IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE MICHAEL CAMERON,

Appellant.

v.

STATE OF NEVADA,

Respondent.

Case No. 83531

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APPELLANT'S OPENING BRIEF

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCING

SECOND JUDICIAL DISTRICT
STATE OF NEVADA

The Honorable Barry Breslow, presiding

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I. STATEMENT OF THE CASE

A. DOCKETING STATEMENT

Because this is an appeal from a judgment of conviction based on a jury verdict of a Category A felony, it should remain with the Nevada Supreme Court. NRAP 17(b)(2)(A). It should remain there anyway because the Fourth and Sixth assignments of error raise questions of first impression involving the United States Constitution.

B. STATEMENT OF PROCEEDINGS BELOW

The State filed an Information against Appellant, charging one count of murder with the use of a deadly weapon. It was charged in alternate theories: either open murder (1-AA-1-2) or felony murder. (1-AA-2) The language of the Information on the felony murder charge specifically read as follows:

> "That the said Defendant, Wayne Michael Cameron, on or about the 11th day of February, 2020, within the county of Washoe, state of Nevada, killed Jarrod Faust in the perpetration or attempted perpetration of a burglary by entering a vehicle with the intent to commit assault or a battery or any felony therein, in that the killing occurred when the Defendant followed a vehicle driven by Jarrod Faust on Welcome Way. The Defendant stopped his vehicle, exited his vehicle with a firearm, approached the driver's side of the Chevrolet Silverado occupied by Jarrod Faust, and shot Jarrod Faust in the face, thereby inflicting mortal injuries upon Jarrod Faust from which he died on or about February 11, 2020, all of which occurred at or near 13425 Welcome Way, Reno."

The State and Defendant filed a number of pre-trial motions, two of which

are discussed extensively below. The first was the State's Motion to Admit Other Act Evidence of "Road Rage." (1-AA-7-37) The State contended therein that the Appellant per his statement acted in response to seeing some type of confrontation between the truck (driven by the victim) and a motorcycle (1-AA-10), but that the Appellant claimed that he did not act "with road rage." (Id. at 11)

The State wished to introduce evidence of an incident approximately 13-18 months prior between Appellant and a young lady with the initials "L.M.", where the Appellant followed her in the same general neighborhood of south-southwest Reno to her residence. By description, nothing violent happened between the Appellant and "L.M." See: 1-AA-12-14.

The second incident involved Appellant's daughter, "A.C.", who recalled an incident occurring in the same neighborhood approximately 12 months prior where Appellant followed four teenagers in a Jeep who had tailgated him. Again, by the description, nothing violent happened between the Appellant and the teenagers. See: 1-AA-14. The State argued that these prior acts were relevant to his motive, his intent and absence of mistake or accident. Per the State: "Contrary to his statement to detectives, [Appellant] actually is 'a road rage guy'." (Id. at 15)

The State also filed a Motion to Admit Other Acts Evidence Regarding "Shootings." (1-AA-38-48) There, the State pointed to additional facts: a) about an hour after the shooting of Mr. Faust, the Appellant texted his close friend, Mr.

Colarchik, where he stated "I think I shot someone. I hate when people make me mad. I hate that I know the law because I'm the one that got out of the car." b) Detectives had information from Appellant's son, Ethan, that Appellant always kept a black pistol, possibly a Glock, chambered in either a 9mm or .40 under the driver's seat of Appellant's vehicle. (Id. at 40) c) A single .40 casing from the scene was discovered to be a forensic match to two casings in the Appellant's vehicle, and that they were identified as having been fired from the same firearm. (Id.) d) Forensic analysis of the recovered bullet from the autopsy determined that it was consistent with being fired from a Smith & Wesson .40 model or Smith & Wesson 10mm model. (Id. at 41) e) The State claimed that Appellant's police statement denied culpability, and that Appellant claimed that his statement to Colarchik was regarding unrelated matters. (Id. at 41)

The State wished to introduce evidence of a shooting at the nearby Lang residence approximately two-and-a-half years prior. The 16-year-old son at that residence had had a recent falling out with Ethan Cameron. (Id. at 43) Forensic testing later confirmed that the casing found in the Lang residence matched the single casing from the murder scene. (Id. at 44) Ethan denied firing the gunshot and showed proof of an alibi through a "Life360 app" as well as proof from that "app" that Appellant was near the Lang residence at the time of the shooting. (Id. at 44)

The second incident was the shooting approximately 15 months prior to Faust's homicide of the exterior of the Tait residence in that neighborhood, which was struck by a bullet. (Id. at 44) Forensic analysis matched the casing in that case to the 9mm casing recovered from the Appellant's Acura, and both casings were identified as having been fired from a Glock 17 recovered from the Appellant's bedroom. (Id. at 44) The State admitted that there was no known connection between the occupants of that residence and Galena High School. (Id. at 44)

The third shooting incident the State wished to introduce was at the "Crofoot" residence, in the same general area of Reno, approximately five months prior to Faust's demise. Forensic analysis of the bullet found near that residence was inconclusive. But the Crofoot's had children who were friends of child victims in two other shooting cases, attended Galena High School with them, and played baseball with Ethan. (Id. at 45) They noted further evidence that the Appellant knew about the shooting per a conversation with the Crofoot's. (Id.)

The State also indicated that there were four other shootings believed to be connected to the Appellant in that neighborhood between October and December of 2018.

The State indicated that "a hearing is not requested at this time as there is no current admissible purpose." (1-AA-46) The State indicated that as the Defendant's theory of the case develops, a relevant and admissible purpose may develop. (Id.)

The defense opposed these motions (1-AA-49-55; 56-60), and the matter went to a pre-trial evidentiary hearing. (1-AA-70-140)

In the trial court's written Order, the Court agreed with the State that the "road rage incidents" were relevant to prove motive, intent, and/or absence of mistake or accident. (1-AA-144) The Court also found that the evidence was prejudicial, but not unduly prejudicial such that Appellant would be deprived of a fair trial. (Id. at 146)

The Court also followed the State's request on the "shootings" evidence, denying that motion without prejudice to renew. (1-AA-147)

The case proceeded to a ten-day jury trial. (1-AA-141-6-AA-1494) The jury returned a verdict of first-degree murder. (7-AA-1495-96)

As discussed below, the "shootings" evidence was presented at the sentencing hearing. (See: 7-AA-1516-1521)

The jury returned a verdict of life without the possibility of parole. (7-AA-1613) At a separate sentencing hearing, the Court added to that a consecutive term of 8-20 years for the deadly weapon enhancement of NRS 193.165. (7-AA-1614)

The Judgment of Conviction was filed September 9, 2021. (Id. at 1614-15) Appellant filed his Notice of Appeal to this Court seven days later, on September 16, 2021. (7-AA-1616-17) This Court has jurisdiction pursuant to NRS 177.015(3) and NRAP 4(b).

