IN THE SUPREME COURT OF THE STATE OF NEVADA

COLE DUANE ENGELSON

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 82691

Appeal From A Judgment of Conviction (Jury Trial)
Fifth Judicial District Court
The Honorable Robert Lane, District JudgeDistrict
Court No. CR9226

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE OF APPELLANT'S COUNSEL,

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RONNI N. BOSKOVICH, ESQ., Attorney for Appellant, COLE D. ENGELSON, in compliance wither her obligations imposed by NRAP 26.1 hereby makes the following statements for consideration by the court:

1. BOSKOVICH LAW GROUP, PLLC is a professional limited liability company, wholly owned by the undersigned attorney, Ronni N. Boskovich, Esq.
2. There are no parent corporations or publicly traded corporations who own stock in the law firm Boskovich Law Group, PLLC, as the undersigned is the sole stockholder and owner of the subject corporation.
3. To the best of her knowledge, the undersigned, RONNI N. BOSKOVICH, ESQ. of BOSKOVICH LAW GROUP, PLLC, along with DANIEL E. MARTINEZ of DANIEL MARTINEZ LAW are the only attorneys and law firms or corporations that have appeared for Appellant, COLE D. ENGELSON, in this appellate matter.
4. The only exception to the above would be Brent D. Percival, Esq., Mr. Engelson's original court appointed counsel in his capacity as a Nye County Public Defender.

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5. These representations are made in order that the judges of this Court may evaluation possible disqualification or recusal.

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I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, based on a jury verdict, of one count of first degree murder. 21 App. 2116. The judgment of conviction was filed on March 12, 2021. 22 App. 2175. A timely notice of appeal was filed on March 26, 2021. 22 App. 2178. This Court has jurisdiction under NRS 177.015.

II. ROUTING STATEMENT

This is an appeal from a judgment of conviction based on a jury verdict for first degree murder with a sentence of life in prison without the possibility of parole. The issues in this appeal are of a constitutional dimension and present crucial issues regarding jury venire, disqualification of a District Attorney's Office, improper admission of evidence and testimony, and improper considerations at the time of sentencing. This appeal challenges more than the sentence imposed and the sufficiency of evidence. This case should be retained by the Nevada Supreme Court. NRAP 17(a)(12). This appeal is not within the case categories presumptively assigned to the Court of Appeals. NRAP 17(b).

III. STATEMENT OF ISSUES

A. Whether the District Court Deprived Cole of a Fair Trial by Improper Admission of Prior Bad Acts.

B. Whether the District Court Deprived Cole of a Fair Trial by Denying His Motion to Suppress.

C. Whether the District Court Deprived Cole of a Fair Trial by Denying His Motion to Disqualify the Nye County District Attorney's Office.

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I. Whether the Sentence of Life Without the Possibility of Parole is a Violation of the 8th Amendment, Cruel and Unusual Punishment, Clause of the Constitution.

J. Whether Cumulative Error Warrants Reversal.

IV. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 7, 2019, the State charged Cole Engelson by way of amended information with one count of first degree murder. (Cole waived his preliminary

hearing to sign a guilty plea agreement, but later changed his mind.) 1 App. 5. Cole pleaded not guilty to the charge. 6 App. 818.

Petrocelli and motion hearings were held prior to, and during, the trial. 4 App. 529, 5 App. 640, 3 App. 455, 13 App. 1380, 16 App. 1630. Arguments on Cole's Motion to Disqualify the Nye County District Attorney's Office were held on October 29, 2020. 6 App. 772. Issues related to those motions are discussed below. Trial began on November 4, 2020. 6 App. 794. The jury returned a verdict of guilty on the sole count on November 16, 2020. 21 App. 2116. Sentencing occurred on February 1, 2021, and March 8, 2021. 21 App. 2118, 22 App. 2133. The district court sentenced Cole to life in prison without the possibility of parole. 22 App. 2175.

V. STATEMENT OF FACTS

Cole Engelson and Victoria Schlick met many years ago, lost touch for several years but then rekindled their relationship sometime around September of 2016. 10 App. 1139. They lived separately in Las Vegas, Nevada, until May 1, 2017, when they moved to 5320 East Manse Road in Pahrump, Nevada together. 10 App. 1141. Cole's only son, also named Cole (hereinafter "Little Cole"), and two of Victoria's kids, Dwight Camp and Yessenia Camp, moved to Pahrump with them. *Id*. Victoria also had an older daughter, Nickole Robinson, who would visit every other weekend. *Id*.

Throughout their relationship, it was well known and documented that Cole was an alcoholic. 10 App. 1149. He even went so far as to take Antabuse, a drug that causes a person to become ill and vomit if they consume any alcohol. Id. However, Cole knew how long it took for the effects of the drug to wear off, and every now and then Cole would stop taking it at certain times so he could drink on special occasions. 10 App. 1150-52. One such special occasion was the Fourth of July in 2017. 9 App. 1080. When he stopped taking Antabuse prior to the Fourth of July festivities, he never took it again. *Id.*

Around 6:00 am on the morning of July 15, 2017, Cole returned home from work in Las Vegas. 11 App. 1180. He, Victoria, Nickole, Little Cole, and Yessenia went out for breakfast at the Pahrump Nugget. 11 App. 1182. Before breakfast, Victoria's family friend Steve Kafton picked Dwight up to spend the day with him. 11 App. 1180. After breakfast, they all went to Goodwill, and then returned home. 11 App. 1184. Little Cole then left with his grandmother to go camping. 11 App. 1186. Victoria and Nickole made plans to have a mother-daughter day; they were going to have lunch and get their nails done. 11 App. 1184-86. Yessenia was going to stay home with Cole because she had been under the weather. 11 App. 1187.

While they were home, Cole started sneaking drinks. 15 App. 1538. His rationale was that he wanted a nightcap to help him sleep when the girls left for their mother-daughter date, since Cole had to drive back to Las Vegas for work that

evening. 15 App. 1539. He filled a pint glass with half vodka and half tap water several times, losing count of his drinks. *Id*. Victoria confronted Cole about drinking, but he denied having consumed any alcohol. 11 App. 1240.

In the early afternoon, Victoria and Nickole left the house for their day together. 11 App. 1188. As they did, three-year-old Yessenia ran out of the house crying and asking to go with them, but Victoria told her she had to stay home. 11 App. 1187. Victoria and Nickole then went to lunch at Subway, grabbed some ice cream at Sonic, and proceeded to their nail appointment. 11 App. 1188.

Somewhere around 5:30pm, Steve dropped Dwight back off at the house. 11 App. 1189. He talked to his mom on the phone a few times, saw that Cole and Yessenia were sleeping in the master bedroom, and sat playing video games for a while. Just before 7:00pm, Cole called Victoria to tell her that something was wrong with Yessenia, and she needed to come home immediately. 11 App. 1197. As Victoria raced home, she received another phone call from Cole, where Cole said he believed Yessenia was dead. 10 App. 1155. Victoria arrived home, ran inside, and found Yessenia on the bed, wet, naked, and covered in bruises. 10 App. 1173. She began to perform CPR, and Nickole and Dwight called 911. *Id*. Pahrump Valley Fire and Rescue arrived at the Manse Road address. 12 App. 1321. They too noticed all the bruising on Yessenia, and Victoria told them that Cole killed her. 12 App. 1327,

13 App. 1371. Yessenia was later pronounced dead at Desert View Hospital. 18 App. 1849.

Dr. Leonardo Roquero performed an autopsy on Yessenia and sent her eyes and brain to specialists to be examined. 16 App. 1646. Yessenia sustained multiple blunt force injuries, abrasions and contusions to her head, neck, torso, and extremities, subcutaneous hemorrhages in multiple areas of her brain, a hemorrhage on the surface of her skull, a focal epidural hemorrhage, as well as subdural and subarachnoid hemorrhaging of the brain, hemorrhaging of the cervical spinal nerve root, and a fractured skull. 16 App. 1654-1730. Additionally, Yessenia suffered retinal and optic nerve sheath hemorrhages and focal orbital hemorrhaging of the eyes. *Id*. The skull fracture was the type of injury caused when someone gets hit by a car or falls off a building; it requires a tremendous amount of force. 17 App. 1763. The cause of death was determined to be multiple blunt force trauma, and the manner of death was determined to be homicide. 16 App. 1648.

Deputies and Detectives from the Nye County Sheriff's Office responded to the Manse Road address shortly after Pahrump Valley Fire and Rescue. 7 App. 923; 9 App. 1039. They made contact with Cole and recognized through their training and experience that he was intoxicated. 9 App. 1047. He had an unknown odor of alcoholic beverage emitting from his person when he spoke; his eyes were glossy; and when he walked, he walked unsteadily. *Id*.

