IN THE SUPREME COURT OF THE STATE OF NEVADA

COLE DUANE ENGELSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 82691

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 CLARIFICATION

In addition to attorneys Ronni Boskovich, Daniel Martinez, and Brent Percival, attorneys Harry Gensler and David Rickert have also represented Cole Engelson in this matter (in its earliest stages).

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STATEMENT OF CASE

From a procedural perspective, the posture of the prosecution as set forth by the Appellant Cole Engelson ("Engelson") is sufficient and not in need of further elaboration.

STATEMENT OF THE FACTS

The State believes that appellant Cole Engelson's ("Engelson") statement of facts is sufficient for the purposes of this response. Nonetheless, the State has a few additions.

When Dwight Camp (("Dwight), the brother of the murdered Yessenia Camp ("Yessenia")) returned to the house on Manse, Engelson asked him to try to wake up Yessenia. Dwight went in, shook her gently, noticed that her body was cool to the touch, discontinued his efforts, and returned to the living room. (Appellant's Appendix, vol. 12 pp. 1284-85, hereinafter "12 AA 1284-85").

Soon after arriving at the house on Manse, Detective Fernandes initially had a limited and understandable objective:

> Q. Now, detective, as you approached the defendant initially, what was your objective at that moment in time?
>
> A. At that moment in time [the objective] was just to find out what happened to Yessenia. (9 AA 1044-45).

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Her initial approach vis-à-vis Engelson was consistent with simply getting a general idea of what was going on:

> I walked up to him, and he was with Deputy Burke at the time in front of the house, and I asked him what was going on today. (9 AA 1045).

After seeing and hearing overwhelming evidence proving that Cole Engelson savagely and brutally murdered Yessenia, the jury found Engelson guilty of first-degree murder. (21 AA 2118).

SUMMARY OF THE ARGUMENT

The State presented overwhelming and properly admitted evidence proving beyond a reasonable doubt that Engelson savagely murdered three-year-old Yessenia Camp while committing child abuse and was therefore guilty of first-degree murder. The District Court correctly denied the motion to suppress statements that were either not a product of custodial interrogation or that were covered by a knowing, intelligent, and voluntary waiver. Engelson's motion to disqualify the Nye County District Attorney's Office was frivolous based both on the law and Engelson's misleading factual assertions. The District Court carefully considered and properly admitted evidence of a small number of prior acts (while denying the majority of the State's requests), autopsy photos, jail phone calls, and the deposition of an unavailable witness. The District Court committed no error in letting family members speak at sentencing and properly

articulated the basis for its sentencing decision. The cumulative weight of the above is minimal and no basis for overturning a verdict forged in the granite of overwhelming evidence that Engelson massacred little Yessenia.

ARGUMENT

A. THE DISTRICT COURT CAREFULLY ANALYZED THE PROPOSED PRIOR ACTS EVIDENCE, DISALLOWED THE MAJORITY OF THE STATE'S PROPOSED PRIOR ACTS EVIDENCE, AND PROPERLY ADMITTED EVIDENCE BASED ON ABSENCE OF MISTAKE

NRS 48.045(2) provides as follows:

> 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.** [Bold added.]

The critical factors in determining admissibility of prior act evidence are whether the evidence is relevant, whether clear and convincing evidence proves the fact at issue, and whether the probative value is not substantially outweighed by 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)).

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1. The evidence regarding the chin injury was properly admitted under NRS 48.045(2) and the *Diomampo-Tinch* standard.

First, evidence of the injury was relevant towards demonstrating an absence of mistake. The state argued that the chin injury showed that in case of accident, Engelson knew to alert Victoria right away, i.e. get help. His delay in acting in the instant case suggests that he failed to do what he previously did for an accidental injury, because the instant case was no accident. (20 AA 2097-99, 3 AA 486 and 495, 20 AA 2003, 10 AA 1146).

Second, the State satisfied the "clear and convincing" standard based on the photos and mother's testimony. Victoria testified about the incident and the state presented photos. Victoria stated she received a picture from Engelson and immediately undertook to secure care for Yessenia. (9 AA 1042-46).

Third, the accidental injury theory has minimal prejudicial impact but has definite probative value in helping to show the dissimilarities between his reaction to the accidental injury in the prior incident and the reaction to the injuries at issue in the instant case.

Evidencing the careful nature of the Court's review, the Court allowed one photo of the chin injury but disallowed a second photo. (5 AA 738-39).

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2. The District Court properly admitted evidence of Engelson's statement about "popping [Yessenia] too hard."

During the trial, an issue arose regarding *statements* Engelson made to the police. (10 AA 1156-58).

First, the statement are not necessarily prior *acts*. They are Engelson's admissions, part of a series of admissions to the police that confirmed that Engelson murdered Yessenia. Regardless, one of the statements was properly admitted to demonstrate absence of mistake and Engelson's understanding of the difference between hitting too hard and not hitting too hard.

After review, analysis, and discussion, (10 AA 1166-67 and 1169-70), the District Court stated its basis for allowing reference to Engelson's statement about having previously spanked Yessenia too hard:

> All right. I'm going to allow the "popped the little girl too hard" for the same reason I 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.

(10 AA 1170). [Emphases added.] Engelson cites a passage from 5 pages earlier in the transcript, where the District Court was discussing various possibilities for the evidence with counsel. (10 AA 1165). Engelson falsely

asserts that this portion of the discussion was the District Court's basis for decision. (AOB 15).

The actual basis as clearly stated by the District Court, that the evidence was admissible under absence of mistake, complements the chin incident. Together, the two incidents suggest that Engelson knows what is "too hard" and knows what is an accident and how to respond to an accident. Based on those two factors, Engelson cannot claim mistake or inadvertence. He would have known Yessenia had suffered harm and that the proper response would have been to seek immediate care had it been an accident or of uncertain cause.

It is also worth noting that Engelson appears to attribute comments to the State that the State did not make. It was the District Court, **not the State**, that made the statement, **outside the presence of the jury**, "[h]e was rough that time[;] [h]e's rough this time." 5 AA 737. Also on AOB 15, Engelson asserts the State used some version of phrase "he was rough there, he was rough here." (AOB 15). The State has no recollection of making such a statement in front of the jury (or the Court, but in front of the Court would not be prejudicial). Unfortunately, Engelson does not provide a specific cite, which frustrates any effort to respond in greater depth.

