IN THE SUPREME COURT OF THE STATE OF NEVADA

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DARION COLEMAN Appellant, vs. STATE OF NEVADA, Respondent.	Case No: 82915

APPELLANT'S OPENING BRIEF

(Appeal from denial of Post-Conviction Writ)

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JURISDICTIONAL STATEMENT

This appeal is in response to a Findings of Fact, Conclusions of Law and Order, which was filed on April 23rd, 2021. 4 AA 762. Appellate jurisdiction in this case derives from Nevada Rules of Appellate Procedure 4 (b) (1), *NRS* 34.575, and Section 4 of Article 6 of the Nevada Constitution, as this matter concerns an appeal of a district court Order denying a Petition for a Writ of Habeas Corpus. The Notice of Appeal was timely filed on May 11, 2021. 4 AA 788-89.

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ROUTING STATEMENT PURSUANT TO NRAP 3(C)(E)(1)(B)(IX)

NRAP 28(a)(5) mandates that Appellant shall provide a routing statement that indicates if the matter is "presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17."

Here, pursuant to NRAP 17(b), this matter should be retained by the Nevada Supreme Court as it is a challenge to a conviction for a category "a" felony and is thus not within the Nevada Court of Appeal's listed jurisdiction. *See* 3 AA 625.

STATEMENT OF ISSUES

Issue One: The District Court Abused Its Discretion When It Did Not Find Deficient Conduct For Failure to Obtain a Timely PTSD Evaluation, And Otherwise Abused Its Discretion In Denying Appellant's Request For The Evaluation Prior To Evidentiary Hearing.

Issue Two: The District Court Abused Its Discretion When It Did Not Find Detective Miller's Testimony Improper Expert Witness Testimony For Which She Was Not Noticed.

Issue Three: The Judgment of Conviction must be overturned, given the district court's reliance on evidence in violation of *Silks*.

Issue Four: The District Court Abused Its Discretion When It Failed To Find That The State Impermissibly Impugned Darion's Right To Silence.

Issue Five: The District Court Abused Its Discretion When It Failed To Deem The State's Closing Argument As Impermissible Tailoring That Precluded Darion From Receiving a Fair Trial.

Issue Six: The District Court Abused Its Discretion When It Failed To Find Deficient Conduct and Prejudice From a Failure to Impeach Or Argue At Closing.

Issue Seven: Cumulative error requires striking of the Judgment of Conviction.

STATEMENT OF THE CASE

Darion Muhammed-Coleman was indicted via Grand Jury on October 11, 2013 for the following charges: conspiracy to commit robbery (felony); attempt

robbery with use of a deadly weapon (felony); murder with use of a deadly weapon (felony); battery with use of a deadly weapon (felony); assault with a deadly weapon (felony); conspiracy to violate uniform controlled substances act (felony); and attempt to possess controlled substance (wobbler). 1 AA 001-2. Darion entered a plea of "Not-Guilty."

Jury Trial proceeded on January 3rd, 2017 and on January 11th, 2017, Darion was found not-guilty on counts one (1), two (2), and five (5) for conspiracy to commit robbery (felony), attempt robbery with use of a deadly weapon (felony), and assault with a deadly weapon (felony) respectively. 3 AA 624-5. However, Darion was found guilty of counts for first-degree murder with use of a deadly weapon; battery with use of a deadly weapon; conspiracy to violate uniform controlled substances act; and attempt to possess controlled substance. *Id.*

Darion was thereafter sentenced on count three (3) (first degree murder with use of a deadly weapon) to a term of life with a minimum of two hundred and forty (240) months in the Nevada Department of Corrections (NDOC), plus a consecutive sentence of a minimum of sixty (60) months and a maximum of two hundred and forty (240) months for the deadly weapon enhancement, for a total aggregate sentence of life with the possibility of parole after a minimum of three hundred (300) months. 3 AA 687-88. As to count four (4) (battery with use of a deadly weapon), Darion was sentenced to a minimum term of forty-eight (48) months and a maximum term of one hundred twenty (120) months in the Nevada Department of Corrections

(NDOC), concurrent to count three (3). *Id.* As to Count six (6) (conspiracy to violate uniform controlled substance act), Darion was sentenced to a minimum term of twenty-four (24) months and a maximum of sixty (60) months, concurrent to count three (3). *Id.* As to count seven (7) (attempt to possess controlled substance), Darion was sentenced to a minimum term of nineteen (19) months and a maximum term of forty-eight (48) months, concurrent to count three (3), and consecutive to case C299066, with seven hundred twenty (720) days credit for time served. *Id.* The Supreme Court of Nevada affirmed the Judgment of Conviction on July 3, 2018. 4 AA 848.

On December 6, 2019, Darion filed his Petition for Writ of Habeas Corpus, alleging as follows; That trial counsel was ineffective for failing to properly cross-examine the lead detective or otherwise raise the issue of perjury or argue the same at closing; That a failure to timely obtain an expert concerning post-traumatic stress disorder given counsel's actual and constructive knowledge of the same amounted to IAC; that the sentencing hearing relied on improper evidence causing Darion to receive an unfair sentencing hearing; that the trial court impermissibly allowed the lead detective to testify as an expert concerning a shooting reconstruction without properly being noticed as such; that the State impermissibly commented on or otherwise solicited comments concerning Appellant's post-arrest and post-*Miranda* silence during trial and during both closing arguments, or alternatively, whether this amounted to an impermissible general tailoring argument during closing in violation

of Darion's State and Federal rights[1]; and that the aforementioned all cascaded in its prejudice to Darion, amounting to cumulative error of a Constitutional dimension that demanded reversal. 1 AA 010—36; *See also* 4 AA 798.

On March 5, 2020, the State filed its Opposition to Defendant's Post-Conviction Petition For Writ of Habeas Corpus and Request for Evidentiary Hearing and counsel for Darion filed a Reply on April 17, 2020. 3 AA 724-759. 4 AA 751-59. Argument on the same proceeded on October 12, 2020. 4 AA 790.

The district court granted only a limited evidentiary hearing concerning Darion's PTSD claim as it related to self-defense but denied the remaining claims. 3 AA 762-86. Both trial counsel and Darion testified at the hearing on December 18, 2020. 4 AA 811-36. Thereafter, this matter was continued for further argument and to allow counsel for Darion additional time to obtain phone records to corroborate the timeline for which Darion relayed his concerns to counsel. 4 A 835-36.

At the return hearing on February 22, 2021, the district court denied the PTSD claim, thereby resolving all claims in the Petition. 4 AA 837. A Findings of Fact, Conclusions of Law and Order was filed on April 23rd, 2021. 4 AA 762. Darion then filed his Notice of Appeal on May 11, 2011 initiating the instant proceedings. 4 AA 788-89.

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[1] The issue of general tailoring was not raised in the Petition itself but was briefed during oral argument on the same. *See* 4 AA 798-802.

STATEMENT OF RELEVANT FACTS

This case hinged on the dual questions of whether Darion reasonably shot Dale Borero in self-defense, and whether he shot first. [2]2 AA 293; 348; 3 AA 544; 4 AA 831 The evidence adduced at trial, including surveillance of the incident and detective testimony provided conflicting information regarding the above at best, and ultimately, this case hinged almost entirely on Darion's credibility, as there were no percipient eye-witnesses, no other persons privy to the conversation between Darion and Mr. Borero, and the only surveillance video was undeniably dubious, particularly given conflicting statements at trial of the two detectives in this matter. 2 AA 348 3 AA 547; 566 596-97; Detective Terri Miller watched surveillance of the incident and wrote in her Declaration of Warrant/Summons that "At that point, Borero pulled a handgun from his right pocket and fired at the black male suspect (Muhammad-Coleman)" and indicated that Mr. Borero shot first. 3 AA 545-46; 632. Miller similarly wrote that Darion "fell to the ground as he attempted to escape the

[2] At least two juror questions concerning the same were posed at trial; one question was posed of who shot first to the ballistics expert, and was deemed improper for that witness; the question was asked again of the lead detective, who testified that the physical evidence suggested that Darion shot first, contradicting her conclusion formed prior to trial. At trial, the State claimed that the same did not matter, but this was contingent upon their belief that Darion was the original aggressor and/or a conviction would be obtained under a felony murder theory (of which Darion was not ultimately convicted). 2 AA 294; 3 AA 544; 615.