Prior to *Miranda* warnings being administered, Detective Alexandra Fernandes began questioning Cole and asked to see the house. 9 App. 1045. Cole consented and answered her questions to the best of his ability, as he did not remember much. 9 App. 1047-53. Detective Fernandes told Cole that what he did remember, Yessenia going limp while he was drying her post-shower on the bathroom counter, did not make sense because there were no wet footprints on the counter. 9 App. 1050. Cole continued speaking with Detective Fernandes, going so far as to go through his cell phone attempting to piece together a timeline of what happened. 9 App. 1061.

Eventually, Cole was placed in handcuffs and read his *Miranda* rights. 9 App. 1077. He waived those rights, and upon learning that Yessenia had died, he began to sob. 9 App. 1078. He reiterated that he could not remember and did not know what happened, but said he took responsibility because he was the only one home. 15 App. 1543. Cole was arrested, and a blood sample was taken, eventually revealing his blood alcohol content to be 0.101. 3 App. 750; 8 App. 955.

The Nye County Sheriff's Office then obtained a search warrant for the house and searched high and low for anything that could have been used to cause any of the injuries to Yessenia. 13 App. 1426. They photographed and impounded pint glasses, cups, wine bottles, hairbrushes, and various other items. 14 App. 1458. The house, however, was not in disarray. 13 App. 1429. There was no damage to the

walls, showers, or any other furniture. 13 App. 1430. Nothing in the house seemed out of place from where it would normally be. *Id*.

Beginning at about 5:36am on July 16, 2017, Cole was again interviewed, this time by Detectives Alex Cox, Wes Fancher, and Logan Gibbs. 13 App. 1409. Cole maintained that he blacked out from drinking and did not remember anything, but the Detectives continued to poke and prod him in their attempts to induce a confession. 14 App. 1492. Cole said he recalled Yessenia falling out of a camping chair shortly after Victoria and Nickole left, and fighting with her in the shower, as she did not like showers and would attempt to run out. 14 App. 1479, 1493. Cole could only speculate as to how she received the injuries, but still took responsibility because he was the only one home with her. 14 App. 1490, 13 App. 1429. Later that evening, just after 7:00pm, now Captain David Boruchowitz again interviewed Cole and attempted to get a confession. 19 App. 1907. He even went so far as to bring Victoria in the room to confront Cole. 19 App. 1915.

After an eight-day jury trial, ripe with Defense objections and potential Constitutional issues, the jury convicted Cole of the sole count of first degree murder. 21 App. 2116. At sentencing, the District Court heard from all of Yessenia's immediate family, in addition to some of her extended family, over Defense's objection. 21 App. 2118, 22 Spp. 2133. The District Court then sentenced Cole to life in prison without the possibility of parole. 22 App. 2175.

VI. SUMMARY OF THE ARGUMENT

Cole's constitutional rights were violated throughout this case. His right to a fair trial, due process, and a fair and impartial jury was violated by the District Court's denial of his motions to suppress his statements and disqualify the Nye County District Attorney's Office. His right to have every element of the charges against him proven beyond a reasonable doubt was violated by the lack of sufficient evidence to support the first degree murder charge. He was prejudiced by the District Court's abuse of discretion in admitting prior bad acts, autopsy photographs, jail phone calls, and the deposition of Christopher Pullen. Cole's constitutional rights were further violated when the District Court considered impermissible testimony and evidence at the time of sentencing and ordered that Cole serve life in prison without the possibility of parole in violation of the Eighth Amendment. While any one of these issues would warrant reversal, the cumulative effect of these errors also necessitates reversal.

VII. ARGUMENT

A. The District Court Committed Manifest Error When It Allowed Evidence of Mr. Engelson's Prior Bad Acts to be Presented to the Jury

The district court committed manifest error when it permitted the State to introduce two incidents of prior bad acts: (1) evidence of a prior injury to Yessenia's chin sustained when Cole was babysitting her, and (2) a prior statement made by Cole to Yessenia's mother, Victoria, referencing a time when he spanked Yessenia

too hard. Neither incident was relevant to Cole's trial, and admission of these prior bad acts was unduly prejudicial.

NRS 48.045(2) states that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by appellate courts on appeal absent manifest error." *Chavez v. State*, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009) (quoting *Somee v. State*, 124 Nev 434, 446, 187 P.3d 152, 160 (2008)). There is a presumption of inadmissibility that attaches to all prior bad act evidence. *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (citing *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)). To determine admissibility of prior bad acts, the district court must hold a hearing outside the presence of the jury and determine that: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Diomampo v. State*, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008) (quoting *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). If bad act evidence is admitted, the district

court is required to provide the jury with a limiting instruction. *Chavez*, 125 Nev. at 345, 213 P.3d at 488.

In *Chavez*, during trial, one child testified that on one occasion "Chavez 'knocked' him out and slapped his other siblings because Chavez thought they were all spying on him and [the victim] while the two were in the bedroom." *Id*. The *Chavez* Court determined that the child appeared to be a credible witness and that the prior bad act testimony was relevant because it demonstrated the child's fear and reason for not disclosing the sexual abuse. *Id.* Furthermore, the district court did provide the jury with a limiting instruction on the limited use of the bad act testimony; therefore, the district court did not make a manifest error in admitting this testimony. *Id.*

In *Diomampo*, the district court allowed the State to go into a line of questioning with one of the officers which suggested that "methamphetamine users 'normally' support their habit by robbing and burglarizing people and that Diomampo "appeared to be driving while under the influence of a controlled substance." *Diomampo* 124 Nev. at 429, 185 P.3d at 1041. Diomampo, who was convicted of mid-level trafficking in a controlled substance, argued that this evidence of alleged prior bad acts was far more prejudicial than probative, especially coupled with the fact that the court did not provide the jury with a limiting instruction. *Id.* Although this case was reviewed under a plain error analysis because

Diomampo failed to object at the time, the *Diomampo* Court ultimately determined that admitting this evidence was in fact a plain error because "it permitted the jury to draw inferences about Diomampo's character and his conforming propensity to commit other crimes," nor was this testimony actually "prior bad act" testimony that was admissible under an exception of NRS 48.045(2). *Id*. at 431, 185 P.3d at1041-42.

1. Evidence of the Cut to Yessenia's Chin Should Not Have Been Introduced, as It Was More Prejudicial Than Probative and Was Irrelevant to Cole's Trial.

After briefing the issue of bad acts evidence, a *Petrocelli* Hearing was order and subsequently held on August 10 and 11, 2020. 1 App. 9-24; 1 App. 43-51; 1 App. 52-60; 3 App. 518-23; 4 App. 529-639; 5 App. 640-741. The district court made its decision on the bad acts evidence that was presented by the State. 5 App. 735-40. The State was attempting to introduce evidence of an incident where Cole was babysitting Yessenia in early April 2017, and she fell off the counter, resulting in a cut and butterfly band-aid on her chin. 4 App. 592-96; 601-02; 606. The defense objected, pointing out that the State is making the "argument for propensity and calling it something else," where the State noted that "it happened there, just like this case." 5 App. 727-28. Furthermore, the Defense objected because there was not clear and convincing evidence that this injured occurred from Cole because Yessenia herself told Victoria that it was an accident, that she "fell." *Id.* at 728. The district

court allowed evidence of the chin injury to come in at trial, stating that "the similarities of the facts are sufficient for prior bad act to bring into this case. We can offset the prejudice with the jury instruction, of course." *Id.* at 737.

On the third day of Cole's jury trial, the State introduced this bad act evidence to the jury through Victoria's testimony. 10 App. 1142. Before doing so, the Court admonished the jury with the limiting jury instruction as required by Nevada law. *Id.* The State went over the incident with Victoria – that Cole was babysitting Yessenia the day she received the cut to her chin, that she thought he had been drinking that day, that he told her Yessenia had fallen off the counter – pointing out the similarities between that incident and the day Yessenia died. *Id.* at 1142-45.

Unlike *Chavez*, where the Court pointed out the relevance of the bad act testimony from the child, showing the child's fear and reason for not reporting the sexual abuse, here, the district court did not expressly demonstrate the relevance of the testimony. Here, the State failed to articulate an exception pursuant to NRS 48.045(2) as to what the purpose of this evidence was, other than to suggest, as the court noted, "[h]e was rough that time[;] [h]e's rough this time." 5 App. 737.