II. STATEMENT OF FACTS

Robert Medina, a Washoe County Sheriff's Office Deputy (2-AA-254) responded to 13425 Welcome Way in South-Southwest Reno off of Zolezzi Lane on February 11, 2020 at approximately 10:04pm, on the subject of the sound of a gunshot with one vehicle driving away and another vehicle remaining on the scene. (Id. at 255-56) When he arrived, he saw a goldish-grey Chevy Silverado truck registered to Jarrod Faust, facing south. The driver's side window was down, and there was music playing from inside the vehicle. Faust was slumped over in the driver's seat. He had a vape pen in his right hand and a gunshot wound to the left side of his face. (Id. at 259-60) There was a large amount of blood throughout the interior of the truck, slight body damage to the front right driver's side bumper, and damage to a mailbox column at 13425 Welcome Way, consistent with the damage to the right front driver's side of the bumper. (Id. at 261) There were no weapons inside of Faust's vehicle. (Id. at 262)

The deputies recovered a shell casing from the cul-de-sac of Welcome Way. (Id. at 264) The vehicle was in gear when they first arrived. (Id. at 267)

Neighbors on Welcome Way heard two loud "pops" between 8:40pm and 8:45pm and saw two vehicles, both with their headlights facing towards 13405 Welcome Way. Then one of the two vehicles left at a fairly high rate of speed while the other one stayed on the street for approximately 30 minutes. (See: 2-AA-

293-94; 329-31; 343; 352-54.) Mr. Faust's vehicle hit the mailbox at 13425 Welcome Way. (Id. at 354, 360) Video surveillance footage at two of the residences in that neighborhood reveal that the homicide likely occurred at 8:44pm. (2-AA-383-84)

Detectives from the sheriff's office collected a fired cartridge case at the bottom part of the cul-de-sac, which was a federal .40 Smith & Wesson cartridge. (2-AA-398, 415-16) They also identified a set of skid marks that were tire impression marks on the asphalt of Welcome Way. (Id. at 416) The distance between the cartridge casing and Mr. Faust's truck was about 50 yards. (Id. at 481)

David Colarchik, a very good friend of the Appellant's (3-AA-548), received a text from the Appellant on February 11, 2020 at about 9:30 or 9:45 in the evening. The Appellant said, "You're not going to believe what happened to me tonight." Colarchik replied, "What?" Appellant replied, "Well, you can't ever tell anybody about this, not even Katie [Colarchik's wife (Id. at 552)]." (Id. at 549) Colarchik asked what happened, and Appellant responded, "I think I just shot someone." Colarchik was shocked. Appellant repeated the statement. At some point Colarchik asked why, and Appellant replied, "I hate when people make me mad. I don't know why I get so angry. I hate that I know the law." (Id. at 551)

Appellant also said, "Well, I'm the one that got out of the car." Colarchik asked, "What do you mean?" Appellant responded, "I'm the one that got out of the

car and went up to him. (Id. at 551-52)

Ethan Cameron, the Appellant's 20-year-old son (3-AA-585), testified that his father (the Appellant) had firearms. He had a silver 9mm behind his nightstand, and a black Glock – probably a .40 – underneath the driver's seat of his car. The rest of his firearms were kept in a safe. (Id. at 586) There were a number of rifles and pistols in the gun safe. (Id. at 587) The Appellant drove a silver Acura MDX. (Id. at 588) Ethan also drove his father's car, typically during ski season when he did not have snow tires on his vehicle. (Id. at 588-89)

Detectives came out to speak with both of them. They both denied knowledge of a shooting, but the Appellant had told Ethan that he had heard about it previously. (Id. at 594-95)

Sometime thereafter Ethan came across in the file cabinet an owner's manual for a .40-caliber pistol. He gave that manual to Detective Nevills. (Id. at 599-600)

Detective Francisco Lopez, of RPD (3-AA-662), served a search warrant on the Appellant's residence and collected a Smith & Wesson from the nightstand, a 9mm handgun in the safe, a Glock17 9mm in a shoulder holster, an AR-15 style rifle, .23 in caliber, and a passport and a couple of telephones inside of the safe. (Id. at 669, 672, 674, 678, 679, 682)[1]

[1] Had trial counsel objected to this, the undersigned would have made an issue out of it. It does not play as a "plain error issue," however, because to the undersigned's knowledge this Court has not ever ruled on evidence of weapons that

During a search of the Acura MDX the police did not find any weapon (3-AA-690), but they found a casing on the floorboard that was a 9mm made by Luger. (Id. at 694-95) Through ATF, police were able to determine that Appellant purchased a .40-caliber handgun in December of 2011 from "Nevada Guns & Ammo" in Silversprings. (Id. at 698-99) However, they did not find a .40-caliber Glock anywhere on the Appellant's property. (Id. at 709-10)

On February 24, 2020, Appellant came into a wine store owned by **Gary Miner**, a friend and customer of the Appellant. (4-AA-768-69) Appellant indicated that he was under investigation for a murder. When the witness asked why, he relayed that he called a friend the other night and told him that he might have shot somebody. (Id. at 769)

The next day Appellant came back into the store and said police had come to his home and taken his guns, his phone equipment and computers. Appellant whispered, "They are not going to find the gun." Miner asked him whether he did it. Appellant responded, "You know I can't tell you that." (Id. at 769-70)

Dave Nevills, the lead RPD detective, questioned the Appellant. Appellant admitted there had been a motorcycle on Welcome Way, but it was not in the cul-de-sac. The only ones there were Mr. Faust and his truck and the Appellant. (4-

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are not the "murder weapon" in a murder case. Other courts have, and have ruled that it is irrelevant and potentially prejudicial.

AA-834) Appellant said he had a fuzzy memory about the incident involved in the case (Id. at 837), but also said he followed the truck because he thought something bad was going to happen. He said the reason he did that is "because I'm stupid." (Id. at 837-38)

One hour and 41 minutes into the interrogation, Appellant denied shooting Mr. Faust. (Id. at 843)

Appellant said there was nobody run off the road or brake-checked by the truck. He stated he was afraid of repercussions. (Id. at 846) He also said there was no road rage on his part. Appellant said he was following a motorcycle. (Id. at 847) Appellant emphasized, "I'm not a road rage guy." (2-AA-855) Appellant indicated that all of his guns were at his house. (Id. at 849)

On February 24, while searching Appellant's 2012 Acura MDX, the officers found a fired cartridge case under the driver's seat. (4-AA-905) They also found another one under the MDX, both .40 Smith & Wesson and Federal. (Id. at 906-07) They also found a fired cartridge from a 9mm weapon. (Id. at 911)

Leah Mazza (4-AA-953-54) testified that on October 30, 2018 she was driving back home to her parents' home in south Reno. (Id. at 954) She turned right off of Damonte Ranch and Arrowcreek Parkway to go up to Zolezzi. As she passed a car someone put their bright lights on and tailgated her. She tried to speed away, but the car stayed with her. (Id. at 956) She tried to lose the car through backroads,

but the car continued to follow her. (Id. at 959) She ultimately got to her parents' home, but when she looked out the window, she noticed the car was parked behind hers with its brights on. (Id. at 961) She noticed someone outside of the car taking pictures of her car while standing behind the car. The car was a white colored small SUV and the driver was a man. (Id. at 961-62) Nobody from the car was yelling at her, and there was no weapon. The person who got out of the SUV did not come onto her parents' property. (Id. at 969-70) Her car was not vandalized, nor was her parents' home. She never saw that person again. (Id. at 971-72)

Aspen C., the Appellant's daughter, testified that she was with her father one evening when a vehicle came up behind them on her tail. He slowed down to let the vehicle pass, and then they turned onto the same street the Appellant turned onto. (Id. at 982-83) Appellant followed the vehicle. It ended up turning off at one of the lower streets before their cul-de-sac. Appellant got out and yelled at them "loud and aggressive," while she stayed in the car and hid. (Id. at 983) The people in the car Appellant followed were just teenagers. (Id. at 985) After that Appellant got back into his car and drove away. (Id. at 987) Nothing violent occurred during the incident. (Id. at 991) The Appellant did not get his gun out of the car. (Id.) The witness does not remember what year the incident happened. (Id. at 991-92)

Appellant ultimately apologized to the two girls for scaring them. (Id. at 998)

A criminalist collected the fired projectile from Mr. Faust's body during his autopsy. (5-AA-1059-60)

The DNA analyst concluded that only Mr. Faust's DNA was located in his Chevrolet Silverado, and only Mr. Cameron's DNA was located in the Acura MDX. (5-AA-1078)

The firearms examiner determined that the .40-caliber cases reported from the vehicle, as well as the .40-caliber fired cartridge case reported from the scene, were all fired from the same unknown firearm. (5-AA-1097-98) The bullet found at autopsy is consistent with a .40-caliber and consistent with one fired by a Smith & Wesson model of the kind Appellant owned. (See: 5-AA-1098, 1101) The 9mm fired cartridge reported from the vehicle was fired from a Glock17, which was one of the recovered weapons. (Id. at 1102-03)

The medical examiner conducted the autopsy examination of Jarrod Faust. (5-AA-1111, 1113) The cause of death was the gunshot wound to his head and the manner of death was homicide. (Id. at 1122) The entrance gunshot wound was on the left side of Mr. Faust's face (Id. at 1116), and was fired within several feet of his body. (Id. at 1117) There were particles of gun powder stippling on his face. (Id.)