A more thorough recitation of the facts from the trial is also written out in the district court Petition 1 AA 010-024.

gunshots being fired" in a paragraph concerning the video that is otherwise written chronologically. 3 AA 632. Indeed, the other detective in this matter, Clifford Mogg, testified that he could not determine who fired the first shot, even with review of the surveillance. 2 AA 348. Even Anya Lester, who the district court and state point to as their properly noticed expert concerning firearms was asked the specific question of who shot first by the jury, and then was not allowed to answer as it was not deemed a proper question for her (but apparently was for detective miller). 2 AA 294; 3 AA 742; 777-78;

Yet almost inconceivably, Detective Miller responded to a juror question that "based on the physical evidence I would say Mr. Coleman shot first" with no explanation for how that same physical evidence caused a contrary position during her investigation earlier when she relied on it. 3 AA 544. This same physical evidence conclusively established that the gun fired by Mr. Borero had an eleven-bullet capacity, that it had discharged all its bullets, and that up to approximately one hour elapsed after the incident and before the first detective arrived on the scene. 2 AA 311; 319; 393-94; Nonetheless, Detective Miller then emphasized, before explicitly claiming not to be such an expert, that the physical evidence at the scene allowed her to determine who shot first, solely based on the "physical evidence." 3 AA 544. Darion was thereafter found "Guilty" of first-degree murder (felony).

Darion, however, provided to the district court post-conviction evidence of error of Constitutional magnitude, implicating both his Federal and State rights in

both his trial and the preparation thereto. Such errors increased the likelihood of conviction in a case where Darion's credibility was central, and their absence would have prompted a reasonable probability of a "not-guilty" verdict. For instance, trial counsel, despite recognizing the importance of a PTSD expert and finding a good-faith basis to utilize it for Darion's self-defense claim, did not timely seek the same, and was then forced to proceed without the benefit of an expert witness. 4 AA 815. Also, as mentioned more fully below, the state made a general tailoring argument that implicated Dariocoln's right to be present at trial, and also impermissibly commented on Darion's post-*Miranda* silence, waiting specifically until rebuttal closing after the defense submitted their case to cause the most prejudice to him.

A. Darion's Claims Related to Post-Traumatic Stress Disorder

Darion revealed a bona-fide PTSD claim to buttress his self-defence argument, about which the jury did not hear. On September 13, 2013, Darion disclosed a familial history of PTSD through his mother to Dr. Lawrence Kapel, Ph.D. 3 AA 707-09. On the same day, Dr. Kapel noted "that his attorney is relating a history of family mental health and that his attorney has been unable to meaningfully engage…." regarding prior counsel, Jeremy Storms, Esq. 3 AA 710. Darion further relayed that he was "jumped' and stabbed by three males with a knife. 3 AA 703. This report was memorialized on September 16, 2013. 3 AA 707.[3] During

[3] Another competency report by Dr. Mark Chambers diagnosed Darion as malingering but also diagnosed him with schizophrenia, and noted previous non-

January 28, 2015, Dr. Daniel Sussman similarly noted a family psychiatric history of PTSD and a personal past diagnosis of bipolar disorder for Darion. 4 AA 886-89.

Altogether, there are at least three (3) competency referrals that indicate the prior shooting and/or PTSD, the dates of which are September and October of 2013 respectively. 3 AA 707-09; 714. This also suggested that prior counsel Storms was on notice regarding PTSD, had his own concerns about the same, and had independent knowledge of the familial mental illness.

At the argument on the Petition in this matter, the district court indicated that "when your client was evaluated for competency, there was no mention of PTSD." 4 AA 792. This was belied by the record, as demonstrated below, as not only did the competency reports mention PTSD, but they also indicated a family history of the same. 4 AA 885-918. Nonetheless, the district court sought more information to identify whether and when trial counsel was informed of Darion's PTSD claims. 4 AA 792. Counsel for Darion also requested authority under NRS 34.790 to allow for a PTSD evaluation because it was necessary to demonstrate prejudice and because Darion was not financially able to pay. 4 AA 794 The district court denied this request. *Id.*

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compliance with mental health medications, including Darion's reporting of previously being prescribed Abilify, Concerta, Seroquel, and Risperdal. 3 AA 70-700-02.

At evidentiary hearing, trial counsel confirmed both that a potential PTSD expert would be helpful in his defense (as a determining factor in self -defense), and relatively easy to obtain with a good reason. 4 AA 815. Importantly, counsel (in a better position to judge than the state or the court) appeared to believe Darion, and indeed sought a psychologist to determine whether to call one as a witness at trial in pursuit of a self-defense claim.[4] However, trial counsel indicated he was forced to file a Motion to Continue due to learning about Darion's PTSD claims in a conversation with him days prior. 4 AA 817-18. This Motion was filed on an Order Shortening Time and was Denied. 4 AA 817-18. Trial counsel did not recall any other pretrial issues of note, other than those for which he filed any Motions. 4 AA 817. Thus, the minutes for a status check hearing on November 28, 2016, when trial counsel indicated to the court concerns with the case and was directed to file a Motion, are in reference to these same PTSD claims. 4 AA 884-85. Thus, it was inconceivable that counsel had only recently learned of them, not only because he acknowledged possession of the competency reports from years prior, but also because of these aforementioned minutes. *Id.*; 4 AA 819.

Conversely, Darion testified that he specifically indicated his PTSD concerns to counsel approximately one week after a hearing on his case that took place on March 9 2016 and 9 months before the Motion to Continue, filed on December 19,

[4] Such strategic decisions have been deemed to be "almost unchallengeable, Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989)

2016. 4 AA 825; 4 AA 858-884. Darion then followed up on this request on or around July 2, 2016 and learned that trial counsel had not yet submitted the paperwork for the evaluation. 4 AA 826. Regarding his belief he suffered from PTSD, he claimed:

> I told him that I needed a PTSD evaluation and I told him that I hadn't been the same since I was shot and we started discussing the circumstances surrounding me being shot and he told me that is possible that I do have PTSD. So we do need to get that evaluation and he told me that he would have to put some type of motion in or something for the Courts to pay for the evaluation because he was Court appointed." 4 AA 825.

It was not disputed that Darion was shot. Ultimately, Darion testified to having made mention of the same several months prior to the filing of the Motion to Continue in his case that sought to continue on the basis of obtaining such an evaluation. 4 AA 826.

The above established the following timeline of knowledge:

- September 13, 2013 – Darion discloses family PTSD history to Dr. Kapel and Dr. Kapel notes attorney's knowledge of mental health concerns 3 AA 707-10;
- October 21 2013 – Darion discloses the PTSD claim to Dr. Harder 3 AA 700-02;
- December 1, 2014 – trial counsel is appointed to the matter 4 AA 822.

- January 28, 2015, Dr. Sussman learns of the same claims and notes a history of bipolar disorder and a familiar history of PTSD. 4 AA 886-89.
- November 28, 2016 – status check hearing where prior counsel notes there is an issue of concern and is directed to file a Motion. 4 AA 884-85.
- December 19, 2016 – Trial Counsel files Motion to Continue. 4 AA 858-84.
- January 3 2017 – Trial commences. 1 AA 038.

Although previous counsel indicated that the claims for PTSD were made to him a couple of days before his Motion to Continue, this as belied by record, and did not minimize counsel's duty to investigate the same, particularly when it was crucial to Darion' self-defense argument. The above evidenced that no later than November 28, 2016, counsel would have notice of PTSD thirty-six days prior to trial, and three weeks prior to the filing of the Motion to Continue. 1 AA 038; 4 AA 858-84. Based on testimony at evidentiary hearing that an evaluation could be obtained relatively easily, this would have been more than enough time to obtain an evaluation prior to the filing of the Motion to Continue. 4 AA 815. Importantly, counsel, who was better equipped than either the Court or the State to determine whether or not a good faith basis existed to consult with a PTSD expert, did not question Darion's claims. *see generally* 4 AA 814-21. However, a reasonable basis upon which previous counsel could rely existed years prior to his Motion on December 19, 2016, and even in the light most favorable to the State, twenty-one days prior to the Motion at a time when trial was thirty-six (36) days away.

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B. Nature and frequency of state's comments.

The State, while only sparingly mentioning the same upon Darion's cross-examination, impugned Darion's exercise of his rights under both the Fifth and Sixth Amendments. During its initial closing, concerning time during which Darion did not come forward and give a statement, the state noted:

> "The four year plan, what's that? Well the Defendant has four years to figure out what he was going to say on the stand" 3 AA 587.

This impermissibly imputed upon Darion a duty to have returned to give a statement to police during those intervening four years, contrary to his well-established right to be free from such compulsion to give a statement. 3 AA 587. The state also suggested that Darion had to testify and subject himself to cross-examination because of the existence of the video surveillance of the incident although Darion was required to give no such statement; specifically stating "And he was subjecting himself to cross-examination. He had to do that. He had to do that because the video shows he killed Dale". 3 AA 609.