The district court noted that "the similarities of the facts are sufficient for prior bad act to bring into this case." *Id.* However, that is not what the district court must determine before prior bad act evidence can be admitted. The district court did not establish relevance, other than to note the similarities between the two incidents,

which shows propensity, an inadmissible reason for prior bad act evidence. Although the district court noted that any prejudice could be cured with a jury instruction, the testimony and evidence presented relating to this prior bad act is so unduly prejudicial that it substantially outweighs any probative value the evidence may have, which is minimal because of the lack of relevance.

As such, the district court committed manifest error by admitting any evidence related to Yessenia' chin cut from April 2017, which requires reversal.

2. Mr. Engelson's Statement Regarding an Incident Where He Previously Spanked Yessenia Too Hard Should Not Have Been Admitted as Bad Act Evidence Because It Was Irrelevant and Unduly Prejudicial.

During the *Petrocelli* Hearing on August 10, 2020, in response to the State's questioning, Victoria Schlick testified about a previous incident where Cole informed her that he had spanked Yessenia "too hard, that he popped her a good one." 4 App. 611. Victoria stated that Cole felt bad and that he shouldn't do that again. *Id*. The district court did not make an explicit ruling on this punishment discussion, as it was not one of the specific bad acts that the State was attempting to introduce.

However, on day three of the jury trial, outside of the presence of the jury, counsel discussed with the Court this spanking incident again. 10 App. 1156-71. The State argued that the spanking incident is admissible because it could help the jury determine whether this was an accident or a homicide, relying on the fact that Cole

himself brought the incident up to law enforcement officers when he was being interrogated. *Id.* at 1157. Cole argued that the State is simply attempting to use this incident as inadmissible character evidence, suggesting that "he hit her too hard in the past, he hit her too hard this time." *Id.* at 1159-60. The district court ultimately admitted the spanking incident under the theory that the State is essentially using it is "part of his confession that, '[y]eah, I beat this little girl to death because I get carried away, and I popped her too hard previously.'" *Id.* at 1165. The district court allowed "the 'popped the little girl too hard' for the same reason [the court] allowed it with the chin which is to show absence of mistake with a jury instruction that it's not to be used for the act of conformity, but that he knows what he's doing when he pops her too hard." *Id*. at 1170.

While this statement facially appears to be more relevant to the crime at hand, introduction of this statement is unduly prejudicial and provides minimal probative value. Even though the court noted that this would be allowed in for purposes of showing absence of mistake, that is a thinly veiled attempt, on the State's part, to admit inadmissible character evidence showing Cole's propensity for this behavior. Both the State and the district court used some version of the phrase, "he was rough there; he was rough here." As in *Diomampo*, this evidence permitted the jury to draw inference's about Cole's character and his conforming propensity to commit this crime. After hearing Cole admit that he hit Yessenia too hard once before, no jury

instruction can cure that kind of prejudice. As such, the district court committed manifest error when it allowed this evidence in at trial warranting reversal.

B. The District Court Committed Error When It Denied Mr. Engelson's Motion to Suppress.

The district court committed reversible error when it denied Cole's motion to suppress his statements and allowed the jury to hear evidence of these statements. This court will uphold the district court's decision regarding suppression unless this Court is left with the definite and firm conviction that a mistake has been committed. *State v. McKellips*, 118 Nev. 465, 469, 49 P.3d 655, 658-659 (2002). Findings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence. *Id.* Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. *Id*.

1. *Miranda* Warnings Were Required as Soon as Law Enforcement Made Contact with Cole

Miranda warnings are "required when a suspect is subjected to a custodial interrogation." *Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1021 (2006). A defendant's statements made during a custodial interrogation may be admitted at trial only if *Miranda* rights were administered and validly waived. *Koger v. State*, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001). A defendant is "in custody" under *Miranda* if he or she has been formally arrested or his or her freedom has been restrained to "the degree associated with a formal arrest so that a reasonable person would not feel free to leave." *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315,

323 (1998). Custody is determined by the totality of the circumstances, "including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning." *Id.* at 1081-82, 968 P.2d at 323. An individual is not in custody for *Miranda* purposes if the police are merely asking questions at the scene of the crime or where an individual questioned is merely the focus of a criminal investigation. *Id*. at 1082, 968 P.2d at 323 (internal citations omitted).

> Objective indicia of arrest comprise the following:
>
> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Taylor, 114 Nev. at 1082, 968 P.2d at 323.

Where the defendant is in fact a suspect, questioning which is reasonably likely to elicit incriminating responses is a "custodial interrogation." *State v. Kong*, 883 P.2d 686, 690 (Haw. Ad.App. 1994). *Miranda* warnings need not be given unless and until the questioning agents have probable cause to believe that the person has committed an offense. *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir., cert. *denied,*118 S.Ct. 731 (1997)), (citing *Stansburv v. California*, 511 U.S. 318 (1994)). Doubts as to the presence or absence of custody should be resolved in favor

of providing suspects with the *Miranda* warnings and a waiver thereof before interrogation continues. *United States v. Griffin*, 922 F.2d 1343, 1348, 1356 (8th Cir. 1990).

The first thing Detective Fernandes should have done was read Cole his *Miranda* rights. He was a suspect—the only suspect—from the minute the Nye County Sheriff's Office arrived at the house and began their investigation. His movement was restricted by the law enforcement-dominated scene, he was never told he was free to leave, and he was arrested at the conclusion of questioning. All the objective indicia that it was a custodial interrogation from the very first question was present. So, because Cole was not read his *Miranda* rights at the outset, his statements to law enforcement should have been suppressed by the district court.

2. Cole Did Not Voluntarily, Knowingly, and Intelligently Waive His *Miranda R*ights

A valid waiver of rights under *Miranda* must be voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." *U.S. v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998) (citing *United States v. Pinion*, 800 F.2d 976, 980 (9th Cir. 1986)). A written or oral statement of waiver of the right to remain silent is not invariably necessary. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

Rather, a waiver may be inferred from the actions and words of the person interrogated. *Id.*

The validity of a defendant's waiver of his Fifth Amendment rights after receiving *Miranda* warnings must be determined in each case by examining the facts and circumstances of the case such as the background, conduct, and experience of the defendant. *Anderson v. State*, 109 Nev. 1129, 1133, 865 P.2d 318, 320 (1993) (citing *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981)); *see also Stewart v. State*, 92 Nev. 168, 170-71, 547 P.2d 320, 321 (1976) (mere intoxication will not preclude the admission of a defendant's statements unless it is shown that the intoxication was so severe as to prevent the defendant from understanding his statements or his rights). The State must prove by a preponderance of the evidence that the defendant knowingly and intelligently waived his Fifth Amendment rights. *Scott v. State*, 92 Nev. 552, 554, 554 P.2d 735, 736-37 (1976) (citing *Lego v. Twomey*, 404 U.S. 477, 30 L. Ed. 2d 618, 92 S.Ct. 619 (1974)).

Due to a totality of the circumstances, Cole never knowingly and intelligently waived his *Miranda* rights. During the first interview with Detective Fernandes, Cole was clearly intoxicated: he had an odor of alcohol on his person and his eyes were glossy. 9 App. 1047. The answers he gave Detective Fernandes made no sense and contradicted the evidence found at the scene. Cole clearly did not remember

what happened, nor understand the situation he was in. It was impossible for him to waive his *Miranda* rights knowingly and intelligently.

Cole was then interviewed early the next morning by Detectives Cox, Fancher, and Gibbs, this time while wearing a suicide smock. 15 App. 1534. He would have undoubtedly been suffering withdrawal symptoms in the form of a hangover. Furthermore, Cole was already sleep deprived working the night before and getting very little, if any, sleep during the day. After being in custody for only a few hours, he was hauled off to an interview room. The suicide smock gives the clear indication that he was not mentally stable enough to knowingly and voluntarily waive his *Miranda* rights, since people are only put in the suicide smocks for specific reasons. 15 App. 1534. Cole was still wearing that same smock when he was interviewed some hours later by yet another member of the Nye County Sheriff's Office, Captain Boruchowitz. In all of these interviews, when considering the totality of the circumstances, it was impossible for Cole to knowingly and voluntarily waive his *Miranda* rights, and his statements should have been suppressed.

3. *Miranda* Warnings Were Stale During Cole's Third Interview with Law Enforcement

In analyzing whether the original *Miranda* warnings were stale by the time a defendant was interrogated a second time, we review the totality of the circumstances to determine whether the warnings were properly given and whether

the accused voluntarily waived those rights. *Koger v, State*, 117 Nev. at 141, 17 P.3d at 430. In doing so, we consider

> "the time elapsed between the warnings and the interrogation which elicited the damaging response; whether the warnings and interrogations were conducted in the same or in different locales; whether the warnings and/or initial interrogation were conducted by the same person or persons who conducted the suspect interrogation; the extent to which the statements made by the accused in the later interrogation differ in any substantial respect from those made at the former; the apparent emotional, physical and intellectual state of the accused at the later questioning."