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Again showing its careful consideration, the District Court disallowed admission of a second statement about discipling children. (10 AA 1170-71).

3. Demonstrating that the District Court carefully and properly applied the test to the State's proposed evidence of prior acts, the District Court denied admission of the majority of the proposed prior acts evidence and admitted only two instances, both of which were accompanied by a proper limiting instruction.

The State requested that 4 instances of prior conduct to be admitted. The District Court showed its understanding of the law, the applicable test, the entirety of the *Petrocelli* process, and the discretion vested in the Court by denying 3 of the 4 requests (not including the "popping" incident discussed *supra)*, (5 AA 735, 5 AA 735-36, 5 AA 737-38), and only permitting one instance of absence-of-mistake evidence ultimately admitted (plus the "popping" statement). (5 AA 736-37). Also, the District Court provided a proper limiting instruction at each appropriate time, (11 AA 1177-79 and 10 AA 1142 and 1178), and the State reiterated this during rebuttal closing argument. (21 AA 1197-99).

B. THE DISTRICT COURT PROPERLY DENIED ENGELSON'S MOTION TO SUPPRESS

Based on the evidence, the record of the hearing, the transcribed and Mirandized interviews, and the facts, the District Court acted correctly when it denied the defense motion to suppress the statements of the defendant based upon his self-serving misapplication of the facts without support from the record before

this Court. To get any traction on appeal, Engelson would have to convince this Honorable Court that the Court below abused the discretion with which it is properly vested when it denyied the pretrial motion to suppress. Engelson has not come anywhere close to demonstrating an abuse of discretion.

It is worth noting that Engelson relies primarily on unsupported assertions and factual interpretations to prop up his argument in favor of suppression.

1. **The District Court properly found that then-Detective Fernandes was not required to have Mirandized Engelson prior to speaking with him immediately upon her arrival at the scene.**

Miranda warnings are "required when a suspect is subjected to a custodial interrogation." *Archanian v. State*, 122 Nev. 1019, 1038 (2006).

"The ultimate issue in the case of an alleged involuntary confession must be whether the will of the accused was overborne by government agents." *Chambers v. State*, 113 Nev. 974, 981 (1997). "Factors to be considered include: the youth of the accused; his lack of education or low intelligence; the lack of any advice of Constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep. *Id.*

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"An individual is not in custody for purposes of *Miranda* where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process...or where the individual questioned is merely the focus of a criminal investigation." *State v. Taylor*, 114 Nev. 1071, 1082 (1998), referencing *United States v. Jones*, 21 F.3d 165, 170 (1994). Custody status depends on the totality of the circumstances, "including the site of the interrogation, whether the objective indicia of arrest are present, and the length and form of questioning. *Id.* at 1081-1082.

> 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.

Id. at 1082, 968 P.2d at 323.

If a defendant is a suspect, questioning that 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 are not required 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 about custody status should be resolved in favor of providing suspects with the *Miranda* warnings and securing a waiver before interrogation continues. *United States v. Griffin*, 922 F.2d 1343, 1348, 1356 (8th Cir. 1990).

Engelson makes numerous false assertions of fact and does not cite to the record, leaving the State unable to review the basis or lack of basis for the assertions. (AOB 18).

Fernandes did exactly what the court in *State v. Taylor*, 114 Nev. 1071, at 1082 (1998), specifically allowed. The chronology demonstrates the propriety of her conduct. The defendant was being asked questions by Fernandez "on-scene regarding the facts and circumstances of a crime," "ask[ed] other questions during the fact-finding process," or asked questions where the defendant was "merely the focus of a criminal investigation."

Immediately after Engelson said he knew something was wrong with the back of Yessenia's head, he tried to wake her, smacking her face a "little bit," saying, "hey, hey, hey, get up, get up, get up and there was nothing. And that's why I called her mom. I don't know if I called the paramedics first but there was

something wrong, "**AND I DID IT,**" (9 AA 1068, 1081-82). [Emphases added.] Fernandes then cuffed him, told him he was being detained, ceased asking questions, confirmed Yessenia's status as deceased, the child's condition as observed by medical personnel at the scene, retrieved Sgt. Fowles Miranda card, read the defendant his rights Engelson confirmed that he understood the rights, waived them, and agreed to continue speaking with Fernandez. (9 AA 1045-50, 1060-68, 1076-82).

Engelson contends, "[Engelson] was a suspect—the only suspect—from the minute the Nye County Sheriff's Office arrived at the house." (AOB 18). This is untrue, and it would have been absurd for Fernandes to get out of her car and immediately pepper people with *Miranda* warnings before doing anything else or finding out a bit about what was happening.

Rather, Fernandes arrived "on scene" in response to a report of a non-responsive toddler and asked a few basic questions to try to get a sense of what had happened. Once Engelson confirmed that he knew something was wrong and that he knew that he did it, Fernandes ceased asking questions, cuffed Engelson, *Mirandized* him, received a waiver, and then, and only then, asked more questions. (9 AA 1045-50, 1060-68, 1076-82).

Engelson's statements to Fernandez were clearly and obviously voluntary and provided in a patently non-coercive environment. It was a conversation between the defendant and a lone plain-clothes detective, pointed out only to show that the environment was not orchestrated to be oppressive or intimidating by using multiple uniformed officers with guns drawn.

2. The District Court properly found that Engelson's *Miranda* waiver was Knowing, Intelligent, and Voluntary; Engelson offered conclusory assertions in lieu of corroborative citations to the record.

The defendant spoke with Fernandez in an intelligent, coherent, rational manner, able to understand her questions, provide rational, intelligent, perhaps calculated answers.

A valid waiver of rights under *Miranda* must be voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "All that is required is that the accused be initially advised of his rights and that he understands them at the time of his interrogation." *Taylor v. State*, 96 Nev. 385, 386 (1980).

Voluntary intoxication, (even when heavily intoxicated, injured, medicated, even with numerous drugs in his system), will not necessarily render statements inadmissible for being involuntarily uttered.