In its rebuttal closing, the state went further and argued,

> "You admit what you can't deny. You deny what you can't admit. When he didn't see the video Mr. Coleman denied everything. After having a few years to contemplate it Mr. Coleman seeing the video then has to admit certain

things. He has to admit he was there with Dustin Bleak. He has to admit that he was there with Mr. McCampbell. He has to admit that he pulled a gun first. He has to admit that he pistol whipped him. He has to admit those stuff. *And he has to deny it was a robbery despite all the evidence that it was a rob -- all the 21 things that Mr. Hamner pointed out saying that there -- this was a robbery. He has to deny that, because if it's a robbery it's felony murder.*" 3 A 614.

And shortly after that,

"Now he knows all those things. So you know what's not going to work? His old version won't work anymore. His I don't know what you're talking about. I wasn't there. I never heard of Traveler's Inn. I never heard of these people. That doesn't work anymore, because of the significant amount of evidence that puts him at the scene and the significant amount of eye witnesses that put him as the person in the passenger's seat. So he has to change that story up. And now he changed it into something different. I gave no directions to Mr. McCampbell. It was Bleak and Costa. Why do this? Because he's trying minimize the fact that this was a robbery. McCampbell wants to park that way. Why? Because he wants to minimize the fact that it's getaway. 3 AA 611.

Essentially, the state argued that the evidence it had provided compelled Darion to testify to self-defense. Importantly, this was not primarily argued during cross-examination of Darion, but rather in closing, after which time Darion could pose no

rebuttal. 3 AA 609; 611; 614. Indeed, the cross-examination theory of the same was limited to the following exchanges, which implied that Darion generally tailored his testimony:

> Q: You've seen all these people walk into this courtroom and testify before you got on here and testified, correct?
>
> A: Yes 2 AA 497.

And later, the state sought to address whether or not Darion came forward and stated self-defense prior an asked,

> "Q But you didn't tell the detectives this story, did you?
>
> A I didn't have my attorney present.
>
> Q Okay. This is the first time you've said this statement?
>
> A No. My lawyer -- no. The detectives --
>
> THE COURT: Hold on a second. I' m going to sua sponte strike that question. Let' s move on." 3 AA 514.

The only other mention was at the start of cross-examination during which time the State confirmed that Darion did not tell the detectives his self-defense story and then said as follows:

> Q So how much time have you had to think about this?
>
> A With this --
>
> Q Almost four years, right?
>
> A That' s -- three and a half years, yes, sir.

Q Okay. So you've had a while?

A Yes, sir.

Q And you've seen this video?

A Yes, sir.

Q You've seen all these people walk into this courtroom and testify before you got on here and testified, correct?

A Yes, sir. 2 AA 497.

Altogether, this evidenced only a passing reference at cross-examination prior to impermissible closing argument to which Darion could not respond, implicating his State and Federal rights.

C. District Court's Order and Findings.

Despite hearing all the above, the court found as follows in its denial of the Petition. Finding good cause for any late filing, the court did not find that trial counsel was ineffective in cross-examination of the detective Miller. 4 AA 772-75. The district court argued that a jury would typically be instructed to consider all the evidence, which would excuse any failure to argue the same at closing and that any further inconsistency raised concerning detective Miller's testimony would have offered no marginal value, as Detective Miller would have similarly claimed counsel to have been misreading her obviously chronological chronology of events. *See* 4 AA 775. The court also denied the claim that Detective Miller testified as an expert,

finding her testimony as proper lay testimony, and based upon her "observations of the casings and the location of the two men…" 4 AA 777.

Moreover, the district court did not acknowledge existence of evidence of PTSD in the competency reports and found that trial counsel filed a Motion to Continue "as soon as he found out about Petitioner's claim," although this was belied by the record. 4 AA 778. Nonetheless, the district court acknowledged trial counsel's testimony that such an expert would have been hired to evaluate the petitioner, and trial counsel testified that it would be helpful in Petitioner's defense. 4 AA 778; 814-15.

Finally, the district court found no prejudice if deficient performance did exist, given its viewing of the video. 4 AA 785-85. The district court found this despite that a jury arguably could not come to the same conclusion while in possession of the same video, despite its disagreement about the same with detectives Mogg and arguably also Miller, and without the benefit of the PTSD expert to explain why Darion might pull out a gun where another individual without the heightened sense of awareness might not. 3 AA 348; 547; 554 4 AA 780. The court further found no error in Darion's sentencing, relying on its aforementioned finding that Detective Miller's testimony was proper. 4 AA 780. It noted that the district court "made note of the circumstances of the shooting as playing a role in sentencing." 4 AA 781. Specifically, the trial court stated, "I am convinced that your client not only pulled the weapon first but he shot first as well before Mr. Borero had produced a handgun."

4 AA 781. This is belied by the video, however, which clearly shows Mr. Borero producing a handgun prior to Darion firing, which was also acknowledged by detective Miller. 3 AA 639-40

Furthermore, in its Order, the court did not acknowledge the prejudice of the comments concerning Darion's post-arrest silence. The court found that a "recorded statement made by a defendant to authorities is not a comment on the defendant's right to remain silent under plain error review." *Houtz v. State*, No. 60858, 2013 WL1092730, Mar. 14, 2013, 129 Nev. 1123 (2013) (unpublished disposition)."; 4 AA 782. 3 AA 587. Pursuant to NRAP 36 (3), this was an improper citation to authority, as the case is an unpublished opinion from 2013. The court also cited to another unpublished opinion that cannot be cited to for authority, to find that cross-examination into inconsistencies between a defendant's statement and his trial testimony is not violative of the right to post-arrest silene. 4 AA 782. Nonetheless, concerning prejudice, the district court found that "the evidence of guilt was overwhelming in the instant case." 4 AA 785. Despite this, the jury found Darion "Not-Guilty" as to the robbery charge, and perhaps more importantly, the district court's claim that "an eyewitness and surveillance video placed petitioner as the individual who shot and killed the victim" was inapposite, as Petitioner admitted the aforementioned. 3 AA 785. That Darion committed a homicide was independent from the question of the strength of the evidence suggesting this homicide was a murder. Nonetheless, the court concluded that the evidence showed that Petitioner

fired first, "negating[ed] any self-defense claim" and ignored that Darion had a gun pointed in his face when he shot and claimed to have pulled a gun only after being threatened. 4 AA 785.

Finally, the district court Order made no mention of the claims raised relating to *Woodstone* and general tailoring, in which the State formulated an impermissible general tailoring argument during its closing and rebuttal closing, implicating and prejudicing Darion's rights to be present at trial, and impinging upon his right to due process under both the 5th and 14th amendments. *See generally* 4 AA 762-86.

SUMMARY OF THE ARGUMENT

A. The District Court Abused Its Discretion When It Did Not Find Deficient Conduct For Failure to Obtain a Timely PTSD Evaluation, And Otherwise Abused Its Discretion In Denying Appellant's Request For The Evaluation Prior To Evidentiary Hearing.

The United States Supreme Court has held that the Sixth Amendment to the United States Constitution provides that every criminal defendant has a right to effective assistance of counsel to assist them with mounting an adequate defense at their criminal trial. *Strickland v. Washington,* 466 U.S. 668, 684-85 (1984). At trial, Darion presented evidence that he acted in self-defense, however, his trial counsel failed to support that claim by timely obtaining a PTSD Evaluation or an expert witness to explain same, for Darion to present at trial. As a result, trial counsel failed to provide effective assistance of counsel for Darion, and such ineffectiveness can

not be considered harmless error because providing evidence of Darion's possible PTSD diagnosis was essential to his credibility and his claim that he acted in self-defense.

B. The District Court Abused Its Discretion When It Did Not Find Detective Miller's Testimony Improper Expert Witness Testimony For Which She Was Not Noticed.

Nevada clearly distinguishes between lay witness and expert witness testimony. *See NRS* 50.265; 50.275. [L]ay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted); *State v. Tierney,* 150 N.H. 339, 839 A.2d 38, 46 (2003). Due to this important distinction, expert witnesses must be specifically disclosed as such in order to provide defendants with sufficient opportunity to prepare and present specifically prepared questions on cross examination regarding the experts conclusions as well as questions intended to probe the expert's credibility and that of their process and methodology. Here, Detective Miller presented testimony that in effect constituted a reconstruction of the crime scene and shooting sequence which she relies on to support her testimony regarding whether or not Darion fired his firearm first. This testimony, which relied on a scientific reconstruction of events was improper expert witness testimony which Detective Miller was not qualified or authorized to present at trial. As a result of the district court's failure to find that

Detective Miller's testimony represented improper expert testimony, Darion was severely prejudiced at trial.

C. The Judgment of Conviction must be overturned, given the district court's reliance on evidence in violation of *Silks*.