Id. at 142, 17 P.3d at 431 (quoting *State v. Beaulieu*, 116 R.I. 575, 359 A.2d 689, 693 (R.I. 1976), *abrogated on other grounds by State v. Lamoureux*, 623 A.2d 9, 14 (R.I. 1993). We further note that so long as the accused is initially advised of his *Miranda* rights and understands them at the time of questioning, "there is no requirement that the warnings be repeated each time the questioning is commenced." *Taylor v. State*, 96 Nev. 385, 386, 609 P.2d 1238, 1239 (1980).

When Captain Boruchowitz interviewed Cole, he never read him his *Miranda* rights. When Cole was previously read his rights by Detectives Fernandes, Cox, Fancher, and Gibbs, he was either intoxicated, hungover, and/or in a state of mental instability. When Captain Boruchowitz finally got to him, it was imperative that he re-read Cole his *Miranda* rights, as he would have sobered up and his state of mind would have been completely different than it was for the previous recitations. Instead, Captain Boruchowitz blew by Cole's constitutional safeguards,

only asking him if he remembered the rights and what they meant. The *Miranda* warnings had become stale at this point, and because Captain Boruchowitz did not re-read them, Cole's statements should have been suppressed. He respectfully requests that his conviction be reversed.

C. The District Court Abused Its Discretion When It Denied the Motion to Disqualify the Nye County District Attorney's Office.

The district court committed reversible error when it abused its discretion when it denied Cole's motion to disqualify the Nye County District Attorney's Office from this case after Cole's previous counsel started working for the DA's Office. The district court has broad discretion in attorney disqualification matters, and this court will not overturn its decision absent an abuse of that discretion. *Waid v. Eighth Judicial District Court,* 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005).

Nevada Rules of Professional Conduct 1.9(a) provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." A superficial similarity between two matters is not sufficient to warrant disqualification. *Waid*, at 610, 119 P.3d at 1223. The burden of proving two matters are "same or substantially related" rests on the party seeking disqualification and "that party must have evidence to buttress the claim that a conflict exists").

An individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office in extreme cases, but the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case. *State v. Eighth Judicial District Court (Zogheib)*, 130 Nev. 158, 164-165, 321 P.3d 882, 886 (2014).

In early 2020, Cole was still being represented by his original counsel, Brent Percival, who at the time was one of the Nye County Public Defenders. In March of 2020, Cole filed a motion to dismiss Mr. Percival and represent himself pro se, alleging that Mr. Percival had violated the attorney-client relationship in multiple different ways. 1 App. 30-39. Ultimately, the district court removed Mr. Percival from the case, and substituted in trial counsel. 1 App. 40-42.

In the early Fall of 2020, Mr. Percival gave his contractually required 90-days' notice that he would be relinquishing his contract as a Nye County Public Defender to accept employment at the Nye County District Attorney's Office. 6 App. 769. However, he requested that the county commission released him from his contract earlier, as it was his intention to being his employment with the Nye County District Attorney's Office no later than November 1, 2020, just three days before his former client's trial was set to begin. 6 App. 746. This request was encouraged and supported by the elected District Attorney and trial counsel for the State, Chris

Arabia, who spoke up at the county commission meeting on October 6, 2020, saying it was imperative that Mr. Percival be released from his contract as quickly as possible. Id. Mr. Percival began his employment with the District Attorney's Office on October 26, 2020 but was placed on administrative leave when the Appellant filed his motion to disqualify the Nye County District Attorney. 6. App. 769.

There is no question that Mr. Percival had a conflict when he joined the Nye County District Attorney's Office. He could not be involved in prosecuting the case in any way. This conflicted was imputed to the entire Nye County District Attorney's Office when it became unlikely the Appellant would receive a fair trial. Mr. Percival had already been accused of multiple ethical violations related to this case when he put his request in to begin work at the Nye County District Attorney's Office just days before trial was set to commence. Even knowing all this, the District Attorney took no steps to remedy the conflict until being confronted by the Appellant's Motion. There is no way for the accused to receive a fair trial when the is a distinct and real possibility that privileged information is being shared with the prosecutor. Cole respectfully requests that his conviction be reversed.

D. The District Court Abused Its Discretion by Admitting Autopsy Photographs

The district court abused its discretion, committing reversible error, when it improperly admitted graphic photographs, in which unfair prejudice substantially outweighed the probative value. A district court's decision to admit photographs

containing graphic content is reviewed for an abuse of discretion. *Harris v. State*, 432 P.3d 207, 213 (Nev. 2018). If this Court determines there was an abuse of discretion, harmless error analysis is used to determine if reversal is warranted. *Id*. Such error is non-constitutional, and this court will reverse if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 212 (citing *Knipes v. State*, 124 Nev. 927, 935, 192 P.3d 1178 (2008)) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). NRS 48.035(1) provides that evidence, even if it is relevant, may be excluded, "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." While it is generally true that pictures of a victim's injuries are probative despite their graphic content, they are not "*always* admissible." *Harris* 432 P.3d at 210-11. Instead, Nevada law focuses on the balancing test outline in NRS 48.035(1), which excludes evidence on grounds of prejudice, confusion or waste of time. *Id*. Of critical important, the district court must serve as a gatekeeper "by assessing the need for the evidence on a case-by-case basis and excluding it when the benefit it adds is substantially outweighed by the unfair harm it might cause." *Id*.

In *Harris*, this Court found that certain photographs admitted in evidence were "shocking." Specifically, the pictures included "images of charred limbs and burned flesh, dissected tracheas and chest cavities ripped open, and the desecrated

bodies of human beings who clearly died a horrific death." *Id.*, 432 P.3d at 211. The graphic nature of these photos "could easily inflame the passions of a reasonable juror, consciously or subconsciously tempting him or her to evaluate the evidence based on emotion rather than reason – the very definition of unfair prejudice." *Id.* (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (explaining that, in the criminal context, the term "'unfair prejudice'…speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilty on a ground different from proof specific to the offense charged")); see also *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (recognizing that evidence can be unfairly prejudicial when it appeals to the emotional sympathetic tendencies of a jury).

The Court in *Harris* also found that the probative value of the graphic photos was unquestionably minimal, and the State did not need the photographs "to prove a fact important to the case." *Id.*, 432 P.3d at 211. In *Harris*, the problem was exacerbated by the court's failure to perform as gatekeeper because the record did "not evidence a meaningful weighing of the potential for unfair prejudice against each photograph's probative value, which leads us to concluded that the district court did not properly fulfill its role as gatekeeper in this case." *Id.*

If graphic photographs are improperly admitted, the analysis turns to whether its admission survives harmless error scrutiny. *Harris*, 432 P.3d at 212-213. An error

is harmless if this court can determine, beyond a reasonable doubt, that the error did not contribute to the defendant's conviction. *Hernandez v.* State, 124 Nev. 639, 653, 188 P.3d 1126, 1136 (2008). In *Harris*, this Court found that the photos were undoubtedly harmless because of the overwhelming evidence. *Harris*, at 212-213. Also in *Harris*, the risk of prejudice from the graphic photographs was tempered by the district court's warning prior to their publication for the jury. *Id*., 432 P.3d at 212-213.

During trial, Cole objected to five pictures being admitted into evidence on the grounds that they were too graphic in nature and more prejudicial than probative. 16 App. 1630-31. Those pictures depicted Yessenia's internal organs during the autopsy. *Id*. Here, just as in *Harris*, the State did not need the photographs to prove any fact important to the case. Outside the presence of the jury, Dr. Roquero testified that he could explain his findings and diagnosis without the five pictures in question, but the pictures would "give more appreciation of the words and the statements that I report." 16 App. 1637. Later, he again later says he can explain the injuries without the pictures. 16 App. 1638. There was absolutely no probative value to the pictures.

Just like in *Harris*, there was not a meaningful weighing of the potential for unfair prejudice in this case. The district court based its decision only on the fact that the pictures were relevant and would help Dr. Roquero explain the injuries. 16 App. 1639-40. Furthermore, in contrast to *Harris*, the district court offered no warning or

admonishment to the jury prior to the publication of the pictures. The district court took no steps to temper the risk of unfair prejudice from the photos. 16 App. 1686. The district court did not properly fulfill its role as gatekeeper in a scenario where the admitted photographs did nothing but unfairly prejudice the Appellant. There is no way to determine beyond a reasonable doubt that this error did not contribute to the Appellant's conviction, so the error was not harmless. Cole respectfully request's that his conviction be reversed.

