No. 86406

IN THE NEVADA SUPREME COURT

Troy White,

Petitioner-Appellant,

v.

State of Nevada, et al.

Respondents-Appellees.

Petitioner-Appellant's Appendix
Volume 8 of 10

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Dated September 13, 2023.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Laura Barrera
Laura Barrera
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2023, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Alexander G. Chen, Jonathan VonBoskerck, and Aaron D. Ford.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

Troy White #1143868 High Desert State Prison P.O. Box 650 Indian Springs, NV 89070	Jaime Stilz Deputy Attorney General Office of the Attorney General 100 N. Carson St. Carson City, NV 89701

/s/ Kaitlyn O'Hearn

An Employee of the Federal Public Defender, District of Nevada

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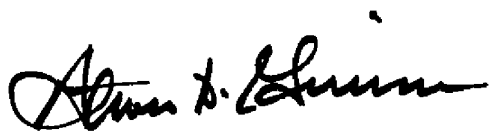


CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA Plaintiff vs. TROY RICHARD WHITE Defendant	.	CASE NO. C-286357 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

JURY TRIAL - DAY 7

THURSDAY, APRIL 16, 2015

APPEARANCES:

FOR THE STATE:	ELIZABETH MERCER JEFFREY S. ROGAN Deputy District Attorneys
FOR THE DEFENDANTS:	SCOTT L. COFFEE DAVID LOPEZ-NEGRETE Deputy Public Defenders
COURT RECORDER:	TRANSCRIPTION BY:
DEBRA WINN District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, THURSDAY, APRIL 16, 2015, 9:30 A.M.

(Court was called to order)

(Jury is not present)

THE COURT: I apologize for having my assistant send out the jury instructions that were incomplete. I had missed one of the instructions I'd specifically taken from a footnote in a case that Mr. Coffee had cited, and I'd left it out when he sent them out. Then I realized it and I added it back in.

MR. COFFEE: Well, I haven't seen what you'd sent out.

THE COURT: Hold on a second. So did you get the verdict form?

MR. ROGAN: Yes.

MR. COFFEE: I didn't get anything. Can I approach?

THE COURT: It's the last three pages of the pack you got.

MR. COFFEE: I didn't get the pack.

THE COURT: You didn't get the packet?

MR. COFFEE: My fault. I didn't check my email. I've been working on --

THE COURT: Okay. Hold on. We can't even talk, then.

Dan, can you go print one for Mr. Coffee.

THE COURT: All right. So where's my marshal?

MS. MERCER: Oh. There was a third version?

MR. ROGAN: No. It's okay.

I'm sorry. We didn't get the third version. We got the second version.

THE COURT: So, Dan, make a couple copies. And then this was -- good thing we did this part.

Then let's switch gears. Where's my marshal?

Can you go ask him to bring me Juror Number 6, Ricky.

MR. COFFEE: You'd warned us you were sending these out, too, Judge. I was busy printing proposed and other things.

THE COURT: It's okay. I was having some issues with some of the language and I was reading cases, and I just didn't type as well as I thought I did. And then I started my civil calendar, which appeared to be much worse because we couldn't agree on who was going when and how long they were going to take. And that was almost a half-hour discussion for next week.

MR. COFFEE: I did print hard copies with case cites and language so we could avoid -- I know the Court's reviewed what we did. I just wanted to avoid lengthy argument on anything if there's any disagreements.

THE COURT: Well, here's even a better choice. I marked -- I have here a packet that include all of the email correspondence between us through -- starting Tuesday at 6:06

and concluding with the April 15th 5:57. I'm going to ask the clerk to mark each of these individually as Court's exhibits. So each stapled version in the order they're stacked is a separate Court's exhibit.

THE CLERK: Okay, Your Honor.

THE COURT: Then I want you to come up and make sure that I didn't miss any. Mr. Rogan's for some reason went to my spam folder.

Yours, on the other hand, did not go to my spam folder.

MR. COFFEE: I'm not going to comment.

THE COURT: So I don't know.

Can I have my one juror. Is he here? Outside the door? Okay. Hold on a second.

So Dulce is marking those as the Court's exhibits next in order. How far are you up, Dulce?

THE CLERK: [Inaudible].

MR. COFFEE: Judge --

THE COURT: Hold on. Hold on.

THE CLERK: State's Exhibit 17 through 27.