The Nevada Supreme Court has held that a criminal sentence must be vacated if such a sentence was based upon evidence that is considered unreliable, inaccurate, or otherwise suspect. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). If a sentence cannot be determined to be "based upon relevant and reliable evidence" then it must be overturned. *Aparicio v. State*, 137 Nev. Adv. Op. 62, 496 P.3d 592, 597 (2021). In this matter, the district court determined that Darion fired his gun first despite contradictions by the lead detective, and the juror's apparent difficulty in concluding that Darion had indeed fired first after reviewing the video of the incident. Thus, Darion's conviction and sentence is improperly based on evidence that is unconfirmed, conflicting, and/or unreliable and should be overturned on that basis.

D. The District Court Abused Its Discretion When It Failed To Find That The State Impermissibly Impugned Darion's Right To Silence.

It is well established by the United States Supreme Court that it is improper for the State to comment on a defendant's silence subsequent to both arrest and the issuing of *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966); *Neal v. State*, 106 Nev. 23, 25, 787 P.2d 764, 764–65 (1990). Here, the State effectively

argued that the jury could negatively infer that Darion's decision to not later come forward and clear up that this was a matter of self-defense, could be interpreted as a sign of his guilt, violating his Fifth Amendment rights, and his rights to due process under State and Federal law. As Darion's credibility was central to this case, and there existed no other meaningful percipient witness evidence, such error was not harmless and greatly prejudiced Darion's self-defense claim.

E. The District Court Abused Its Discretion When It Failed To Deem The State's Closing Argument As Impermissible Tailoring That Precluded Darion From Receiving a Fair Trial.

In Nevada, defendants have an unqualified and statutory right to be present at trial. NRS 178.388 (1) Here, the State sought to confuse and mislead the jury into believing that Darion only sought to claim self-defense in this matter after hearing the State present its evidence against him. This clouded the fact that Darion was telling his story for the first time not in an effort to tailor it to the evidence he heard in the courtroom, but rather because it was the truth. The state similarly impugns Darion's right to due process and his right to review the evidence, arguing solely in closing that Darion's appreciation of the State's trying to prove its case caused him to tailor his story to fit what he had heard. 3 AA 608; 611; 614.

Moreover, the state's argument that Darion must testify because of the video, or that he sought to minimize that this was a robbery was impermissible. First, comments that Darion was trying to minimize that it was a robbery and to avoid

conviction for felony murder were devoid of any reference to evidence in the record. 3 AA 611. Given Darion's unqualified right to remain at trial, this was an impermissible general tailoring comment. This placed Darion into a Constitutionally impermissible catch-22 where exercise of one right (the right to testify at trial) would cause implication of his right to remain silent until then, precluding and/or prohibiting one right solely due to exercise of another.

F. The District Court Abused Its Discretion When It Failed To Find Deficient Conduct and Prejudice From a Failure to Impeach Or Argue At Closing.

Trial Counsel's failure to impeach lead Detective Miller regarding her contradictory statements concerning who shot first was below an objective standard of reasonableness. In addition to violating Nevada law, federal law has established that "A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez,* 174F.3d 1067,1071 (9th Cir. 1999).

Here, despite its crucial connection to Darion's self-defense claim, previous Counsel failed to identify numerous times during the investigation where Detective Miller indicated that Mr. Borero and not Darion, shot first. *Id.* at 510. The moment the question of who shot first was asked and answered in contradiction to Darion's testimony, his self-defense theory was naturally and substantially harmed. In fact, if

Mr. Borero was found to have shot first, it would be difficult to understand how any reasonable jury could conclude that Darion did not act in self-defense. Thus, Darion's former counsel's failure to highlight Detective Miller's conflicting statements as to whether or not Darion fired first (particularly at closing) represented clear ineffective assistance of counsel.

G. **Cumulative error requires striking of the Judgment of Conviction.**

Even if no one error is sufficient to constitute a violation justifying reversal, cumulative error can take on constitutional dimensions. *Parle v. Runnels*, 505. F F.3d 922, 927 (9th Cir. 2007); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); U.S. Const. amend. V, XIV; Nev. Const. art. I, sec. 8, cl. 5. If no one error is convincing to this Court, then the cumulative effect of numerous errors argued herein creates a due process violation. Therefore, the above errors must be cumulated, even if their independent effect is insufficient to form a constitutional violation, the combined effect of the stated errors is sufficient to support Darion's request to overturn his conviction.

LEGAL ARGUMENT

A. The District Court Abused Its Discretion When It Did Not Find Deficient Conduct For Failure to Obtain a Timely PTSD Evaluation, And Otherwise Abused Its Discretion In Denying Appellant's Request For The Evaluation Prior To Evidentiary Hearing.

The U.S. Constitution guarantees every defendant a right to effective assistance of counsel through the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 684-85 (1984). Article I, Section 8, Clause 1 of the Nevada Constitution also guarantees this right. *Buffalo v. State,* 111 Nev. 1139, 1140 (1995). In Nevada, the appropriate vehicle for reviewing whether counsel was effective is a post-conviction relief proceeding. *McKague v. Warden,* 112 Nev. 159, 164 n.4, 912 P.2d 255, 258 n.4 (1996). Furthermore, IAC claims must only be proven by a preponderance of the evidence standard. *Means v. State,* 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

The test for effective assistance of counsel has two prongs. The first is error. *Strickland,* 466 U.S. at 688. An attorney has committed error if their actions fall below the objective standard of reasonableness that prevails in the legal profession. *Id.* If an action can be considered as "sound trial strategy," then it is presumptively not error. *Id.* at 689. However, the attorney's actions must be considered "in light of all the circumstances" of the case. *Id.* at 690. Actions which deviate to some extent from sound strategy lose that presumption to the same extent. *Id.* at 690-91.

The second prong of *Strickland* is prejudice. To be reversible, attorney error must create a reasonable probability of a different result. *Strickland,* 466 U.S. at 687. *Strickland* does not require prejudice to be shown by a preponderance of the evidence. *Id.* Rather, this probability must simply be enough to undermine confidence in the outcome of the proceeding. *Id.* at 694. Such a proceeding requires

that defense counsel subject important components of the State's case to "meaningful adversarial testing." *US. v. Cronic,* 466 U.S. 648, 659 (1984).

Standard of Review:

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. *Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (citing *Kirksey v. State,* 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)). The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." *Means v. State,* 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. *Hargrove v. State,* 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Petitioner additionally makes constitutional claims under the United States Constitution. *See also Gonzalez-Soberal v united states*, 244 F.3d 273 (1st. Cir 2001) (remanding for determination of whether it was prejudicial for counsel to fail to impeach with documentary evidence). In addition to violating Nevada law, federal law has established that "A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." See *Hart v. Gomez,* 174F.3d 1067,1071 (9th Cir. 1999).

1. Failure to timely obtain a PTSD Evaluation.

In *Mitchell v. State*, 124 Nev. 807, 192 P.3d 721 (2008), the Court indicated that evidence of Post-Traumatic Stress Disorder could be introduced to support a self-defense claim. As a result, whether or not a defendant has PTSD is relevant to such a claim. *See Pundyk v. State*, 136 Nev. 373, 376–77, 467 P.3d 605, 608 (2020) (allowing psychiatric expert witness testimony in murder case). [5]

Trial counsel has a duty to investigate when presented with triggering facts. Howard v. State, 2014 WL 3784121 •2 (unpublished disposition. Nevada Supreme Court No. 57469, July 30, 2011), citing *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (acknowledging counsel's obligation to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). In light of facts concerning psychiatric and psychological infirmities, there existed an unquestionable duty to gather mitigating life history records. *Porter v, Mccollum* 558 U.S. 30 (2009); *Howard v, State*, 2014 WL 378412.

With the foregoing records in hand, trial counsel next had a duty to hire an appropriate expert witness to evaluate PTSD and potentially present such testimony

[5] This was also impliedly allowed in *Pimentel,* where the Court did not find any issue with a doctor testifying regarding PTSD and its impact on his state of mind at the time of the incident. *Pimentel v. State*, 133 Nev. 218, 229, 396 P.3d 759, 768 (2017).

to the jury. *Ake v. Oklahoma*, 470 U.S. 68 (1986).[6] Nonetheless, trial counsel may also violate the first prong of Strickland by failing to present evidence that the defendant lacked the requisite mental state. *See Sanborn v. State,* 107 Nev. 399, 104 (1991) (ineffective assistance of counsel for failure to present evidence of self-defense); *Buffalo v, State*, 111 Nev. 1139, 1149 (1995) (where it was ineffective assistance of counsel for failure to present evidence of self-defense and defense of others to mayhem charge).