E. The District Court Committed Plain Error When It Allowed Evidence of Mr. Engelson's Custody Status to be Presented to the Jury in the Form of Recorded Jail Calls.

The district court erroneously admitted jail calls at trial, thereby informing the jury of Cole's custody status. This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. *Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009) (citing *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006)). However, if a defendant fails to object to the admission of evidence, we review the district court's decision for plain error. *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

The United States Supreme Court has held that a defendant is innocent until proven guilty, meaning that "a defendant is entitled to not only the presumption of innocence, but also the indicia of innocence," including verbal references of custody status. *Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (citing

Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. Baugh*, 174 Mont. 456, 571 P.2d 779, 782 (1977)). Furthermore, this Court has previously determined that informing a jury "that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom." *Haywood v. State*, 107 Nev. at 288, 809 P.2d at 1273. The Court did note that "[w]hen the evidence of guilty is overwhelming, even a constitutional error can be comparatively insignificant." *Id.* (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967)).

In *Haywood*, during trial the prosecutor referenced the fact that Haywood had been held in custody between the time of his arrest and trial. *Haywood* 107 Nev. at 287, 809 P.2d at 1273. The Court determined that was an error, but it was a harmless error in light of the overwhelming evidence of guilt. *Id.* Haywood was on trial for stealing a purse from an elderly woman in a parking lot, and several independent witnesses observed the incident, identifying Haywood as the perpetrator. *Id.* at 286-87, 1272. The Court determined that the prosecutor's error was harmless because of the overwhelming evidence of guilty, i.e., the five independent witnesses that positively identified Haywood and two other witnesses who gave matching descriptions of Haywood. *Id*. at 288, 1273.

Unlike in *Haywood*, where multiple witnesses observed Haywood committing the crime, here, no independent witnesses observed Cole commit the crime he was

on trial for. Although Cole was the only one who was home with Yessenia, the question at trial was whether Cole actually caused Yessenia's death. No one watched Cole abuse Yessenia causing her death. It was up to the jury to determine whether Mr. Engelson was innocent or guilty.

During Cole's jury trial, the State introduced a number of jail calls that Cole made while in custody. 17 App 1822-29. When identifying State's Proposed Exhibit 48A, the witness explains that it is a CD of "jail excerpts calls that [she] created." *Id.* at 1822. The State went on to ask about the accuracy of a transcript of these calls, "So the best you know, it's 100 percent what's written down there is what we would hear if we played the jail call?" *Id.* at 1824. By referencing these calls as "jail calls," the State essentially informed the jury that Cole had been sitting in custody since the incident occurred. Given this information, the jury could draw an inference of guilt, similar to as if Cole had been brought into the courtroom in jail attire and shackles.

Although this Court has noted that this clear error will be harmless in the face of overwhelming guilt, here, the evidence of guilt is not overwhelming because causation was still at issue. As such, the district court committed plain error when allowing this evidence to come in at trial. Furthermore, this error was not harmless, and therefore, should warrant a new trial.

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F. The District Court Deprived Cole of a Fair Trial by Improper Admission of the Deposition of Christopher Pullen

The district court committed reversible error by admitting the deposition of Christopher Pullen, who was not an unavailable witness, without a written motion or sworn affidavit.

1. Christopher Pullen Was Not Unavailable as a Witness and the State Did Not Exercise Reasonable Diligence

Decisions regarding the admissibility of evidence that implicate constitutional rights are mixed questions of law and fact subject to de novo review. *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008). Previous testimony of a witness may be used at trial on that matter under NRS 171.198 and NRS 51.325 if three preconditions exist: first, that the defendant was represented by counsel at the previous hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." *Drummond v. State*, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970).

A witness may be unavailable if he or she is "absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance. NRS 51.055(1)(d). *See Funches v. State*, 133 Nev. 316, 922-23, 944 P.2d 775, 779 (1997) (rejecting a strict construction of NRS 171.198's list of conditions that create unavailability and expanding the definition to include NRS

51.055 and other general provisions of the evidence code when determining a witness's unavailability.)

In determining whether the proponent of former testimony has met its burden of proving that a witness is constitutionally unavailable, the touchstone of the analysis if the reasonableness of the efforts. *Hernandez v. State*, 124 Nev. at 651, 188 P.3d at 1134. This court has held that the State's efforts were reasonable when the State made an effort to obtain the witness in question and it was unlikely that additional efforts would have led to securing the witness for trial. *Id.* at 651, 188 P.3d at 1135; *Quillen v. State*, 112 Nev. 1369, 1376, 929 P.2d 893, 898 (1996). This Court shall consider the totality of the circumstances when determining whether a party made a reasonable effort to procure a witness's attendance. *Id.* at 650-52, 188 P.3d at 1134-35 (holding that the State did not make a good faith effort when it failed to (1) provide evidence regarding its attempt to obtain the witness's attendance after failing to appear on the morning of trial; (2) make an effort to communicate with an adult in the witness's household; (3) provide information that a family emergency existed, which prevented the witness from appearing; (4) advise the district court how long the witness would be unavailable; and (5) seek a continuance to obtain the witness).

We have interpreted the requirement that the State "exercise reasonable diligence" to mean that the State must make reasonable efforts to procure a witness's

attendance at trial before that witness may be declared unavailable. *Power v. State*, 102 Nev. 381, 383-84, 824 P.2d 211, 212-13 (1986) (citing *Ohio v. Roberts*, 448 U.S. 56, 74-75, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *abrogated on other grounds by Crawford v. State*, 541 U.S. 36, 60, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

Christopher Pullen was not legally unavailable as a witness pursuant to NRS 51.055(1)(d). Specifically, he was not outside the jurisdiction of the court to compel his appearance at trial. By all information and belief, Mr. Pullen was still in the state of Nevada, in Las Vegas, Clark County. That is well within the jurisdiction of the Court to compel his appearance, as evidenced by the fact that the State procured a material witness warrant to forcibly bring him to court.

The State's efforts to procure Mr. Pullen's attendance at trial were not reasonable given the information available and background of Mr. Pullen. At the time of the deposition, Mr. Pullen was incarcerated at the Nevada Department of Corrections, with an expected released date in August of 2020. The Appellant asked Mr. Pullen what address he would be paroling to, but Mr. Pullen refused to answer. 1 App. 114. The State did not get that information when they had Mr. Pullen present in person. Instead, as everyone anticipated, Mr. Pullen was released from prison and in the wind.

The State argued that they received an oral promise to appear from Mr. Pullen, but there is no information on the record as to when that was or the circumstances surrounding it. 13 App. 1381. The State also argued that they sent a subpoena to the Nevada Department of Corrections, but there was no proof presented that Mr. Pullen ever received that subpoena. Id. The State claims they did everything they could to locate Mr. Pullen, but they did not contact the state agency that had the most recent contact with Mr. Pullen: the Nevada Department of Corrections. 13 App. 1387. The reasonable thing to do would have been to reach out to NDOC, and the Department of Parole and Probation, and find out what address Mr. Pullen paroled to, and whether he provided a telephone number. Instead, the State was content taking shots in the dark.

Because Christopher Pullen was not unavailable as a witness and the State did not take reasonable efforts and exercise reasonable diligence to procure Mr. Pullen's appearance at trial, the District Court erred in admitted the deposition testimony of Christopher Pullen.

2. The State Did Not Show Good Cause for Making an Untimely Motion

NRS 174.125 requires motions in the district court to be made at least 15 days before the scheduled trial date, unless the trial court finds good cause to hear the motion closer to trial. A party making a motion fewer than 15 days before trial must submit an affidavit to the court to establish good cause for making the untimely

motion. NRS 174.125(4). Whether there is good cause to make an untimely motion for admission of prior hearing testimony requires the district court to make a factual finding that the State exercised reasonable diligence before NRS 174.125's pretrial motion deadline. *Grant v. State*, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001). The procedural safeguards addressed in *Bustos v. Sheriff*, 87 Nev. 622, 491 P.2d 1279 (1971), apply equally to this situation and require that such a motion be supported by an affidavit. *Hernandez*, at 648-49, 188 P.3d at 1133. Therefore, to establish good cause for making an untimely motion to admit prior hearing testimony, the State must provide an affidavit or sworn testimony regarding its efforts to procure the witness prior to trial. *Id.*

The District Court never made a factual finding that the State exercised reasonable diligence to procure Christopher Pullen's attendance at trial. The District Court never made any findings at all, simply stating "Your motion is granted" at the end of argument. 13 App. 1389. The State was required, pursuant to *Bustos* and *Hernandez* to support their untimely motion with an affidavit or sworn testimony. Neither was done, and the District Court never requested either. These procedural safeguards are in place to protect the rights of the accused. By skirting them, the State gave itself an unfair and unjust advantage at trial, and the District Court failed in its role as gatekeeper.