THE COURT: So in a little bit I'm going to have you -- before we formally settle the instructions I'm going to have you look at those to make sure that I completely and accurately -- my assistant completely and accurately printed all of the versions that you had been exchanging with us so

that we have a complete record of all of the versions and the comments that were made by both sides. Because most of the arguments I would typically have during the settling of jury instructions you appropriately made by email yesterday, and I considered them, evaluated them, and this morning I read -- yesterday and this morning both I read cases that you had cited so that I could make sure that the set that I prepared and which I distributed to you this morning and which you have now been provided, which in my computer is called Court's 3, is the version that I think most appropriately represents the instructions to be given to the jurors.

Yes.

MR. COFFEE: Before we bring the juror back we should probably waive Mr. White's presence for the settling of instructions and for --

THE COURT: Is it okay?

Just leave him there for a minute.

Is that okay, if we waive his presence for this?

MR. ROGAN: Yes, ma'am.

MS. MERCER: Yes, Your Honor.

THE COURT: All right. Bring me the juror.

(Juror Number 6 entered courtroom)

THE COURT: Good morning, sir. How are you doing?

JUROR NUMBER 6: Good. How are you?

THE COURT: I am well. Can you come to the front

row so the mike can pick you up even though that's not your usual assigned seat.

JUROR NUMBER 6: Sure.

THE COURT: Somebody noticed you using I don't know if it was an iPad or a phone to text during I don't know if it was a break or sometime when we didn't have things happening. Can you tell me a little bit about what you were doing with the texting and the emails.

JUROR NUMBER 6: I was just turning it off onto airplane mode most of the time.

THE COURT: Okay.

JUROR NUMBER 6: And then there were like alerts coming, and I was just clearing those out.

THE COURT: Okay. So you haven't been doing anything related to this case during the proceedings?

JUROR NUMBER 6: No.

THE COURT: Any questions you'd like to ask him?

MR. ROGAN: No.

THE COURT: Any questions you'd like to ask him?

MR. COFFEE: No.

THE COURT: Thank you, sir. We appreciate that.

Now, Kevin, this is what I want you to do. I want you to go tell the jurors that my case for next week still has something I have to handle this morning, because I'm not done with Sands-Jacobs. So if you could let the jurors go on a

break for about an hour, because that's how long it's going to take me to finish with Sands-Jacobs, given how long they've already spent here this morning.

THE MARSHAL: 10:45?

THE COURT: Yeah, that's my best guess. Tell them thank you and I'm really, really sorry.

(Juror Number 6 exited courtroom)

THE COURT: Okay. Now, I've handed you -- or my assistant has handed you what has been marked as what was my Court's 3 and the verdict form. I am going to have those marked by the clerk as the next in order Court's exhibits. The verdict form will be Court's --

THE CLERK: 28.

THE COURT: And the instructions will be?

THE CLERK: 29.

THE COURT: The instructions are unnumbered and are in the identical condition with what you've been provided. If you will look at the last three pages of the pack my assistant has given you, that should be Court's Exhibit 28, which starts as "Verdict," and is then three pages long.

MR. COFFEE: Yes.

THE COURT: Does anyone disagree with the form of verdict other than the portion at Count 2 where there is not an attempt voluntary manslaughter portion?

MR. COFFEE: No.

THE COURT: Okay. Now, can you tell me about the attempt voluntary manslaughter portion, Mr. Coffee.

MR. COFFEE: Yes. We had tendered some instructions concerning attempt voluntary manslaughter. They are part of the Court's record at this point, I expect. Here's the problem. I'll try to make it as simple as I can, my understanding of the problem anyways. There's a case called Curry in Nevada that says that attempt voluntary manslaughter is not a crime in Nevada. That follows a case called Williams -- or Allen, I'm sorry. Case called Allen that said it was error for the District Court to refuse to give an instruction on attempt voluntary manslaughter.

The problem with both these cases, they're decided pre Byford. And Byford is a watershed case in Nevada homicide jurisprudence. It represented a change in the law pursuant to Ika. And we've got that laid out someplace else in our instructions.