> While the testimony we have set out indicates that the appellant had been drinking to some extent prior to making the statements attributed to him by the officers

> and Sample and Shafer, still it includes testimony upon which the jury could well conclude that his mind was not in a maudlin condition and that he knew what he was saying. The fact that a person charged with crime is intoxicated when he makes a confession will not necessarily exclude it as evidence. It is only when an accused is so drunk when he makes a confession as to render him unconscious of what he is saying that the law deems his confession incompetent. Intoxication of a lesser degree is for the jury to consider in determining the weight to give the confession.

State v. Hall, 54 Nev. 213, 234, 235 (1932).

> A confession by a defendant suffering from drug withdrawal may be involuntary when the withdrawal results in a confession which is not the product of a rational intellect and a free will. United States v. Harden, 480 F.2d 649 (8th Cir. 1973). In this case appellant's withdrawal symptoms were minor. During the confession he was coherent, able to recall facts in great detail, and showed no signs of discomfort. Under these circumstances we are satisfied that the appellant voluntarily made the incriminating statements. United States v. Harden, *supra.* Cf. Tucker v. State, 92 Nev. 486, 553 P.2d 951 (1976); Stewart v. State, 92 Nev. 168, 547 P.2d 320 (1976).

Pickworth v. State, 95 Nev. 547, 549 (1979).

> The general rule with respect to confessions made by a person under the influence of intoxicants can be summarized as follows: proof that the accused was intoxicated at the time he confessed his guilt will not, without more, prevent the admission of his confession. See e.g., Commonwealth v. Chapman, 345 Mass. 251, 186 N.E.2d 818 (1962); People v. Dorman, 28 Cal.2d 846, 172 P.2d 686 (1946); 69 A.L.R.2d 361. However, if it is shown that the accused was intoxicated to such extent that he was

> unable to understand the meaning of his statements, then the confession is inadmissible. Roper v. People, 116 Colo. 493, 179 P.2d 232 (1947).

Tucker v. State, 92 Nev. 486, 488 (1976).

Engelson asserts that he "was clearly intoxicated" because "he had an odor of an alcoholic beverage on his person and his eyes were glossy [sic]." (AOB 19). Those two factors do not establish intoxication. Also, Engelson refused to submit voluntarily to a blood draw. (9 AA 1044, p. 32 of State's Exhibit 16).

Even if Engelson were intoxicated, nothing in the record suggests that any intoxication would have been sufficient to invalidate his statements. He showed no signs of being any of the following: "unable to understand the meaning of his statements" (*Tucker*, supra); unable to recall facts and speak coherently (*Pickworth*, supra); or "unconscious" of what he was saying (*Hall*, supra).

Engelson also relies on baseless, unsourced generalizations. He asserts without citation that he did not remember what happened and did not understand his situation. Additionally, he claims that his answers "contradicted the evidence found at the scene" and that this somehow means that his *Miranda* waiver was invalid. (AOB 19-20).

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Engelson then shifts to the early-morning interview by Detectives Cox, Fancher, and Gibbs. Engelson asserts without citation that he was suffering from withdrawal (a hangover) and was sleep-deprived. Engelson then adds, "**After being in custody for only a few hours**" he was interviewed by the three detectives. (AOB 20). [Emphasis added.] Engelson has not suggested that anyone prevented him from resting and recovering from any possible hangover during those few hours.

Engelson claims that the mere wearing of a jail suicide smock shows a lack of mental stability so profound that he was unable to waive his *Miranda* rights knowingly and voluntarily. (AOB 20).

The suicide smock is typically given to inmates who the Detention Center thinks *might* be suicidal, but Detention's opinion is just that, an opinion. Detective Cox clarified the issue during his trial testimony:

> Q. Did you ask Cole any questions about that, about why he was in the smock?
>
> A. I believe I asked him if he was suicidal.
>
> Q. What was his response?
>
> A. I think it was no.

(15 AA 1534-35). The State is unaware of evidence that the suicide smock was anything more than a standard precaution.

It is also worth noting that Engelson refused to voluntarily submit to a blood draw to determine his blood alcohol level necessitating the need for a warrant resulting in his blood being drawn at 12:15 a.m. July 16, 2017, five hours after law enforcement and medical personnel had been dispatched to the scene. His blood was drawn within roughly one hour after being given permission to have the blood drawn by telephonic search warrant, the call to Justice of the Peace Gus Sullivan. (14 AA 1453-57).

Fernandes *Mirandized* Engelson as soon as his statements provided probable cause (or more). Later, Cox re-*Mirandized* Engelson, who agreed to speak with Cox, Gibbs, and Fancher. Engelson then spoke in a logical, rational, relatable manner that belies any assertion that the statements provided were in any manner involuntarily given.

Engelson also refers to a later interview with a Captain Boruchowitz and asserts that the police station interviews are invalid because his waiver was not knowing and voluntary. (AOB 20-21). As the discussion above demonstrates, the waiver was knowing and voluntary.

3. The District Court properly found that the previous *Miranda* warnings given to Engelson had not grown stale by the time of the interview with Officer Boruchowitz.

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"Where the accused has been fully and fairly apprised of his *Miranda* rights, 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). Engelson offers several conclusory assertions without citation to the record, which hampers the State's ability to respond. However, Engelson seems to be saying that he might have sobered up and had a different state of mind, so a re-reading of the *Miranda* warning was necessary. (AOB 21). On the other hand, his state of mind could have been the same—Engelson is engaging in speculation and not really arguing any specific requirement that the warning be given a third time.

Importantly, as pointed out by the court in *Taylor v. State*, 96 Nev. 385, 386 (1980), giving another *Miranda* warning was neither critical to the analysis nor necessary, but was provided to the defendant from an abundance of fairness and circumspection.

C. THE DISTRICT COURT PROPERLY DENIED ENGELSON'S MOTION TO DISQUALIFY THE NYE COUNTY DISTRICT ATTORNEY'S OFFICE.

Nevada law regarding the disqualification of an entire District Attorney's Office underwent a welcome updating in 2014. Merely alleging a possible

appearance of impropriety is not sufficient to disqualify an entire DA's Office. Remaining on a case is proper under the Nevada Rules of Professional Conduct if the DA's Office takes precautions to "wall off" a potential conflict. As will be demonstrated below, the Nye County DA's Office took sufficient precautions and even Engelson's lawyers admit that they have nothing but their own imaginings and speculation to support the grave allegations that they have made.

Engelson's lawyers moved for disqualification by citing an expressly overruled Nevada case, claiming they did not have time to shepardize it. (6 AA 775). As will be demonstrated below, they bounced from citing overruled authority to making false factual assertions to support their argument.

