IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH JUNIOR BARLOW

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 77055

DEATH PENALTY CASE

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

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Keith Barlow was convicted of two counts of first degree murder and sentenced to death on each count. His conviction and sentences of death were imposed in a trial which was fundamentally unfair and which was repeatedly plagued by constitutional violations at every stage of the case. Each of these violations was set forth in detail in the Opening Brief. The State argues in response that no judicial errors or abuse of discretion occurred and that there was no prosecutorial misconduct, and that even if there were, those violations of Keith's constitutional rights were harmless. The State is wrong. When given the heightened review that a capital case must receive, it is apparent that the trial below was unfair, the verdicts are unjust, and Keith is entitled to a new trial.

II. REPLY TO THE STATE'S STATEMENT OF THE FACTS

The facts are adequately set forth in the Opening Brief and are not repeated here. Keith notes that the State's Statement of Facts omits entirely important mitigation evidence that was presented at the penalty phase of the trial.

III. REPLY TO THE STATE'S ARGUMENT

A. The Jury Selection Process Was Unconstitutional

Keith contends his constitutional rights were repeatedly violated during jury selection because the district court wrongly limited voir dire on the death penalty,

violated Batson v. Kentucky, and erred in refusing to grant a defense cause challenge. The State argues in response that no errors were committed during jury selection. AB 15-16.

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

The district court denied Keith the right to life qualify the jury by prohibiting questions of prospective jurors during voir dire about whether they would consider mitigation in a case involving two victims. The State misconstrues Keith's position by claiming that he wanted to tie potential jurors to a specific position based on specific facts of the case. AB 22. The State responds based on this incorrect premise. To the contrary, Keith was only asking if the juror in question would consider imposing a sentence other than the death penalty in a case involving two victims. 7 ROA 1604. Based on case authority that Keith cited, which the State largely ignored, this was his constitutional right in order to properly life qualify the jury. OB 57-59. Furthermore, much of the case authority the State relies on does not support its position, including Oliver v. State, 85 Nev. 418, 423–24, 456 P.2d 431, 434–35 (1969). AB 20. As the State correctly notes, Oliver held that "a party cannot interrogate potential jurors on issues of law during voir dire"). Id. Nowhere does the

record demonstrate that Keith attempted to argue law in front of the jury during voir dire.

The State's reliance on Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), is also misplaced. As the State correctly notes, Witter dealt with the ability to ascertain a juror's position regarding a specific statutory aggravator, which was not the case here. Id. Unlike Witter, defense counsel only asked Ms. Hasting if she could impose a sentence other than the death penalty in a case where there were two victims.[1] 8 ROA 1663. Accordingly, this was not a situation, as the State claims, where Keith was attempting to tie the jurors to a specific position based on specific facts of the case. AB 22.

The State next provides an irrelevant example of voir dire of another juror to support its argument that Keith was allowed to properly life quality the jury. AB 21. The State focuses on Juror No. 10, noting that while defense counsel was not permitted to ask her one question, it was allowed to ask this juror if she could consider all forms of punishment. AB 24. This example is inapplicable to the issue that Keith raised. The question the State relies on for Juror No. 10 inquired as to

[1]The prejudice from the limitation on voir dire on this issue was amplified by the prosecutorial misconduct, discussed in detail below, which suggested that the way to give meaning to the offense against Donnie was to return a sentence of death, as Keith could be sentenced to life in prison for the offense against Danielle alone. 17 ROA 3809.

whether she was aware of individuals who had been exonerated by DNA, and in some cases exonerated after they had been executed. 8 ROA 1612. This has nothing to do with whether the district court abused its discretion by denying Keith's question regarding multiple victims. 7 ROA 1604-06. The State further expounds on this irrelevant example by pointing out that this juror was asked if she would consider all four forms of punishment. AB 24. The State implies that if a defendant can ask one of the necessary factors to life qualify a jury in a capital case, other necessary procedural safeguards can be ignored. However, as Keith extensively cited to in his opening brief, the ability to properly life qualify a jury is a fundamental right under Morgan v. Illinois, 504 U.S. 719, 729 (1992). Furthermore, as cited in the opening brief, several other jurisdictions have addressed the issue of asking jurors their views on the death penalty when there are multiple victims, or other salient circumstances, and approve of these types of questions. OB 36-37. The State almost entirely ignores these cases, and in particular, largely fails to address Morgan.

The State argues that the district court allowed Keith to question other prospective jurors about multiple victims. AB 21; 7 ROA 1590; 8 ROA. 1639-40, 1674. This actually supports Keith's position. The State is correct that defense counsel was able to ask some other jurors if they would be open to considering a penalty other than death where there were multiple victims or would always impose the death

penalty if there were multiple victims. Id. However, this makes the district court's refusal to allow the same question to be asked of Ms. Hastings even more confounding. If it was inappropriate to ask other jurors the question about multiple victims and whether they could impose the death penalty, the district court should not have allowed this question asked of other jurors. And if it was an appropriate question of other jurors, then it was an appropriate question of Ms. Hastings, and the district court abused its discretion by not permitting the question.

The State next asserts that Keith was still able to properly life qualify the jury because of information contained in the questionnaires. AB 21. However, the questionnaires never asked what the prospective juror's views were if there were multiple victims. See e.g. 26 ROA 5894-5908. The questionnaires asked "Mr. Barlow is charged with acts of violence, including murder. Is there anything about the nature of these charges, in and of themselves, that would interfere with your ability to fairly decide this case?" 26 ROA 5899. Neither the State nor the district court had any issues with asking the jurors their general thoughts about facts related to the case, except for the critical question about whether a life sentence could be considered in a case with more than one victim. Id. The State cites no authority for the proposition that information in a jury questionnaire alone is sufficient to life qualify a jury. Even if such authority exists, the questionnaire here was inadequate.

Keith made a specific argument, and cited to Morgan in support, as well as authority from other state and federal jurisdictions which have addressed this issue. See People v. Amezcua and Flores, 434 P.3d 1121, 1133 (Cal. 2019); People v. Pearson, 297 P.3d 793, 816 (Cal. 2013); People v. Cash, 50 P.3d 332, 342-343 (Cal. 2002); Ellington v. State, 735 S.E.2d 736, 750-61 (Ga. 2012) (overruled in part on other grounds by Willis v. State, 820 S.E.2d 686, 706 (Ga. 2018) ; State v. Clark, 981 S.W.2d 143, 146-48 (Mo. 1998); State v. Jackson, 836 N.E.2d 1173, 1188-89 (Ohio 2005); United States v. Flores, 63 F.3d 1342, 1356 (5th Cir. 1995). The State fails to respond to any of these cases, other than Cash, 50 P.3d 332, 342-343 (Cal. 2002). Its failure to address this authority is reflective of the fact that the constitutional right to examine jurors about the critical fact that the case involves two victims as part of the life qualification process is well established

The State fails to adequately refute that Keith was prejudiced by the district court's abuse of discretion in improperly preventing him from life qualifying the jury in a capital case, and that this error was structural under Morgan v. Illinois, 504 U.S. 719, 729 (1992). The State claims there was no prejudice because this juror did not sit on the final empaneled jury. AB 24. While this is true, what the State omits is that Keith was forced to expend a peremptory challenge on this juror. 33 ROA 7265. As discussed the section below, Ms. Darlyne Gonzalez was a biased juror, and her

inclusion on the panel that resulted in a jury that was not impartial. 33 ROA 7265. Keith's counsel noted at trial that if they had more peremptory challenges, they would have expended one on Ms. Gonzalez. 16 ROA 3666. Moreover, the district court's ruling had a chilling impact on counsel's questions to other jurors. As such, the State falls far short of meeting its obligation to establish that the constitutional error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). The district court's erroneous ruling permeated the entire voir dire process and restricted counsel of fully life qualifying the jury. Keith respectfully requests that his sentence and conviction be reversed.

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

Keith contends that the State's purposeful discrimination during jury selection were pretextual and exercised in violation of Batson v. Kentucky, 476 U.S. 79 (1986). The State argues in response that Batson was not violated. AB 24.

a. Keith made a prima facie showing of purposeful discrimination

The State acknowledges Keith's point regarding this Court's prior rulings on the effect a prosecutor's strikes may have on the mathematical percentages of a distinct group in the panel. AB 30. However, the State then proceeds to take issue with this Court's rulings, particularly in Cooper v. State, 432 P.3d 202, 204-05 (Nev.

2018), on the issue of examining the mathematical percentage of minorities on a panel, before and after a prosecutor's strikes. AB 30-31. The State argues that solely relying only on the percentages is illogical. AB 30. However, the State fails to provide any authority to refute this Court's clear position in Cooper, 432 P.3d at 205. ("The State's use of two challenges to strike members of a cognizable group along with the composition of the venire before and after the strikes suggest not only a pattern but a disproportionate effect resulting from the challenges."). The State notes that Keith "admits" there were only three African-Americans on this panel. AB 30. However, what the State fails to note is that there were also only three African-Americans on the venire panel in Cooper, in which this Court reversed. Id. 432 P.3d at 205. The State posits that the problem with this Court's holdings regarding the examination of mathematical percentages is that when there are a few number of minorities, it will be impossible to strike a minority juror without affecting the percentages. AB 30. The State's argument fails to note the historical purpose and relevance of Batson, which remains as relevant as ever as evidenced by the recent decision in Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) (Court did not break new legal ground but enforced and reinforced Batson by applying it to the facts of the case.).

Despite its view that this Court's position in Cooper is illogical, the State

addresses the mathematic percentages in the venire panel by making an invalid argument based on Cooper and Watson v. State, 130 Nev. 764, 782, 335 P.3d 157, 171 (2014). It claims that in those cases there was a ten percent variation between the percentage of strikes used and the percentage of the venire the group made up. AB 31. This specific ten percent numeric standard was nowhere cited in either Cooper or Watson and appears entirely made up by the State. The State then attempts to compare this case with Watson in one respect, noting that with nothing other than the percentages, there is no evidence of purposeful discrimination. AB 31. While this Court could analyze the percentages on their own, combined with the strikes, just as in Cooper, there is additional information to justify the finding that Keith established the first step under Batson. Id. 432 P.3d at 205. In Cooper, this Court was able to examine the mathematical percentages before and after the State's strikes, in addition to improper questions asked by the State during voir dire regarding the issue of the Black Lives Matter movement. Id. Similarly, here, in addition to the mathematical percentages, this Court can examine the district court's error at the first step, as well as Keith's comparative analysis. Williams v. State, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018).