Wayne Michael Cameron testified in his defense.

On February 11, 2020 he left Murrietta's restaurant after two drinks. (5-AA-

1152-53) He left around 8:30pm, and took some back roads towards his home. He became aware of a pickup truck and a motorcycle approaching from behind. The pickup had been stopped for some time. The motorcycle was stopped behind him. The motorcycle attempted to go around the truck, and the truck started going and almost hit him. The motorcycle ultimately got around the pickup. Appellant was thirty yards away when this happened. (Id. at 1152-53)

At first Appellant thought the pickup driver was a teenager texting in the middle of the road. Then he thought the person might be intoxicated. Therefore, he followed the pickup. (Id. at 1154) He followed the pickup through a number of turns, and they ended up in the cul-de-sac in question. (Id. at 1155-56)

When Appellant arrived in the cul-de-sac he pulled his window down. The other driver had his window down. Appellant asked if he was alright. The truck driver said he was. The truck driver then said, "Why the fuck are you following me?" (sic) The Appellant replied, "Why are you trying to kill people?" The driver said, "What business of that is yours?" (Id. at 1157-58)

At one point the truck driver got mad, flinched at the Appellant, and said, "I will kill you, motherfucker." (sic) The truck driver was still in his vehicle when he said that. He had opened the door and the Appellant was behind his door. (Id. at 1159)

The truck driver held his hand up and the Appellant believed he had a gun.

(Id. at 1160) Thus, the Appellant reached under his seat, grabbed his gun, popped the clip, and loaded a cartridge. (Id. at 1160)

At that point the Appellant set the gun on his driver's seat. He was scared but he said, "Hey, you know what, let's just call it a night. This isn't my problem." (Id. at 1160-61) The truck driver said in response, "Problem? You don't know my problems, you little piece of shit. You panty-wearing motherfucker." (sic) Appellant then said, "Just so you know, I have a gun too." The driver started yelling, "Fuck you." (sic) He turned his wheel straight at the Appellant and drove it right at him with his arm up, like he was going to kill the Appellant with his vehicle. (Id. at 1161)

When that happened, the Appellant grabbed his gun. The Appellant tried to evade the truck to his left, and the Appellant fired his weapon. (Id. at 1162)

When Appellant first fired the gun, he did not see where he was aiming. After he fired it, the pickup was in front of him. The truck did not strike him or his vehicle. The driver appeared to change directions. When he fired his weapon, the Appellant could not see the pickup driver at the moment of firing. (Id. at 1164)

After he fired the weapon, the driver took off. The Appellant got in his car and left. The pickup had stopped 60 or 70 yards down the road. The Appellant could not see inside the pickup when he drove by it. He did not attempt to do so. (Id. at 1165)

He admitted his conversation with Mr. Colarchik, but added that he also told Colarchik that "He (Appellant) could have died that night." (Id. at 1167)

He also admitted to lying to the police during the interrogation and not telling them about the shooting or believing he was acting in self-defense. (Id. at 1170-71)

He could not explain how a 9mm cartridge casing got in his vehicle or the two .40-caliber fired cartridge casings got there on February 11, 2020. (Id. at 1172-73)

Regarding the incident with Leah Mazza, she bumped into him and he pulled over, but she kept going. That's why he followed her. (Id. at 1174-75) He took a picture of her license plate in case he needed to report the accident. (Id. at 1175-76) It turned out there was no damage to the vehicle, so he let it go. (Id. at 1176) He never attempted to contact her. (Id.)

With respect to the incident that Aspen testified to, that was a case of four young people goofing around in their car. He pulled over to let them pass. They turned basically towards his house, and he followed them. (Id. at 1176) He confronted them and demanded to speak to their parents. But then he realized that they did not know what they were doing. He apologized for acting like a grumpy old man. (Id. at 1177) When he got out of the vehicle on that occasion, he did not have a gun in his hand. (Id.) Likewise, when he got out of the vehicle with Ms.

Mazza, he did not have a gun in his hand. (Id. at 1178)

On cross-examination the trial prosecutor cross-examined the Appellant extensively about the prior incidences involving Ms. Mazza and the girls in the Subaru. (See: 5-AA-1189-91)[2]

III. STATEMENT OF ISSUES

A. Did the trial court violate Appellant's Fifth, Sixth and Fourteenth Amendment rights to due process of law and to a fair trial, when it permitted the state to obtain a conviction on a theory of felony murder, with absence of proof of burglary as charged?

B. Did the trial court violate Appellant's Fifth and Sixth Amendment rights to due process of law, to a proper probable cause determination, and to fair notice of the charges against him, when it permitted a constructive amendment to the Information by way of the jury instructions?

C. Did the trial court abuse its discretion and commit reversible error in allowing evidence of uncharged "road rage incidents" between Appellant and other individuals? In so doing, did the trial court violate Appellant's Fifth, Sixth and Fourteenth Amendment rights to due process of law and a fair trial?

D. Did the trial court commit plain constitutional error in allowing the victims and derivatively, through the prosecutor's argument, the Appellant's own son, to give sentencing recommendations as part of "victim impact" evidence?

E. Did the trial court commit reversible error by allowing evidence of "prior shootings" – that were not proven clearly and convincingly, but rather based on impalpable evidence – to be considered by the jury?

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[2] Unfortunately, the trial prosecutor engaged in a style of extensive cross-examination of having Appellant comment on the truthfulness of various witnesses against him. See: 5-AA-1201-02; 1210-11; 1228-29. This is a violation of Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890 (2003). However, in some instances trial counsel did not object, and in other instances trial counsel did not make a motion to strike or a motion for mistrial. Therefore, the issue would have to be raised as plain error. For that reason, the undersigned does not raise that issue here.

F. Should this Court declare the last sentence of NRS 200.030(4) to be unconstitutional?

IV. ARGUMENT

A. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL WHEN IT PERMITTED THE STATE TO OBTAIN A CONVICTION ON A THEORY OF FELONY MURDER, WITH AN ABSENCE OF PROOF OF BURGLARY AS CHARGED.

1. STANDARD OF REVIEW

A district court has broad discretion with respect to jury instructions, and absent an abuse of discretion or judicial error, this Court will uphold a district court's decision regarding a jury instruction. Brooks v. State, 124 Nev. 203, 206, 180 P.3d 657 (2008) However, an accurate instruction upon the basic elements of the offense charged is essential. Failure to so instruct constitutes reversible error in the absence of harmlessness, as that constitutes constitutional error. See: Rossana v. State, 113 Nev. 375, 382-83, 934 P.2d 1045 (1997).

As noted above, the State charged this murder case on alternate theories of open murder and felony murder, with the underlying felony being a burglary.

During the jury instruction process, Appellant objected to Instruction No. 34. (6-AA-1280-1293) Over objection, the trial court sided with the State and instructed on felony murder. (6-AA-1292-93)

Instruction No. 34 reads as follows:

"In regard to Count I of the Information the State has alleged alternative theories of murder as allowed by law. Specifically, the State has alleged:

1. Willful, deliberate, and premeditated murder, or

2. Felony murder.

You must unanimously agree that the Defendant is guilty of murder based upon one or more of the alternative theories. However, it is not necessary that you unanimously agree upon the specific theory by which the murder was committed.