Here, counsel acknowledged the need for the PTSD evaluation to use in support of Darion's defense. 4 AA 815. Indeed, the adduced timeline showed three weeks in the light most favorable to the state, during which time this evaluation could have been accomplished. First, the minutes on November 28th, 2016, thirty-six (36) days prior to trial, show that trial counsel indicates some concerns by Darion and is directed to file a Motion. 4 AA 884-85. Twenty-one days later, on December 19, 2016, trial counsel files a Motion, which is then denied on December 28, 2016, when it is approximately a week before trial. 4 AA 818. This shows more than a month during which time trial counsel could have acquired the evaluation and

[6] Where Defense "requested a psychiatric evaluation at state expense to determine petitioner's mental state at the time of the offense, claiming that he was entitled to such an evaluation by the Federal Constitution." The trial court ultimately "denied petitioner's motion for such an evaluation."). *See also Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) (holding counsel ineffective for failing to properly investigate evidence of mental impairment). Failure to investigate a defendant's organic brain damage or other mental impairments may constitute ineffective assistance of counsel. See, e.g., *Hendricks v. Calderon*, 70 F.3d 1032, 1043-44 (9th Cir. 1995); *Evans v. Lewis*, 855 F.2d 631, 637-38 (9th Cir. 1988).

identified if an expert was needed prior to filing a Motion to Continue. This is because the record shows that Trial counsel indicated concerns on November 28, 2016 and was directed to file a Motion, and a Motion was filed on December 19, 2016. 4 AA 858; 884. It is inconceivable that the above referenced anything other than the forthcoming Motion to Continue that referenced PTSD, contrary to the district court's position. 4 AA 778-89. When considering the competency reports, the notice regarding PTSD was years prior to trial, and was readily apparent with a review of the evidence. 3 AA 700-02; 707-10 Thus, every reading of the facts offers sufficient time with which counsel could have timely obtained the PTSD evaluation before trial.

However, while the state and district court point to the competency reports to establish doubt concerning Darion's PTSD claim, they fail to consider that the competency reports, by both their own unambiguously written words, and their legal directive, rely on the *Dusky* standard, asking only whether the defendant understands the charges against him/her, and whether the defendant can assist in his/her representation. *Dusky v. United States*, 362, US 402 (1960); 3 AA 701; 709; 713. To consider this evaluation tantamount to an evaluation for PTSD, posits an unreasonable expectation to address matters outside its scope, as such are simply not the purpose of the medical professionals' findings and recommendations. Indeed, the existence or non-existence of mental illness is not mutually exclusive with an individual's ability to understand the charges against them and assist in their defense.

Thus, the fact that Darion requested and was denied a PTSD evaluation was prejudicial error. 4 AA 794. Just like *Ake*, where the district court erred and failed to grant an evaluation at the state's expense, here too did the district court abuse its discretion, and deny Darion's claims without a reason to refuse the evaluation. For the sake of argument, that Darion has PTSD and that he might have been malingering concerning his competency to proceed to trial are not mutually exclusive, and thus in the light most favorable to the State, even if their suggestion is true, the competency reports are only a tool for the state and are not dispositive concerning mental illness. This does not undermine a reasonable probability of a different result in Darion's case, and it importantly does not justify refusing to grant Darion such an evaluation at state expense.

The prejudice here was without question, given that this was a close case, there was no eye-witness testimony, and Darion's credibility was central to whether not the jury found him guilty. 1 AA 038- 3 AA 560. First, no percipient witnesses testified to the matter but for Darion. *Id.* This maximized the potential impact of such a PTSD expert in explaining why Darion pulled the gun first, even though both Darion and the decedent had their guns drawn when the first shot was fired. *See* 3 AA 555. Moreover, contrary to the district court's claims that the video is clear, the numerous professionals who have evaluated the same and could not come to the same conclusions shows this claim to be untrue. *Id.*; 2 AA 348 Thus, this error can similarly not be deemed harmless, given that it was crucial to the proposed self-

defense claim. Ultimately, the district court abused of its discretion when it denied the request for a PTSD evaluation that would have gone straight to the issue of whether or not failing to obtain the same was ineffective. Despite this, it was deficient conduct to fail to timely obtain the PTSD evaluation, rather than to seek a continuance a week prior to trial for the same, and the district court abused its discretion when it failed to consider the same or the resulting substantial prejudice.

B. The District Court Abused Its Discretion When It Did Not Find Detective Miller's Testimony Improper Expert Witness Testimony For Which She Was Not Noticed.

Nevada clearly distinguishes between lay witness and expert witness testimony. *See NRS* 50.265; 50.275. Lay witness testimony is limited to that is:

> "1. Rationally based on the perception of the witness; and
>
> 2. Helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue."

Admissibility of expert testimony is within the discretion of the trial court. *Mortensen v. State*, 986 P.2d 1105, 115 Nev. 273 (1999); *see also Emmons v. State*, 807 P.2d 718, 107 Nev. 53 (1991).

Alternatively, Nevada provides for testimony from experts as follows:

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

within the scope of such knowledge." *NRS* 50.275. Where a subject-matter is "one which common knowledge will enable one to decide, it is not a proper subject for expert testimony." *Duff v. Page*, 1957, 249 F.2d 137 (1957); *see also Burnside v. State*, 352 P.3d 627, 131 Nev. 371 (2015) (noting that distinguishing expert testimony for lay witness testimony "lies with a careful consideration of the substance of the testimony: whether the testimony concerns information within the common knowledge of or capable of perception by the average layperson or requires some specialized knowledge or skill beyond the realm of everyday experience."). In *Garcia-Arias*, a nurse included observations of a victim's injury, and also observations about the nature of an injury that were not properly noticed for expert testimony (specifically whether or not injuries included punctures and/or lacerations). *Garcia-Arias v. State*, No. 71562, 2017 WL 6049183, at *1 (Nev. App. Nov. 17, 2017).[7] The Court held that while such observations were appropriate lay testimony, that testimony about the age of the bruises or blood pooling were not. *Garcia-Arias v. State*, No. 71562, 2017 WL 6049183, at *1 (Nev. App. Nov. 17, 2017). Federal law also provides for both expert and lay witness opinion in a similar manner to Nevada law. *FED R. EVID.* 701; 702.

[7] *See also Grimes v. State*, 2014, 130 Nev. 1183, 2014 WL 819469, (2014) holding that testimony of a crime scene analyst who was not noticed as an expert concerning whether a knife wound was consistent with a knife slipping, was expert testimony and not proper lay witness testimony.

Moreover, a lay opinion differs from expert testimony which offers specialized knowledge obtained through experience. *See Johnson v. Egtedar,* 112 Nev. 428, 436, 915 P.2d 271, 276 (1996). Additionally, "The scope of a witness' testimony and whether a witness will be permitted to testify as an expert witness are within the discretion of the trial court, and the trial court's ruling will not be disturbed unless there is an abuse of discretion.". *DeChant v. State*, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000). Altogether, "The admissibility and competency of opinion testimony, either expert or non-expert, is largely discretionary with the trial court. *Watson v. State*, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978). Ultimately, "[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney,* 150 N.H. 339, 839 A.2d 38, 46 (2003) As a result, "Lay testimony must be confined to personal observations that any layperson would be capable of making." *Burnside v. State*, 131 Nev. 371, 383, 352 P.3d 627, 636 (2015). For example, in *Lord v. State*, the Court held that a detective did not provide a proper lay opinion, and in fact testified as an unnoticed expert, when he gave testimony that "certain minor injuries on Lord indicated that Lord had recently been in a fight." 107 Nev. 28, 33, 806 P.2d 548, 551 (1991). The Court held this this was error and that such testimony should only "be given by one qualified as a medical expert." *Id.* Finally, lay testimony shrouded as expert testimony violated

Darion's due process rights under both State and Federal Law. *See U.S. Const. amend.* V.