1. The District Court properly declined to disqualify the Nye County District Attorney's Office because a mere possible appearance of impropriety is insufficient and the District Attorney's Office took proper steps to "wall off" Deputy District Attorney Brent Percival.

In *State v. Eighth Judicial Dist. Court of the State*, 130 Nev. 158, 164 (2014) the Court stated:

> We are not convinced that appearance of impropriety is the appropriate standard for determining whether an individual prosecutor's conflict should be imputed to an entire office. First, that standard is not implicit in the current Nevada Rules of Professional Conduct. Second, there are several policy arguments in favor of a test that limits the disqualification of an entire district attorney's office: there is a large cost to the county in paying for a special prosecutor to prosecute the case;

> an attorney is presumed to perform his ethical duties, including keeping the confidences of a former client; and courts should not unnecessarily interfere with the performance of a prosecutor's duties. ([T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as maintain high ethical standards. (citations omitted).

In that decision, the Court also held as follows:

> Using a standard that is as ambiguous as the appearance-of-impropriety standard...could result in in many unnecessary disqualifications, limit mobility from private practice and restrict the assignment of counsel when no breach of confidences has occurred. For these reasons we overrule *Collier* to the extent that it relies on appearance of impropriety to determine when vicarious disqualification of a prosecutor's office is warranted (citations omitted) (emphasis added).

Id. at 164.

Engelson's lawyers have admitted that their entire disqualification theory is based solely on speculation; "[[W]e are] not going to have any hard evidence of that. [We] don't have anything to back it up." (6 AA 788). It is also worth noting that Engelson's lawyers declined to call witnesses when they had the opportunity. (6 AA 787-90).

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Engelson's lawyers also evidence a fascination with the fact that after Mr. Percival accepted an offer to join the Nye DA's Office, the District Attorney wanted to have him start sooner rather than later. (6 AA 777, AOB 23-24).

In his appeal brief, Engelson omits the reason for the early start. As stated in a declaration that is part of the record on appeal, the District Attorney noted that Mr. Percival is an excellent attorney and that the early start would reduce the number of cases that would eventually have to be reassigned to other public defenders and thus enhance judicial efficiency. (6 AA 767).

Engelson also attempts to mislead this Court by falsely insinuating that Deputy District Attorney Percival had been removed from the Engelson case because of allegations that he had violated the attorney-client privilege. (AOB 23). The relevant excerpt from page 23 of Appellant's Opening Brief:

> ... Cole [Engelson] 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 AA 30-39). Ultimately, the district court removed Mr. Percival from the case, and substituted in trial counsel. (1 AA 40-42).

Defense counsel's clear implication is that the District Court removed Mr. Percival because of allegations of violating the attorney-client privilege. Defense

counsel intentionally omits the real reason. The District Court was clear in its reason for replacing Mr. Percival:

> When I took Mr. Percival off of Mr. Engelson's case and appointed you two, it was for health reasons because I thought you two would do a better job than Mr. Percival for such an important case. I don't have any recollection of me making a finding that it was because he shared and violated that attorney-client privilege.[1]

6 AA 785.

Engelson's counsel has offered no evidence at any time to buttress her scurrilous allegation but ends her disqualification argument by accusing Mr. Percival, a 30+ year attorney with an impeccable reputation, of the "distinct and real possibility that privileged information is being shared with the prosecutor."

Engelson's handling of this issue has been outrageous and the District Court correctly denied the motion to disqualify.

2. The District Court correctly found that the District Attorney's Office undertook appropriate screening procedures as contemplated by the Nevada Rules of Professional Conduct.

Engelson also argues that the District Attorney's Office should have been disqualified based on the Nevada Rules of Professional Conduct (NRPC).

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[1] The District Court's reference to "health reasons" refers to the fact that Mr. Percival suffered a life-threatening medical emergency in January of 2020 (requiring emergency life-saving open chest surgery), approximately one month prior to the then-trial setting. The insinuation that the Court found an ethical breach is unfortunate.

Engelson's argument is misguided and must fail. The NRPC specifically provides that when adequate screening measures are in place, an entire firm does not have to be disqualified.

Under NRPC 1.12(c), a law firm (such as the Nye County District Attorney's Office) will not be disqualified if adequate screening measures (typically called a 'Chinese Wall') are in place. *Ryan's Express Transp. Servs. Amador, State Lines, Inc.*, 128 Nev. 289, 297 (July 2012). Sufficiency of screening mechanisms include, but are not limited to, instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; restricted access to files and other information about the case; timing of the screening measures; and the likelihood of contact between the quarantined lawyer and other members of the firm. *Id.* at 297-298

In the Engelson case, numerous screening mechanisms were put in place to uphold the highest ethical standards and ensure no disqualification would be necessary. The top secretary confirmed that all employees were advised, before and right when Percival joined the office, not to discuss the Engelson case with Mr. Percival and not to show him any documents regarding the matter. (6 AA 757). The Supervising DA Administrator ensured that Percival had no access to the case management system. (6 AA 759).

The District Attorney confirmed that Percival had been "walled off" from the case, that the hiring of Percival had nothing to do with the Engelson case, that nobody in the office obtained any information from Percival about the Engelson case, and that Percival was not participating in any activity related to the Engelson case. (6 AA 767). Because of the Defense counsel's accusations, Engelson was also put on short-term leave. Placing him on leave was strictly out of an abundance of caution. (6 AA 789-90).

Despite the above-described actions and precautions, defense counsel falsely asserts, "the District Attorney took no steps to remedy the conflict until being confronted by the Appellate's Motion." (AOB 24).

Under both Nevada Supreme Court precedent and the NRPC, the District Court correctly denied the motion to disqualify.

D. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY ADMITTED SOME OF THE GRAPHIC AUTOPSY PHOTOS, WHICH AIDED THE JURY IN UNDERSTANDING ESSENTIAL MEDICAL TESTIMONY.

The standard of review for admission of graphic photos is abuse of discretion. Even if the District Court admits such photos in error, reversal is improper unless such an error has a substantial and harmful impact or role in

shaping the jury verdict. *Harris v. State*, 432 P.3d 207, 212-13 (Nev. 2018). Based on *Harris* and NRS 48.035(1), a court must assess probative value and prejudice; the photo should be admitted unless the potential unfair harm of admission substantially outweighs the probative value. *Id.* at 210-11.