In other words, if six of you agree that a defendant is guilty of willful, deliberate, and premeditated murder, and six of you agree that a defendant committed felony murder, then you may properly find a defendant guilty of murder.

The elements of each of these alternative theories of murder are set forth elsewhere in these instructions." (6-AA-1477)

The Court also gave Instructions No. 42 and 43, over the continued objection of Appellant. (6-AA-1305) Those instructions read:

"Whenever death occurs during the perpetration or attempted perpetration of certain felonies, the killing constitutes murder of the first degree. The offense of burglary is such a felony, and therefore a killing which is committed in the perpetration or attempted perpetration of a burglary is first degree murder. This is the felony murder rule.

In regard to the felony murder alternative, the State is not required to prove that the killing was committed with malice, premeditation, or deliberation. An unlawful killing of a human being, whether intentional, unintentional, or accidental, which is committed in the perpetration or attempted perpetration of burglary is first degree murder.

Therefore, the elements of felony murder of the first degree, as

alleged in this case are:

1) The Defendant did willfully and unlawfully;

2) Perpetrate or attempt to perpetrate the crime of burglary; and

3) The killing of Jarrod Faust occurred during the perpetration or attempted perpetration of the burglary.

For purposes of the felony murder alternative, the elements of the crime of burglary are:

1) The Defendant did willfully and unlawfully;

2) Enter into the vehicle of Jarrod Faust;

3) With the intent to commit assault or battery or any felony." (6-AA-1487, 1488)

The Court also gave Instructions No. 45 and 46 over the incorporated objection of Appellant. (6-AA-1305-06) Those instructions read:

"Entry by breaking or other force is not an element of the offense of burglary. Burglary occurs and is complete when any vehicle is entered with the intent to commit assault, battery or any felony therein, even if entry is made with the consent of the owner, and even if the assault, battery or felony is not committed thereafter. 'Entry' of a vehicle includes the entrance of the intruder, or the insertion of any part of his body or of any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person, or to detach or remove property. An entry is complete when any portion of the intruder's body, or any instrument or weapon held by the intruder and used or intended to intimidate a person or remove property, penetrates the space within the vehicle's outer boundary. Even the slightest penetration into a vehicle will suffice to support a burglary.

'Assault' means:

1) Intentionally placing another person in reasonable apprehension of immediate bodily harm; or

2) Unlawfully attempting to use physical force against another person.

'Battery' consists of any willful and unlawful use of force or violence upon the person of another.

…

As applied to Felony Murder, the term 'perpetration' includes not only the acts that constitute the elements of Burglary, but also encompasses acts beyond the statutory elements of that felony to include all acts following and connected to the crimes that form in Burglary apart of the same occurrence. Thus, the 'perpetration' of a burglary does not end the moment all of the statutory elements of the felony are complete. Instead, the duration of felony murder liability can extend beyond the termination of the felony itself if the killing and the felony are part of one continuous transaction. Therefore, when a killing takes place in the course of an unbroken chain of events flowing from the initial attempted or completed burglary, it has been committed in the perpetration of the burglary." (6-AA-1490, 1491)

Finally, Appellant continued his objection to Instruction No. 47. (6-AA-1306) That instruction read:

"An 'attempt' is an act done with the intent to commit a crime, intending, but failing to accomplish it. As it pertains to felony murder, the elements of attempted burglary are the following:

1) The Defendant intended to commit burglary;

2) The Defendant performed some act toward the commission of burglary; and

3) The Defendant failed to consummate commission of burglary.

> Mere preparation to commit a crime, such as by devising or arranging the means necessary for the commission of the offense, is insufficient to constitute an attempt. The act done must be a direct step or movement toward the present commission of the crime, although it need not amount to the commission of an actual element of the crime. When the intent to commit the crime is clearly shown, there need only be slight acts in furtherance of the crime to constitute an attempt." (6-AA-1492)

2. ARGUMENT

The issue of whether these instructions constitute a constructive amendment of the Information, as quoted above at page 1, is discussed below. This issue concerns whether this case could be prosecuted on a felony murder theory, with burglary being the underlying felony. The answer is no.

First, we must set this issue up properly as follows:

1. The State can lawfully charge alternate theories of first degree murder, and due process does not require the jury to agree unanimously on one theory. Schad v. Arizona, 501 U.S. 624 (1991) The issue is not that, but rather, whether the State proved that which it charged.

2. Based upon the language of NRS 205.060(1), the entry of a vehicle not only includes the intent to commit grand or petit larceny, but also assault or battery on any person or any felony. See: State v. Contreras, 118 Nev. 332, 334-37, 46 P.3d 661 (2002)[underlying felony of burglary with intent to commit battery does not merge into a homicide committed during the burglary involving the same intent and thus may support a felony-murder charge]. Again, the issue is not whether the

State can lawfully charge such a theory, but rather, whether it proved what it charged to the federal constitutional standard.

3. When the State charges a crime as here, it must be prepared to prove each and every one of its theories beyond a reasonable doubt. It is well settled that where a defendant is charged with a crime which alleges multiple objects per count, or manner and means of commission per count, or theories of culpability per count, one of which is theoretically impossible, and a general verdict is reached without the jury being instructed to disregard the theoretically impossible theory/object/means, the verdict must be set aside. Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359 (1931)

Thus, the Ninth Circuit has reversed three general verdicts on this principle of law. See: United States v. Barona, 56 F.3d 1087, 1097-98 (9th Cir. 1995), cert denied, 516 U.S. 1092 (1996); United States v. Qualls, 140 F.3d 824, 829-30 (9th Cir. 1998); and United States v. Fulbright, 105 F.3d 443, 450-51 (9th Cir. 1997).

4. The crime of burglary constitutes separate elements: the requisite specific intent, and also an entry. But the federal constitutional standard of Jackson v. Virginia, 443 U.S. 307 (1979) requires sufficient evidence on each and every element of the offense. This assignment of error raises the question of whether there is sufficient evidence of an "entry."

Again, the answer is no.

The fact that the requisite specific intent and the entry are different elements of burglary is well demonstrated by the Court of Appeals' published opinion in Merlino v. State, 131 Nev. 652, 661-62, 357 P.3d 379, 385-86 (Nev. App. 2015).

There, no dispute existed that the defendant intended to commit a felony inside of the pawn shop building, to wit, the crime of obtaining money under false pretenses. However, when she placed jewelry which she knew was stolen into a retractable sliding tray on the outer boundary of the building housing the pawn shop, the issue is whether that constituted an "entry" within the meaning of NRS 205.060. Since the outer boundary of the structure was self-evident, the common law "airspace test" applied in determining an entry, and the Court held that one does not "enter" a "pawnshop" building by placing stolen items and removing money from the retractable sliding tray of the pawn shop's drive-thru window.

Here, based upon the medical examiner's testimony, Appellant was not at "point blank range" when he shot the .40 Glock, but was several feet outside the truck. The question of whether that constitutes an "entry" ostensibly is answered by NRS 193.0145:

> "'Enter,' when constituting an element of part of a crime, includes the entrance of the offender or the insertion of any part of the body of the offender, or of any instrument or weapon held in the offender's hand and used or intended or intended to be used to threaten or intimidate a person, or to detach or remove property."

Read literally, this case is not an "entry." If the jury believed Mr. Cameron,

at 8:45 at night in a residential neighborhood he could not even see Mr. Faust. Mr. Faust literally did not know what hit him seconds before he died. And if the jury believed Mr. Cameron, he was acting in self-defense, not with the intent to threaten or intimidate Mr. Faust.