. . .

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

The State fails to address Keith's argument that the district court erred at step one. Specifically, Keith argued that the district court made a finding that Keith failed to show the State's actions resulted in "systematic exclusion" and that this was the standard for the third step of a fair cross section challenge, not the first step of a Batson challenge. Morgan v. State, 134 Nev. 200, 208, 416 P.3d 212, 221 (2018); Williams v. State, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018); 11 ROA 2468. The State's response fails to even acknowledge this argument. See Polk v. State, 126 Nev. 180, 184-86, 233 P.3d 357, 359-61 (2010); Belcher v. State, 464 P.3d 1013, 1023-1024 (Nev. 2020).

Keith also argued that the district court erred by finding that the first step was not established because of the remaining diversity of the panel. 11 ROA 2468, 2471. The State addresses this point in a cursory manner by simply restating that the remaining diversity on a panel suffices to disprove purposeful discrimination. AB 33. Keith supported his argument that it is a logical fallacy to look at the remaining diversity on the panel as evidence that a Batson violation did not occur because "even a single instance of race discrimination against a prospective juror is impermissible." Flowers, 139 S. Ct. at 2242. The State recognizes that this legal principle is correct but argues that Keith misinterprets it. AB 32. The State is wrong. Keith was not

arguing that any time a member of a protected class is struck, it is discrimination by default. Id. Instead, he cited to this legal principle to counter the argument that remaining diversity of the panel was a valid way to deny a Batson challenge. The State fails to address this argument or cite any relevant authority for its claim that the diversity on the panel after peremptoriness are expended is sufficient grounds to defeat a Batson challenge at the first step.

The State takes issue with combining members of a protected class in a Batson challenge. AB 33-34. As Keith noted, other jurisdictions have addressed this issue, and while this Court has not explicitly addressed this matter, it did reverse on a Batson challenge that contained mixed protected classes in Diomampo v. State, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008).

The State expresses in strong terms its argument for why such a practice should not be permitted, and would ultimately be "abhorrent" to the legal system. AB 34. However, the State fails to cite to a single case to support this position. Id. The State once again substitutes its own opinion for legal authority, whereas Keith relied on legal authority from this jurisdiction and others to support his position. 11 ROA 2463; OB at 41, 48.

. . .

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

The State, without citing any authority, argues that any claims regarding a comparative analysis of jurors was waived in the district court. AB 35. This position contradicts Supreme Court precedent. See Miller-El v. Dretke ("Miller-El II") 545 U.S. 231 (2005) (holding that a comparative juror analysis by an appellate court is appropriate for analyzing whether a prosecutor's proffered justifications were pre-textual, even where the analysis was not performed at trial). See also Flowers, 139 S. Ct. at 2234 ("Comparing prospective jurors who were struck and not struck can be an important step in determining whether a Batson violation occurred.") (citing Snyder v. Louisiana, 552 U. S. 472, 483-484 (2008)).

The State responds to Keith's comparative analysis but fails to adequately refute his points. Regarding prospective juror, Raymond Johnson - No. 0079, the State claims that Keith argued he was only one of three jurors who responded affirmatively to having a felony who was struck by the State. AB 35. This is inaccurate. What he argued was that in response to the district court's inquiry, three venire panelists indicated that they possibly had a felony: Juror No. 079, Raymond Johnson, Juror No. 088, Pornpot Chamnong, and Juror No. 099, Charles Meyers. 8 ROA 1792-95. However, it was only Mr. Johnson whom the State requested be removed without conducting an inquiry if he actually had a conviction or was eligible

to serve. 9 ROA 1842. In contrast, the State made no attempt to remove Mr. Meyers, who indicated he had a felony, and just as Mr. Johnson, claimed it happened in the 1980's. 8 ROA 1795. In fact one of the prosecuting attorneys remarked that "the theme is crimes in the 80's here." 9 ROA 1928.

The State makes an inaccurate argument that Mr. Meyers was qualified to serve under NRS 6.010, whereas Mr. Johnson was not. AB 35. However, the record reflects that after extensive voir dire, even the prosecutor conceded he was not eligible to serve and the district court determined under NRS 6.010 he could not serve. 9 ROA 1978-79. However, this information only came out because Mr. Meyers was afforded the opportunity to explain his background though continuing inquiries during voir dire. Id. Mr. Johnson was not afforded this opportunity because the State insisted that he be dismissed before any verification or inquiry about his supposed felony took place. 9 ROA 1842. Further contradicting the State's argument is the contrast in the claimed felonies between the two jurors. Mr. Johnson claimed he had a drug possession conviction 1984, whereas Mr. Meyers claimed he had a burglary conviction as well as one for retail theft in 1980. 8 ROA 1792, 1795.

The State fails to respond to the point that when the State was presented with information at the same time from two jurors, one Caucasian and one African -

American, both of whom claimed they had convictions in the 1980's, it only moved to dismiss Mr. Johnson, the African-American. Id.

Beyond a cursory reference to Mr. Johnson's claim of a felony - without acknowledging the circumstances and why the State allowed Mr. Meyers to stay - the State largely fails to respond to Keith's arguments regarding the comparative factors he listed in his Opening Brief, including age, race, and other information provided during voir dire. As such, the State fails to appropriately respond to the comparative analysis for Raymond Johnson and Charles Meyers.

Regarding Juror No. 047, Idoelia Williams, who the State struck, Keith compared her with Juror No. 146, Erika Bowman, who the State did not strike. 10 ROA 2129, 11 ROA 2462, 33 ROA 7265. The State lists four criteria that distinguish Ms. Williams from Ms. Bowman: that Ms. Bowman would consider all punishments while Ms. Williams would not; Ms. Williams had a DUI; Ms. Williams thought the criminal justice system does not always work; and Ms. Williams could not sit as a fair and impartial juror because she is a woman of strong faith. AB 36 - 37. Each one of these points fails and in some cases is belied by the record.

The record reveals that Ms. Williams would consider all punishments. 8 ROA 1695, 1698. In fact, Ms. Williams's views on the death penalty were very similar to Ms. Bowman's. 8 ROA 1697-99; 27 ROA 5992-93. Regarding her DUI, she does not,

as the State claims, have a "criminal history." AB 37. She indicated on her questionnaire that she was arrested for a DUI. 23 ROA 5256-57. Ironically, the State's claim that she had negative feelings towards the criminal justice system is belied in part by her thoughts on her DUI. AB 37. She indicated that she was embarrassed for making a bad decision and that the criminal justice system was doing its job. 23 ROA 5256.

The State claims that for one question in the juror questionnaire, Ms. Williams indicated could not perform some of her duties. AB 36. A closer examination of the record reveals the flaw with this argument. In responding to question no. 47, as to whether a defendant should live or die, Ms. Williams put "no" accompanied by a comment of "not the best experience for me." 23 ROA 5260. However, on all the other questions, she indicated that she could impose any punishments, including the death penalty. 23 ROA 5258-60. Furthermore, during voir dire, she answered all the questions to the State's satisfaction that she could serve as an impartial juror and carry out her duties. 8 ROA 1695-99. It is revealing that the State's argument to remove her is so weak that at trial it did not attempt to challenge her for cause during voir dire, or question her about this during voir dire. Id. Only on appeal, when faced with the difficult task of providing a pretextual reason to justify her removal, does the State focus on an ambiguous response to one answer in her questionnaire. AB 36.

The State inaccurately claims that the only commonality between Ms. Bowman and Williams was their age. AB 36. This is belied by the record as they had both had been victims of crime, and had similar views on the death penalty. 10 ROA 2130, 2137; 23 ROA 5250; 27 ROA 5985. The State attempts to make a point that Ms. Bowman said she could consider all punishments but Ms. Williams would not. This too is belied by the record and her response during voir dire. 8 ROA 1698. Furthermore, Ms. Williams would seem like a stronger juror for the State, given that in the case of child molesters, and terrorists she would always pick the death penalty as a first option. 8 ROA 1697.

Finally, the State fails to adequately address the comparison between Juror No. 210, Virgie Hill and Juror No. 073, Melanie Placket. The State does not attempt to address the numerous comparisons raised by Keith. AB 37-38, 24ROA 5460, 27 ROA 6195. Instead, the State attempts to distinguish the two based on one salient factor: that Ms. Hill indicated that she believes the system is sometimes biased against African-Americans, and Keith is African-American. AB 37. The State omits the rest of her answer on bias, where she clarified that she did not believe "that was always the case." 10 ROA 2221.

Ultimately, the State fails to refute Keith's comparative analysis, which combined with the mathematical percentages of the targeted groups, before and after

the venire panel, and the district court's error at the first step of the Batson challenge, constitute structural error. Keith respectfully requests that his sentence and conviction be reversed.

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

Keith contends the district court improperly denied his challenge for cause of a juror, resulting in a biased jury. The State argues in response that the district court did not err because Mr. Nickerson merely stated that he would give less weight to childhood mitigation, not that he would never consider it. AB 40. This is inaccurate. The State attempts to construe Mr. Nickerson's answer as an issue of how much weight he would have given to certain mitigating factors, not that he would refuse to consider them. AB 40. However, the State's argument is belied by his own words. When was asked specifically about childhood experiences in mitigation, he indicated he would not consider them:

> MS. TRUJILLO: Okay. And when you say further the connection, I specifically used childhood, so anything in childhood probably wouldn't matter in deciding whether or not what punishment you would impose?
>
> PROSPECTIVE JUROR NO. 037: I'd have to agree with that, yes.

8 ROA 1663. As such, this was not a question of weight but rather refusal to consider a mitigating factor.

The State claims that the district court's decision was in line with the relevant law in this jurisdiction. AB 41. The State fails to cite to or provide the legal authority in support of its claim. AB 40-41. There is none. "It is well established that the sentencer in capital case must consider all mitigating evidence presented by the defense." Burnside v. State, 131 Nev. 371, 384, 352 P.3d 627, 651 (2015) (internal citations omitted).