The problem is when you look at Curry, Curry essentially doesn't consider the word "deliberate." Express malice requires the deliberate intention to take away human life. And Curry gives absolutely no meaning to that "deliberate" word. It pretty essentially says if you have the intent to kill, the specific intent to kill, it's attempt murder. Of course, the problem with that is manslaughter may include the attempt to kill. So we end up in this Hobsian

situation, for lack of a better description, where if I fire a shot and hit somebody and they die it is attempt murder and I have the state of mind for attempt murder. Let's make that assumption to start with, I fire a shot and I hit somebody and they -- I'm sorry, I fire at somebody, hit somebody that died, it is voluntary manslaughter, all right. The exact same state of mind and they don't die it is attempt murder under Curry. Of course, the problem with that is there's a lesser penalty for voluntary manslaughter than there is for attempt murder. It's a one to ten, as opposed to two to twenty. So you've got a public policy problem in addition to everything else we've talked about that it is advantageous for me if the victim dies if I have the intent to kill, but it would otherwise be manslaughter. It doesn't make a lot of sense. Curry recognized it was a minority position, one of only a few states that had adopted it. There were some cases afterwards. I think the case is Gonzalez -- it's cited again in our papers -- from Kansas that looked at Curry and said Curry doesn't make a lot of sense. And I think the reason Curry doesn't --

THE COURT: Well, regardless of whether the Nevada Supreme Court makes any sense, regardless --

MR. COFFEE: I understand.

THE COURT: -- they are the controlling authority in Nevada.

MR. COFFEE: I understand. My position is that

Curry is one of those cases that got swept away with the Byford decision and the change of law, and after the change of law in Byford we should be entitled to attempt voluntary manslaughter. Because if I have the appropriate state of mind and meet all the other conditions and the only failing in my case is that the person doesn't die, then I should not be charged with a higher crime because they did not die, if that makes sense. So that's the reason for it.

THE COURT: I understand your position, but I feel constrained by the decision the Nevada Supreme Court has made, so I'm not going to provide on the verdict form the attempt voluntary manslaughter.

MR. COFFEE: Understood.

THE COURT: Would you like a few minutes to go through the packet of instructions that have been marked as Court's Exhibit 29 before we formally settle them?

MS. MERCER: Your Honor, we've had a chance to go through them.

THE COURT: Mr. Coffee.

MR. COFFEE: I can go through as we go. I do -- how familiar -- I do have one question for the Court given the ruling on attempt voluntary manslaughter.

THE COURT: How familiar am I?

MR. COFFEE: Yeah.

THE COURT: I wrote them.

MR. COFFEE: I understand. I understand. But I will tell you I've got a lot of information in my head, and it's hard for me to keep track of things.

THE COURT: It's okay.

MR. COFFEE: Because we were not given the instruction concerning Curry, is there an instruction in the packet -- the only thing that I'm left curious about -- as to what happens if it would otherwise be an attempt murder but it meets the conditions of heat of passion? Because the way I read -- the way I read Curry --

THE COURT: Hold on. Let me go to that portion.

MR. COFFEE: -- and the way I read Keys is that means a not guilty verdict. And that's one of the problems I think, of course, with no attempt voluntary manslaughter, is you put a jury in a position of shots are fired, somebody's hit with shots, but they are constrained for a not guilty verdict if it happened in qualifying heat of passion, which seems to be a kind of ridiculous position to put a jury in, too.

THE COURT: There is not an instruction related to that on the attempt murder section. There are two attempt murder instructions that appears immediately before the instruction on the deadly weapon enhancement.

MR. COFFEE: I had tendered one in our -- in later --

THE COURT: I know you had.

MR. COFFEE: -- in the other packet, and I would ask that they be instructed on that point of law.

MR. ROGAN: Your Honor, I think it's -- in response, it's already subsumed in the instruction on attempt murder that you have to have the specific intent to kill. The State concedes that an attempt killing in the heat of passion doesn't have the intent to kill element present so the verdict is not guilty.

THE COURT: So you like the portion that says "Implied malice is not an element of attempt murder and is not to be considered by you in regards to this charge"?

MR. ROGAN: Right.

THE COURT: Because it has to be express malice.

MR. ROGAN: Correct.

THE COURT: Which is the deliberate intention.

MR. COFFEE: And, Judge, pursuant to Crawford v. State we're entitled to negatively phrased position instructions that point out exactly the point that we are asking for. The reason we're entitled to those is that jurors are not expected to be as conversant in the law as we are and it's supposed to be a plain understanding. With that in mind we would ask for a plain instruction that says, if it would otherwise be heat of passion -- or I think the Court understands the principle I'm asking for, and I think we'd

suggested one, if it would otherwise be heat of passion then you must find the defendant not guilty on the attempt murder, the attempt murder charge.