But if the jury believed the prosecutor, as the jury evidently did, Appellant executed Mr. Faust, acting as an executioner and as a traffic vigilante. See: 6-AA-1345, 1367. That is, he acted with the specific intent to kill, not to intimidate, harass or batter.

The problem here is the same problem this Court faced in Smith v. First Judicial District, 75 Nev. 526, 529-30, 347 P.2d 526, 528 (1959). There, the defendant entered the "open part" of a pickup truck, i.e., the bed, but not the cab, in stealing property. Based upon the statute as it was then written, he was not guilty of a vehicle burglary. As this Court properly noted, the criminal statute must be strictly construed when the legislature's intent is in doubt as to the crime of burglary's meaning. Smith, 75 Nev. at 528, 347 P.2d at 527.

As this Court explained in State v. Lucero, 127 Nev. 92, 249 P.3d 1226 (2011), the starting point for determining the legislative intent is the statute's plain meaning: When it is clear on its face the Supreme Court cannot go beyond the statute in determining legislative intent. Lucero, 127 Nev. at 95.

This statute is clear. In order to be an "entry," the person who discharges the

weapon must do so with the intent to threaten or intimidate a person. Whether one believes Appellant or believes the State, Appellant did not do that.

The issue here lies with the legislature. Discharging a firearm into an occupied vehicle is a Class B felony per NRS 202.285(1), whether or not there is an intent to harm or to intimidate the occupant. If NRS 193.0145 is amended to state that the use of the weapon is intended to commit any felony, then we have an "entry," and the firing of a weapon into a residence or a vehicle is a burglary. Compare: State v. Williams, 873 P.2d 471, 473-74 (Or. App. 1994). Until that happens, this case is technically not a burglary.

The error cannot be harmless, as the trial prosecutor extensively argued felony murder as a reason for conviction at 6-AA-1360-66. Given the relatively short time in which the jury deliberated and the lack of questioning during deliberation, it seems possible to very likely that some of the jurors alighted on guilt of first degree murder based on felony murder, without regard to premeditation and deliberation.

That becomes very important for this reason: The jury rejected self-defense, and it may well be that they decided that this was imperfect self-defense, or that Appellant, even holding the genuine belief of the need for self-defense, did not hold that belief reasonably. As a matter of law, imperfect self-defense does not mitigate murder to manslaughter. Hill v. State, 98 Nev. 295, 296-97, 647 P.2d 370

(1982)

However, a reasonable jury also could determine that Appellant did not act with deliberation, but rather, impulsively; and if the jury so decided, the theory of murder would be second, not first. See: Byford v. State, 116 Nev. 215, 235-36 n.4, 994 P.2d 700 (2000). But "felony murder" took away the jury's ability to return a verdict of second-degree murder.

For that reason, then, Appellant was prejudiced by the incorrect jury instruction and theory. A reversal and remand for a new trial must ensue.

B. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, TO A PROPER PROBABLE CAUSE DETERMINATION, AND TO FAIR NOTICE OF THE CHARGES AGAINST HIM WHEN IT PERMITTED A CONSTRUCTIVE AMENDMENT TO THE INFORMATION BY WAY OF THE JURY INSTRUCTIONS.

1. STANDARD OF REVIEW

The Standard of Review on this issue is not straightforward.

As noted above at 1-AA-2, the theory of felony murder was that the Appellant committed a burglary by entering Mr. Faust's vehicle with the intent to commit assault or battery "or any felony therein (unnamed)."

Then, as noted at pp. 17-20 above, the Court gave jury instructions over Appellant's objections that expanded the "felony" to attempted burglary. See: NRS 200.030(1)(b). Specifically on Instruction No. 47, the jury was instructed that it could find the felony if it found that the Defendant intended to commit a burglary.

and performed some act towards its commission but failed to consummate the commission of the burglary.

But then, during the first closing argument, the trial prosecutor argued that if the Appellant was simply trying to scare Mr. Faust, he was attempting to commit an assault which is a burglary under the statute. (6-AA-1363)

This caused Appellant to object and ask for a mistrial. (Id. at 1364) It was Appellant's understanding that the theory of felony murder was "putting the gun into the vehicle." (Id.) The prosecutor's response was "Sour grapes, Judge. That is what the law says." (Id.) The Court overruled the objection and the request for a mistrial, and allowed the prosecution to proceed. (Id. at 1365)

The verdict form simply found Appellant guilty of first degree murder with the use of a deadly weapon, not indicating the theory reached. (7-AA-1495-96)

A constructive amendment to an indictment (or information) occurs when the defendant is tried on a charge or theory not presented to the grand jury (or by extension, to the justice of the peace). That is a per se violation of the Fifth Amendment grand jury clause. United States v. Miller, 471 U.S. 130, 140 (1985); Strione v. United States, 361 U.S. 212, 217 (1960) A constructive amendment can occur by way of a jury instruction. See: United States v. Pierre, 484 F.3d 75, 81 (1st Cir. 2007).

While Appellant objected, he did not use the "magic words" constructive

amendment; but that obviously is what he meant.

In any event, a constructive amendment to an indictment (or information) is presumed prejudicial even when raised as plain error. United States v. Syme, 276 F.3d 131, 154 (3d Cir. 2002) Other circuits hold that even as plain error it is structural error. See: United States v. Folresca, 38 F.3d 706, 713 (4th Cir. 1994); United States v. Ford, 435 F.3d 204, 216 (2d Cir. 2006).

So regardless of where this Court lands, it would seem that review is de novo. And in any event, while the Court reviews a ruling on a motion to dismiss an indictment or information for abuse of discretion, it reviews issues of statutory construction de novo. State v. Plunkett, 134 Nev. 728, 730, 429 P.3d 936, 937-38 (2018) The reason this situation constitutes a constructive amendment in part involves statutory construction.

2. ARGUMENT

An amendment of an information is usually within the trial court's discretion. But that discretion is abused if the defendant's substantial rights are thereby prejudiced. Green v. State, 94 Nev. 176, 179, 579 P.2d 1123 (1978)[reversible error where information amended at trial after all of evidence admitted.] No prejudice occurs if the information is amended simply to conform to the victim's preliminary hearing testimony, even where it occurs during trial. See: Varay v. State, 121 Nev. 159, 162-63, 111 P.3d 1079, 1081-82 (2005). And if the

indictment or information is amended but the defendant already had notice of the amended theory because of the nature of the charges in the initial criminal complaint, the defendant's substantial rights are not abused. See: State v. Eighth Judicial District, 116 Nev. 374, 378-79, 997 P.2d 126 (2000).

But on the same hand, an indictment or information alleging a theory of murder should specifically allege the acts supporting the theory. See: Barren v. State, 99 Nev. 661, 665-68, 669 P.2d 725, 727-29 (1983), citing Simpson v. District Court, 88 Nev. 654, 661, 503 P.2d 1225 (1972).

The problems in this case are manifest. First of all, the word "attempt" nowhere appears in the initial charging Information. Moreover, the "attempted burglary" in this case, per the State's theory adopted by the court below, was an "attempt to commit an attempt," since per NRS 200.471(a)(1) an assault can consist of an attempted battery. But that result is logically impossible. Moreover, how could Appellant have "failed to complete the burglary," when he successfully fired the gunshot?

And most importantly, the State sought this jury instruction with the approval of the court below after the Appellant testified. The point of these instructions was to say that assuming Appellant did not act in self-defense, even if he did not see Mr. Faust, he knew the vehicle was occupied by a driver and he therefore must have intended to attempt to scare (i.e., threaten or intimidate) the

driver with his gunshot. In that way the instruction made Appellant guilty of first degree murder, even if the jury believed Appellant's testimony.