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3. The Improper Admission of the Deposition Testimony Was Not Harmless

This Court reviews a district court's decision to admit prior testimony for harmless error. *Quillen*, 112 Nev. At 1376, 929 P.2d at 898. In considering whether a Confrontation Clause violation is harmless, this court looks to "the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, and, of course, the overall strength of the prosecutor's case." *Power*, 102 Nev. At 384, 724 P.2d at 213. After considering those factors, if this court can determine, beyond a reasonable doubt, that the erroneous admission of the prior testimony did not contribute to the defendant's conviction, then the error was harmless. *Chapman v. California*, 386 U.S. 18, 25-26, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Christopher Pullen was the only witness to testify that Cole, allegedly, recalled spanking Yessenia, causing her to fall and hit her head. 1 App. 75. Pullen is also the only witness to testify that Cole, allegedly, recalled Yessenia climbing on a dresser. 1 App. 76. And in response, Cole spanked the child, causing her to fall and hit her head. Id. The fatal injury that killed Yessenia was whatever injury caused her fractured skull and accompanying head injuries. There is no testimony anywhere else in any of the proceedings that Cole cause, or even recalled, any head injuries to Yessenia.

Pullen is also the only witness to testify that Cole, allegedly, recalled that Yessenia fell on a cup while she was in the shower. 1 App. 75-76. Thus, Pullen's testimony was not cumulative; there was no corroborating evidence to anything Pullen testified to. It cannot be shown beyond a reasonable doubt that Pullen's testimony did not contribute to the Appellant's conviction. So, the improper admission of the deposition testimony was not harmless, and his conviction must be reversed.

G. There Is Insufficient Evidence to Support the First Degree Murder Conviction

Cole's state and federal constitutional rights to due process of law, equal protection, and right to be convicted only upon evidence establishing every element of the offenses beyond a reasonable doubt, were violated because there is insufficient evidence to support the conviction for first degree murder. U.S. Const. amend. I, V, VI, XIV; Nevada Cont. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In reviewing an insufficiency of the evidence claim, a court must determine whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Thomson v. State*, 125 Nev. 807, 816, 221 P.3d 708, 714-15 (2009); *Newson v. State*, 462 P.3d 708 (Nev. 2020). A conviction that fails to meet this standard violated due process. *Mikes v. Borg*, 947 F.2d 353, 356 (9th Cir. 1991).

Throughout the trial, the jury heard from dozens of witnesses, including multiple expert witnesses on behalf of the State, and not one of them was able to articulate what happened inside the house that caused Yessenia's death. While her body was riddled with bruising, the majority of the injuries she suffered did not contribute to her death. Yessenia's death was due to one major, traumatic event that caused the skull fracture and other severe head injuries.

Dr. Roquero testified that those injuries are commonly scene when someone is hit by a car, or falls off a building. 17 App. 1763. They are caused by an event that produces a massive amount of force. Id. But despite that, there was no evidence that any event with the force of a car crash took place inside the house. There was no damage to the walls, floor, or furniture, and the house was not in disarray compared to how it normally appeared. 13 App. 1429. There were no bruises, scrapes, or fractures on Cole's hands, or anywhere on his body, to suggest he delivered the fatal blow to Yessenia. There was insufficient evidence presented, such that "any rational trier of fact," even "when viewing the evidence in a light msot favorable to the prosecution," could "find the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Cole respectfully requests that his conviction for first degree murder be reversed.

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H. The District Court Erred When It Permitted Non-Victims to Provide Victim Impact Testimony at Sentencing.

The district court committed reversible error on two separate occasions in allowing testimony from non-victim witnesses during the sentencing hearing. First, the district court committed plain error when it allowed a victim to read into the record a statement written by the victim's aunt, Amber Schlick. Second, the District Court abused its discretion when it allowed the victim's uncle, Ryan Monroe, to speak at sentencing over Defense Counsel's objection. The non-victim testimony permitted by the district court affected Cole's substantial rights and caused both actual prejudice and a miscarriage of justice.

According to Nevada Revised Statute 176.015(3), "the court shall afford the victim an opportunity to: (a) Appear personally, by counsel or by personal representative and (b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." "'Victim' includes: (1) A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)." NRS 176.015(5)(d). Finally, a relative of a person means: "(1) A spouse, parent, grandparent or stepparent; (2) A natural born child, stepchild or adopted child; (3) A grandchild, brother, sister, half brother or half sister; or (4) A parent of a spouse." NRS 176.015(5)(b).

When an appellant failed to object to certain victim impact testimony at the time of sentencing, this Court reviews the issue under a plain error analysis, as opposed to an abuse of discretion standard. *Dieudonne v. State*, 127 Nev. 1, 10, 245 P.3d 1202, 1208 (2011); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); *see also Vega v. State*, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010). Plain error review requires an appellant to demonstrate that the error affected his substantial rights "by causing actual prejudice or a miscarriage of justice." *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. If an appellant raises an objection at trial, the district court's determination will not be disturbed on appeal, absent an abuse of discretion, due to the wide discretion a sentencing judge is allowed in imposing a sentence. *Randall v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993); *see also Deveroux v. State*, 96 Nev. 388, 610 P.2d 722 (1980). If the record demonstrates prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, the district court has abused its discretion. *See Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976).

In *Aparicio v. State*, the Nevada Court of Appeals determined that the district court erred when it considered approximately 45 impact letters from individuals that were not victims under NRS 176.015(5)(b), (d). 478 P.3d 410, 3 (Nev. App. 2020). The *Aparicio* Court confirmed that, for purposes of sentencing, a victim is "'[a] person who has been injured or killed as a *direct* result of the commission of a crime,'

as well as the spouses, parents, grandparents, siblings, or children of such a person." *Id*. at 2. Of the approximately 50 impact letters that the prosecution submitted to the district court, fewer than five were from actual "victims." *Id*. at 3. Many were from cousins, aunts, uncles, friends, colleagues or former colleagues. *Id.* The *Aparicio* Court noted that NRS 176.015(6) provides that NRS 176.015, in general, "does not restrict the authority of the court to consider *any reliable and relevant evidence* at the time of sentencing." *Id.* (citing NRS 176.015(6)) (emphasis added). Ultimately, the Court determined that while the district court's consideration of the non-victim letters was not by itself a reversible error, the district court did err "because it treated the *non*-victim impact letters the same as victim impact letters, and because the non-victim impact letters were, in part, neither relevant nor reliable." *Id*.

According to the *Aparicio* Court, for non-victim letters to be admissible, although not admissible as victim impact letters, the letters need to be reliable and relevant to fall within NRS 176.015(6)'s purview. *Id.* The Court determined that many of the non-victim letters submitted were not relevant, as they referenced the effect of the crime on non-victims rather than actual victims of the crime. *Id.* Furthermore, many of the non-victim letters included specific sentencing requests, i.e., that a certain sentence be imposed. *Id.* A non-victim's opinion as to specific punishment is irrelevant, as it is not permitted under NRS 176.015(3)(b). *Id*.; *see also Randell v. State*, 109 Nev. 5, 8 846 P.2d 278, 280 (1993). The *Aparicio* Court

concluded that non-victims' opinions on sentencing are irrelevant. *Id. referencing State v. Brumwell*, 249 P.3d 965, 972 (Or. 2011) ("'Evidence is relevant and thus admissible in the penalty phase if the evidence increases or decreased, even slightly, the probability of the existence of facts material to those penalty-phase questions.'").

The Court then went on the consider whether any of the non-victim letters provided by the State were reliable. Admittedly, hearsay evidence is admissible in the penalty phase, "so long as the evidence has sufficient indicia of reliability to support its probable accuracy." *Id.*; (citing 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2266 (2016)). However, no evidence was presented to show that these impact letters were reliable in any way. *Id.* The State did not attempt to establish the reliability of any one letter, rather just presenting the letters as a group with no context as to the veracity of these letters. *Id.* Therefore, the district court erred in considering the non-victim letters because their reliability had never been established. *Id.*

1. The District Court Committed Plain Error When It Allowed Dwight Camp to Read a Letter Allegedly Written by Yessenia's Aunt, Amber Schlick, a Non-Victim.