Finally, the State argues that even if the district court erred, such error was harmless because the final empaneled jury did not contain a biased juror. AB 41. However, this argument also fails. Keith argued that the inclusion of Juror No. 239, Ms. Darlyne Gonzalez, on the final panel constituted a biased jury. 16 ROA 3666. The State fails to properly refute this claim. On her juror questionnaire form, she clearly indicated that if a murder was premeditated, she would always vote for the death penalty. 28 ROA 6354. The State's attempts to rehabilitate her views in their response do not succeed. In fact, during voir dire, the State attempted to lead her by asking her to confirm that when she filled out the questionnaire, she had never considered the death penalty, to which she responded that she actually had. 10 ROA 2282. She also indicated that the problem with not giving the death penalty is that people have to stay in prison, necessitating their feeding, housing, and clothing. 10 ROA 2283. On voir dire she never specifically retracted or changed her statement

from the questionnaire. 10 ROA 2277-91. As such, she was a biased juror. Sayedzada v. State, 419 P. 3d 184, 191 (Nev. Ct. App. 2018) (Court noted that bias, or bias in fact, arises where the juror demonstrates a state of mind that prevents the juror from being impartial)); Burnside, 131 Nev. at 384, 352 P.3d at 651; Morgan, 504 U.S. at 729-30.

The State claims that defense counsel should have moved to challenge Ms. Gonzalez for cause. AB 43. However, what Keith argued, and what the State fails to address, is that defense counsel objected at trial that had they been not forced to expend all their peremptory challenges, including on Mr. Nickerson who should have been dismissed for cause, they would have used a peremptory on Ms. Gonzales. 11 ROA 2489. Her inclusion on the final panel constituted a biased jury. Blake v. State, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). The State falls far short of meeting its burden of proving that the constitutional error was harmless. Keith was substantially prejudiced by the district court's decision. Had Mr. Nickerson been removed for cause, Ms. Gonzales would not have served on the jury. The presence of a single biased juror who should have been dismissed following a challenge for cause can be the basis for reversal. See Thompson v. State, 111 Nev. 439, 443, 894 P.2d 375, 377 (1995). Moreover, there is a reasonable probability that had a fair juror taken her

place, in consideration of all of the evidence, Keith would not have been sentenced to death. His judgment must therefore be reversed.

The entire jury selection process failed to comply with constitutional mandates. Keith is entitled to reversal of his conviction and the grant of a new trial.

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

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

Keith contends the district court erred in admitting testimony regarding tool mark analysis and failing to perform its role as gatekeeper for admission of expert testimony, as mandated this Court. The State argues in response that the district court did not err by admitting this testimony. AB 43.

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

Keith contends that the State's tool mark expert, Ms. Lester, was not qualified to testify as an expert in tool mark evidence. The State argues that it established her qualifications to testify as an expert. AB at 45-46.

In Higgs v. State, 126 Nev. 1, 18-19, 222 P.3d 648, 659 (2010) and Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008), this Court held that an expert must be qualified to testify. Here, Ms. Lester did not meet the qualification

standard and should not have been allowed to testify about her tool mark and ballistics examinations. The State argues that she was qualified because she had a degree in forensic science. AB 45. Courses for her degree, however, included chemistry, biology, and physics – none of which were of use for firearms and tool mark examinations. 14 ROA 3063. Moreover, attending tours of manufacturing facilities did not establish qualification to testify as a scientific expert. Although Ms. Lester testified that she passed competency tests before conducting her own casework, 14 ROA 3010, no testimony was presented that those competency tests were given by an accredited agency or were otherwise sufficient to establish her qualifications.

At trial, and in the Opening Brief, Keith noted that Ms. Lester testified she was not familiar with the scientific standard of "reasonable degree of scientific certainty." 14 ROA 3083. The State fails to address this fact in its Answering Brief. This fact alone establishes her lack of qualification. The district court abused its discretionin finding her to be qualified.

b. The Testimony Did Not Assist The Trier Of Fact

Keith contends Ms. Lester's testimony was also inadmissible because it did not assist the jury. The State argues in response that her testimony was admissible under Hallmark. AB 47. Specifically, the State asserts that Keith is asking this Court to find

that firearm marker analysis is not a field for which any individual may be qualified as an expert, and that the only support for this request are reports issued by The National Research Council and the Presidential Council of Advisors on Science and Technology. AB 47. The State minimizes and mischaracterizes Keith's argument. Keith contends that Ms. Lester's testing in this case was invalid, and therefore did not assist the jury, in addition to the lack of a scientific foundation for tool mark evidence generally.

Ms. Lester testified that there is no baseline standard she tries to reach when comparing bullets, but rather focuses on finding a pattern to indicate a match. 3 ROA 623. The State failed to establish that this was a reliable methodology, and that her methodology was testable and had been tested, was subject to published peer review, or based on particularized facts rather than assumption, conjecture or generalization. See Higgs, 126 Nev. at 19-20, 222 P.3d at 660; Hallmark, 124 Nev. 499-502, 189 P.3d at 651-52. See also United States v. Adams, 444 F.Supp.3d 1248, 1258-66 (D. Ore. 2020) (extensive analysis concerning the admissibility of scientific expert testimony relating to tool mark comparison evidence under the Daubert standard, and explaining the problems with subjective opinions). Without a baseline standard, and the use of an objective test, this "expert" testimony is of little value.

The State asserts that tool mark and ballistics evidence has long been accepted by the courts, so this type of testimony should be allowed. AB 49-51. These same arguments were made in the past concerning bite mark evidence. It was once widely accepted, and was the subject of expert testimony in many trials, but has now been discredited and recognized to be untrustworthy. See Ex parte Chaney, 563 S.W.3d 239, 255-61 (Tex. Cr. App. 2018) (providing lengthy discussion of the evolution of bite mark comparison evidence); Stinson v. Gauger, 868 F.3d 516, 520-22 (7th Cir. 2017) (noting the now discredited testimony of Las Vegas forensic odontologist Dr. Raymond Rawson, "the best forensic odontologist in the United States," which resulted in a wrongful conviction for first-degree murder); People v. Moldowan, 643 N.W.2d 570, 570-71 (Mich. 2002); C. Michael Bowers, "Problem-Based Analysis of Bitemark Misidentifications," 159 Suppl. Forensic Sci. Int'l S104, S106-S107 (2006) (study resulting in a 63.5% false positivity rate).

In the Opening Brief, Keith noted that Ms. Lester's qualifications as an expert were troubling because she lacked knowledge regarding what a "reasonable degree of scientific certainty" entails. 14 ROA 3083. See Las Vegas Metro. Police Dep't v. Yeghiazarian, 129 Nev. 760, 767, 312 P.3d 503, 508 (2013) (Finding expert testimony admissible where the expert was able to calculate to a reasonable degree of scientific certainty the vehicles' starting positions, their prebraking and impact

speeds, and the general angle at which the vehicles collided). The State fails to address this issue in its Answering Brief. Again, given this fundamental flaw, her testimony was of little value.

c. The District Court Failed In Its Role As Gatekeeper

In the Opening Brief, Keith contended that the district court abused its discretion by summarily finding that the science of firearms and tool mark analysis, while questionable, was sound and therefore admissible, and by summarily finding that Ms. Lester was qualified as an expert. 7 ROA 1478-82. The district court failed in its gatekeeping function by failing to hold an evidentiary hearing or otherwise thoroughly examine each of the factors for admissibility of this testimony. Higgs,126 Nev. at 14, 222 P.3d at 656. In response, the State recites the district court's brief ruling, AB 52-53, but fails to establish that the district court thoroughly considered each of the relevant factors and also fails to establish that an evidentiary hearing was not necessary. See Mathews v. State, 134 Nev. 512, 517, 424 P.3d 634, 639 (2018); Hallmark; and Higgs. Accordingly, the district court failed in its role as gatekeeper.

The State next contends that any error in the admission of Ms. Lester's testimony was harmless. AB 54-56. It notes other evidence that was introduced against Keith, but fails to establish that the erroneous admission of evidence did not have a "[s]ubstantial and injurious effect or influence in determining the jury's

verdict" Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

The applicable test is not whether sufficient evidence exists to support the conviction. It is whether the testimony had a substantial and injurious effect or influence on the verdict. Id. Here, there was no eyewitness to the shootings. There was no video of the event. Keith did not confess or make incriminating statements to officers. The State relied on Ms. Lester's testimony during closing arguments. 15 ROA 3256, 33 ROA 7309-10. Given the lack of evidence against Keith, Ms. Lester's findings and testimony played a significant role in tying Keith to the shootings. Given the gravity of the charges, and the quality and character of the error, the judgment should be reversed. Keith requests his conviction be reversed and this matter be remanded for a new trial.

2. The District Court Erroneously Instructed The Jury

a. A Burglary Instruction Was Invalid

Keith contends the district court erred in instructing the jury that:

> Every person who unlawfully breaks and enters any apartment may reasonably be inferred to have broken and entered or entered it with intent to commit an assault, and/or a battery, and/or a felony therein, unless the unlawful breaking and entering or unlawful entry is explained by evidence satisfactory to the jury to have been made without criminal intent.

14 ROA 3172. The State argues that the instruction is correct because it mirrors NRS 205.065. AB 56-57. Keith acknowledges that the instruction mirrors the statutory language, but that fact does not make the instruction valid under long established authority addressing the unconstitutionality of statutes and instructions that shift the burden of proof to the defendant.

The State next argues that this instruction is valid under White v. State, 83 Nev. 292, 295-96, 429 P.2d 55-57 (1967). AB 57. Keith acknowledged this Court's ruling in the Opening Brief, but argued that it should be overruled under Patterson v. New York, 432 U.S. 197, 210 (1977); Mullaney v. Wilbur, 421 U.S. 684, 702 & n.31 (1975); In re: Winship, 397 U.S. 358 (1970). The State acknowledges these cases, but argues that they do not hold that the existence of a presumption or inference relieves the State of its burden to prove the charges beyond a reasonable doubt. AB 58. The State is wrong. See generally United States v. Haymond, 139 S.Ct. 2369, 2375-77 (2019) (plurality opinion) (Gorsuch, J.) (discussing the ancient rule that the government must prove to a jury ever criminal charge beyond a reasonable doubt).

In Patterson, the Supreme Court addressed a New York statute which provided for an affirmative defense of extreme emotional disturbance. 432 U.S. at 198. The statute placed the burden on the defense of proving the affirmative defense by a preponderance of the evidence, but only after the state proved all of the elements of

the murder charge, including the intent to cause the death of another person, beyond a reasonable doubt. Id. Specifically, the jury was instructed:

> Always remember that you must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt.

