? No one disputes that we make choices, but there are some things that I want to review with you that are not—that have not been talked about or haven't been highlighted"). Therefore, Barlow's assertion that he was denied the ability to address the issue is belied by the record.

The record is clear that Barlow was not denied an opportunity to address this argument and that the State's argument was not otherwise improper. As such, this argument does not constitute prosecutorial misconduct and this claim should be denied.

To the extent this Court finds that this argument constituted prosecutorial misconduct, any error was harmless. First, any error would not be one of constitutional dimension. The relevant question is therefore whether this argument substantially affected the jury's verdict. See Valdez, 124 Nev. 1172, at 1188-89, 196 P.3d at 476. A review of the record shows that the statements did not. First, as the State articulated above, it was Barlow who first introduced this comparison. 17 AA3790. As such, even if the State had remained silent on this subject, the jury had already been made aware that Barlow's sister had grown up in a comparable situation, yet had never attempted to murder another individual. It is therefore doubtful that the jury would have ever found that Barlow's childhood qualified as a mitigating circumstance

Second, the jury unanimously found that the State had proven beyond a reasonable doubt all six (6) of the aggravating circumstances. 16 AA3639-40. Amongst these were the fact that Barlow had previously attempted to murder multiple people. Id. None of these aggravating circumstances had anything to do with the comparison of Barlow to his sister. Therefore, even if the State had never made these statements, the jury would have returned a verdict finding for the exact same aggravating circumstances, and likely would have returned a verdict finding the same mitigating circumstances as well. There can be no serious argument that this argument by the State substantially affected the outcome of the verdict. When

combined with the overwhelming evidence of Barlow's guilt (see Section IX(B) for a more thorough summary of the evidence presented against Barlow during the guilt phase of his trial), it is clear that any error resulting from the State's argument was harmless. Therefore, this claim should be denied.

D. The State Did Not Commit Prosecutorial Misconduct in Discussing the Second Victim

Barlow next argues that the State committed prosecutorial misconduct when it made the following argument:

> 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 possibility of parole. There's not even a question about that. Maybe you'd even 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 this offense.
>
> Ask your self 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 do your job, we will respect that verdict. Thank you.

AOB at 112; 17 AA3809.

"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." Jeremias v. State, 134 Nev. 46, 57, 412 P.3d 43, 53, reh'g denied (Apr. 27, 2018), cert. denied, 139 S. Ct. 415, 202 L. Ed. 2d 320 (2018). In Jeremias, the Court expressed reservations about, but ultimately found no error with the following statement:

> [W]hat'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."

Jeremias v. State, 134 Nev. 46, 57, 412 P.3d 43, 53, reh'g denied (Apr. 27, 2018), cert. denied, 139 S. Ct. 415, 202 L. Ed. 2d 320 (2018).

The State's argument in the instant case clearly does not rise to the level of the prosecutor's statement in Jeremias. In Jeremias, the prosecutor said that anything less than the death penalty would be "virtually meaningless." In contrast, in the instant case, the State said "Make sure both people here get justice." The State went on to say that they would ultimately respect whatever decision the jury came to. Given that this Court did not find that the States argument in Jeremias were not in error, neither was the argument in the instant case.

The State's argument clearly then falls within the acceptable boundaries of reminding the jury that the loss of each victim's life should be reflected in the verdict. Barlow's arguments to the contrary are not persuasive. First, Barlow makes a weak attempt to shame the State for making such an argument when Jeremias had

just been decided. Given that the facts are easily distinguishable from Jeremias, it is unclear why Barlow believes such a readily transparent ploy would be successful.

Second, Barlow correctly asserts that in Jeremias, the statements were not objected to, while in the instant case, Barlow objected to the State's argument. 17 AA3809-10. However, there was no indication made by the Court in Jeremias that its holding depended upon the standard of review. Further, the Court went as far as to state in Jeremias that "there is also no indication that it affected the outcome of the proceedings. Jeremias, 134 Nev. at 57, 412 P.3d at 57 (emphasis added). Finally, as the State articulated above, the statements made in the instant case do not rise to the same level as the statements in Jeremias. As such, the statements do not constitute prosecutorial misconduct, and this claim should be denied.