During Cole's first sentencing hearing held on February 1, 2021, Yessenia's older brother Dwight Camp took the stand to testify. 21 App. 2126. Dwight carried with him two different letters to the stand, one from his and Yessenia's grandmother, Mary Schlick, and one from their aunt, Amber Schlick. *Id.* Cole contends that the

aunt is not a victim for purposes of sentencing. Notably, Cole did not object to Dwight reading the letter at this time, so this Court would review this admission for plain error. *Id.* at 2126-27.

Indeed, under the analysis the Nevada Court of Appeals relied upon in *Aparicio*, any testimony of Amber Schlick should be treated as *non*-victim testimony. Much like in *Aparicio*, where the State presented letters that were written by extended family such as cousins, aunts, and uncles, here, a letter allegedly written by Yessenia's aunt was presented as a victim impact letter. *Id.* at 2127. As the *Aparicio* Court did, this Court should determine that any testimony presented on behalf of the aunt, Amber Schlick, should be considered non-victim testimony.

Although NRS 176.015(6) gives the district court discretion to "consider any reliable and relevant evidence at the time of sentencing," the testimony should not have been admitted because it is neither reliable nor relevant. A physical copy of this impact letter was not provided to Cole nor the district court. Dwight brought a piece of paper with him to the stand and read it into the record. None of the Parties were able to examine this letter to establish any veracity, to determine if there was a signature purported to be from Amber Schlick, or to determine if it was handwritten or typed out. The State did not ask any questions of Dwight to establish veracity. *Id.* at 2126-27.

Additionally, the statement read into the record by Dwight was not relevant to sentencing. Similar to *Aparicio*, Amber's letter referenced the crime's impact on her, a non-victim, and the family, as a whole. Amber's sentencing desires are certainly irrelevant under *Aparicio*. She states that "the defendant should get maximum possible sentence." *Id.* at 2127. As a non-victim, Amber's opinion on the matter of sentencing is simply irrelevant, as it does not increase or decrease, even the slightest, the probability of any additional facts material to the sentencing phase.

The district court committed plain error in allowing this statement to be read into the record at sentencing because the error affected Cole's substantial rights "by causing actual prejudice or a miscarriage of justice."

2. The District Court Abused Its Discretion When It Permitted Yessenia's Uncle, Ryan Monroe, a Non-Victim, to Testify at Sentencing.

On March 8, 2021, Cole appeared for his continued sentencing hearing, and the State called Ryan Monroe, Yessenia's uncle on her father's side, as a witness to provide victim impact testimony. 22 App. 2155. Cole objected to Ryan being called as a witness, as he is not being victim under NRS 176.015(5). *Id*. at 2156. After a short recess, Cole renewed his objection stating that the testimony of an uncle was not contemplated in NRS 176.015. *Id.* at 2158. The district court ultimate allowed Mr. Monroe to testify, citing the court's discretion. *Id.* at 2159-60.

Under *Aparicio*, Ryan Monroe, as Yessenia's uncle, is not a victim. Despite that, the district court is still permitted to consider his statement if it is "reliable and relevant evidence." NRS 176.015(6). The State and the district court suggest that Ryan should speak as the representative of his brother, Yancey Camp, Yessenia's father, who passed away from cancer approximately one year after Yessenia's death. 22 App. 2157-60. Cole objected to the State's reliance on NRS 176.015(6), stating that Mr. Monroe's testimony was not the type of evidence that was contemplated in that statute. *Id.* at 2158. Indeed, the *Aparicio* Court confirmed its position that "[e]vidence is relevant and thus admissible in the penalty phased if the evidence increases or decreases, even slightly, the probability of the existence of facts material to those penalty-phase questions." *Aparicio*, 478 P.3d at 3 *referencing State v. Brumwell*, 249 P.3d 965, 972 (Or. 2011).

Mr. Monroe's testimony is not relevant to sentencing, as it does not present any evidence relevant to the penalty phase, nor is it reliable. Although Mr. Monroe attempted to craft his statement so that he is speaking on behalf of his brother, Mr. Monroe's statements referred to the effects that this crime had on him, a non-victim, personally and the community as a whole. 22 App. 2162-64. Furthermore, Ryan's statement included specific recommendations as to punishment – again, an opinion that is irrelevant when presented by a non-victim. As in *Aparicio,* the non-victim statement of Mr. Monroe is irrelevant and should have been excluded. Mr. Monroe's

statement is not reliable as to any opinions or statements that may have been attributed to Yancey Camp. Any conversations that Ryan may have had with Yancey Camp about the incident happened approximately three to four years prior. Cole had no way to confirm the veracity of any of Ryan's statements that may have been attributed to Yancey Camp.

The district court abused its discretion by allowing this testimony in over Cole's objections. As a non-victim, Mr. Monroe added vivid, emotional testimony on a topic that he was not entitled to speak on. Because he is a non-victim, how this crime directly affected him is irrelevant. The district court abused its discretion in letting Mr. Monroe testify about the wails of anguish that he heard from an actual victim or the images that pop into his head every time he showers because of the evidence that he witnessed at the trial. 22 App. 2162-63. These statements have no evidentiary value as it relates to the sentencing phase of Cole's case. As such, allowing them in demonstrated undue prejudice.

I. The District Court Abused Its Discretion When It Sentenced Cole to Life in Prison without the Possibility of Parole

The district court abused its discretion when it sentenced Cole to life in prison without the possibility of parole for an offender with limited and state criminal history and other substantial mitigating factors. Appellant recognizes that "the sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion. *Houk v. State*, 103

Nev. 659, 664, 747 P.2d 1376, 1379 (1987). *See also Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009).

Traditionally, the Nevada Supreme Court refrains from interfering with the sentence imposed so long as the record does not demonstrate prejudice resulting from consideration of information founded on facts supported only by impalpable or highly suspect evidence. *Id.*; *Allred v. State*, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004). Cole submits, however, that this authority should be overruled and that the appellate courts should review sentencing determination for an abuse of discretion, even in the absence of consideration of impalpable or highly suspect evidence.

The district court did not articulate findings in support of the sentence it imposed; it did not discuss the aggravating factors and compare them to the mitigating factors. 22 App. 2170-2174. The Nevada Supreme Court has held that a lower court is not required to articulate findings before imposing lesser sentences. *See Campbell v. Eighth Judicial District Court*, 114 Nev. 410, 413, 957 P.2d 1141, 1142 (1998). Cole urges this Court to impose this requirement because it is consistent with other rulings in which this Court has found that articulation of facts is necessary for appellate review, it is consistent with other courts addressing this issue, and *Campbell* should be reconsidered in light of subsequent authority which undermines its premise.

In *Campbell*, 114 Nev. At 413, 957 P.2d at 1142, the Nevada Supreme Court addressed a defendant's argument that "in order for counsel to effectively represent their clients and responsibly address the court, the district court must articulate its reasons for imposing a sentence." The defendant in that case relied upon *People v. Watkins*, 613 P.2d 633 (Colo. 1980), and *United States v. Brown*, 479 F.2d 1170 (2nd Cir. 1973), as support. *Id.* The Nevada Supreme Court found *Watkins* inapposite because the rule articulated therein pertained to felony convictions, as opposed to the misdemeanor conviction at issue in *Campbell*. *Id.* Following that reasoning to its logical conclusion, *Campbell* should not apply to this case because it concerned a misdemeanor conviction, rather than the serious felony at issue here. The Nevada Supreme Court found this distinction to be important in *Campbell*.

In *Campbell*, the Nevada Supreme Court declined to follow *Brown* and require that a district court articulate its reasons for imposing a sentence in this state because "this action is best left to the legislature." *Id.* More recently, however, the Court has recognized that such a legislative requirement would violate the separation-of-powers doctrine. In *Mendoza-Lobos v. State*, 125 Nev. 634, 218 P.3d 501 (2009), the Nevada Supreme Court considered a recent amendment to the deadly weapon enhancement statute, NRS 193.165(1), that required the district court to consider enumerated factors and state on the record that it had considered the factors in determining the length of the enhancement sentence. *Id.* At 636, 218 P.3d at 502.

The Court found that the amended statute violated the separation of powers doctrine to the extent that it requires the courts to state on the record that the enumerated factors have been considered and to make specific findings in that respect. *Id.* At 637, 639, 641, 218 P.3d at 502, 504, 505. *Campbell* should be reconsidered in light of the Court's recognition that it is a violation of the separation of powers doctrine for the legislature to act in this area. In *Mendoza-Lobos*, the Court elected to abide by the legislatures mandate "because it serves a laudable legislative goal with respect to the length of the enhancement sentences and facilitates appellate review." *Id.* At 637, 641, 218 P.3d at 402. So too here, the appellate courts should mandate that the district court articulate reasons for its sentencing decision to serve the goals of assuring that sentences are fair and reasonable, and the facilitate appellate review.