Id. at 200. In finding New York's statute not to be unconstitutional based upon the burden placed on the defendant to prove the affirmative defense, the Supreme Court noted that "[t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime." Id. at 205-06. Here, in contrast, the jury was instructed that the State's burden of proving the intent to commit an assault, and/or battery, and/or felony could be inferred unless the unlawful breaking and entering or unlawful entry was "explained by evidence satisfactory to the jury to have been made without criminal intent." 14 ROA 3172. This inference removed the State's obligation to prove the mens rea element beyond a reasonable doubt and shifted the burden to the defense under Patterson. The instruction here was unconstitutional because it served to negate facts of the crime

which the State was to prove in order to convict, and therefore violates Due Process. Id. at 206-07.

As explained in Patterson, Mullaney is in accord. That case holds that "shifting the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impressible under the Due Process Clause." Patterson, 432 U.S. at 215, citing Mullaney, 421 U.S. at 686-87.

Like the United States Supreme Court, this Court recognizes that a statute or jury instruction that shifts the burden of proof to the defendant by presuming an ingredient of an offense upon proof of the other elements of the offense violates the Due Process Clause of the Fourteenth Amendment, and is unconstitutional. Sheriff, Clark County v. Boyer, 97 Nev. 599, 601 (1981) (citing Patterson, Mullaney, and Sandstrom v. Montana, 442 U.S. 510 (1979)). Under this authority, White, 83 Nev. 292, 429 P.2d 55, must be overruled.

In the Opening Brief, as in the district court, Keith argued that the district court should have given an alternative instruction, which added the following language to the State's proposed instruction:

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

12 ROA 2758. The district court refused this instruction. 14 ROA 3122. The State argues that the district court did not err. AB 58-59. Specifically, the State argues that it was not necessary because the instruction created only an inference and because jury instruction 36 defined the burden of proof. AB 60. The notion that a jury understands the difference between an inference and a presumption is fantasy. The fact remains that the instruction shifted the burden of proof, the proffered instruction clarified this confusion, and was consistent with controlling constitutional authority. The district court abused its discretion by refusing this instruction.

The State argues that there was evidence of Keith's intent to commit a felony inside of the apartment. AB 60. This decision, however, is a factual issue that should have been resolved by the jury, as guided by proper instructions. The jurors may have agreed with the State's arguments, or they may have disagreed. The jurors could have found that the entry was made in a heat of passion, as the result of years of a difficult and complicated relationship, and that the intent to inflict harm was arrived at after the entry. Such an argument resulting in a physical confrontation is consistent with the history of the two persons involved. There is no way of determining what the jury would have found had it been properly instructed. Accordingly, the State cannot meet its obligation of proving beyond a reasonable doubt that the error was harmless.

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b. The State of Mind Instructions Were Misleading

Keith contends that the district court erred in instructing the jury about the state of mind elements of the offenses in Instruction No. 18

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

14 ROA 3181. The State argued in response that this instruction was identical to the law set forth in Miranda v. State, 101 Nev. 562, 568, 707 P.2d 1121, 1125 (1985). AB 61. The State acknowledges, however, that Miranda concerned a sufficiency of the evidence argument and did not approve of this language for use as a jury instruction. AB 62.

The State argues that Keith did not offer a competing standard for how the jury should be instructed. AB 62. This is not correct. Keith argued that this instruction was duplicative of other instructions and therefore unnecessary. See e.g. 14 ROA 3200 (defining direct and circumstantial evidence). Moreover, in the district court, Keith asked that the instruction be modified to inform the jury that "the State must nevertheless meet its burden of proving, either by direct or circumstantial evidence, that Mr. Barlow acted with the *mens rea* elements defined in each offense and that if the State fails to do so that Mr. Barlow is entitled to a verdict of not guilty." 12 ROA 2760. The district court refused this instruction. 14 ROA 3123. Either omission of the

instruction or the modification was necessary to accurately instruct the jury about the State's burden of proof. Patterson, 432 U.S. at 210; Mullaney, 421 U.S. at 702 & n.31; and Winship, 397 U.S. 358.

Keith also contends, for the same reasons, that the district court erred in instructing the jury about the intention to kill in Instruction No. 19:

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

14 ROA 3182. The State argues that this instruction was proper. AB 64. As it did in the district court, the State relies on Dearman v. State, 93 Nev. 364, 566 P.2d 40 (1977), as support. AB 64. The State also cites to Washington v. State, 132 Nev. 655, 662, 376 P.3d 802, 806 (2016) and Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975). AB 64. Like Miranda, Dearman, Washington and Moser concern an appellate court's sufficiency of the evidence review and do not address whether this is a proper instruction for the jury.

The State argues that language used in this Court's opinions is appropriate for use as a jury instruction. AB 65. The State provides no authority for this conclusion. It is common sense that an opinion written by highly-educated judges -- with substantial experience in comprehending legal jargon, with an intended audience of attorneys who have been trained for years in understanding the nuances of the law --

is not the same as a jury instruction which is designed for lay persons who serve on a jury, who in all likelihood have little understanding of legalese and complex legal principles. See generally Vance v. Ball State Univ., 570 U.S. 421, 444-45 & n.13 (2013) (noting the need for clear jury instructions for jurors who do not have the benefit of extensive study of the law on the subject [employment discrimination]); United States v. Dobek, 789 F.3d 698 (7th Cir. 2015) ("jurors are not lawyers and jury instructions should steer clear of legal jargon"). Moreover, "[c]ases are not authority for propositions not considered." In re Tartar, 339 P.2d 553, 557 (Cal. 1959).

The instructions given here were confusing and acted to reduce the State's burden of proof. The instructions proffered by Keith would have clarified the State's burden and were appropriate given the confusing nature of the State's proposed instructions, which were ultimately given by the district court. The State argues that any error was harmless because the jury found Keith guilty of burglary, which serves as a basis of felony-murder, rendering the intent to kill element irrelevant. AB 66. This argument ignores the fact that burglary itself is a specific intent offense, see Hubbard v. State, 422 P.3d 1260, 1262 (Nev. 2018), and therefore suffers from the error discussed above. This argument also fails to acknowledge the important principle that if the jury found Keith guilty under a felony-murder theory, the

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aggravating circumstances based upon felony-murder would be invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

3. There was Pervasive Prosecutorial Misconduct In The Culpability Trial

Keith's state and federal constitutional rights to due process of law, equal protection, and a fair trial were violated because of prosecutorial misconduct during the culpability phase of the trial. The State argues in response that there was no prosecutorial misconduct. AB 69.

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

During closing arguments, the prosecutors made several arguments that were inflammatory and unsupported by the evidence concerning the alleged sequence of bullets during the shootings. 15 ROA 3245-47. Keith contends these arguments were misconduct. In response, the State argues the arguments were supported by the evidence. AB 69-71. There is absolutely no evidence, not even enough to support an inference, as to the prosecutor's arguments about where Danielle was sitting prior to the shooter's entry into the apartment, her movements after the entry, whether she was caught off guard, whether there was any conversation, or the conclusion that this was a targeting killing, with Danielle the target. The absence of citation to the record in the Answering Brief in support of these alleged facts is telling. Likewise, there is no

evidentiary support for the claim during the prosecutor's rebuttal argument that Danielle was shot first, then Donnie, and the shooter left one bullet to give a *coupe de grace* shot of Danielle in the head. This testimony was directly contradicted by the testimony of the medical examiner who testified under oath that he could not sequence the multiple bullet wounds in a victim. 13 ROA 2880-81. There was no evidence of any kind to support this outrageous argument. There was also no justification for the prosecutor's action of disregarding the district court's ruling on a portion of the argument, by making final inflammatory argument. 15 ROA 3246-47.

In the Opening Brief, Keith cited ample authority that the State may not argue facts or inferences not supported by the evidence, may not make arguments with the purpose of merely arousing the juror's emotions, and may not make statements designed to appeal to the jury's sympathies. See Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987); Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985); Rose v. State, 123 Nev. 194, 210, 163 P.3d 408, 419 (2007); Berger v. United States, 295 U.S. 78, 88 (1935). The State fails to address this authority and fails to establish that the outrageous misconduct did not influence the jury's verdict.[2] The judgment of conviction should therefore be reversed and remanded for a new trial.

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[2]The State also fails to address Keith's argument about the charged nature of the courtroom due to the actions of the prosecutors and victim's family, and how these actions exacerbated the prejudice from the arguments

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

Keith contends that the prosecutor committed misconduct commenting on Keith's silence, at the close of the rebuttal argument. The State responds that the argument was permissible and did not constitute a statement on Keith's Fifth Amendment right. AB 76-78. Specifically, the State asserts that the argument did not include a comment on Keith's failure to give a statement or testify. Reading the statement in context, however, confirms that the prosecutor was claiming Keith knew who killed Donnie and Danielle, and if the jury did their job, they would tell Keith that they also knew. 15 ROA 3277. This argument was immediately prior to the jury's deliberations, at the most prejudicial time of closing arguments. This language was manifestly intended, or was of such a character, that the jury would naturally and necessarily take it to be a comment on Keith's failure to testify. It was therefore misconduct. Bridges v. State, 116 Nev. 752, 764-64, 6 P.3d 1000, 1008-09 (2000); Griffin v. California, 380 U.S. 609, 613-14 (1965).

Keith acknowledges that there was no objection to this argument, but the argument was nonetheless highly improper and deprived Keith of his substantial rights, caused actual prejudice, and was a miscarriage of justice. The prejudice from the comment on Keith's decision to remain silent and not testify was exacerbated by the prosecutor's directive to the jury "to do its job" by finding that Keith "executed"

Danielle and Donnie. See United States v. Sanchez, 176 F.3d 1214, 1224-25 (9th Cir. 1999) (conviction reversed based upon prosecutorial misconduct, including argument that it was the jury's duty to find the defendants guilty). The State fails to address this portion of Keith's argument. Its failure to do so should be deemed a confession of error. See Polk, 126 Nev. at 184-86, 233 P.3d at 359-61 (The failure to address issues on appeal may constitute a confession of error.). See also Belcher, 464 P.3d at 1023-1024 (where the State has failed to respond to an issue this Court may overlook the State's failure to argue harmlessness but only in extraordinary cases.).

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

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

Keith contends his constitutional rights were violated by use of an invalid aggravator of great risk of death to more than one person. OB 87. Specifically, the aggravator is invalid because there is insufficient evidence to support it, the State presented a theory for which no notice was provided, and it is duplicative. The State contends that the aggravator is valid. AB 78.