However, to the extent this Court finds that the State's argument was improper, any error was harmless. First, any error would not be one of constitutional dimension. The relevant question is therefore whether this argument substantially affected the jury's verdict. See Valdez, 124 Nev. 1172, at 1188-89, 196 P.3d at 476; see also Jeremias, 134 Nev. at 57, 412 P.3d at 53 (seemingly adopting this standard of harmless error when the Court stated "[t]here is also no indication it affected the outcome of the proceeding.") A review of the record shows that the statements did not.

The jury returned a verdict finding unanimously that the State had proven beyond a reasonable doubt all six (6) aggravating circumstances. 16 AA3639-40. Given that this argument had nothing to do with any of those aggravating circumstances, the jury likely would have returned a verdict finding the exact same aggravating circumstances even if the State had never made this argument.[9] Further, this argument did not seek to alter the weight the jury gave to any of the mitigating circumstances presented by Barlow. 16 AA3635-38. As such, this argument did not affect the relative weight the jury gave either the aggravating or mitigating circumstances.

Instead, this argument was merely a reminder that there were two victims in the instant case, and that any mercy extended to Barlow should consider this fact. However, given the nature of Barlow's crime, the overwhelming evidence of his guilt, the fact that he had previously tried to kill Woods on another occasion, the fact that he had shot another individual prior to the crimes for which he was convicted, and the fact that he had a long history of engaging in violent criminal conduct, it was a near certainty that the jury would never have extended this mercy regardless of if the State had made this argument. As such, it cannot be said that this argument

[9] While one of the aggravating circumstances was that Barlow was convicted of more than one offense of first-degree murder, the proof of this aggravating circumstance was in no way reliant on this argument, and instead was proven through the verdict the jury had previously returned during the guilt phase of Barlow's trial.

affected the outcome of the proceeding. Therefore, any potential error was harmless and this claim should be denied.

E. The State Did Not Commit Prosecutorial Misconduct in Asking the Jury to Perform its Duty

Finally, Barlow argues that the State committed prosecutorial misconduct when it made the following statements during closing of the penalty hearing:

> As I said to you, and Mr. Scow 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.
>
> ….
>
> 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 AA3802-03.

As Barlow concedes in his Opening Brief, these statements were not objected to at the penalty hearing. AOB at 115. Therefore, Barlow has waived all but plain error review of the statement pursuant to Leonard v. State, 17 P.3d 397, 415 (2001). However, this argument fails under any standard of review.

In Evans v. State, this Court stated that "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." Evans v. State, 117 Nev. 609, 633, 28 P.3d 498, 515 (2001) (*citing* United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir.1986)).

Barlow takes the State's comments out of context. In full context, the State's closing was:

> As I said to you, and Mr. Scow 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.
>
> And it's a funny thing, justice, right? I mean, there's philosophers, kings, even the legislature has tried to come up with a definition of what justice is. If you read your jury instructions, it isn't in there. It doesn't tell you what the answer to the question is. This isn't like the guilt phase.
>
> Ultimately, it's like what a Supreme Court Justice said about a very different matter; you just sort of know it when you see it. The law never tells you that the death penalty must be imposed. But sometimes, justice will demand it. And that decision is the decision you guys collectively get to make. And you're told what the rules are. And you've heard the aggravating circumstances and the mitigating circumstances, the weighing equation.
>
> I'm going to assume that somebody who's attempted to kill four people, and has killed two people, that the aggravation's going to outweigh whatever the mitigation is, no matter what you presented, and ultimately, just discuss that final decision that I assume you're going to make with the four categories.
>
> And I only want to address a few things with you, because, for the most part, your job is to go back there and do the duty we gave you. And Mr. Scow and I are going to respect whatever verdict you give. It's the system we live under and it's the system which we accept and believe in.
>
> 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 AA3802-03.