Other courts recognize the importance of requiring that a sentencing court articulate findings to support a sentence. For example, federal court judges are required to state in open court the reasons justifying the sentence imposed. *See* 18 U.S.C. section 3553(c); *Rita v. United States*, 551 U.S. 338, 356 (2007). *See also Wright v. State*, 670 P.2d 1090 (Wyo. 1983), in which the Wyoming Supreme Court reaffirmed its strong recommendations that a trial judge provide an explanation for the reasons for denial of probation.

In *People v. Watkins*, 613 P.2d 633 (Colo. 1988), the Colorado Supreme Court examined this issue at length. The Court found that, "the failure of a sentencing judge

to state on the record the basic reasons for the selection of a particular sentence creates a burdensome obstacle to effective and meaningful appellate review of sentences." *Id.* at 636 (citations omitted). "If appellate review of felony sentences is to satisfy its state objectives, it requires that the sentencing judge state on the record the basic reasons for imposing the sentence." *Id*. (citing ABA Standards Relating to Appellate Review of Sentences section 2.3, Commentary at 47 (1968)). "This requirement is particularly essential in those cases where the sentence involves a very restrictive form of deprivation, such as a term of confinement in a correctional facility." *Id.* In addition to aiding appellate review, the requirement of a sentencing explanation for felony sentences "produces other benefits of comparable significance to the criminal justice system. Such explanation will serve as 'a powerful safeguard against rash and arbitrary decisions' at this crucial stage of the criminal process when the defendant's liberty is at stake.'" *Id*. at 168-69 (quoting *United States v. Brown,* 479 F.2d 1170, 1776 (2nd Cir. 1973)). Other benefits of requiring an explanation include fostering consistency and fairness, minimizing the risk that the judge might have acted on inaccurate and unreliable information, assisting the defendant in making an informed decision about whether to appeal, and providing guidance to correctional authorities. *Id.* (citations omitted). Ultimately, the Colorado Supreme Court concluded that:

> "We require that hereafter in felony convictions involving the imposition of a sentence to a correctional facility the sentencing judge

> state on the record the basic reasons for the imposition of sentence. The statement of reasons need not be lengthy, but should include the primary factual considerations bearing on the judge's sentencing decision.
>
> *Id.*

Likewise, in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), Justice Douglas, in his concurring opinion, warned against the dangers of unfettered sentencing discretion without oversight. He characterized such unfettered discretion as being "...pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments. *Id.*, at 408 U.S., at 256-57.

The Nevada Supreme Court's decisions, particularly those issued after the 1998 opinion in *Campbell*, in other contexts, have consistently recognized the need for a record of the lower court's reasoning in order to provide meaningful appellate review. In *Knipes v. State*, 124 Nev. 927, 932-33, 192 P.3d 1178, 1181-82 (2008), the Court noted the trend of specific findings requirements, and held that hearings to determine the admissibility of juror questions should be held on the record so as to ensure meaningful appellate review and facilitate the efficient administration of justice. In *Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005), the Court held that district courts should clearly set forth the factual findings relied upon in resolving suppression motions. This same result was reached in *State v. Ruscetta*, 123 Nev. 299, 302, 305, 163 P.3d 451, 453, 455 (2007): "Because the court failed to

make findings with respect to the nature of the search . . . the record is insufficient to effectively review the district court's decision granting the motion to suppress. Although certain facts may be inferred from the district court's ruling, we decline to speculate about the factual inferences drawn by the district court." (Internal quotations and citations omitted). See also *State v. Rincon*, 122 Nev. 1170, 147 P.3d 233 (2006) (same).

Additional case authority by the Nevada Supreme Court supports a ruling that district courts must articulate their findings so that this Court may provide meaningful appellate review of those decisions. *See e.g. Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 540 n.2, 216 P.3d 779, 788 n.2 (2009) (district court must make findings of reasonableness on awards of attorney's fees, and failure to make any findings on this issue would constitute an abuse of discretion); *Lioce v. Cohen*, 124 Nev. 1, 19-20, 174 P.3d 970, 982 (2008) ("[W]hen deciding a motion for a new trial [based upon a claim of attorney misconduct in a civil case], the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its applications of the [applicable standards] to the facts of the case before it. In doing so, the court enables our review of its exercise of discretion in denying or granting a motion for a new trial."); *Boonsang Jitnan v. Oliver*, 254 P.3d 623, 629 (Nev. 2011) ("Deferential review is not no review and does not automatically mandate adherence

to the district court's decision. Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation.") (internal quotations and citations omitted); *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009) (concluding that the district court's decisions concerning child support and modification of a child custody arrangement was an abuse of discretion because the district court did not make findings of fact supporting its decisions, and noting that specific findings of fact are crucial for appellate review). See also *Byford v. State*, 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007) (noting requirement that a district court enter findings of fact and conclusions of law in support of its decision on a habeas corpus petition).

Mr. Engelson asks that this Court require a sentencing judge to articulate reasons supporting the imposition of a term of imprisonment. He recognizes that this would be a new rule, so a remand would be appropriate so as to give the district court the opportunity to provide these findings.

In the alternative, this Court should find that the sentence imposed here was unreasonable and an abuse of discretion. As the United States Supreme Court recognized in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), individualized sentencing in criminal cases has long been the accepted practice in this country. *Id.* at 438 U.S. at 602. And where sentencing discretion is granted, it is

essential that a judge must possess the fullest information possible regarding the defendant's life and characteristics. *Id.* at 603. This is in order to facilitate the sentencing court's consideration of all mitigating and aggravating circumstances. *Id.* Such mitigating evidence is crucial to an individualized sentencing decision. Evidence in mitigation can include a defendant's impoverished background, his or her upbringing, any childhood abuse, the defendant's intelligence, mental health disorders, his or her non-violent nature, the potential for rehabilitation, etc. *Robinson v Schriro*, 595 F.3d 1086 (9th Cir. 2010). Types of evidence in mitigation are virtually limitless and there is no need to establish a causal connection between the crime committed and the evidence in mitigation prior to the sentencing court's consideration of such mitigating evidence. *Id.* at 1112.

Further, as stated above, without an adequate record, the danger of prejudice insinuating itself into the proceedings is ". . . an ingredient not compatible with the idea of equal protection of the laws . . .". *Furman v. Georgia*, 408 U.S. 238, 257, 92 S.Ct. 2726, 2735, 33 L.Ed.2d 346 (1972).

The record here is clear that the district court did not discuss or even seem to consider any mitigating circumstances. In its soliloquy, the district court discussed the offense at hand, and the performance of defense counsel, but never once touched upon the Defendant's background, disorders, likelihood of reoffending, or any other mitigating circumstance. The sentence imposed of life in prison without the

possibility of parole was an unreasonable abuse of discretion that lacks an adequate record stating the rationale behind said decision.

J. Cumulative Error Warrants a New Trial

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Butler v. State*, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). This Court will reverse a conviction "if the cumulative effect of these errors deprived appellant of his right to a fair trial." *Gonzalez v. State*, 131 Nev. 991, 994, 366 P.3d 680, 682 (2015).

"The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle*, 505 F.3d at 927 (citing *Chambers*, 410 U.S. at 290); *Gonzalez*, 366 P.3d at 688. The record here established that the cumulative error is warranted. *See also DeChant v. State*, 166 Nev. 918, 927, 10

P.3d 108, 113 (2000). ("If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction."). "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id*. (internal quotations omitted).

Here, the errors directly affected Cole's conviction for first degree murder. They prevented him from having a fair and impartial jury, prevented him from raising issues on appeal, prevented him from only having relevant evidence admitted against him, inflamed the jury and denied him to ability to confront a witness in front of the jury by the improper admission of evidence, and prevented fair proceedings by denying pretrial motions. The crime Cole was convicted of was grave. Therefore, the cumulative effect of all these errors denied him a fair trial.

Whether or not any individual error requires the vacation of the judgment, the totality of these errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable that, that cumulative effect of these numerous constitutional errors was harmless. The totality of these violations substantially and injuriously affected the fairness of the proceedings and prejudiced Cole. He requests that this Court vacate his judgment and remand for a new trial.

/ / /

/ / /

VIII. CONCLUSION

Cole Engelson respectfully submits for the reasons stated herein, that his judgement of conviction be reversed based upon insufficient evidence, or that in the alternative, this case be remanded for a new trial.

DATED this 23rd day of July, 2021.

Respectfully Submitted,

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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 Microsoft Word 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)(A)(ii). The relevant portions of the brief are 13,786 words.

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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 his 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 23rd day of July, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 23rd day of July, 2021, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

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