It is worth noting that this Honorable Court found that the *Harris* photos, which depicted crime victims who had burned to death, had minimal probative value. Additionally, the trial court did not adequately weigh the probative-prejudicial factors. *Id.* at 211.

By contrast, Dr. Roquero confirmed the probative value of the Yessenia photos, the District Court conducted a brief hearing on the subject, and the District Court weighed the factors before deciding to allow the photos.

Dr. Roquero confirmed that he and the State discussed the case and his testimony, and that the State asked for Roquero to select photos that would help to explain his findings and testimony. Roquero selected the photos, including the five to which Engelson objected. (16 AA 1637-38).

On cross during a pre-testimony hearing mid-trial (with jury out of courtroom), Engelson established that the disputed photos would in fact be key to properly explaining Roquero's testimony and findings:

> Q: [Preface Omitted.] .... Are the pictures going to help the jury explain everything – help you explain everything to the jury **a little bit more or a lot bit more?** [Emphasis added.]
>
> A: **A lot bit more in terms of the location, because I will be using medical terms that sometimes is very hard or a little challenging for any nonmedical jurors or any nonmedical individuals in the court....** [Emphasis added.] (16 AA 1638).

In other words, the disputed photos had a very high probative value, unlike the photos in *Harris*, which had minimal probative value. 432 P.3d at 211. Also unlike *Harris*, the District Court in the instant case weighed the various factors; in fact, the District Court conducted a hearing to ensure proper consideration of the issue. (16 AA 1632-33, 1636-39).

On re-direct, Dr. Roquero summed up the need for the photos:

> Q: Doctor, you're going to be able to say words to the jury, correct?
>
> A: That is correct.
>
> Q: But with the photographs, you're going to be able to say, "And this is what I mean."
>
> A: That is correct. (16AA 1639).

After additional discussion and consideration, the District Court found that the photos would be relevant to the issue of Yessenia's death and allowed them. (16 AA 1640).

E. NO PREJUDICE TO ENGELSON RESULTED FROM ADMISSION OF EVIDENCE OF JAIL PHONE CALLS HE MADE AND THERE WAS NO REFERENCE TO HIS BEING IN CUSTODY DURING THE TRIAL.

"The rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence. Illinois v. Allen, 397 U.S. 334 (1970); State v. Baugh, 571 P.2d 779, 782 (Mont. 1977). Informing the 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. 285, 288 (1991) [Bold and underline of the word "is" was added.]. "In *Haywood*, ***the prosecutor referred to the fact that the defendant had been in custody between the time of his arrest and trial***; the prosecutor cross-examined the defendant about jail visits he received from friends and relatives. *Id.* at 287, 809 P.2d at 1273." *McNelton v. State*, 115 Nev. 396, 407 (1999). [Bold and italics added.]

In the specific circumstances of jail calls and the *Haywood* rule notwithstanding, jail calls can be properly admitted if the contents are probative, according to persuasive Nevada authority. *Gray v. State*, 2020 Nev. Unpub. LEXIS 1171, (unpublished disposition), cited as contemplated by NRAP 36(c)(3). In *Gray*, the defendant asserted that the introduction of jail calls

constituted a reference to his incarceration and therefore was impermissibly prejudicial. The calls were probative to resolving whether Gray and the victim knew each other prior to the alleged robbery. *Id.* at 5-6. This Honorable Court concluded, "The probative value of this evidence is not substantially outweighed by any unfair prejudice resulting from the jury knowing Gray had been incarcerated, particularly since the jail calls did not reference Gray's **incarceration status at the time of trial** .... As such, we conclude the district court acted within its discretion in admitting the calls." *Id.* at 6. [Bold added.]

Based on *Haywood*, a key aspect of analyzing mentions of incarceration is whether there is mention that the defendant **is** in custody during the time of trial, or, as happened in *Haywood*, the ***prosecutor mentioned that the defendant had been in custody from arrest to trial.*** Time of trial is the key.

In the instant case, Engelson is not alleging that there were references to him being in custody at the time of trial or having been in custody all the way from arrest to trial. Therefore, the reference to jail calls would not sufficiently raise an inference of guilt to meet the *Haywood* standard. Additionally, *Gray,* while persuasive only, would suggest that use of Engelson's calls was not improper.

If one were to assume arguendo that allowing the calls amounted to error, the error would have been harmless and thus reversal unwarranted. As *Haywood*

held, "Still, we noted in *Chandler* that this type of error is not always prejudicial rather than harmless. *Chandler*, 92 Nev. 299, 300, 550 P.2d 159, 160 (1976). When the evidence of guilt is overwhelming, even a constitutional error can be comparatively insignificant. *Chapman v. California*, 386 U.S. 18, 22 (1967); Guyette v. State, 84 Nev. 160, 438 P.2d 244 (1968)." *Haywood* at 288.

The evidence against Engelson was overwhelming. Yessenia Camp, age 3, suffered severe injuries all over her head and body, and died. Listing her injuries consumed 15 pages of the autopsy report and an entire page of the trial transcript of the State's closing. (16 AA 1648-50, 20 AA 2001-03). The day of Yessenia's death, she had been left with Engelson while her mother and sister went out. (12 AA 1308-09). A few hours later, Yessenia's brother Dwight came home. (12 AA 1282). Engelson asked Dwight to try to wake Yessenia up. Dwight went in the master bedroom. Yessenia was on the bed, unresponsive and cold to the touch. (12 AA 1284-85). Paramedics eventually arrived and never detected any signs of life. (13 AA 1360). Yessenia was later pronounced dead. (18 AA 1848-49).

Engelson confessed multiple times to the killing, e.g., stating, "I'm the one who did this," and her cause of death was "literally" his hands. (13 AA 1420). He recalled how Yessenia had fallen in the shower and "slammed" into the side

of the shower. (13 AA 1417). Engelson explained that she had also afallen from having her feet go out from under her. (13 AA 1418).

By the time she was taken out of the shower, her body was limp. (9 AA 1045-46, 1050). Finally, Engelson had marks on his knuckles that were consistent with hitting a person or shower doorjamb. (13 AA 1394-95).