THE COURT: Mr. Rogan, I don't have that in my pack.

MR. ROGAN: No. I don't think it was submitted. I think a negative instruction would simply say that, if you find that the State has not proven express malice, namely, deliberate intention unlawfully to kill, then you must find the defendant not guilty. And then he can refer back to the heat of passion instruction and the voluntary manslaughter to indicate that an action that's done, that's rash, that's impulsive is not intentional and there's no express malice in that regard.

THE COURT: Dictate again, please, Mr. Rogan. If you find that the defendant did not --

MR. ROGAN: If you find that the State did not prove that the defendant acted with express malice, namely, the deliberate intention unlawfully to kill, then you cannot find the defendant committed the crime of attempt murder.

THE COURT: Mr. Coffee, are you okay with that?

MR. COFFEE: No.

THE COURT: Okay. Tell me what you want.

MR. COFFEE: And we did submit -- attempt -- Court's indulgence for just a second, because I'm removing some language. Court's indulgence.

THE COURT: It's okay, Mr. Coffee. Please take your time.

MR. COFFEE: All right. Heat of passion, unlawful provocation may be considered in determining whether or not the State has proven the charge of attempted murder. If the State has failed to prove that either -- and it's those two possibilities -- that either the defendant was not acting in heat of passion or, two, that the provocation was not legally adequate, then the defendant is entitled to a verdict of not guilty on the charge of attempt murder.

THE COURT: I'm waiting for Mr. Rogan to finish thinking.

MR. ROGAN: Court's indulgence.

THE COURT: He's going to look over your shoulder.

MR. COFFEE: Sure.

(Pause in the proceedings)

MR. ROGAN: Your Honor, I think we've come to a compromise here.

THE COURT: All righty. And you've got to go slow, because I'm typing.

MR. ROGAN: Okay.

THE COURT: It starts, "You are instructed that if you find the State has not established that the defendant --"

MR. ROGAN: I think we're changing the entire --

MR. COFFEE: Actually we're going to [inaudible] to

be consistent with the other instruction, I'm sorry.

THE COURT: Okay.

MR. ROGAN: "If you are satisfied beyond a reasonable doubt that there was an unlawful attempt to kill, but --"

THE COURT: "...satisfied beyond a reasonable doubt --"

MR. ROGAN: "...that there was an unlawful attempt to kill, but you have a reasonable doubt whether the crime of attempt murder was done in the heat of passion -- or sudden heat of passion," rather --

THE COURT: You're using the word "sudden heat of passion"?

MR. ROGAN: Yeah, "...sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, you must give the defendant the benefit of the doubt and return a verdict of not guilty."

And then I think it should also -- Court's indulgence again.

(Pause in the proceedings)

MR. ROGAN: Okay. And then a new paragraph.

THE COURT: Okay.

MR. ROGAN: "There must -- for you to find that the defendant -- for you to find that the defendant acted in the heat of passion there must be a serious and highly provoking

injury inflicted upon the defendant sufficient to excite an irresistible passion in a reasonable person."

THE COURT: Okay. Go again. "...sufficient to excite..."

MR. ROGAN: "...sufficient to excite an irresistible passion in a reasonable person."

And then a new paragraph. "Heat of passion and lawful provocation may be considered in determining whether the State has proven intent -- deliberate intent in regards to the charge of attempt murder."

THE COURT: Mr. Coffee?

MR. COFFEE: That's fine.

THE COURT: Okay. Let me read it back to you after I clean up a couple of things here.

Okay. This is what I have, and I may not have gotten it all, because I am not good at dictation. "If you are satisfied beyond a reasonable doubt that there was an unlawful attempt to kill but you have a reasonable doubt whether the crime of attempt murder was done in the sudden heat of passion caused by a provocation apparently sufficient to make the provocation irresistible, you must give the defendant the benefit of that doubt and return a verdict of not guilty of attempt murder.

"For you to find the defendant acted in the heat of passion there must be a serious and highly provoking injury

inflicted upon the defendant sufficient to excite an irresistible passion in a reasonable person.

"Heat of passion and lawful provocation may be considered in determining whether the State has proven deliberate intention in regards to the charge of attempt murder."

Did I get it pretty close?

MS. MERCER: Yes, Your Honor.

MR. COFFEE: Sounds right.

THE COURT: All right. So we've resolved that issue.