While the State certainly tasked the jury with doing its duty, the State never stated nor insinuated that the jury's duty was to return a verdict of death. As the record makes abundantly clear, the "duty" the State discussed was the jury's duty to decide the penalty. In discussing this duty the State claimed that the law never requires the death penalty be imposed, that aggravating and mitigating evidence must be considered, that the State would respect whatever verdict the jury returned, and that a verdict not finding death was fine. Id.

As such, the prosecutor's statements in the instant case are easily distinguishable from statements made in the cases cited by Barlow. See United States v. Mandelbaum, 803 F.2d 42, 43 (1st Cir.1986) (where the State said, "I would ask you, therefore, to do your duty and return a verdict of guilty."); Evans v. State, 117 Nev. 609, 633, 28 P.3d 498, 515 (2001) (where the State asked the jury, "do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?"). In both of Barlow's cited cases, the State said that the jury's duty was to return a verdict of death. As the record above clearly illustrates, the State made no such comment in the instant case.

Instead, the State said the jury's duty was to consider the evidence and make their finding based on said evidence. Such a reality is emphasized by the State's statement "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." The State could not be arguing that the jury's duty was to return a verdict of death when it urged the jury to do uphold its duty after expressly stating that it was fine to not return a verdict of death. As such, this statement was not prosecutorial misconduct and this claim should be denied.

Further, to the extent this Court construes the State's argument as equating the jury's duty with returning a verdict for death, the error was harmless and does not warrant reversal. In Evans v. State, this court stated that such an error, on its own was not necessarily sufficient to show that the defendant was prejudiced during his penalty hearing. Evans, 117 Nev. at 634, 28 P.3d at 515. In the instant case, Barlow was not prejudiced by the State's statements because the State also explicitly told the jury that it was not required to make a finding of death, that the State would respect their verdict no matter what they found, and that it was fine to not return a verdict for death. Further, the jury was instructed that they were never required to find for the death penalty. 16 AA3648. As such, any prosecutorial misconduct arising from implying that the jury's duty was to return a verdict of death was harmless and this claim should be denied.

X. THE DISTRICT COURT DID NOT ERR IN NOT ALLOWING BARLOW TO MISSTATE THE LAW

Barlow next argues that the district court erred in denying change the language to verdict forms during the penalty hearing from:

> Having found that the mitigating circumstance or circumstances outweigh any aggravating circumstances

to

> If at least one of you determines that a mitigating circumstance or mitigating circumstances outweigh

Barlow further argues that it the district court erred in not allowing him to present the argument at his closing during the penalty hearing that if a single juror finds that mitigating circumstances outweigh aggravating circumstances, then a defendant must be sentenced to some penalty other than death. AOB at 119. According to Barlow, such language in the verdict form and closing argument was permissible and legally accurate pursuant to Evans v. State, 117 Nev. 609, 635-36, 28 P.3d 498, 516-17 (2001).

A district court's rulings regarding the latitude allowed in closing argument is reviewed for abuse of discretion. Glover v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 125 Nev. 691, 704, 220 P.3d 684, 693 (2009), as corrected on denial of reh'g (Feb. 17, 2010). Defense attorneys are permitted to argue all reasonable inferences from the record. Id. However, a defendant is not entitled to misstate the law during a closing argument. See Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976).

The district court chose not to change the language in the verdict form because the district court did not want the jury to believe that as soon as one juror expressed that they found that the mitigating circumstances outweighed the aggravating

circumstances, that "that mechanically causes all the other jurors to have to automatically decide that aggravation doesn't outweigh mitigation and they – they can't keep deliberating and they have to eliminate the death penalty." 17 AA3747. The district court's decision was, in part, based on not wanting the jury to think that any deliberation had to be cut short once one juror had expressed reservation about the imposition of the death penalty. The district court did not believe that such was the state of the law articulated under Evans. The district court also precluded Barlow from arguing at closing that any one individual juror's finding that mitigating evidence outweighed the aggravating evidence would force the jury to return a verdict for a penalty other than death. 17 AA3747-49. The district court's logic was consistent with its logic articulated earlier, primarily that it did not believe that such an argument was an accurate portrayal of the law. 17 AA3747-49.