As such, this case is indistinguishable from Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000)[reversed and remanded]. There, as here, the State caused the Information to be amended after the defendant testified, to add a theory of felony murder that was tailored to the defendant's testimony. In reversing, this Court held that such an amendment violated the Appellant's Sixth Amendment right to be clearly informed of the nature and cause of the charge in order to prepare a defense adequately. The Court cited Cole v. Arkansas, 333 U.S. 196 (1948) and Alford v. State, 111 Nev. 1409, 1415, 906 P.2d 714, 717 (1995) in support of that holding.

As such, Appellant's objections to Instructions No's. 42, 43, 46 and 47 were entirely correct and should have been sustained. That error is clearly prejudicial and a new trial must be ordered.

C. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN ALLOWING EVIDENCE OF UNCHARGED "ROAD RAGE INCIDENTS" BETWEEN APPELLANT AND OTHER INDIVIDUALS. IN SO DOING, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

1. STANDARD OF REVIEW

On the one hand, the admissibility of prior bad acts evidence is within the discretion of the trial court and its decision will not be disturbed on appeal unless it

is manifestly wrong. Phillips v. State, 121 Nev. 591, 601, 119 P.3d 711 (2005)

On the other, the general presumption is that uncharged bad acts are inadmissible. And uncharged bad act evidence is potentially highly prejudicial. Tavares v. State, 117 Nev. 725, 731, 732, 30 P.3d 1128 (2001)

2. ARGUMENT

As seems to happen often since 2012, the State, in successfully advocating the admission of Leah Mazza's and Aspen C.'s testimonies, believes that Bigpond v. State, 128 Nev. 108, 116, 270 P.3d 1244 (2012) opened the door to allow any uncharged misconduct whenever the defendant's credibility is at issue, regardless of the categories in NRS 48.045(2). We submit that is a severe misreading of Bigpond.

In Bigpond, the prior acts consisted of crimes, to wit, misdemeanor batteries that Bigpond perpetrated on the same victim, which resulted in judgments of conviction and resulted in the enhanced misdemeanor into a felony. Bigpond, 128 Nev. at 110-11. The State wished to present the prior convictions in order to explain the relationship between the victim and Bigpond, and provide a possible explanation (i.e., motive) for the victim's recantation. (Id. at 111)

But subsequently, in Randolph v. State, 136 Nev. Ad. Op. 78, 477 P.3d 342 (2020), this Court made clear that when balancing the probative value against the danger of unfair prejudice, courts consider a variety of factors: the strength of the

evidence as to the commission of **the other crime**, the similarity between **the crimes**, the interval of time that is elapsed **the crimes**, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility. Randolph, 477 P.3d at 349.

Thus, firstly under NRS 48.045(2), the uncharged acts must be something that is prosecutable. They were in Bigpond. Here they were not. Mr. Cameron broke no law in following either Ms. Mazza or the errant teenagers in the incident which Aspen described. And he did nothing violent or threatening to either young woman/set of young women.

Secondly, not only must the uncharged evidence be relevant to one of the categories contained in NRS 48.045(2), but that category must be relevant to an actual issue in the case[3]. Thus, in Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005) the uncharged offense was not relevant to a common scheme or plan, *modus operandi*, intent, or motive, and thus was inadmissible. See: Rosky, 121 Nev. at 196-98.

And in Elsbury v. State, 90 Nev. 50, 518 P.2d 599 (1974), uncharged

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[3] In Bigpond, the uncharged crimes were relevant to motive, albeit the victim's motive to lie. When it comes to the defendant's motive, the issue is: Why? What motivated the defendant to commit the crime? See: Richmond v. State, 118 Nev. 924, 932-33, 59 P.3d 1249 (2002). However, as Richmond and Mortensen v. State, 115 Nev. 273, 281, 786 P.2d 1105 (1999) instruct, the answer cannot be "Because the defendant has the propensity to get involved in this sort of criminality." If that is the answer, the evidence is inadmissible.

misconduct was improperly admitted in a narcotics sales case, where the defense was coercion or entrapment, the uncharged misconduct was offered to prove the defendant's knowledge, but his knowledge of the narcotic nature of the substance sold was not at issue. Elsbury, 90 Nev. at 53.

Moreover, even if the State could concoct a theory that the prior "road rage" incidents were violent, since this case involved death and self-defense but the other cases did not involve either, the uncharged misconduct was inadmissible. The uncharged evidence simply does not bear on the elements of premeditation and deliberation. Longoria v. State, 99 Nev. 754, 756-57, 670 P.2d 939 (1983).

Rosky and Longoria resulted in reversals. So must this case.

Elsbury resulted in a holding of harmless error. The error in this case certainly is not harmless.

As indicated above, the trial prosecutor cross-examined Appellant extensively on the "road rage incidents." And in closing argument, the trial prosecutor referenced the Appellant as an "executioner as a traffic vigilante." (6-AA-1345) In rebutting self-defense, the trial prosecutor stressed that the case was "an execution" because Appellant is a "vigilante." (Id. at 1367) He argued that the prior uncharged acts are "abhorrent behavior, behavior indicative of premeditation and deliberation, the actions of a murderer." (Id. at 1397)

Respectfully, this case cannot survive an analysis under Randolph,

Richmond, Mortensen, Elsbury, Rosky, or Longoria. The conviction can and should be reversed on this ground alone or in cumulation with the other trial errors.

D. THE TRIAL COURT COMMITTED PLAIN CONSTITUTIONAL ERROR IN ALLOWING THE VICTIMS AND DERIVATIVELY, THROUGH THE PROSECUTOR'S ARGUMENT, THE APPELLANT'S OWN SON, TO GIVE SENTENCING RECOMMENDATIONS AS PART OF "VICTIM IMPACT" EVIDENCE. AS SUCH, APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, TO A FAIR SENTENCING TRIAL AND TO FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT WERE IMPINGED.

1. STANDARD OF REVIEW

As counsel did not object, this issue is reviewed for plain error. Although failure to object at trial generally precludes appellate review, the Supreme Court has the discretion to review constitutional or plain error. Plain error exists when the error is clear, and it affects a defendant's substantial rights. Where there is no alleged constitutional component, the error must be so unmistakable that it reveals itself by a casual inspection of the record under current Nevada law. LaChance v. State, 130 Nev. 263, 271 n.1, 272-73, 321 P.3d 919 (2014)

Jordyn Faust, the younger brother of the deceased, urged the jury to return a verdict of life imprisonment without the possibility of parole. (7-AA-1550)

Ashley Faust, the deceased's younger sister, also advocated that the Appellant spend the rest of his life in prison without the possibility of parole. (Id. at 1558)

Karen Faust, the deceased's mother, asked the jury for a sentence of life without the possibility of parole. (Id. at 1570)

And the trial prosecutor argued in rebuttal that the Appellant's own son, Ethan, imposed the Appellant with a life without parole sentence by saying "If you don't own this, I will never speak with you again." (Id. at 1581)

2. ARGUMENT

Per Witter v. State, 112 Nev. 908, 922, 921 P.2d 886 (1996), this Court interpreted Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) to mean that it is permissible for victims to give sentencing recommendations as part of their victim impact testimony at sentencing in a non-capital case, albeit not in a capital case[4].

Frankly, we do not think Randell states that precisely. Randell actually applies to the typical case wherein the death penalty is not involved and the Court, not the jury is the sentencing decision maker. Randell, 109 Nev. at 7. As this Court explained:

> "Judges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence. (cites omitted) The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim and making a sentencing decision. …" Randell, 109 Nev. at 7-8

[4] Witter was overruled on other grounds. Nunnery v. State, 127 Nev. 749, 774-76, 263 P.3d 235, 252-53 (2011).