MR. COFFEE: Yes.

THE COURT: Next? And I have added that at the end of the last two attempt murder instructions.

MR. COFFEE: Okay.

THE COURT: I will give you a new pack as soon as we get through this process, and it will be numbered.

MR. COFFEE: And, Judge, as far as specials, I saw the Court had incorporated the language I think that the State had agreed to concerning heat of passion can include attempt to kill, so we withdraw our objections in that regard that satisfies what we were asking for.

THE COURT: Okay.

MR. COFFEE: And I assume that was included in the pack.

Did the Court include an instruction concerning the duration of provocation?

THE COURT: I did not.

MR. COFFEE: And we've offered that just very briefly in our packet. What we had offered was, "While the state of mind consisting -- constituting heat of passion must be the result of a sudden impulse, the provocation leading to the sudden heat of passion --" it should say "can occur," "-- can occur over either a long or short period of time and may be the result of an ongoing series of events." We would offer that.

We would also offer splitting this in two with an instruction that just says, "...may occur over a long or short period of time," or an instruction that says, "...may be the result of an ongoing series of events." There are no Nevada cases that I can compel the Court to give me this instruction. Would have given some cases from outside the jurisdiction. It seems to be consistent with the rationale of Boikins [phonetic], as we've pointed out. I know that's a self defense case. But, again, that's a situation where you've got provocation for self defense arguably and it takes place over a long period of time. You've got Roberts that, while he finds out his wife's having an affair, they also talk about a dinner that he's been stood up for and some other things that take place over a long period of time. That's the reason we

ask for the instructions.

Pursuant to 175 -- there's a statute that allows us to request instructions, and if they're pertinent it says they should be given.

THE COURT: Uh-huh.

MR. COFFEE: That's we pressed it. We think that it's pertinent because it's going to lead up to the events here.

THE COURT: Okay. Anything else that you want to say on that issue?

MR. COFFEE: No.

MS. MERCER: Your Honor, we'll submit it on our written opposition.

THE COURT: Okay. I had previously decided not to give that given my review of the cases which indicated at least in Nevada there was no basis for the instruction.

Okay. Next?

MR. COFFEE: Understood. There was one line of the malice instruction that we had objected to. I don't know if that was removed or not.

THE COURT: Did not remove it.

MR. COFFEE: And we'll just submit on what we had submitted as to why it should be removed.

THE COURT: Okay. Any others that you think we need to consider, remembering I already went through your entire

package?

MR. COFFEE: Understood. The last thing is just the Clay objection to the child abuse.

THE COURT: And I read Clay again yesterday while I was sitting at the airport, and I understand your position, but I think the modification that is made to the instruction covers the issues addressed in the Clay case.

MR. COFFEE: Understood. And the only thing we would note is without alleging some kind of actual injury I don't know how it could be a felony as opposed to a gross. But --

THE COURT: Well, but they've alleged the mental injury, which has related in an attempt suicide, has related in psychological treatment, and additional other kinds of injuries which are included in that child abuse definition.

MR. COFFEE: I understand. But we don't give a definition of mental injury with the tendered instruction that they had -- they had removed the definition of "injury" from the tendered instruction yesterday.

MR. ROGAN: Right. Because it's the -- the statute requires mental suffering.

THE COURT: Right.

MR. ROGAN: Mental injury only relates to a particular form of child abuse caused by nonaccidental injury, and so those definitions relate only to that particular form

of abuse which we're not alleging. That's why we removed them.

THE COURT: "To suffer unjustifiable physical pain or mental suffering" is what the instruction reads. And the mental suffering I think we've had testimony on.

MR. COFFEE: We haven't had testimony of mental suffering. There's no specific definition. I think it's limited by statute. But we'll submit on the objection, Judge. I don't want to go far afield.

THE COURT: Okay. Anything else before I give you a numbered set?

MS. MERCER: No, Your Honor.

THE COURT: All right. Mr. Kutinac, if you would please print Court's 4.

While we're printing Court's 4 is there anything else outside the presence before I go to Sands-China's motions in limine that I still have to hear this morning?

MS. MERCER: No, Your Honor. Not from the State.

THE COURT: I'm going to number them probably as they argue. You're going to get a numbered version. Then you can identify specifically, Mr. Coffee, those particular instructions that you object to for the record. You don't have to give any additional reasons, because I think we're covered under the Court's exhibits and the discussion we've had. But I think it's critical that you identify the specific

instructions after reviewing the numbered set.