To be clear, neither the Court nor the State ever stated or implied that a sentence of death could be returned on anything less than a unanimous finding that the aggravating circumstance(s) outweighed any mitigating circumstance(s). 16 AA3626-28. In fact, jury instruction six (6) and seven (7) clearly articulate this standard. 17 AA3646-47. Further, jury instruction seven (7) is an exact replica of the jury instruction this Court recommended be given in Evans v. State, 117 Nev. 609, 635-36, 28 P.3d 498, 516-17 (2001). 17 AA3647.

The question the district court grappled with instead is whether changing the language in the verdict form would cause the jury to believe that if one juror initially thought that the mitigating evidence outweighed the aggravating evidence, that the jury was not entitled to deliberate, discuss, or argue regarding the state of the evidence. 17 AA3747. The district court reasoned that this could not be the thrust of this Court's logic in Evans. Id. The district court further reasoned that there was always the possibility of a hung jury, a possibility that would be a logical impossibility under the standard Barlow here urges this Court to adopt. Id.

Barlow suggests that under the rule announced in Evans if a single juror finds that mitigating circumstances outweigh aggravating circumstances, then a defendant must be sentenced to some penalty other than death. According to Barlow, a hung jury is not a legitimate possibility in this regard. AOB at 124. It is on this assumption about the rule announced in Evans that Barlow bases this claim.

However, this Court has never held that Evans stands for such a proposition. Indeed, Barlow cites to no authority claiming that it has. The more natural reading of Evans is to read the case to mean what it says, that a finding of death cannot be returned absent a unanimous finding by the jury that at least one aggravating circumstance was proven beyond a reasonable doubt, and a unanimous finding that the aggravating circumstances outweigh the mitigating circumstances.

That this is the correct interpretation is supported by NRS 175.556. NRS 175.556(1) states:

> In a case in which the death penalty is sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the district judge who conducted the trial or accepted the plea of guilty shall sentence the defendant to life imprisonment without the possibility of parole or impanel a new jury to determine the sentence.

Further, the language in NRS 175.556 permitting the impanelling of a new jury to determine the sentence was added in 2003, two (2) years after this Court's holding in Evans. Such language clearly allows for the possibility of a hung jury, a possibility which could not exist under the interpretation of Evans Barlow urges this Court to adopt. This Court has further upheld the constitutionality of NRS 175.556 in Maestas v. State, 128 Nev. 124, 137, 275 P.3d 74, 83 (2012).

It is therefore clear that the standard Barlow urges this Court to adopt is incorrect. As articulated above, the district court noted as much when it denied Barlow's request to change the jury verdict form as well as precluded him from arguing an incorrect statement of law during closing arguments. As such, the district court did not abuse its discretion and this claim should be denied.

However, to the extent this Court finds that the district court acted in error, said error was harmless. The jury unanimously found that all five (5) of the State's aggravating factors were proven beyond a reasonable doubt. 16 AA3639; 17 AA3828-33. The jury also unanimously found that the aggravating circumstances

outweighed any mitigating circumstances. 17 AA3828-33. As such, the language contained in the verdict form cannot credibly be considered to have resulted in a different sentence, where no one juror found that the mitigating circumstances outweighed the aggravating circumstances. Therefore, this claim should be denied.

XI. THE NEVADA DEATH PENALTY IS NOT UNCONSTITUTIONAL

Barlow next argues that Nevada's death penalty is unconstitutional. AOB at 126. More specifically, he alleges that Nevada's death penalty is unconstitutional because (1) it does not sufficiently narrow the class of persons eligible for the death penalty (AOB at 127), (2) that the death penalty is cruel and unusual punishment (AOB at 134), and (3) that hi death sentence is invalid because Nevada has no mechanism to provide executive clemency (AOB at 137).

However, this Court has repeatedly rejected these same challenges to the death penalty. Nunnery v. State, 127 Nev. 749, 782, 263 P.3d 235, 237 (2011); see also Thomas v. State, 122 Nev. 1361, 1372, 148 P.3d 727, 735-36 (2006); Colwell v. State, 112 Nev. 807, 812-15, 919 P.2d 403, 406-08 (1996).