Here, Detective Miller's testimony regarding the shooting sequence amounted to an expert opinion. During trial, Detective Miller's claims about her evaluation of evidence to determine who shot first, amounted to an expert shooting reconstruction, in contravention of *Johnson*. 3 AA 544; 547. There is arguably specialized knowledge upon which an individual must rely to identify the numerous factors that should logically be considered to reconstruct a shooting, assumedly including things such as identifying gun powder residue and the recovery of clothing to test for the same. Rather, this is precisely the type of case for which *Burnside* demands an expert witness, as Detective Miller's mere perception of not seeing a shell casing where she expected to see one, is insufficient to allow her to provide such an expert opinion. *See Id.* at 510. Additionally, as stated in *Tierney*, expert testimony can only be "mastered by specialists in the field," and to the extent Detective Miller sought to be an expert, it was deficient performance to not challenge such assertions or her qualifications to reconstruct the shooting. The resulting prejudice is more than mere assertion, as the jury's focus on the shooting sequence lent significant and particular weight to Detective Miller's claims. 2 AA 294; 3 AA 544. Alongside the fact that there existed no other eyewitness testimony, it was prejudicial to allow Detective Miller to testify to what amounted to expert testimony without proper notice. *See Id.*

Rather, the district court incorrectly found that the mere observation of a lack of casing was tantamount to a shooting reconstruction. 4 AA 777. Whether or not a casing was located was not the same inquiry as whether or not a casing existed. Trial testimony made clear that Mr. Borero firing eleven shots was consistent with the eleven-bullet capacity in his gun, and that more than one hour elapsed after the incident, before which time officers could arrive to even attempt to secure the scene. 2 AA 311; 319; 393-94. This means that the physical evidence recovered at the scene alone was not conclusive as to who shot first. The question of who shot first could not be reduced to something that could be determined by an officer's training and experience. In fact, the lack of expert disclosure ensured that Darion could not properly cross-examine or develop a defense to challenge the detective's scientific findings. This is notable given the district court and state's current reliance on the state's expert on firearms, Anya Lester, despite that she was deemed an improper person to to pose the question of who shot first. 2 AA 294; 3 AA 742; 777-78. This exacerbated the prejudice to Darion as it simultaneously allowed testimony from an improper source while precluding testimony from a proper one. This also caused prejudice that was evidenced when the district court used detective Miller's testimony as justification for the imposed sentence of twenty years to life, showing the comments' harmful effect. 4AA 780-81. Therefore, the district court abused its discretion when it failed to find that detective Miller's was not properly noticed as an expert, and that the failure to do so compromised Darion's due process rights.

C. The Judgment of Conviction must be overturned, given the district court's reliance on evidence in violation of *Silks*.

Although district courts hold "wide discretion" in sentencing decisions, such decisions may be overturned if the record demonstrates "prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Allred v. State*, 120 Nev. at 410, 92 P.2d 1246, 1253 (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Whenever a court relies on such evidence, the Judgment of Conviction is to be set aside for a new sentencing hearing. *Denson v. State*, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996). Similarly, a sentence is to be vacated if it this Court cannot determine, "with any degree of certitude, whether the district court's sentencing decision was based upon relevant and reliable evidence or on impalpable or highly suspect evidence." *Aparicio v. State*, 137 Nev. Adv. Op. 62, 496 P.3d 592, 597 (2021).

Reliance on an unfound fact is sufficient to overturn a Judgment of Conviction for reliance on improper evidence. In *Denson*, the State charged Denson with five (5) separate burglaries, after which time Denson pled "Guilty" to two (2) counts of burglary, and parole and probation recommended a concurrent six-year prison term. *Denson*, 112 Nev. at 492. After the district court reviewed several videotaped incidents, some of which were related to uncharged crimes in the aforementioned indictment, Denson was sentenced to a term of two (2) to five (5) years in prison, with count two to run consecutively to count one. The Court held that the district court's

reliance on uncharged criminal acts, and specifically the comments of "I'm absolutely convinced you are a dangerous person…. I think every time you walk into a casino you have the intent to steal," was improper. *Id.* 493-94.

Here, the district court found no reliance on suspect evidence, finding the video clear despite substantial testimony to the contrary. 4 AA 780-81; 2 AA 348; 3 AA 544. The district court found that the evidence was overwhelming despite detectives Mogg's and Miller's own admission they could not tell who shot first based on the video, and the juror's apparent difficulty with the same. 2 AA 348; 3 AA 544; 4 AA 780; 784. Additionally, while it was not disputed that Darion killed Mr. Borero, the district court's claim that there was overwhelming evidence of guilt is belied by the record; namely, the court does not point to any information that would indicate Darion was deliberately, willfully, or premeditated in his actions. 4 AA 761-86. Nonetheless, the above contradiction was a basis upon which the district court relied in its sentencing. 3 AA 686. Therefore, Darion's sentencing was based on facts that were based solely on such impalpable or highly suspect evidence" such that Darion's sentence was based upon dubious facts. *Silks*, 92 Nev. at 94. Therefore, this matter must be remanded to allow for a new sentencing hearing consistent with *Silks*.

D. The District Court Abused Its Discretion When It Failed To Find That The State Impermissibly Impugned Darion's Right To Silence.

The state may never comment on a defendant's silence subsequent to both arrest and *Miranda*. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966); *Neal v. State*, 106

Nev. 23, 25, 787 P.2d 764, 764–65 (1990).[8] And "reference during cross-examination of a defendant and closing argument to the defendant's post-*Miranda* silence is not harmless error "when the defendant's credibility is crucial to his defense and the prosecutor's comments are deliberate and repetitious." *McCraney v. State,* 110 Nev. 250, 256, 871 P.2d 922, 926 (1994). Furthermore, a person does not waive their right to silence merely because they initially answer some questions or give some information to law enforcement *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). Such comments are not only reversible error, but oftentimes require this Court's *sua sponte* intervention to ameliorate, given their uniquely prejudicial nature. *McCraney v. State*, 110 Nev. 250, 256, 871 P.2d 922, 926 (1994). [9]

Even when a defendant gives a statement, their remains an unqualified right to remain silent protected by the Fifth Amendment. In *McCraney*, the Court admonished the State concerning its comments about a defendant who did not come forward any

[8] The prosecution is forbidden at trial to comment upon a defendant's election to remain silent following his arrest and after being advised of his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *See Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). "This court has repeatedly condemned such prosecutorial misconduct, and noted the enormous expense borne by the state each time such misconduct necessitates a retrial. Unfortunately, as this case illustrates, the problem continues." *McGuire v. State,* 100 Nev. 153, 155, 677 P.2d 1060, 1062 (1984).

[9] *Emmons v. State,* 107 Nev. 53, 61, 807 P.2d 718, 723 (1991) (this court may address plain error or issues of constitutional dimension *sua sponte*, *abrogated on other grounds by Harte v. State,* 116 Nev. 1054, 13 P.3d 420, 432 n. 6 (2000) (en banc) (per curiam).

time prior to trial to tell anybody about his story of self-defense, thereby causing prejudicial error and warranting reversal. *McCraney v. State*, 110 Nev. 250, 255–56, 871 P.2d 922, 925–26 (1994). In *McCraney*, McCraney testified at trial that his brother, Lorne, shot a firearm and committed a murder. He was asked on cross-examination as follows:

> "Q. You're testifying under oath that your brother Lorne was one of the shooters?
> A. Yes.
> Q. My question is: Why didn't you say something sooner?
> A. I didn't want to snitch on my brother.
> ....
> Q. So you are testifying that despite your knowledge of your brother's involvement, you didn't tell anyone about that?
> A. No.
> Q. On September 19, 1991, did you tell the police that your brother, Lorne McCraney, was also involved as a shooter of Kinnie Poole?
> A. No.
> Q. You had an opportunity to do that, didn't you?
> A. No.
> Q. You could have done it, couldn't you?
> A. They didn't ask me no questions.
> Q. Then you didn't volunteer any information?
> A. Right."

This prejudiced was enhanced when the State noted,

> "almost eight months, 240 days, 3360 hours, or whatever eight months with the discovery, with the benefit of counsel, with all the witness statements, and for the first time he tells the story claiming self-defense." *Id.* at 256.

The comments were so prejudicial that this Court overturned conviction despite the State's proper argument that the matter was not properly pled before the Court on

appeal, as the infringement on the right to silence required *sua sponte* relief. *Id.* In *Neal*, this Court similarly admonished the State, who first, specifically elicited from the defendant on cross-examination that he did not "Tell anyone in law enforcement what you told this jury," and then second stated to the jury during closing, "Does he tell anyone? Does he tell anyone? No. He tells the attorneys later as he begins to work on his story." *Neal v. State*, 106 Nev. 23, 24–25, 787 P.2d 764, 764–65 (1990). This too was reversible error.

Importantly, the prejudice faced in such instances is magnified where credibility is central to the defense, and there is limited other corroborating evidence for the state's case.[10] Unlike cases with substantial physical evidence and corroborating testimony, cases warrant reversal where the "main issue in the case was self-defense, there were no witnesses, and evidence was circumstantial." *Aesoph v. State,* 102 Nev. 316, 721 P.2d 379 (1986); *see also Coleman v. State*, 111 Nev. 657, 664, 895 P.2d 653, 658 (1995).

Here, the state effectively argued that the jury could negatively infer against Darion that he did not come forward during the four (4) years preceding trial to claim self-defense, violating his Fifth Amendment right and Fourteenth Amendment rights to due process under State and Federal law. 3 AA 497; 514; 587; 609; 614; 4 AA 798.