And if there are any that the State objects to, you can do the same thing.

MS. MERCER: Thank you, Your Honor.

THE COURT: All right. And I also note that the verdict form has been objected to because I did not include the attempt voluntary manslaughter and the attempt voluntary manslaughter with use.

MR. COFFEE: Thank you.

THE COURT: And I overruled those objections.

(Court recessed at 9:58 a.m., until 10:44 a.m.)

THE COURT: This is the formal settlement of jury instructions. While I was handling Sands-Jacobs did my assistant provide you with a copy of the jury -- Court's proposed jury instructions numbered 1 through 38?

MR. COFFEE: He did.

MS. MERCER: Yes, Your Honor.

MR. ROGAN: Yes, Your Honor.

THE COURT: Have the parties had an opportunity to review the proposed instructions numbered 1 through 38?

MS. MERCER: Yes, Your Honor.

MR. COFFEE: We have.

THE COURT: Were there any typos or other things that you saw in that review?

MR. COFFEE: There are two typos that we're aware

of, Judge.

THE COURT: And where are they?

MR. COFFEE: Page 4 says an "indictment." That should read an "information."

THE COURT: That isn't my fault. That's the State. But, yes, that would be correct, that we need to change that. See why I wouldn't let Dan run the copies?

This is Court's exhibit in order for the record.

THE CLERK: Yes, Your Honor. That would be 30.

THE COURT: Mine says "an information" on top of Instruction Number 3.

MS. MERCER: Oh. That's weird.

MR. ROGAN: Instruction Number 4.

THE COURT: Oh. Instruction Number 4. You're right. There it is. "...an information." Okay. So we'll have that change made on Instruction 4.

MS. MERCER: And then in Instruction Number 13 there was some superfluous language that doesn't apply to the case that we probably should have removed.

THE COURT: And what is that?

MS. MERCER: After "sufficient to make the passion irresistible," the rest of that should be deleted.

THE COURT: After "or involuntary"?

MR. ROGAN: Yes.

THE COURT: So period --

MR. ROGAN: No, no, no. No, no, no.
MS. MERCER: Before "involuntary."
MR. ROGAN: Before.
MR. COFFEE: Involuntary is not part of our case.
THE COURT: I know. So where do you want me to put the period?
MS. MERCER: After "irresistible."
THE COURT: On line 5.
MS. MERCER: Yes, Your Honor.
THE COURT: So after "irresistible" on line 5 we will strike the remainder of that paragraph. Is that correct?
MR. COFFEE: Yes.
THE COURT: Okay.
MS. MERCER: And that was it, Your Honor.
THE COURT: Other than the typos that have been identified on Instruction 4 and 13, are there any modifications of language that appear to need to be made?
MS. MERCER: No, Your Honor.
THE COURT: Are there any objections by the State to any of the instructions numbered 1 through 38?
MS. MERCER: No, Your Honor.
THE COURT: Are there any additional instructions to be offered by the State?
MS. MERCER: No, Your Honor.
THE COURT: Mr. Coffee, have you had a chance to

review 1 through 38?

MR. COFFEE: I have.

THE COURT: Other than the typos we're correcting on 4 and 13, do you have an objection to any of the instructions?

MR. COFFEE: Yes, Judge.

THE COURT: Can you tell me which ones.

MR. COFFEE: Sure. Beginning with Instruction 6, we object to the last line for the reasons that were submitted before.

THE COURT: And that is part of the written submission that's part of the Court's exhibits that we've already marked.

Anything else? Any other numbers?

MR. COFFEE: I'm getting there, looking at my notes real quickly. We're good through at least 15.

Instruction 18, object to line 6 for the same reasons that we've objected to the last line of the malice instruction.

THE COURT: And those are part of written submissions that have already been marked as Court's exhibits, as well as our other discussions.

Any additional ones, Mr. Coffee?

MR. COFFEE: Yes. 24 and 25 object as a group pursuant to the Clay decision in the confusion that is set forth in -- it's, again, our court submission.

THE COURT: And we've already addressed that both on the record earlier today, as well as in the written submissions you provided yesterday. They've been marked as Court's exhibits.

MR. COFFEE: Correct.

THE COURT: Any additional objections to the instructions from the defendant?

MR. COFFEE: I believe that's it, Judge.