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

The State contends that sufficient evidence was presented of the State's "bullet

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in the courtyard" theory because the Notice of Intent stated that:

> [Barlow] 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.

AB 80 (citing 1 ROA 89). The plain language of the State's Notice of Intent fails to include any information about its "bullet in the courtyard" theory. There is no indication whatsoever that the State would be arguing that the aggravator could be found based upon a bullet that traveled through a wall, through a window, and into a courtyard that may or may not have had people nearby.

The State also argues that notice was adequate because the State's factual recitation demonstrated "that the State was alleging that the shooting took place in a public place, to wit, an apartment complex." AB 81 (citing 1 ROA 82-86). There is no factual or legal support for this argument. The shooting here did not occur in a public space or the common areas of an apartment complex. It took place inside of an apartment. 13 ROA 2777, 2789. Moreover, in its Notice of Intent the State relied solely upon a claim of "a great risk of death to Danielle Woods and Donnie Cobb who were standing 4 feet from each other at the time he shot them from a distance of no further than 8 feet." There was no allegation that any other people were at risk. Under

the State's argument here, every murder which takes place in an apartment building, condominium, duplex, hotel, or other multiple-unit accommodation would be subject to the aggravator. There is no indication that the Legislature intended such a result, and even if it had, such an aggravator would fail to narrow the class or persons eligible for the death penalty and would be unconstitutional.

The State argues that the Notice of Intent here gave sufficient notice and relies upon Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011) in support. AB 79-81. The Notice here was far different than that in Nunnery. In that case, the Notice of Intent informed Nunnery that the aggravator was based on the fact that Nunnery repeatedly fired his weapon in a public place near numerous bystanders. Id. at 778-79, 263 P.3d at 255. Here, there was no mention of a public place and there was no mention of bystanders. Indeed, to date not a single bystander has ever been identified or proven to actually exist and unlike Nunnery, the shooting here took place inside of an apartment, not in a parking lot of an apartment complex, which was near a bus stop and a sidewalk where numerous people, including children, were present. Id. at 758, 780, 263 P.3d at 242, 256. The facts here are nothing like the facts in Nunnery and the State's suggestion otherwise is bewildering.

The State's Notice of Intent was invalid under SCR 250(4)(c); Redeker v. Eighth Judicial Dist. Ct., 122 Nev. 164, 168, 127 P.3d 520, 523 (2006); and Hidalgo

v. Eighth Judicial Dist. Court, 124 Nev. 330, 337, 184 P.3d 369, 375 (2008).

b. There Is Insufficient Evidence To Support This Aggravator.

Keith contends there is insufficient evidence to support the State's theory that persons other than Danielle and Donnie were in great risk of danger and there is insufficient evidence to support a finding that Keith "knowingly" created such a risk. OB 90. The State argues in response that sufficient evidence was presented to support this aggravator. AB 82.

The State first argues that "specific knowledge that other individuals are nearby is not necessarily required for this aggravator to be proven." AB 82 (citing Adams v. State, No. 60606, 132 Nev. 937, WL 315171 (2016) (unpublished disposition)). Adams does not stand for this proposition. In its unpublished order, this Court did not hold that specific knowledge of other individuals is not required. Id. at *9. Rather, this Court, in the context of a successive habeas corpus petition, noted the appellant's argument that the State failed to prove that he knew other children were asleep in the house. Id. This Court responded that on direct appeal the proximity of two victims to each other when they were shot and the presence of three other children sleeping in the adjoining bedroom was sufficient to prove the aggravating circumstance, the ruling constituted law of the case, and the appellant articulated no compelling reason to revisit that decision. Id. at *9-10. In addition, the offenses at issue in Adams

occurred long before 1993, when a legislative amendment to NRS 200.033 made it clear 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) applied convictions of more than one offense of murder in the immediate proceeding. See Flanagan v. State, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996). This legislative change renders Adams inapplicable.

NRS 200.033(3) requires the State to prove, beyond a reasonable doubt that "the murder was committed by a person who *knowingly created a great risk of death to more than one person* by means of a weapon, device or course of action which *would normally be hazardous to the lives of more than one person."* (Emphasis added). The State's argument here would nullify the mens rea element of the aggravator. There is a longstanding presumption, traceable to the common law, that legislative bodies intend "to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" Rehaif v. United States, __ U.S. __, 139 S.Ct. 2191, 2195 (2019) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)). This interpretive maxim provides a presumption in favor of scienter, meaning a "presumption that criminal statutes require the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission.'" Id. (quoting

Black's Law Dictionary 1547 (10th ed. 2014)). The presumption is especially great when a general scienter provision is in the statute itself. Id. (citing ALI, Model Penal Code §2.02(4), p. 22 (1985) (when a statue "prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears"). "As 'a matter of ordinary English grammar," [the United States Supreme Court] normally read[s] the statutory term "knowingly" as applying to all the subsequently listed elements of the crime.'" Id. at 2196 (quoting Flores-Figueroa v. United States, 556 U.S. 646, 650 (2009)). See also Clancy v. State, 129 Nev. 840, 845-46, 313 P.3d 226, 229 (2013) (explaining need for knowledge element for the offense of leaving the scene of an accident).

Similarly, the State relies on a few cases concerning offenses involving multiple murders in which this Court considered the validity the aggravator. AB at 82-83 (citing Jimenez v. State, 105 Nev. 337, 342, 775 P.2d 694, 697 (1989); Evans v. State, 112 Nev. 1172, 1195, 926 P.2d 265, 280 (1996); Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993)). The offenses in each of these cases, however, took place before the 1993 amendment to NRS 200.033, which defines an aggravator for multiple murders in NRS 200.033(12) rather than NRS 200.033(3), as explained in Flanagan, 112 Nev. at 1421, 930 P.2d at 699. See Jimenez, 105 Nev. at 338, 775

P.2d at 694 (finding the aggravator invalid for a 1987 offense involving two stabbings); Evans, 112 Nev. at 1179, 1195, 926 P.2d at 270, 280 (finding aggravator valid for a 1992 offense involving the shooting of four adults in the presence of two children); Hogan, 109 Nev. at 953, 958-59, 860 P.2d at 712, 714-15 (finding aggravator valid for a 1984 offense involving the shooting of two people, one of whom died). It is difficult to understand the State's reliance on these cases in light of the statutory change which "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." Flanagan, 112 Nev. at 1421, 930 P.2d at 699 (citing 1993 Nev. Stat., ch. 44, §§ 1, 4 at 77). The State's failure to find any supporting authority for application of this aggravator to a case involving an offense after October 1, 1993, under facts similar to those presented here, is telling. The aggravator is not properly applied to cases involving multiple murders as those are the subject of NRS 200.033(12).

The State next argues that there was sufficient evidence to support the aggravator because Keith would have been aware that other people were present in the apartment complex. AB 83-84. There is no aggravator for "shooting inside of an apartment which is an apartment complex where other people may possibly be present." This simple fact is reflected both in NRS 200.033, which does not include

such an aggravator, and by the numerous cases in which the State sought the death penalty against a defendant for offenses committed inside of an apartment, but did not allege the great risk of death aggravator. See e.g. Jeremias v. State, 134 Nev. 46, 50, 412 P.3d 43, 46 (2018) (defendant convicted of two counts of murder after shooting two people inside their apartment, in an apartment complex, with witnesses from the complex, but no "great risk" aggravator was sought or found); Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003) (defendant convicted of two counts of murder, and two counts of attempted murder, for the shooting of four people inside of an apartment, but no "great risk" aggravator was sought or found).

Finally, the State argues that sufficient evidence was presented because the two victims were in close proximity to each other at the time they were killed. AB 84. The State fails to cite any relevant authority that would support the aggravator based on this evidence for an offense committed after October 1, 1993.

There was no evidence here that other people could have been in danger based upon a bullet that traveled through a wall, through a window, and into a courtyard. There was no evidence that the bullet retained any deadly capacity after traveling through the wall and window. There was no evidence that there were people in the courtyard or on nearby sidewalks. There was no evidence that Keith purposefully shot through the apartment wall, had any knowledge that the bullet would travel through

a window, or had any knowledge that people might be nearby. Accordingly, there is insufficient evidence exists to support the aggravator. See Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987); Leslie v. State, 114 Nev. 8, 21, 952 P.2d 966, 975-76 (1998).

c. This Aggravator Is Duplicative

Keith contends that this aggravator cannot be based upon the shots fired at Danielle and Donnie as the jury returned a special verdict for an aggravator based on that allegation in finding the aggravator for conviction for more than one offense of murder in the instant case. OB 91; 16 ROA 3640; 17 ROA 3831. In its response, the State acknowledges that in Servin v. State, 117 Nev. 775, 788-89, 32 P.3d 1277, 1287 (2001) this Court held it was improper to find multiple aggravating circumstances based on the same conduct. AB 85. Nevertheless, the State argues that the two aggravators here, which are both premised on the fact that two people were shot and killed, is valid under Hernandez v. State, 118 Nev. 513, 529-30, 50 P.3d 1100, 1111 (2002). AB 85. The facts of this case are far closer to Servin than Hernandez. In Servin, this Court found that the aggravating circumstances of burglary and home invasion are duplicative. Servin, 118 Nev. at 788-89, 28 P.2d at 1287-87. In Hernandez, this Court found that aggravating circumstances of mutilation and sexual-penetration were not duplicative. Hernandez, 118 Nev. at 529-30, 50 P.3d at 1111.

Here, both aggravators are premised on the exact same facts: two people were shot and killed, while in close proximity to each other, and at nearly the same time. Basing two aggravators on this single action does not serve distinguishable state interests and the gravamen of each aggravator is the same. The aggravators are therefore duplicative and unconstitutional. See Stringer v. Black, 503 U.S. 222 (1992); United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996); Allen v. Woodford, 395 F.3d 979, 1012-13 (9th Cir. 2004).