However, in Kaczmarek v. State, 120 Nev. 314, 336-37, 91 P.3d 16, 31-32 (2004), a capital case, the defendant wished to present the opinion testimony of the victim's next-of-kin, advocating a life and not a death sentence. That testimony was disallowed and on appeal, this Court affirmed. This Court specifically noted that the victim's opinion on sentencing is irrelevant to the defendant's character, his record, or the circumstances of the victim's murder. In fact, this Court cited with approval to Robison v. Maynard, 829 F.2d 1501, 1505 (10th Cir. 1987): "Such testimony, at best, is a gossamer veil, which would blur the jury's focus on the issues it must decide."

Respectfully submitted: The better approach to take is not that an opinion as to the sentence to be imposed can be made in any non-capital sentencing, but rather, it is error but is assessed for harmlessness. The error is presumed harmless in a judge sentencing but not a jury sentencing. Jurors do not have the training or experience that trial judges and/or PSIR writers possess.

The reasons we advocate that result are as follows:

1) Per Payne v. Tennessee, 501 U.S. 808 (1991), victim impact testimony is admissible at sentencing when the testimony is relevant and unprivileged, and its weight is left to the factfinder who has the benefit of cross-examination and contrary evidence by the opposing party. **However, victim impact evidence cannot be offered to encourage comparative judgments**; as long as the victim

impact evidence is designed to show each victim's "uniqueness as a human being," whatever the factfinder might think the loss to the community results only from his victimization might be, the evidence is admissible. Payne, 501 U.S. at 823-24.

2) However, victim impact testimony in the form of an opinion as to the kind of sentence the defendant "should" serve does not meet that threshold test of relevant, admissible evidence. Lay opinions as to the kind of sentence a defendant should receive suffer from a lack of foundation, because the witness is no better position to form an opinion than the fact-finder itself, and the allowance of such an opinion in evidence constitutes an appeal to sympathy or prejudice, and tends to suggest that the fact-finder shift his his/her responsibility to those witnesses. McCormick on Evidence, §12 at 30-31 (3d. ed. 1984)

3) And finally, as this Court noted in Kaczmarek, a victim's opinion on the kind of sentence the defendant should serve is irrelevant to his character, his record, or the circumstances of the victim's murder.

If we have a system whereby the jury will be the sentencer, then this Court must be sensitive to the proposition that the evidence it considers in fact is relevant only to the defendant's character, his record, or the circumstances of the victim's murder.

As noted in Miller v. Alabama, 567 U.S. 460, 469-70 (2012), striking life without parole sentences for juveniles as violative of the Eighth Amendment, the

Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions, which flow from basic precepts of justice that punishment for the crime should be graduated in proportion to both the offender and the offense.

Allowing the jury to be caught up in a "revenge-fest" such as this, aggravated by the incredibly prejudicial "slap" at the defendant through the prosecutor by his son, violates said Eighth Amendment prohibition.

It is time – indeed, it is way past time – to modify Randell to apply only to judge sentencings, with a finding of error but a presumption of harmless error, and to disallow "sentencing opinions" from victims in any kind of jury sentencing – whether capital or non-capital.

E. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING EVIDENCE OF "PRIOR SHOOTINGS" TO BE CONSIDERED BY THE JURY, AS THEY WERE NOT PROVEN CLEARLY AND CONVINCINGLY, BUT RATHER, BASED UPON IMPALPABLE EVIDENCE.

1. STANDARD OF REVIEW

Where character evidence is admitted at a penalty or sentencing hearing, the Court reviews the same for abuse of discretion, noting that the verdict cannot be based solely on punishment for uncharged acts. Denson v. State, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996)

Prior to the beginning of the penalty hearing, Appellant objected to any

evidence or testimony regarding uncharged shootings, claiming that such evidence was highly suspect or impalpable. (7-AA-1505) The trial court overruled the objection on the basis that a different standard for admission of uncharged misconduct at a trial exists versus at a sentencing hearing. (Id. at 1506-07)

Detective Nevills testified at the hearing that on June 22, 2017 at about 11:08pm, Brian Lang and his son, Brooks, were inside the residence. They heard shots, but thought it came from a television program or videogame they were paying attention to. In fact projectiles came into the home. (7-AA-1516) They discovered eight .40-caliber fired cartridge casings, and recovered five bullet fragments from inside the residence. A neighborhood resident heard the shots and saw a mid-sized SUV leaving the area. Brooks believed that Ethan Cameron might have been involved. (Id. at 1517)

They found the .40-caliber casing in the Appellant's car matched up to the recovered casings from the Lang residence. Ethan was interviewed and denied culpability, but indicated that Appellant was in the area of Mr. Lang's residence on the date and time in question. (Id. at 1518)

On October 18, 2018 at about 9:30pm, an incident occurred in the same general neighborhood involving residents named Lisa and William Tait. (Id. at 1519)

This incident occurred twelve days prior to the "Mazza residence" incident,

and is only about two minutes away from the Appellant's residence. There is no known or developed explanation or motive between the Tait's and the Appellant. (Id. at 1521) Apparently, they found a projectile in a window frame below a living room window and a 9mm fired cartridge casing in the street. (Id. at 1520) That casing matched to the Glock17 9mm found in Appellant's residence. (Id.)

2. ARGUMENT

In Mason v. State, 118 Nev. 554, 562, 51 P.3d 521, 526 (2002), this Court stated that evidence of uncharged misconduct on an unrelated offense is inadmissible at penalty/sentencing if it is "dubious" or "tenuous."

But what do those words mean?

The Court came closer in Allen v. State, 99 Nev. 485, 488-89, 491, 665 P.2d 238, 240-41, 242 (1983): Character evidence that is of "questionable value" and may leave the jury with the false impression of the defendant's commission of an uncharged act should not be admitted. *In dicta* in Allen, the Court suggested that even at penalty the uncharged misconduct should meet the standards of NRS 48.045(2).

In this case, the best we can say is that someone operating the Appellant's vehicle fired gunshots into two residences. But we do not know why. We do not know what the shooter's intent was. Nor do we know precisely who did it, if persons other than Appellant had access to his vehicle – as is the case with Ethan.

The situation is analogous to Glispey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1973), the reversal of an order denying pre-trial habeas. There, this Court held that since the accused's access to a prison restroom was a woman visitor was not exclusive and she did not maintain control over the location, even if she placed marijuana in the paper towel receptacle, a subsequent attempt to recover would be purely speculative and could not sustain requisite probable cause to hold her for trial on the basis of constructive possession.

There, during the preliminary examination, two other women who had used the restroom in question denied they had placed the bag of marijuana in the paper towel receptacle. 89 Nev. at 223.

As in Glispey, the evidence of these uncharged "shootings" is based upon speculation. In the end, we do not know who really did it or why. And if we cannot determine that, then the evidence is "impalpable," or "dubious," or "tenuous" or, more clinically, does not meet the "clear and convincing standard" of NRS 48.045(2).

Undeniably, this evidence had a great impact on the jury. From the jury deliberation question at 7-AA-1584-92, regarding what the sentence would be for use of a deadly weapon, it is manifest that the jury wanted to return a verdict that would ensure that Mr. Cameron not drive a vehicle again[5]. But the jury's concern

[5] The Court's refusal to answer that question was not error per Menendez-Cordero

in that regard was obviously driven by this uncharged "shooting" evidence.

Therefore, even if the Court determines that Appellant had a fair guilt trial, it must reverse and remand for a new penalty hearing.

F. THE COURT SHOULD DECLARE THE LAST SENTENCE OF NRS 200.030(4) TO BE UNCONSTITUTIONAL

This issue is raised as plain error, but it is one near and dear to this author's heart.

NRS 200.030(4) states as its last sentence:

> "A determination of whether aggravating circumstances exist is not necessary to fix the penalty of imprisonment for life with or without the possibility of parole."