[10] *See Murray v. State*, 113 Nev. 11, 18, 930 P.2d 121, 125 (1997) (This Court found reversible error where the state commented such during the defendant's cross examination, during closing, and from a state witness, when the defendant's credibility was "Crucial to his defense."

The state emphasized during its closing that Darion did not come forward for four years, that he had reviewed all the evidence, and only then decided to claim self-defense, and that he was compelled to testify in his defense because of the existence of the video; this placed a prejudicial burden upon him that both the Nevada and Federal Constitution prohibit. 3 AA 587; 609; 614; 4 AA 798. Specifically, Darion's silence post *Miranda* cannot be dangled to the jury to suggest the questions of "why Darion didn't forward earlier" or "why Darion chose to withhold his self-defense claim and to disavow knowledge of the incident prior to speaking with counsel."

The state's comments rise to the level of requiring *sua sponte* relief from this Court.[11] As it pertains to this issue, this case is similar to *McCraney*, where a defendant did not claim self-defense until testifying to it at trial for the first time. Like *McCraney*, who was entitled to maintain his silence until trial and testify, here too Darion cannot be prejudiced solely due to the exercise of his State and Federal constitutional rights. It is immaterial that Darion initially declined to discuss self-defense before invoking his rights under *Miranda*. *v. Arizona*, 384 U.S. 436, 476 (1966). This negative inference to the jury of Darion's silence during the preceding four years to trial is simply prohibited. Moreover, the state's comments here are eerily

[11] Pursuant to *Chapman v. California*, 386 U.S. 18 (1967), when a defendant demonstrates constitutional error this court will reverse unless the State shows "beyond a reasonable doubt[ ] that the error did not contribute to the verdict" and is therefore harmless error. *Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008); *see also* NRS 178.598; *Belcher v. State*, 136 Nev., Adv. Op 31, 464 P.3d 1013, 1023 (2020).

similar to those in *McCraney*, particularly the notion of a "four year plan" and the state's analysis in *McCraney*, breaking down the intervening time between the incident and trial by hours, days, and months. 3 AA 587. Crucially, the prejudice in both instances is the same, because it places into the jury's mind the impermissible notion that should the defendant be telling the truth arguing self-defense, that nothing would have precluded him from coming forward to law enforcement to give a statement prior to trial testimony. This held against Darion that he did not simply waive his Fifth Amendment right and his rights pursuant to *Miranda* and return to law enforcement to claim self-defense. This is equivalent to *Neal*, where the state stated to the jury during closing that the defendant had not gone to tell his story to law enforcement prior to his trial testimony, where that too was reversible error.

The above can also not be deemed harmless error, as Darion's credibility was central to this case, and there existed no other meaningful percipient witness evidence. 1 AA 038- 3 AA 560. Other than the unclear video, no person heard the conversation prior to the shooting that could testify to it other than Darion. *Id.* Without question, this case centered around why Darion drew a firearm, and yet no witnesses existed to disclaim his testimony as to why he felt it necessary to defend himself. 2AA 489-93. Thus, the jury's gauge of Darion's credibility was dispositive here; no other person could tell them what was said that night once Darion and Mr. Borero met face to face, and no evidence existed to prove or disprove Darion's claims that he sought to defend himself and his Dustin. *Id.*. This made assessment of his credibility nearly the sole

inquiry in this matter. For this reason it was highly prejudicial to impermissibly impugn it as the state did here with comments concerning his right to silence. Therefore, the state impermissibly commented on Darion's rights, and he must be granted a new trial as a result.

E. The District Court Abused Its Discretion When It Failed To Deem The State's Closing Argument As Impermissible Tailoring That Precluded Darion From Receiving a Fair Trial.

This Court has expressed serious concern at state arguments at closing seeking to utilize the defendant's right to be present at trial against him. *Woodstone v. State*, 435 P.3d 657 (Nev. 2019); *Ortiz v. State*, 482 P.3d 1207 (Nev. 2021). Implications of this right are divided in both specific and general, and general tailoring is impermissible when the defendant cannot confront the accusations on cross-examination. *Ortiz v. State*, 482 P.3d 1207 (Nev. 2021). Generic tailoring arguments are those tied solely to a defendant's presence at trial while specific tailoring arguments are accusations supported by "specific evidence of actual fabrication." *Portuondo v. Agard*, 529 U.S. 61, 71; 77, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000). In *Portuondo*, the Court issued a split-decision that arguments that a defendant tailored his testimony, after his presence and hearing the State's presentation of the evidence in a trial, did not violate a defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Nonetheless, in the dissent, Justice

Ginsburg noted the particular danger of tailoring arguments, as they do not advance the truth-seeking function of trial, and:

> "But when a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants equally and therefore does not help answer the question that is the essence of a trial's search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence?" *Portuondo v. Agard*, 120 S. Ct. 1119, 1130 (2000) (dissenting opinion).

The dissent went on to note that "If a defendant appears at trial and gives testimony that fits the rest of the evidence, sheer innocence could entirely explain his behavior as opposed to state insinuations of tailoring. *Id.* at 1134.

While Nevada has not yet departed from *Portoundo*, this Court has noted that it is particularly concerned where such tailoring comments occur when the defendant' credibility "was central to the jury's s determination of guilt." *Woodstone v. State*, 435 P.3d 657 (Nev. 2019). *Woodstone* has also warned the state that that generic accusations of tailoring – accusations not based upon the evidence – are "particularly troubling, "especially where they are raised for the first time during rebuttal closing arguments. *Id*.

Nevada defendants also hold an unqualified and statutory right to be present at trial. The Constitution of the State of Nevada, Article I, Section 8 (1) states:

> "No person shall be tried for a capital or other infamous crime (except in

> cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the Legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or Attorney General of the State, and in any trial, in any court whatever, the party accused *shall be allowed to appear and defend in person*, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself. (Emphasis added)."

Additionally, NRS 178.388(1), demands that the defendant be "present at every stage of trial." Thus, Nevada has specifically guaranteed a defendant the right to both appear and defend, in person and with counsel at any trial. Nevada's explicit codification of a defendant's right to be present at trial magnifies any prejudice faced as a result of a prosecution's impermissible tailoring comments.

Several other States have also addressed the propriety of tailoring arguments and have split with the United State Supreme Court on the issue, and many have frowned on tailoring arguments not based in evidence.[12]

[12] *See State v. Daniels*, 861 A.2d 808 (N.J. 2004) (prosecution needed evidence of tailoring to argue the same); *State v. Swanson*, 707 N.W.2d 645 (Minn. 2006) ("better rule" was for prosecution to not make tailoring argument without evidence

Here, the state effectively argued that Darion heard all the evidence, and then and only then told his story of self-defense, implicating his due process rights and right to be present at trial. The state charged Darion with robbery and stated, in a general comment towards his need to mount a defense that, "this was a robbery. He has to deny that, because if it's a robbery it's a felony murder." 3 AA 615. The state also argued that Darion had to testify to negate video surveillance evidence. 3 AA 609. Yet, this was precisely the situation the dissent in *Portoundo* sought to avoid; that the state did nothing to advance the trial's truth-seeking function, and rather, only served to prejudice the jury against Darion. *Portuondo*, 120 S. Ct. at 1130 (dissenting opinion). This clouded the fact that Darion was telling his story for the first time, not in an effort to tailor it to the evidence he heard in the courtroom, but rather because it was the truth. In fact, there was no evidence upon which the state relied to make its tailoring argument to suggest that Darion's story was not true merely because he was charged with robbery and he had to deny the same. 3 AA 615. There was similarly no permissible basis upon which to ask Darion on cross-examination if he had sat through all the testimony and heard all the evidence, only to later broadside him at rebuttal closing with claims that the self-defense theory was only a result of Darion's response to the state's case at trial. 3 AA 608; 611; 614 The impugns Darion's right to due process and his right to review the evidence.

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that defendant tailored testimony); *Martinez v. People*, 244 P.3d 135 (Colo. 2010) (improper tailoring argument where state failed to tie to evidence in the record).

Importantly, the state referred to the above only sparingly in cross-examination. During cross, the state effectively made a general tailoring argument when it asked Darion if he had seen everyone prior to him come up and testify. 2 AA 497. Yet the state repeatedly drew the jury's attention to its tailoring arguments during its rebuttal closing, after which time the jury would hear no more argument or evidence. 3 AA 608; 611; 614. As this Court emphasised in *Woodstone*, such comments are particularly concerning; here, Darion's credibility is central to this case, and the state saved most of its attack for rebuttal closing, after which time the defense could submit no response. 3 AA 611; 614; 608-09;

Moreover, the state's argument that Darion must testify because of the video, or that he sought to minimize that this was a robbery was impermissible. *See* 3 AA 609. First, comments that Darion was trying to minimize that it was a robbery to avoid conviction for felony murder is devoid of any reference to evidence in the record. 3 AA 611. Given Darion's unqualified right to remain at trial, this was an impermissible general tailoring comment. This also placed Darion into a Constitutionally impermissible catch-22 where exercise of one right (the right to testify at trial) would cause implication of his right to remain silent until then. This is verboten as it forces Darion to preclude exercise of one of his Constitutional rights solely due to exercise of another. Therefore, the state made impermissible tailoring arguments that violated Darion's state and federal rights, and the district court

abused its discretion when it failed to even address the same in its Order. 3 AA 761-88.