The State next argues that "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." AB 86. The State again relies on Jimenez, 105 Nev. at 343-43, 775 P.2d at 697-98, and Hogan, 103 Nev. at 24-25, 732 P.2d at 424 in support of its argument, even though, as discussed at length above, those cases predate the 1993 amendment to NRS 200.033 which created the multiple murder aggravator. The State also relies on Lisle v. State, 113 Nev. 540, 556, 937 P.2d 473, 483 (1997). That case is of no relevance. There was only one count of murder in that case. Id. at 546, 937 P.2d 477. Moreover, the conduct there involved shooting a driver of a moving vehicle on the freeway, an act which created a great risk of death to more than one person. Id. at 545, 937 P.2d at 476. The fact remains: despite numerous cases in this state that have involved the killing of two people in

close proximity to each other at the same time, the State cannot identify a single case in which aggravators have been found for both multiple murder and great risk of death based upon this single act. No such case exists, nor could it under the constitutional limitations on stacking aggravators.

d. The Invalid Aggravator Is Not Harmless

Keith contends his sentence of death must be vacated due to the invalid aggravator because the State cannot establish beyond a reasonable doubt that the jury would have found Keith eligible for the death penalty in the absence of this aggravator. Likewise, the State cannot establish beyond a reasonable doubt that the jury would have sentenced Keith to death, following a weighing of valid aggravating and mitigating evidence and consideration of other matter evidence, had this aggravating circumstance not been included. The State argues in response that this Court has the authority to reweigh aggravating and mitigating circumstances and that "[e]ven 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." AB 88. The State's legal analysis is erroneous. This is not a sufficiency of the evidence test, rather the State bears the heavy burden of proving, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988) (citing Chapman v. California, 386

U.S. 18, 24 (1967)). See also Neder v. United States, 527 U.S. 1, 18-19 (1999) (harmless error analysis involves a thorough examination of the record and whether the contested the fact at issue). The State fails to establish, beyond a reasonable doubt, both that each juror would have arrived at the same decision concerning the weighing of aggravating and mitigating circumstances, and the same decision concerning selection of the death penalty without the use of this aggravating circumstance. Keith highly contested the State's argument that the weighing of aggravating and mitigating evidence warranted the death penalty, and that a death verdict should be imposed. The extremely heavy weight of this aggravator on these subjective determinations of the jury mandates reversal of the death sentences.

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

Keith contends his constitutional rights were violated based upon the admission of testimonial hearsay evidence during the penalty trial. The State argues that the Confrontation Clause does not apply to the penalty phase of a capital trial. AB 89.

In the Opening Brief, Keith set forth ample reasons and authority in support of his contention that this Court's holding in Summers v. State, 122 Nev. 1326, 1331, 148 P.3d 778, 781-82 (2006). Those arguments need not be repeated here. The State's argument, however, that this matter is controlled by Williams v. New York, 337 U.S. 241 (1949), needs to be addressed.

In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court held that the defendant's right to due process was not offended by the trial judge's consideration of information supplied to aid a judge's determination whether to sentence a defendant to death, even though the defendant did not have the ability to confront or cross-examine witnesses about that evidence.[3] Id. at 251-52. But in New York in the 1940's, a conviction for first-degree murder, standing alone, subjected a defendant to capital punishment. See Id. at 242 n.2; Specht v. Patterson, 386 U.S. 605, 606-07 (1967). The evidence at issue in Williams thus pertained only to selection – that is, whether to impose a sentence already "within statutory limits." Apprendi v. New Jersey, 530 U.S. 466, 481-82 (2000) (emphasis omitted). Williams has nothing to say about the "radically different situation" where the prosecution offers evidence at a sentencing proceeding in which "a new finding of fact" is necessary to establish eligibility for heightened punishment. Specht, 386 U.S. at 608. In that situation, this Court has distinguished Williams and held a defendant has a right to "be confronted with the witnesses against him" when the prosecution offers evidence to increase punishment from a term of years to life imprisonment. Id. at 610. The same should be true when increasing a sentence from life in prison to death. See

[3]The Sixth Amendment right of confrontation and cross-examination was not applied to the states until 16 years after Williams. See Pointer v. Texas, 380 U.S. 400 (1965).

Buchanan v. Angelone, 522 U.S. 269, 275 (1998) (eligibility determinations require "differ[ent] constitutional treatment" from selection determinations); Bullington v. Missouri, 451 U.S. 430, 446 (1981) (likening the sentencing regime in Specht to an eligibility determination in a modern death-penalty regime).

Even apart from the formal logic of the Ring/Apprendi rule concerning findings of fact that expose defendants to heightened punishment, the Supreme Court's jurisprudence makes clear that confrontation rights should apply to evidence offered to prove death-eligibility. The Confrontation Clause applies, by its terms, to "all criminal prosecutions," U.S. Const. amend. VI, and the Court has held that a death-eligibility proceeding is tantamount to "a trial on the issue of guilt and innocence." Bullington, 451 U.S. at 444; accord id. at 446. Furthermore, "[b]ecause the death penalty is unique 'in both its severity and its finality,'" the Court has repeatedly "recognized an acute need for reliability in capital sentencing proceedings." Monge v. California, 524 U.S. 721, 732 (1998) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.)); see also Caldwell v. Mississippi, 472 U.S. 320, 340 (1985) (noting the "heightened need for reliability in the determination that death is the appropriate punishment" (internal quotation marks omitted)); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stressing that the "qualitative difference between death and other penalties calls for

a greater degree of reliability when the death sentence is imposed"). There is no tool for ensuring the reliability of prosecutorial evidence more vital than the right of confrontation. The Clause requires testimonial statements to be given in open court subject to "testing in the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004). And centuries of experience have shown that this process "is much more conducive to the clearing up of truth" than hearsay evidence. 3 William Blackstone, Commentaries on the Laws of England *373 (1768); see also Mattox v. United States, 156 U.S. 237, 242-43 (1895) (confrontation allows jury to determine whether testimonial assertions are "worthy of belief"); Matthew Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better"). This safeguard should not be denied where defendants most need it – during proceedings determining whether they will be sentenced to death.

Simply stated, Williams was a Due Process case that did not address the Sixth Amendment rights that are now applied to the states and did not address modern day death penalty jurisprudence. This Court's continued reliance on Williams is not warranted and is contrary to existing Supreme Court precedent. Summers and its progeny should therefore be overruled.

In the Opening Brief, Keith made extensive arguments about the prejudicial evidence that was admitted in violation of his right to confrontation. The State fails to address this argument and therefore confesses error should this Court overrule Summers. See Polk, 126 Nev. at 184-86, 233 P.3d at 359-61; Belcher, 464 P.3d at 1023-24. Accordingly, reversal is warranted.

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

Keith contends his sentence should be reversed because of extensive prosecutorial misconduct during the closing argument of the penalty phase. Keith's constitutional rights were also violated by the district court's failure to provide a remedy in response to the misconduct.

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

Keith contends that during the penalty phase, the prosecutor misstated the definition of mitigation and trivialized its importance, and the district court erred by not giving the jury an admonishment, thereby validating the State's rhetoric. The prejudice to Keith was evidenced by the jury's failure to find numerous mitigating factors, some which were undeniably proven. The State fails to adequately refute Keith's argument. AB 91.

The State cites to Watson v. State, 130 Nev. 764, 769, 335 P.3d 157, 162 (2014) to support its argument that the prosecutor did not misstate the legal definition of mitigation. AB 102. However, even the State's partial, and selective quote from Watson does not support its position. The State claims that mitigation is any fact that exists. AB 93. As Keith argued, and which the State failed to properly respond to, the legal standard for mitigation is that it can be "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see NRS 200.035. Even the State's reliance on NRS 200.035 undercuts its own argument. The State is correct that the statute provides that murder of the first degree may be mitigated….by any other *mitigating* circumstance. NRS 200.035 (emphasis added). This contradicts the State's argument because it concedes that the prosecutor said that mitigation could be *anything*. AB 93.

Furthermore, the State fails to properly address the argument that the prosecution misstated the legal definition of mitigation by positing that having a good childhood could be a mitigating factor. 17 ROA 3806. Lockett, 438 U.S. at 604 (mitigation includes "any aspect of the 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.)" (emphasis added). The State argues that the analogy of a good

childhood was valid because Keith had made his childhood a factor. AB 94. As discussed above, not only was the State's example of a good upbringing completely belied by the record but the State's proffered explanation of why it could be considered mitigation defies logic. The State notes that "[i]f Barlow had a good childhood, he would have been perfectly entitled to argue that such an upbringing should be considered a mitigating circumstance." Id. As discussed above, this does not fall within the legal definition of mitigation, and is factually belied by the record. The sarcastic tone of the trial prosecutor proffering a "good childhood" as a mitigating factor runs contrary to the actual legal standard. 17 ROA 3806; Lockett, 438 U.S. at 604; NRS 200.035.

The State, relying on Emil v. State, 105 Nev. 858, 868, 784 P.2d 956, 962 (1989), misconstrues what the prosecutor did by claiming he was simply arguing about the weight the jury should give to mitigation. AB 93. However, that case addressed the weight given mitigation, whereas here the prosecutor did not minimize the weight of the mitigating evidence but minimized mitigation itself. Emil, 105 Nev. at 868, 784 P.2d at 962; 17 ROA 3805-06.

The State's reliance on Nunnery, 127 Nev. 742, 782, 263 P.3d 235, 257 (2011), to argue the error was harmless is also misplaced. The State is correct that in Nunnery, this Court held that jurors are not required to find mitigating factors simply

because there is unrebutted evidence. Id. 127 Nev. at 782, 263 P.3d at 257. However, that was not Keith's argument. Instead, he argued that the jury's lack of selected mitigating factors, despite unrebutted evidence, especially about his childhood trauma, establishes the prejudice from the State's improper comments. 16 ROA 3635. Finally, regarding the issue of a cognizable advantage, the State argues that the jury instructions cured any harm. AB 96. This argument fails because the prosecution's misstatement of the legal definition of mitigation, combined with multiple references downplaying the importance of mitigation did in fact prejudice Keith, as indicated by the lack of mitigating factors selected, despite the unrebutted evidence. The State failed to show how the jury instructions cured this harm. An admonishment by the district court could perhaps have reduced the harm, but as Keith noted, no such admonishment was given and the objection was not even sustained. 17 ROA 3826. The State fails to address this important fact in its argument on harmless error.

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

Keith contends that during the penalty phase the prosecution committed misconduct by making an improper argument by advocating on behalf of future victims as a reason to give Keith the death penalty.

The State makes an unusual argument that the prosecutor was not making an argument about future dangerousness, but then contradicts itself by noting that it was an argument about future dangerous but was only raised as a reason to give Keith the death penalty. AB 98. The State is acknowledging Keith's argument here. Keith argued that the prosecution was telling the jury to give Keith the death penalty because if he was given life, he would attack other inmates and guards. 17 ROA 3809. The State's response does nothing to refute this point. The State makes an attempt to blame the defense for the prosecutor's improper actions, claiming that defense counsel argued that Keith could be properly housed. AB 98. However, the State could have responded to this without arguing to the jury that if they did not give him death, he would attack future victims. 17 ROA 3808.