Applying the standards in *Jackson, Thomson,* and *Newton*, *See* Section G (argument asserting of insufficient evidence), *infra* at p. 35, any rational trier of fact would and could find that the State has established the elements far beyond a reasonable doubt.

It is unfortunate that Engelson's counsel offers the false assertion that "[t]here were no bruises, scrapes, or fractures on Cole's hands" to suggest that he murdered Yessenia and that, presumably, the absence of such marks would be exculpatory. (AOB 38).

Former Detective Logan Gibbs testified that he interviewed Engelson early on the morning after the murder and observed "what appeared to be scrape marks" on two of the knuckles on Engelson's right hand. (13 AA 1393). The District Court admitted a photo with the scrapes into evidence. (13 AA 1394). When the State asked Detective Gibbs whether the scrape marks were consistent with "throw[ing] a punch and hit[ting] something, whether that be a person or an

object?" Gibbs answered, "Yes." (13 AA 1395). Asked whether the scrape marks were "consistent with hitting a door jamb," Gibbs answered, "Yes." (13 AA 1395).

F. THE DISTRICT COURT PROPERLY ALLOWED TO STATE TO PRESENT THE RECORDED DEPOSITION OF CHRISTOPHER PULLEN'S TESTIMONY BECAUSE PULLEN WAS UNAVAILABLE TO TESTIFY AT TRIAL.

NRS 174.175(1) provides in pertinent part as follows:

> If it appears that a prospective witness is an older person or a vulnerable person or may be unable to attend or prevented from attending a trial or hearing, that the witness's testimony is material and that it is necessary to take the witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information or complaint may, upon motion of a defendant or of the State and notice to the parties, order that the witness's testimony be taken by deposition....

NRS 174.175(1) also touches on the need to allow confrontation of witnesses. It provides in pertinent part as follows:

> If the deposition is taken upon motion of the State, the court shall order that it be taken under such conditions as will afford to each defendant the opportunity to confront the witnesses against him or her.

NRS 174.228 concerns videotaped depositions and helps illuminate NRS 174.175 in the sense that it contains a more comprehensive list of requirements for use of depositions at trial. It provides in pertinent part as follows:

> A court may allow a videotaped deposition to be used instead of the deponent's testimony at trial only if:
> **3.** In all cases:
> **(a)** A justice of the peace or district judge presides over the taking of the deposition;
> **(b)** The accused is able to hear and see the proceedings;
> **(c)** The accused is represented by counsel who, if physically separated from the accused, is able to communicate orally with the accused by electronic means;
> **(d)** The accused is given an adequate opportunity to cross- examine the deponent subject to the protection of the deponent deemed necessary by the court; and
> **(e)** The deponent testifies under oath.

NRS174.215 provides in pertinent part as follows:

> 174.215 1. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears:
> (e) That the party offering the deposition could not procure the attendance of the witness by subpoena.

The Nevada Supreme Court has held:

> "[T]he State must make reasonable efforts to procure a witness' attendance at trial before that witness may be declared unavailable."

Hernandez v. State, 124 Nev. 639, 645, 188 P.3d 1126, 1131 (2008), *abrogated on other grounds by Baker*, 134 Nev. at 412 P.3d at 22.

The witness Christopher Pullen was unavailable to the State. He was served at the time of the deposition and gave assurances that he would appear. When COVID caused a continuance, the State obtained an oral promise to appear and a Material Witness Arrest Warrant. (10 AA 1113-15). The State also sent a subpoena to the prison where Pullen was incarcerated. (13 AA 1380-81).

The deposition took place on May 21, 2020 in Department 2 of the Pahrump District Court, with District Court Judge the Honorable Robert Lane presiding. (1 AA 61-135). The first few pages of the hearing transcript show that a District Court Judge presided, that the accused was present and represented by counsel, that the accused had the opportunity to cross-examine the witness, and that the witness testified under oath. (1 AA 61-66, 96-99). Between those conditions and the unavailability of the witness at trial, the use of the deposition was proper and more than complied with the requirements of the NRS and *Hernandez.*

Engelson's reliance on the "outside the jurisdiction of the court to compel his appearance" language of NRS 51.055(1)(d) is misplaced. Based on Engelson's logic, a witness could never be considered unavailable if there was a chance the witness might be in Nevada while avoiding a subpoena and/or court proceeding. Given that anyone of unknown whereabouts could conceivably be

in Nevada, Engelson's interpretation would cull subpoena- and hearing-dodgers from the herd of unavailables.

G. THE STATE PRESENTED OVERWHELMING EVIDENCE THAT COLE ENGELSON COMMITTED FIRST-DEGREE MURDER WHEN HE BEAT YESSENIA CAMP TO DEATH.

In reviewing an insufficiency of the evidence claim, a court must determine whether, when 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 violates a defendant's due process rights. *Mikes v. Borg*, 947 F.2d 353, 356 (9th Cir. 1991).

Yessenia Camp, age 3, suffered severe injuries all over her head and body, and died. (16 AA 1648). The day of Yessenia's death, she had been left with Engelson while her mother and sister went out. (12 AA 1308-09). A few hours later, Yessenia's brother Dwight came home. (12 AA 1282). Engelson asked Dwight to try to wake Yessenia up. Dwight went in the master bedroom. Yessenia was on the bed, unresponsive and cold to the touch. (12 AA 1284-85).

Paramedics eventually arrived and never detected any signs of life. (13 AA 1360). Yessenia was later pronounced dead. (18 AA 1848-49).

Engelson confessed multiple times to the killing, e.g., stating "I'm the one who did this" and her cause of death was "literally" his hands. (13 AA 1420). He recalled how Yessenia had fallen in the shower and "slammed" into the side of the shower. (13 AA 1417). Engelson also explained that she had fallen from having her feet go out from under her. (13 AA 1418).

By the time she was taken out of the shower, her body was limp. (9 AA 1045-46, 1050). Finally, Engelson had marks on his knuckles that were consistent with hitting a person or shower doorjamb. (13 AA 1394-95).

Applying the standards in *Jackson, Thomson,* and *Newton*, any rational trier of fact could and would find that the State has established the elements beyond a reasonable doubt.