What that sentence seems to mean is that in a non-capital murder sentencing, the sentencer – whether court or jury – need not consider aggravating or mitigating circumstances, and thus need not be instructed on them. Rather, non-capital murder sentencings effectively can be "free-for-alls."

In the opinion of this author, that result will not do. It is unconstitutional, in violation of the Eighth Amendment.

The Court must be sensitive to these matters:

First, per NRS 213.085, when the judgment is life without the possibility of parole, the Pardons Board cannot commute that sentence to life with the possibility

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v. State, 135 Nev. 218, 227-28, 445 P.3d 1235, 1242-43 (2019).

of parole. Essentially, the legislature has spoken: One sentenced to life without the possibility of parole will die in prison, just of natural causes. That person need not be concerned with rehabilitation.[6]

Secondly, how many inmates on death row have ultimately been executed against their wishes in the last 45 years? The undersigned can think of one: John Moran. There are a few others who "just gave up and participated in State-assisted suicide." Otherwise, as Chief Justice George of the California Supreme Court aptly observed, "The leading cause of death on death row is old age." That is true, and in this state consider death row inmates such as Thomas Wilson: He has been on death row since 1979!

Effectively, in this state the real difference between the death penalty and life without for the vast majority of such inmates is where they are housed. Death row inmates are housed at the Ely State Prison in maximum security with relatively few privileges; life without inmates actually can end up at Northern Nevada Correctional Center or Southern Desert Correctional Center with typical yard and job privileges held by relatively "short-term" inmates.

The comments of Justice Sotomayor in her dissent from the denial of

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[6] It is true that the Pardons Board could commute a sentence of life without the possibility of parole to a term of years. The undersigned is aware of a few cases where that should happen in his opinion; but, to the undersigned's knowledge, it has never happened. It is difficult to imagine any district attorney's office not objecting to such a result at a Pardons Board hearing!

certiorari in Campbell v. Ohio, ___ U.S. ___, 138 S.Ct. 1059-60 (2018) ring very true to this author:

> "Petitioner Glen Campbell challenges the constitutionality of Ohio Rev. Code Ann. § 2953.08(D)(3) (West Supp. 2017), which provides that sentences "imposed for aggravated murder or murder" are "not subject to review." I concur in the denial of certiorari because Campbell failed adequately to present his constitutional arguments to the state courts. I nonetheless write separately because a statute that shields from judicial scrutiny sentences of life without the possibility of parole raises serious constitutional concerns.
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> In Ohio, after a defendant is found guilty of aggravated murder, the State authorizes a range of penalties, including life in prison with parole eligibility after 20, 25, or 30 years, or life imprisonment without the possibility of parole. See § 2929.03(A)(1). Under that scheme, Campbell was sentenced to life imprisonment without the possibility of parole after pleading guilty to aggravated murder. He challenged his sentence on appeal, arguing in part that the trial court failed to balance the aggravating and mitigating factors as required by § 2929.12 of the Ohio statute.[1] The Court of Appeals of Ohio found this argument "unreviewable" under § 2953.08(D)(3). App. to Pet. for Cert. A–3. That provision, contained within the appellate review section of the Ohio statute, provides: "A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section." § 2953.08(D)(3). The court below relied on precedent from the Supreme Court of Ohio, which has held that § 2953.08(D)(3) is "unambiguous" and "clearly means what it says: such a sentence cannot be reviewed." *State v. Porterfield,* 106 Ohio St.3d 5, 8, 2005–Ohio–3095, ¶ 17, 829 N.E.2d 690, 693.
>
> Trial judges making the determination whether a defendant should be condemned to die in prison have a grave responsibility, and the fact that Ohio has set up a scheme under which those determinations "cannot be reviewed" is deeply concerning. Life without parole "is the second most severe penalty permitted by

law." *Harmelin v. Michigan,* 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment). In recent years this Court has recognized that, although death is different, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham v. Florida,* 560 U.S. 48, 69, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). "Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.' " *Miller v. Alabama,* 567 U.S. 460, 474–475, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (quoting *Graham,* 560 U.S., at 69, 130 S.Ct. 2011). A life-without-parole sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Id.,* at 70, 130 S.Ct. 2011 (internal quotation marks and bracket omitted).

Because of the parallels between a sentence of death and a sentence of life imprisonment without parole, the Court has drawn on certain Eighth Amendment requirements developed in the capital sentencing context to inform the life-without-parole sentencing context. For instance, this Court imported the Eighth Amendment requirement "demanding individualized sentencing when imposing the death penalty" into the juvenile conviction context, holding that "a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison." *Miller,* 567 U.S., at 475, 477, 132 S.Ct. 2455. The Court also categorically banned life-without-parole sentences for juvenile offenders who did not commit homicide. See *Graham,* 560 U.S., at 82, 130 S.Ct. 2011.

The "correspondence" between capital punishment and life sentences, *Miller,* 567 U.S., at 475, 132 S.Ct. 2455, might similarly require reconsideration of other sentencing practices in the life-without-parole context. As relevant here, the Eighth Amendment demands that capital sentencing schemes ensure "measured, consistent application and fairness to the accused," *Eddings v. Oklahoma,* 455 U.S. 104, 111, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), with the purpose of avoiding "the arbitrary or irrational imposition of the death penalty," *Parker v. Dugger,* 498 U.S. 308, 321, 111

> S.Ct. 731, 112 L.Ed.2d 812 (1991). To that aim, "this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency." *Clemons v. Mississippi,* 494 U.S. 738, 749, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); see also *Parker,* 498 U.S., at 321, 111 S.Ct. 731 ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally"); *Gregg v. Georgia,* 428 U.S. 153, 195, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Steward, Powell, and Stevens, JJ.) (noting that "the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner").
>
> In my view, this jurisprudence provides good reason to question whether § 2953.08(D)(3) really "means what it says": that a life-without-parole sentence, no matter how arbitrarily or irrationally imposed, is shielded from meaningful appellate review. Our Eighth Amendment jurisprudence developed in the capital context calls into question whether a defendant should be condemned to die in prison without an appellate court having passed on whether that determination properly took account of his circumstances, was imposed as a result of bias,[2] or was otherwise imposed in a "freakish manner." And our jurisprudence questions whether it is permissible that Campbell must now spend the rest of his days in prison without ever having had the opportunity to challenge why his trial judge chose the irrevocability of life without parole over the hope of freedom after 20, 25, or 30 years. The law, after all, granted the trial judge the discretion to impose these lower sentences. See § 2929.03(A)(1)."

We urge this Honorable Court to follow the lead of Justice Sotomayor and to hold that that sentence of NRS 200.030(4) violates the Eighth Amendment's prohibition of cruel and unusual punishment.

V. CONCLUSION

This Appellant did not receive a fair trial, whether at the guilt phase or at the

penalty phase. A reversal and remand should ensue.

DATED this 10th day of March, 2022.

Respectfully submitted,

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By: */s/RichardCornell*_____
Richard F. Cornell

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28(e), and NRAP 32(a)(8):

I have read the Appellant's Opening Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e), in that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face which is Times New Roman 14-point; it is in a plain style; and the margins on all four sides are at least one (1) inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), because it contains less than 14,000 words, to wit: 11,755 words.

DATED this 10th day of March, 2022.

/s/RichardCornell
Richard Cornell, Esq., #1553

CERTIFICATE OF MAILING

The undersigned certifies that they are an employee of Richard F. Cornell, P.C., and that on the 10th day of March, 2022, they served a true and correct copy of the foregoing document upon the necessary party(ies), as set forth below, by way of the court's E-flex filing system:

Washoe County District Attorney's Office
Appellate Division
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DATED this 10th day of March, 2022.

*/s/KathrynOBryan*_____
Kathryn O'Bryan, Employee