The State claims that even if the prosecutor was advocating on behalf of future victims, it was not improper. AB 98. Jones v. State, 113 Nev. 454, 469, 937, P.2d 55, 64 (1997), which the State relies on, notes that prosecutors may make arguments of future dangerousness, even when there is no evidence of violence, independent of the murder. However, subsequent to that decision, in Schoels v. State, 114 Nev. 981, 988-989, 966 P.2d 735, 740 (1998), this Court expounded its position, noting that prosecutors "may not argue or suggest to the jury that the jury is or would be responsible for any future victims of the defendant," through suggestion or strong

implication. To support this, the Court cited to Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990) - of which Keith relied on but the State failed to respond.

Here, the prosecution did just that by telling the jury that if they did not give him the death penalty, he would attack other guards and inmates. 17 ROA 3808. The State claims that Keith readily admits that he had numerous violent encounters with other inmates. AB 99. However, this was not what Keith readily admitted and is actually a misstatement. Keith listed three incidents, one which was not even a physical altercation, in which the other inmate was identified as the original aggressor. 15 ROA 3400. There was another physical altercation in which he was identified as the initial aggressor, and a third altercation in which Keith was beat up by an inmate. 15 ROA 3406; 16 ROA 3542. Beyond this misrepresentation of Keith's argument, the State makes no mention of any attacks on guards in any manner whatsoever. AB 98-99. By informing the jury that if they did not give him death, he would attack guards and other inmates, the State was placing the burden on the jury for any future victims of Keith. 17 ROA 3808.

The State claims that Keith's argument that this was harmful because it was done on rebuttal fails. This was, contrary to the State's claim, new information and a new argument the State had not employed. AB 98. This Court has indicated its concern with arguments made for the first item on rebuttal where the defendant does

not have a chance to respond. Woodstone v. State, 2019 Nev. Unpub. Docket No. 74238, 435 P.3d 657 (2019) (Court found practice of accusing defendant of generic tailoring "particularly troubling in instances where accusations are raised for the first time on rebuttal closing arguments-where a defendant has no opportunity to address the accusations and where such accusations do little to advance the truth-seeking function of trial.") (citing Portuondo v. Agard, 529 U.S. 61, 77-78 (2000)) (Ginsburg, J., dissenting)).

The State's reliance on Hernandez v. State, 118 Nev. 513, 526, 50 P.3d 1100, 1109 (2002), is misplaced. Here, the State was not responding to an earlier contention by defense counsel. Nowhere did defense counsel claim that if the jury gave Keith life without parole he would not spit on guards. This was a new, unsupported argument during the State's during rebuttal argument.

The State's harmless error analysis fails. The State relies on Castillo v. State, 114 Nev. 271, 279, 956 P.2d 103, 108 (1998), for the proposition that where there is overwhelming evidence of guilt, future dangerousness comments made during penalty phase are not improper. However, as discussed above, Keith challenges the claim that there was overwhelming evidence of guilt. Secondly, in Castillo, this Court clarified its stance in Jones, 113 Nev. at 469, 938 P.2d at 64, finding a prosecutor's statements improper where they argued that the jury must decide between death for the defendant

or for a future victim. Id., 114 Nev. at 279, 956 P.2d at 108. The Court ultimately found the comments did not unfairly prejudice the defendant, determining whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process," and ultimately concluding they did not because of the overwhelming evidence of guilt. Id. (citing Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995)). However, to the extent that this Court relies on overwhelming evidence of guilt to determine prejudice during the penalty phase, Keith encourages the Court to revisit this standard as the penalty phase of a capital case concerns much more than the evidence presented during the culpability phase of the trial and involves an entirely different analysis.

The Court in Castillo relied on Bennett, which in turn relied on Darden v. Wainwright, 477 U.S. 168, 170 (1986), for its finding that overwhelming evidence of guilt could be used to determine prejudice. However, Bennett did not reference overwhelming evidence of guilt, and nowhere in Darden did the Supreme Court reference evidence of guilt to determine if improper comments unfairly prejudiced the defendant during the penalty phase. Darden, 477 U.S. at 170; Bennett, 111 Nev. at 1105, 901 P.2d at 680. Instead, in Darden, the Supreme Court looked at whether "[t]he comments did not manipulate or misstate the evidence, or implicate other specific rights of the accused, and much of their objectionable content was responsive

to the opening summation of the defense (available under a state procedural rule)." The Court further noted that "defense counsel were able to use their final rebuttal argument to turn much of the prosecution's closing argument against it." Id.

The lack of support in Supreme Court precedent concerning the application of overwhelming evidence of guilt indicates that such a consideration is not appropriate for the penalty phase. As such, Keith urges this Court to focus on the standard outlined in Darden and Castillo, to the extent that Castillo correctly analyzed, as Darden did, whether the comments "infected the trial with unfairness as to make the resulting conviction a denial of due process." Castillo, 114 Nev. at 281, 956 P.2d at 105.

Under that standard, here, the prosecution manipulated and misstated the mitigation, implicated numerous specific rights of Keith, and as discussed throughout, much of the improper comments were not in response to defense counsel's summation. Darden, 477 U.S. at 170. Additionally, unlike Darden, defense counsel did not have an opportunity to give rebuttal. Id.; 17 ROA 3808.

The State fails to show that this error was harmless, because as Keith argued, the State was the party seeking the death penalty and the it was the State who specifically informed the jury that it made no difference if they gave him a sentence of death or life except that if they gave him life he would attack guards and inmates.

17 ROA 3808. Accordingly, this placed an improper burden on the jury and substantially affected the verdict of death.

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

During rebuttal of the penalty phase, the State improperly referenced Keith's sister as a reason to discount his mitigation. 17 ROA 3807. The State fails to address this adequately. As is a common theme in addressing the prosecution's improper actions during penalty phase, the State attempts to shift the blame to the defense. The State claims that the prosecutor was simply responding to Keith's counsel. AB 101-02. However, Keith's counsel was making a point to emphasize the mitigating factors by noting that Keith and his sister grew up in the same house but because of a myriad of facts, he suffered trauma and other mitigating factors. 17 ROA 3789-90. By emphasizing to the jury that Keith's sister did not grow up to kill anyone, the State improperly minimized the mitigation.

The State's claim that there was no prejudice because this was done in rebuttal is belied by this Court's position in Woodstone, Unpublished, 435 P.3d at 657, cautioning against arguments in rebuttal for which defense counsel cannot respond. Furthermore, despite the State's claims, Keith was not given a chance to respond to this specific argument.

The State's attempt to argue that such practice, if improper was harmless, also fails. The State makes an argument they use throughout this section for the numerous instances of prosecutorial misconduct, all of which occurred during the rebuttal phase: that the jury found all six aggravating circumstances and that the issue of guilt was not close. AB 104. As discussed above, the issue of guilt at the trial phase should be irrelevant to whether the prosecution committed misconduct during rebuttal of the penalty phase. Regarding the six aggravating circumstances, the State seems to ignore the argument that the jury failed to find mitigating circumstances that were demonstrably proven, which indicates that the finding of the six aggravating circumstances and minimal mitigating circumstances happened because of, and not in spite of, the State's improper comments. 16 ROA 3635.

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

Keith contends that the prosecution committed misconduct when it asked the jury that if they felt a life sentence was appropriate for one victim, then they should return a sentence of death for the second victim. The State acknowledges that in Jeremias, 134 Nev. at 57, 412 P.3d at 53, this Court noted that it was inappropriate to ask the jury to impose the death penalty because there were multiple victims. AB 106. However, the State resorts to a semantical argument to distract from this Court's

clear holding in Jeremias, by arguing that there the prosecutor said that anything less than death would be virtually meaningless, whereas the prosecutor here did not. Id. However, the Court did not say the term "virtually meaningless" was the issue but indicated its disapproval of an argument based on placing value on a victim's life in cases involving multiple victims through the return of a death verdict. Jeremias, 412 P.3d at 53. Here, the prosecutor argued that if the jury returned a life sentence for the murder of Danielle, they must then give death for the life of Donnie. 17 ROA 3809. As such, the State made an inappropriate suggestion that the jury show there was value to Donnie's life by giving the death penalty, and the State fails to adequately refute this point. Jeremias, 134 Nev. at 57, 412 P.3d at 53.

The State further argues that even if it was inappropriate, it was not deemed error in Jeremias, and should not be here. AB 107. However, the State casually dismisses that the standard of review in Jeremias was plain error but here is harmless error. Id., 412 P.3d at 48; 17 ROA 3809; AB at 107-108. Next, the State makes an inappropriate claim that Keith is attempting to "shame" the State because Jeremias "had just come out." AB 106-107. Contrary to the State's claim, Jeremias was published on March 1, 2018, and Keith's trial began on June, 18, 2018. Id., 412 P.3d at 48; 7 ROA 1519. As such, this was not a "ploy" by the defense. AB 107. Rather, the State is attempting to distract from the point that the prosecutor's actions were

especially egregious because despite this Court's clear indication that it found the comments inappropriate, the prosecutor made the comments anyway. 17 ROA 3815-16. This is further evident by the State's failure to acknowledge or address McGuire v. State, 100 Nev. 153, 155, 677 P.2d 1060, 1062 (1984) (despite prior condemnation of prosecutorial misconduct, the problem illustrated by this Court still persisted).

Finally, the State concedes that harmless error does apply but argues, as it does in the argument addressing the comparison of Keith to his sister, that the jury found all six aggravating circumstances. AB 108. The State also argues that because the prosecutors did not address any of the aggravators, it was harmless. AB 108-109. The State cites to no authority for this position that if an improper argument is made but does not address the aggravators, it is harmless. Id. The State also fails to acknowledge that since this Court previously found such comments inappropriate, the lack of an admonishment by the district court increased the prejudice from these comments. 17 ROA 3811-3812. Lastly, the State fails to take into account that this comment did not occur in a vacuum. But as discussed above and below, was part of numerous other violations, which taken as a whole, substantially affected the verdict and prejudiced Keith.