It is unfortunate that Engelson offers the false assertion that "[t]here were no bruises, scrapes, or fractures on Cole's hands" that would suggest that he murdered Yessenia. (AOB 38). Detective Logan Gibbs testified that he interviewed Engelson early on the morning after the murder and observed "what appeared to be scrape marks" on two of the knuckles on Engelson's right hand. (13 AA 1393). The District Court admitted a photo with the scrapes into

evidence. (13 AA 1394). When the State asked Detective Gibbs whether the scrape marks were consistent with "throw[ing] a punch and hit[ting] something, whether that be a person or an object?" Gibbs answered, "Yes." (13 AA 1395). Asked whether the scrape marks were "consistent with hitting a door jamb," Gibbs answered, "Yes." (13 AA 1395).

H. THE DISTRICT COURT DID NOT ERR AT THE SENTENCING HEARING WHEN HE ALLOWED YESSENIA'S BROTHER DWIGHT CAMP TO READ FROM LETTERS PURPORTEDLY PROVIDED TO HIM BY YESSENIA'S GRANDMOTHER AND AUNT.

As a preliminary matter, Engelson's argument regarding the reading of letters relies heavily and primarily on the law and facts discussed in *Aparicio v. State,* 2020 Nev. App. Unpub. LEXIS 1006 (unpublished disposition), an unpublished Nevada Appeals Court decision. (AOB 40-45). This appears to violate NRAP 36(c)(3), which specifically provides, "unpublished dispositions issued by the Court of Appeals may not be cited in any Nevada court for any purpose." Engelson also cited the case (but not by name, just by its holding) during the sentencing hearing. (22 AA 2159).

The State finds itself in a quandary and will discuss *Aparicio* solely as necessary to respond to Engelson's brief, and respectfully requests deference from this Honorable Court.

The Nevada Supreme Court has held as follows:

> The sentencing proceeding is not a second trial and the court is privileged to consider facts and circumstances which clearly would not be admissible at trial. *United States v. Cifarelli*, 401 F.2d 512, cert. denied, 393 U.S. 987 (2d Cir. 1968); *United States v. Metz*, 470 F.2d 1140, cert. denied, 411 U.S. 919 (3d Cir. 1972). So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed.

Silks v. State, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976).

NRS 176.015(6) provides as follows:

> 6. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

The "reliable and relevant" clause renders moot much of the hullabaloo regarding who is or is not a victim, as defined by NRS 176.015, of Engelson's crime. NRS 176.015 discusses who is a victim but does *not prohibit* non-victims from speaking at sentencing.

1. The District Court did not err at the sentencing hearing when it allowed Yessenia's brother Dwight to read letters from Yessenia's grandmother and aunt during his testimony.

Dwight Camp, big brother of the murdered toddler Yessenia, read two letters to the District Court, one from Yessenia's grandmother, Mary Schlick, and one from Yessenia's aunt, Amber Schlick. Engelson did not object. Mary and Amber both requested the maximum sentence for the murder. (21 AA 2124-27). It is worth noting that brother Dwight, sister Nickole, and mother Victoria specifically asked for Life without Parole, the maximum available sentence, i.e. the grandmother and aunt asked for the exact same thing that the siblings and parent requested. (21 AA 2149, 2131, 2153).[2]

In this case, a grieving brother shared the thoughts of his grandmother and aunt on the murder of his sister. Seeing the grief of his family members is certainly part of Dwight's grief, and so their feelings are relevant. While it's theoretically possible that Dwight conspired with an unknown party to read a false statement into the record that sounded exactly like what a grandmother and aunt would say, it seems quite unlikely. Clearly, Dwight's testimony and his allusions to other relatives were reliable. Hence, the District Court did not err

[2] By contrast to the two letters (from grandmother and aunt) that Dwight referenced, the *Aparicio* case that Engelson unfortunately relied upon involved approximately 45-50 letters, including letters from friends, colleagues, and former colleagues. (AOB 40-41).

and if this Court finds otherwise, no prejudice arose from the addition of the grandmotherly and auntly opinions on sentencing that were identical to those of sister, mother, and brother.

2. The District Court properly allowed Ryan Monroe, the brother of Yessenia's now deceased father, to testify regarding the father's reaction to Yessenia's death and thoughts about Engelson's potential punishment.

Ryan Monroe is an uncle of the victim Yessenia and brother of Yessenia's late father, who passed away one year after Yessenia's death. Ryan was at least in part trying to stand in for Yessenia's father. (22 AA 2157-58). The State and defense counsel conferred regarding whether Ryan could testify. (22 AA 2156-59). Defense counsel conceded that he had found no authority precluding the District Court from exercising its discretion to allow Ryan to testify. (22 AA 2159).

Ultimately, the District Court did exercise its discretion under 176.015(6) to allow the testimony, concluding that it would be reasonably reliable. The District Court stated that it might not normally allow Ryan to testify, but would allow Ryan to speak so that the feelings of Yessenia's late father might be heard.

Ryan stated that Yancey Camp, his brother and Yessenia's father, died in 2018 but lived with Ryan at the time of Yessenia's murder. Ryan was confident

that he could articulate the impact of Yessenia's death on her father. (22 AA 2162). He recounted the father's "wailing in anguish" and did drift into some of his own thoughts and feelings. (22 AA 2162-63).

Regarding sentencing, Ryan confirmed that his recommendation for Life without Parole was actually that of Yessenia's father. He repeated the request for Life without Parole on behalf of Yessenia's father and himself, and again veers into some of his own thoughts and feelings. (22 AA 2163-64).

Engelson argues, again citing *Aparicio*, that Ryan was not a victim and that his testimony was neither relevant nor reliable. (AOB 45-46). While Ryan might not fit the definition of victim in NRS 176.015, the District Court correctly exercised its discretion to allow him to testify. Allowing Ryan to testify was the best way to add some thoughts and feelings from Yessenia's late father into the record. Like mother, sister, and brother, Yessenia's father wanted Life without Parole. (22 AA 2163-64).

Engelson also asserts that Ryan's recollections of Yancey's feelings and thoughts about a sentence were unreliable because any discussion of those issue would have occurred three to four years prior to the sentencing hearing. (AOB 46). Had Ryan been testifying regarding a conversation about what happened in the Golden Knights game the night before, Engelson might have a point. In

Ryan's case, however, he was talking about Yancey's "wails of anguish" over the murder of his little girl and discussion of the appropriate punishment for the brutal murderer of his little girl. The District Court correctly understood that memories of Yancey's reaction to losing Yessenia and his wish for Engelson's sentence tend to have more staying power than last night's hockey scores.