THE COURT: Does the defendant have any additional instructions to offer at this time?

MR. COFFEE: The ones we'd offered before. Do you want me to --

THE COURT: Were there any specific ones that are in the packet you've offered before that you want the clerk to specifically number today?

MR. COFFEE: Yes.

THE COURT: They're already Court's exhibits, but if there's a particular one you want her to specifically number, I need you to tell me which ones.

MR. COFFEE: Okay. The instruction concerning duration of -- well, if a record's made -- I just don't know --

THE COURT: As you remember to designate Court's exhibits as part of your record, I think your record's made.

MR. COFFEE: Perfect.

THE COURT: The problem is lots of people forget to designate the Court's exhibits and then they aren't part of your record.

MR. COFFEE: Perfect, Your Honor.

THE COURT: But that's not my problem, because I don't designate your record.

MR. COFFEE: No. But as long as the Court's not considering it a waiver because I'm not tendering them again right now and having them numbered, we're in good shape.

THE COURT: No. You tendered them yesterday, I went through them, we had email correspondence, and there were even supplemental discussions that were provided by the State in response to some of your comments later in the day. I provided you my comments and my versions, and I even asked for clarification on a couple, and that's all represented in the emails that have been provided.

MR. COFFEE: Perfect.

THE COURT: So I think you've made your record. But if there's something else --

MR. COFFEE: No.

THE COURT: Like I used to have a partner who would have eight versions, and he would just keep going after the judge would say no in offering them. So --

MR. COFFEE: No.

THE COURT: No. Okay.

MR. COFFEE: And we'd offer the alternatives on the duration instruction. They aren't typed alternatives. We would offer breaking off -- striking language on the duration instruction to strike the "short and long" portion of the language and just leave "series of events." Or strike the "series of events" and just leave "short and long" for duration. So we're good.

THE COURT: Okay. And we've previously discussed that we don't think the Nevada caselaw supports that particular issue.

MR. COFFEE: Understood.

THE COURT: Anything else? All right. Then I'm going to have copies made for the jurors of the instructions with the corrected 4 and 13 in there, and we will be in recess until those copies are ready.

(Court recessed at 10:52 a.m., until 11:08 a.m.)

(Jury is present)

THE COURT: Counsel, you can be seated.

Good morning, ladies and gentlemen. I apologize for being so late. One of my cases, the one that starts on Monday for the next couple of weeks, had some serious problems this morning which caused me to be delayed. So I hope this additional break you had this morning wasn't too inconvenient. I apologize.

Ms. Clerk, could you please call the roll of the

jurors.

THE CLERK: Yes, Your Honor.

(Jury roll called)

THE COURT: Counsel stipulate the presence of the jury?

MS. MERCER: Yes, Your Honor.

MR. COFFEE: Yes, Judge.

THE COURT: Ladies and gentlemen of the jury, I'm about to instruct you upon the law as it applies in this case. I would like to instruct you orally without reading to you. However, these instructions are of such importance that it is necessary for me to read to you these carefully prepared written instructions. The instructions are long, and some are quite complicated. If they are not especially clear when I read them to you, you will have your own copy which the marshal will now pass out along with a copy of the verdict form so that you can read along with me as I go through the instructions, and make notes on the instructions as the attorneys in their closing arguments explain the application of the facts to these instructions.

(Jury instructions read - not transcribed)

THE COURT: Ladies and gentlemen, given the hour, rather than start the closing arguments and interrupt them midstream, we're going to take an early lunch break and come back at 1:00 o'clock. During this recess you're admonished

not to talk or converse among yourselves or with anyone else on any subject connected with this trial, or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including, without limitation, social media, texts, newspapers, television, the Internet, and radio, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

We'll see you at 1:00 o'clock outside Courtroom 14A. Have a nice lunch.

(Jury recessed at 11:37 a.m.)

THE COURT: Counsel, is there anything outside the presence?

MR. COFFEE: There is.

THE COURT: Okay.

MR. COFFEE: Two matters. When we were exchanging instructions back and forth the State's conferred instruction -- we had a Roberts instruction, an instruction that is required by Roberts that says physical injury isn't necessary.

THE COURT: Yes.

MR. COFFEE: It's not in the final packet. We'd agreed to move it into the -- the State had wanted to move it into the body of the instruction.

MR. ROGAN: Yeah. It should have been there.