This Court has repeatedly held that Nevada's death penalty sufficiently narrows the class of persons eligible for the death penalty. Nunnery v. State, 127 Nev. 749, 782, 263 P.3d 235, 237 (2011); Thomas v. State, 122 Nev. 1361, 1372, 148 P.3d 727, 735-36 (2006); Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005). Barlow's only argument that Nevada's death penalty is not sufficiently

narrow is that there are fifteen (15) potential aggravating circumstances and that this Court has allegedly "broadly construed" many of these statutory factors. AOB at 129; NRS 200.033. However, no new factors have been added to NRS 200.033 since this Court's holding in Nunnery that the death penalty was sufficiently narrow. Further, every case Barlow cites for the proposition that these factors are construed broadly predate Nunnery. As such, Barlow is simply rehashing old arguments. Barlow has not presented any new or compelling reason for this Court to depart from its precedent in finding that the Nevada death penalty is sufficiently narrow. As such, this argument is unpersuasive.

This Court has also repeatedly held that the death penalty does not constitute cruel and unusual punishment. Nunnery, 127 Nev. at 782, 263 P.3d at 237; Colwell, 112 Nev. at 814-15, 919 P.2d at 408. Barlow has presented no persuasive reason for this Court to overturn its precedent. Barlow first argues that the State legislature has not "affirmatively voted to retain the death penalty in over four decades." AOB at 135. According to Barlow, such a reality suggests that the death penalty is no longer the will of the people. However, Barlow has provided no support for the notion that the will of the people has changed in this regard, he merely asserts it as a conclusory statement. Barlow next argues that the financial cost of the death penalty far exceeds the cost of life in prison. However, whether a sentence violates the eighth amendment does not turn on the financial cost of the penalty, it turns on whether the

sentence is unconstitutional or so disproportionate to the crime that it shocks the conscience. See Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979). As such, this argument is better suited for presentation to the State legislature then a Court ruling on the constitutionality of the death penalty. As such, Barlow has not presented any compelling reason for this Court to overturn its prior decisions finding that the death penalty is not cruel and unusual.

Finally, this Court has repeatedly held that Nevada death penalty is not unconstitutional on the basis of Nevada's executive clemency laws. Nunnery, 127 Nev. at 782, 263 P.3d at 237; Colwell v. State, 112 Nev. at 812–15, 919 P.2d at 406–08. In fact, this Court has found that clemency is not even required to make a death penalty scheme constitutional. Jeremias v. State, 134 Nev. 46, 59 412 P.3d 43, 54 (2018).

As such, Barlow has not presented any reason for this Court to depart from the longstanding precedent that the Nevada death penalty is unconstitutional. The Court should therefore decline Barlow's invitation to do so here, and this claim should be denied.

XII. BARLOW'S JUDGMENT OF CONVICTION SHOULD NOT BE VACATED BASED UPON CUMULATIVE ERROR

Finally, Barlow argues that his judgment of conviction should be vacated based upon a finding of cumulative error. AOB at 139.

"Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000).

In the instant case, the factors do not support a finding of cumulative error. First, the issue of guilt was not close. The State introduced substantial evidence connecting Barlow to both murders. Second, the quantity and character of any error was minimal, as there was no error under any of the grounds Barlow raises in his Opening Brief. Finally, the gravity of the crime charged was severe, with Barlow being convicted of two (2) counts of First-Degree Murder with Use of a Deadly Weapon, one (1) count of Home Invasion While in Possession of a Deadly Weapon, one (1) count of Burglary While in Possession of a Firearm, and one (1) count of Assault with a Deadly Weapon. 16 AA3210-13. Therefore, this claim should be denied.

CONCLUSION

For the foregoing reasons, Barlow's Judgment of Conviction should be AFFIRMED.

/ / /

/ / /

/ / /

Dated this 16th day of June, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 29,706 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of June, 2020.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 16, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JONELL THOMAS
Chief Deputy Special Public Defender

NAVID AFSHAR
ALZORA B. JACKSON
MONICA R. TRUJILLO
Deputies Special Public Defender

JOHN NIMAN
Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

JN/Ronald Evans/ed