Ryan's testimony was relevant and reliable. Hence, there was no error. Should this Court find otherwise, it is worth noting that the Yancey/Ryan recommendation matched those of Victoria, Nickole, and Dwight and so any error would be harmless.

I. THE DISTRICT COURT ABSOLUTELY DID NOT ABUSE ITS DISCRECTION AND PROPERLY SENTENCED ENGELSON TO LIFE WITHOUT PAROLE FOR THE BRUTAL SLAYING OF THREE-YEAR-OLD YESSENIA CAMP; THE COURT METED OUT THE MOST APPROPRIATE PUNISHMENT AVAILABLE.

"Despite its harshness, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Additionally, we afford the district court wide discretion in its

sentencing decision." *Allred v. State*, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004) (internal citations omitted) (overruled on other grounds).

Cole Engelson savagely and brutally murdered the toddler Yessenia Camp. The District Court correctly identified and imposed the *most* just sentence available: life without parole.

After deliberating for about two hours, the Jury found Engelson guilty of first-degree murder for killing Yessenia Camp. (21 AA 2110). Yessenia was three-years old and suffered numerous severe injuries. Listing them consumed a full page of trial transcript. (20 AA 2001-2003). The District Judge detected "no remorse" from Engelson. (22 AA 2174)

Engelson incorrectly claims that the District Court made no findings and failed to discuss possible aggravating and mitigating factors. (AOB 47). While the District Court might not have prefaced certain remarks with, "this is an aggravator," or "this is a mitigator," or "this is a finding," the District made findings and discussed aggravating and mitigating factors.

The District Court distinguished *malum in se* offenses from *malum prohibitum* offenses and found that Engelson's crime was *malum in se*, i.e. a severe offense. (22 AA 2171). The District Court noted the shocking nature of the murder: "I sat through the trial too, and I was a little shocked each step of the

way." (22 AA 2172). It is worth remembering that listing Yessenia's injuries consumed an entire page of trial transcript. (20 AA 2001-03). A reasonable inference is that a shocking, severe brutalization of the toddler Yessenia struck the District Court as substantial aggravation.

The District Court also found that Engelson had shown "no remorse." (AA 2174). Early in the sentencing hearing and with his first opportunity to address the Judge regarding sentencing, Engelson opted to go "all in" with his remorselessness strategy: "Before I get started, I do have a quick question of the Court. Since I believe wholeheartedly that as soon as the Supremes get ahold of my direct appeal, this is coming back for another round, can anything I say be used against me in another trial?" (22 AA 2141).

The District Court seemed unimpressed and ultimately summarized, "[W]hat's the emotion you show when you find out you beat a three-year-old to death? Still waiting to see it. I thought maybe it would be today. Still no normal reaction that all the rest of us would if we were in that boat. No remorse...." (22 AA 2173-74).

The District Court also elaborated on its general approach to sentencing in a case such as this: "[I]f you've never done a crime in your life, but the crime you

do is so malum in se, you're probably going to get hammered. And obviously that's this case." (22 AA 2172).

Engelson's counsel raised alcohol abuse as a possible mitigator: "[T]hat demon that is in the bottle, that alcohol is the underlying reason for all of this, Your Honor." (22 AA 2138). The District Court heard the defense assertion and later stated as follows: "[T]he defense can't be alcohol. Alcohol is no defense." (22 AA 2172). The District Court also rejected memory lapse as any kind of defense. (22 AA 2173).

Clearly, the District Court carefully evaluated this case and Engelson. The District Court considered the horrifying facts, the relatively flimsy alleged mitigators, and Engelson's lack of remorse.

Based on all of that, the District Court imposed a sentence of life without parole, a just sentence and one that is not disproportionately harsh in light of the utter and final destruction Engelson imposed on Yessenia. Thus, the sentence must stand.

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J. ENGELSON'S CUMULATIVE ERROR ARGUMENT IS WITHOUT MERIT.

For the reasons elucidated in Parts A-I, above, Engelson has incorrectly alleged errors and there is no basis for a cumulative error argument. Assuming arguendo that error(s) occurred, such error(s) would have been harmless and definitely not sufficient to justify reversal based on cumulative error.

Nevada law provides that "the cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually." *Butler v. State*, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004) (overruled in part on other grounds in *Lisle v. State*, 131 Nev. 356, 366, 351 P.3d 725, 732 (2015). "If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction." *DeChant v. State*, 166 Nev. 918, 927, 10 P.3d 108, 113 (2000).

"Relevant factors to consider in deciding whether the 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.*

1. The issue of guilt or innocence was not close. As noted in Section G of this brief, *See* pp. 34-36, *supra*, regarding sufficiency of the evidence, Engelson was alone with Yessenia, Engelson later stated that Yessenia had

slammed into the shower wall and also fallen, Yessenia was cold and unresponsive when her brother arrived and checked on her, and she was soon pronounced dead of severe injuries to her head and body. Engelson confessed multiple times, including his statement, "I'm the one who did this." (13 AA 1420). At the end of an eight-day trial, the jury deliberated for approximately two hours before finding Engelson guilty.

2. Assuming arguendo the presence of error, the quantity and character of error are both negligible. As discussed in Parts A-I, Engelson has not demonstrated error and his complaints cannot alter the fact that he was the only person with Yessenia when she was injured, he waited hours to call for help, and he had marks on his hands consistent with hitting a person. (13 AA 1393-95). He received a fair trial.

3. The gravity of the crime charged is high. It is beyond dispute that Engelson's crime was grave. He murdered a toddler, Yessenia Camp.

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CONCLUSION

Engelson murdered Yessenia and the jury convicted him of first-degree murder based the combination of murder and child abuse and based on compelling, admissible evidence. There is no basis for reversing. This Honorable Court must affirm the Judgement of the District Court.

DATED: September 7th, 2021.

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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be

supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

VERIFICATION

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 pt. font; or

[ ] This brief has been prepared in a monospaced typeface using Microsoft Word in _____ with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[x] Proportionately spaced, has a typeface of 14 points or more and contains approximately 10,992 words as per NRAP 32(a)(7)(A)(ii); or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed ___ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure

DATED: September 7th, 2021

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