. . .

e. The State Committed Prosecutorial Misconduct By Asking The Jury To Do Its Duty

Keith contends that the State committed additional misconduct by making an improper argument asking the jury to do its duty. 17 ROA 3802-03. The State attempts to distinguish this matter from the cases Keith cited by claiming that in those cases, the prosecution asked the jury to do their duty by returning a verdict of death, whereas here, the prosecution simply asked the jury to do their duty by returning an appropriate verdict. AB 112. This argument fails. In Evans v. State, 117 Nev. 609, 634, 28 P.3d 498, 515 (2001), the prosecutor never asked the jury to return a verdict of death in conjunction with a request to do their duty either. The prosecutor asked the jury if they had the intestinal fortitude, resolve, determination, and courage to do their legal duty. Id. It was implied that their legal duty was to return a verdict of death. Similarly, here, the prosecutor, who advocated for the death penalty, was similarly implying to the jury that their appropriate duty was to return a verdict of death. 17 ROA 3802. The State's argument that the trial prosecutor told the jury that they did not have to return a verdict of death is misleading. AB 111. The record establishes that the prosecutor was informing the jury that by doing their duty, they would impose a sentence of death. 17 ROA 3802.

Furthermore, the State fails to properly explain that in Evans, while this court noted the comments were highly improper, on their own they did not prejudice the

defendant's right to a fair trial. Evans, 117 Nev. at 634, 28 P.3d at 515. However, when combined with the other instances of improper comments and misconduct, the Court found them prejudicial. Id. Similarly here, when combined with the numerous instances of prosecutorial misconduct, and improper comments, exerting pressure on the jury to do their duty certainly prejudiced Keith. The fact that all the instances of prosecutorial misconduct were done in rebuttal, without any opportunity from Keith to respond, compounded the harm. Woodstone, Unpublished, 435 P.3d at 657.

Once again, this Court expressed its disapproval of certain comments and arguments, and once again, the State showed total disregard for this Court's warnings. McGuire, 100 Nev. at 155, 677 P.2d at 1062. The numerous instances of prosecutorial misconduct during penalty phase no doubt inflamed the juror's passions, misstated the law, and prejudiced Keith, such that reversal of his death sentence is the appropriate remedy.

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

Keith contends his right to present a defense was violated by a district court order prohibiting his counsel from presenting argument that was fully supported by Nevada law and the instructions. The State argues in response that the district court

did not err in refusing to change the language of the verdict form to be consistent with the Evans instruction, and did not abuse its discretion in prohibiting the defense closing argument on Evans instruction. AB 112-13.

Essentially, the primary conflict in both issues can be boiled down to this: The State contends that if one or more jurors, but less than all jurors, find that mitigation outweighs aggravation, a hung jury is declared and a new penalty trial is held; while Keith contends that if one or more jurors find that mitigation outweighs aggravation, the death penalty is no longer a consideration for the jury and deliberations continue on the three remaining non-death sentencing options. The State fails to cite any authority, from any source, in support of its position, while Keith's position is firmly established by Evans v. State, 117 Nev. 609, 635-36, 28 P.3d 498, 516-17 (2001), and a jury instruction mandated by that case which has been given in every capital trial for the last two decades.

The State argues that NRS 175.556 supports its position. AB 115. The State is wrong. NRS 175.556 states that in a capital case, "if a jury is unable to reach a unanimous verdict upon the sentence to be imposed" the trial court shall sentence the defendant to life without the possibility of parole or impanel a new jury. This statute addresses the ultimate sentencing decision, but does not address the weighing of mitigating and aggravating factors. This crucial step in the process comes before the

jury determines the sentence to be imposed. The 2003 amendments to this statute, which removed the option of sentencing by a three-judge panel, did not address this issue and there is no language in the amendment which would purport to overrule Evans. See Lisle v. State, 131 Nev. 356, 365-67 (2015) (recognizing the unique nature of Nevada's death penalty scheme imposes an individualized weighing requirement prior nto the determination of which sentencing option should be imposed).[4]

The jury instructions given in Evans are well established and indeed are mandated by this Court. They are consistent with precedent from the United States Supreme Court which recognizes the role of the individual juror in determining mitigation and the weight it should be given. See Kansas v. Marsh, 136 S.Ct. 633, 642 (2016); Mills v. Maryland, 486 U.S. 367, 371-73 (1988).

The State briefly claims that any error in refusing to change the verdict form and in prohibiting the defense closing argument on the jury instruction and this important component of Nevada's death penalty scheme is harmless. AB at 116-17. The State fails to address Herring v. New York, 422 U.S. 853, 857, 862 (1975) and Glover v. Dist. Court, 125 Nev. 691, 703-05, 220 P.3d 684, 693-94 (2009). Those

[4]As noted in the Opening Brief, OB 123-24 & n.15, the role of the individual juror in determining mitigation and ultimately controlling whether the death penalty is a sentencing option is firmly established by decades of case authority. The State does not contest or address this authority.

cases recognize that counsel must be given latitude in giving closing argument and recognize that the right to effective assistance of counsel prohibits restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process. The district court's order prohibiting the defense argument prevented counsel from making the key point essential to the defense, even though that point was fully supported by Nevada statutory and case authority, federal constitutional authority, and a jury instruction which has been mandated by this Court. The failure to correct the verdict form added insult to this injury. No ruling could have been more devastating to the defense case at this crucial moment of the case. The State fails to establish beyond a reasonable doubt that this constitutional error was harmless. The sentence s of death must therefore be vacated and this case remanded for a new trial.

D. Nevada's Death Penalty Is Unconstitutional

Keith contends the death penalty is unconstitutional. The State argues in response that Nevada's death penalty scheme should be upheld. AB 117.

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

Nevada's death penalty fails to meet the mandate of the United States Supreme Court that a death penalty scheme genuinely narrow the class of persons eligible for the death penalty. See Woodson v. North Carolina, 428 U.S. 280, 296 (1976); Arave

v. Creech, 507 U.S. 463, 474 (1993); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988); Zant v. Stephens, 462 U.S. 862, 877 (1983)). The State notes that this Court has repeatedly held that Nevada's death penalty sufficiently narrows the class of persons eligible for the death penalty. AB 117 (citing Nunnery v. State, 127 Nev. 749, 782, 263 P.3d 235, 237 (2011) and other authority). Keith acknowledges that this Court has repeated this conclusion in many cases, yet the fact remains that the State cannot identify a single case in which this Court has actually analyzed Nevada's scheme, especially in light of the numerous aggravators that have been added since Gregg v. Georgia, 428 U.S. 153 (1976) and the broad interpretation of aggravators that has been given by this Court. There has never been a reasoned analysis of this Court's scheme and whether it permits broad imposition of the death penalty for virtually any and all first-degree murderers. Ample facts and authority supporting this contention were set forth in the Opening Brief, but the State fails to address the merits of these arguments. Its failure to do so should be deemed a confession of error. See Polk, 126 Nev. at 184-86, 233 P.3d at 359-61; Belcher, 464 P.3d at 1023-24.

2. The Death Penalty Is Cruel And Unusual Punishment.

Keith contends his death sentence is invalid because the death penalty is cruel and unusual punishment under the Eighth and Fourteenth Amendments. The State argues that the death penalty has been upheld by the courts. AB 117-18. Keith

acknowledged that this is the current state of the law. See Bucklew v. Precythe, __ U.S. __, 139 S.Ct. 1112, 1122-23 (2019).

Keith argued there is no modern legislative vote in Nevada that supports a conclusion that the death penalty is the will of the people in this state. The State responds that "this argument is better suited for presentation to the State legislature [than] a Court ruling on the constitutionality of the death penalty." AB 119. The State fails to acknowledge the critical fact that during the last legislative session, two bills were introduced which would have banned the death penalty in Nevada, but two prosecuting attorneys from the Clark County District Attorney's Office, the same office which is prosecuting Keith, were in charge of both the Nevada Senate and Assembly, and these bills were not given a hearing. See AB 149 (2019), SB 246 (2019). Under these unique circumstances, the will of the people could not be fairly expressed. See generally McCleskey v. Kemp, 481 U.S. 279, 319 (1987) ("It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.'") (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J. dissenting).

The State fails to show that the will of the people in Nevada, under contemporary community standards, reflects continuing support for the death penalty. Accordingly, the death penalty should be declared cruel and unusual punishment.

3. Executive Clemency Is Unavailable.

Keith contends his death sentence is invalid because Nevada has no real mechanism to provide for clemency in capital cases. The State argues in response that this Court has previously rejected this argument. AB 119 (citing Jeremias v. State, 134 Nev. 46, 59, 412 P.3d 43, 54 (2018). Keith acknowledged such in its Opening Brief, but argued that this was contrary to federal constitutional authority. See Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 294 n. 4 (1998) (Stevens, J., concurring in part, dissenting in part); Evitts v. Lucey, 469 U.S. 387, 401 (1985); Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Harbison v. Bell,556 U.S. 180, 192 (2009); Herrera v. Collins, 506 U.S. 390, 411-12 (1993). The State fails to address this authority and fails to explain how Nevada's death penalty scheme, which omits a clemency process, satisfies the constitutional mandate. The failure to have a functioning clemency procedure makes Nevada's death penalty scheme unconstitutional, requiring that Keith's death sentence be vacated.

E. The Judgment Should Be Vacated Based Upon Cumulative Error

Keith contends that his judgment and sentences of death should be reversed based upon cumulative error. The State contends that there are no errors and that the issue of guilt was not close because the State introduced substantial evidence connecting Keith to both murders. AB 120. As set forth above, there were numerous

errors, during both the culpability and penalty phases of the trial. Whether or not any individual error requires reversal, the totality of these multiple errors and omissions resulted in substantial prejudice. The State fails to show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Keith. Merely reciting the convictions and noting that evidence was presented fails to establish that the judgment and sentences should not be vacated under the cumulative error doctrine. This is especially so in a capital case, which is subject to heightened reliability standard. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

VIII. CONCLUSION

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

. . .

. . .

death and a new penalty trial. Finally, he contends that the death penalty should be vacated.

DATED this 29th day of September, 2020.

Respectfully submitted,

/s/ JONELL THOMAS

By:_____
JONELL THOMAS
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CERTIFICATE OF COMPLIANCE

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

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

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(B)(I). The relevant portions of the brief are 17,709 words.

4. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of September, 2020.

/s/ JONELL THOMAS

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 29th day of September, 2020, a copy of the foregoing Reply Brief was served as follows:

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