F. The District Court Abused Its Discretion When It Failed To Find Deficient Conduct and Prejudice From a Failure to Impeach Or Argue At Closing.

Failure to impeach Detective Miller regarding her contradictory statements concerning who shot first was below an objective standard of reasonableness. In addition to violating Nevada law, federal law has established that "A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." See *Hart v. Gomez,* 174F.3d 1067,1071 (9th Cir. 1999).

Here, despite its crucial connection to Darion's self-defense claim, (indeed it was the precise question asked by a juror at the end of all testimony), trial counsel failed to identify numerous times during the investigation where Detective Miller indicated Mr. Borero and not Darion, shot first and otherwise did not argue the same to the jury at closing. *Id.* at 510; 2 AA 294; 3 AA 544; 547. Importantly, detective Miller denied such contradiction during the brief time during which the arrest report was brought to her attention well after her original testimony. 3 AA 546-7. Yet Counsel did not utilize the number of times Detective Miller expressed her belief that Mr. Borero fired first. 3 AA 640; 3 AA 545-46; 632. That detective Miller previously impeached herself is not subject to reasonable dispute, despite her argument that she

did not precisely say that Mr. Borero shot first. *Id.* Detective Miller's statement that she did not explicitly claim Mr. Borero fired first ignores two (2) crucial aspects; first, that she made the statement on several occasions, and not just during the one instance which Previous Counsel mentioned; and also that her explanation required one to believe that she issued a written report detailing the surveillance in otherwise chronological order, but for some reason did not chronologically identify the crucial matter of who shot first. 3 AA 640; 3 AA 545-46; 632.

As stated above, it became clear at trial that no person witnessed the shooting or heard the exact words exchanged to either corroborate or disprove Darion's story. 1 AA 038 - 3 AA 560. Thus, the State's case rested, in large part, on Detective Miller's investigation. The jury did not hear, however, the separate times the investigation asserted that Mr. Borero shot first, claims that were undeniably based on the evidence initially recovered at the scene, and the same physical evidence purportedly supporting the detective's contrary finding. 3 AA 640; 3 AA 545-46; 632. This means that no additional investigation occurred to change the original finding between the time of Detective Miller's initial investigation and trial. *Id.*

However, that the jury was allowed to believe that Detective Miller's investigation always and consistently stated that Darion shot first, when it did quite the opposite, created error that violated both state and federal law. As a result, the jury likely gave more credibility to this unchallenged statement, than it would have had previous counsel impeached Detective Miller or argued to the same effect at

closing. Given the importance of detective Miller's testimony in this case with limited evidence, there exists a reasonable probability of a different result. Had detective Miller's contradictory investigation (and the fact that she effectively disavowed her initial findings) been properly addressed with the jury, this would have cast doubt on the verdict. *Id.*

Moreover, trial counsel's implicit admission of Detective Miller's conclusion further evidenced error. 3 AA 547. Without challenge, Detective Miller was able to directly contradict Darion's self-defense claim, effectively casting prejudicial doubt. The moment the question of who shot first was asked and answered in contradiction to Darion's testimony, his self-defense theory was naturally and substantially harmed. In fact, if Mr. Borero was found to have shot first, it would be difficult to understand how any reasonable jury could conclude that Darion did not act in self-defense. In fact, trial counsel appeared to tacitly admit to Detective Miller's finding by pointing out that the video did not show who shot first, rather than point out Detective Miller's earlier and contradictory findings. 3 AA 547. Subsequently, it was error to not mention the matter at closing and to allow the jury to continue with the assumption that the evidence unequivocally and consistently pointed to the fact that Darion shot first, despite that it did not. Without giving the jury the opportunity to impeach her trial testimony with her own investigation, detective Miller's testimony casted significant and persuasive doubt upon Darion's self-defense. While Darion's credibility was central to his defense, nothing was done to impeach the detective's

credibility concerning her shifting findings when she sought to discredit him. Finally, this cannot be deemed a strategic decision, as there existed no potential benefit to refrain from impeaching evidence that most strongly cast doubt on Darion's testimony. This left the jury, during deliberations, with no meaningful reason (despite that such existed outside the trial record) to disagree with detective Miller's conclusions. Contrarily, should detective Miller have been properly impeached, or the matter been mentioned during closing, it appears that at least one important matter under the jury's deliberation would have been resolved in a manner much more favorable to Darion, and less favorable to the State undermining confidence in the verdict. 2 AA 294; 3 AA 544 Therefore, it was deficient performance that prejudiced Darion to fail to impeach detective Miller's inconsistent statements or fail to mention the same at closing.

G. Cumulative error requires striking of the Judgment of Conviction.

Even if no one error is sufficient to constitute a violation justifying reversal, cumulative error can take on constitutional dimensions. *Parle v. Runnels*, 505. F F.3d 922, 927 (9th Cir. 2007); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); U.S. Const. amend. V, XIV; Nev. Const. art. I, sec. 8, cl. 5. If no one error is convincing to this Court, then the cumulative effect of numerous errors argued herein creates a due process violation. Moreover, the following are relevant factors to consider in evaluating a claim of cumulative error: (1) whether the issue of guilt is close, (2) the

quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 17, 992 P.2d 845, 855 (2000)

Here, the above errors must be cumulated, as even if their independent effect is insufficient to form a constitutional violation, the combined effect of the stated errors caused Darion to face harm of constitutional magnitude. The issue of guilt was certainly close, considering the multiple "Not-Guilty" verdicts on this matter, and the juror's two questions concerning the central issue of who shot first. 2 AA 294; 3 AA 544; 624-5. Additionally, the errors are of serious magnitude as they, in part, implicate Darion's right to presence at trial and his right to remain silent, as opposed to ancillary issues concerning other witnesses or other testimony. Finally, counsel acknowledges that the gravity of this charge is serious, which ought to magnify the impact of multiple errors that infected the trial, and warrants reversal. Therefore, the errors herein must be cumulated, and as a result, their combined impact (if any single error is insufficient) precluded Darion from receiving a fair trial.

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CONCLUSION

Pursuant to the arguments above, Appellant, Darion Coleman, humbly requests that this Court reverse the Judgment of Conviction or grant any other relief this Court deems appropriate.

Dated this 6th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. I hereby certify that the instant brief complies with the typeface and type style requirements of NRAP. 32 (a) (4) – (6), and that the font used is Times New Roman 14 Point in Microsoft Word.
2. That this brief complies with all applicable page and/or word limitations under NRAP 32(a)(7) and contains 15,167 words inclusive of the table of contents and table of authorities, etc, and is within the limitations allowed above.
3. That I have read this appellate brief, and to the best of my knowledge and belief, it is not frivolous or interposed for any improper purposes, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation.
4. That this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular *NRAP* 28(e)(1), requiring that 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 found.

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I further understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of December 2021

Respectfully submitted:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DARION COLEMAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No.: 82915

NRAP 26.1 DISCLOSURE

That undersigned Counsel of record certifies that the following must be disclosed pursuant to *NRAP* 26.1. Darion Coleman is represented by Waleed Zaman, Esq, of Zaman Legal LLC, of which Zaman & Trippiedi, PLLC. is a parent corporation, and who represents him as Appointed counsel in the instant Appeal but did not represent him during District Court proceedings. Further, there are no parent corporations for which disclosure is required pursuant to this rule.

Dated this 6th day of December 2021.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that I filed the foregoing **APPELLANT'S OPENING BRIEF** with the Nevada Supreme Court by electronic filing. I certify that the following parties or their counsel of record are registered as e-filers and that they will be served electronically by the system, in accordance with the Master Service List:

Adam Laxalt, Esq.
Nevada Attorney General

Aaron Ford Esq.
Nevada Attorney General

Alexander Chen, Esq.
Chief Deputy District Attorney - Appellate

I further certify that on December 7th, 2021, I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** through personal mail, addressed in a sealed and prepaid envelope to:

Darion Muhammad-Coleman #1144228
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DATED this 7th day of December 2021.

Waleed Zaman

Waleed Zaman, Esq.