MR. COFFEE: But the final packet that the Court has

put together, it's not there. And Roberts they held it was reversible error not to give that.

THE COURT: What is it? What's the language?

MR. COFFEE: Direct physical contact -- hold on.

MR. ROGAN: A minute.

THE COURT: When did you send it to me, Mr. Rogan, so I can see if I can find it real quick?

MR. ROGAN: It was the conferred instructions.

MR. COFFEE: Do you have the last version?

MR. ROGAN: Yeah.

MR. COFFEE: There was another conferred instruction that didn't -- some way or another didn't make it.

THE COURT: I saw you guys talking, so I figured there was something.

MR. COFFEE: Yeah.

MR. ROGAN: I'm sorry. It's not -- it's not the conferred instructions, it's the manslaughter instructions that defense counsel submitted. Here it is.

THE COURT: So defendant's specials final? Specials updated final?

MR. COFFEE: No, it's not the specials. When we were going back and forth on the manslaughter we had it as a separate instruction. The State had sent me a suggestion to move it into the -- move it into the body. The Court may have not been in the emails between the two of us.

THE COURT: Okay. We can add it as an A. It won't be a problem.

MR. COFFEE: Okay.

THE COURT: I just need you to tell me what the language is.

MR. ROGAN: Yeah. We'll find it.

THE COURT: Well, can you give it to me now. Because I'm going to do it before I break -- before I leave to go to the meeting at lunch so that I can have the copies made and ready so when the jurors come back I can read them the supplemental instructions.

MR. COFFEE: Yeah. If the Court will let me boot my computer, I'll give you the exact language.

And the other problem is we had a similar -- it was in the -- I thought it was in the conferred instructions concerning absence of heat of passion and Crawford instruction, which is mandatory pursuant to Crawford v. -- mandatory pursuant to Crawford v. State. And that doesn't look like that made it, either.

MR. ROGAN: Which one is it?

MR. COFFEE: I'll show you.

THE COURT: I've got your conferred instructions up, so tell me which one it is.

MR. ROGAN: These are Mr. -- it's not -- it's actually not the conferred instructions. It's the

instructions that Mr. Coffee had drafted on voluntary instruction -- voluntary manslaughter. I think the title of the document was "Voluntary Manslaughter with Specials on Crawford."

THE COURT: I don't even have anything with that title.

MR. COFFEE: I think it may have went back and forth between the two, and I assumed it ended up in the conferred.

THE COURT: It's okay. If you two agree to the language, I will type them right now --

MR. COFFEE: We had.

THE COURT: -- we will give them numbers, and we will copy them, and the jurors will insert them into their things. We will give them a staple remover, bring the huge stapler in --

MR. COFFEE: I know we discussed them.

Permission to approach, Judge?

THE COURT: Yes. Please. So I can fix this issue.

MR. COFFEE: And this -- I know we'd sent it, because the Court had asked us about this legally adequate provocation on the bottom.

THE COURT: Well, that legally adequate provocation was in like eight different places and it was never defined, and it was bothering me.

MR. COFFEE: Yeah.

MR. ROGAN: I thought we'd just agreed to take it out.

THE COURT: Yeah.

MR. ROGAN: Right.

THE COURT: Which solved the problem.

MR. COFFEE: Yeah, we can leave that last line off. I don't care. The last line is not critical to me at all.

THE COURT: Okay. So you want me to add an instruction that reads, "If there is some evidence of heat of passion caused by legally adequate provocation, the State has the burden of proving beyond a reasonable doubt that either the defendant was not acting in the heat of passion when he killed or the passion was not caused by legally adequate provocation. If they have failed to meet this burden but you find the State has proven an unlawful killing, then you must return a verdict of voluntary manslaughter."

MR. COFFEE: Yes.

THE COURT: Okay. And I'll add that in the voluntary manslaughter section.

And what was the other one that you -- that we didn't get included?

MR. COFFEE: Just -- we're going to just do something real simple. The injury suggested need not be facility. Fair enough?

MR. ROGAN: Right. Yeah. The injury contemplated

by the manslaughter instructions need not be physical.

MR. COFFEE: That's good enough. That covers Roberts.

MS. MERCER: I think it's a highly provoking injury.

MR. COFFEE: Sure. Sure. Yeah. The highly provoking injury need not be physical. That's fine. Whatever you want for the front end language. I didn't mean to shorten it.

MS. MERCER: The language is right here, Scott.

(Pause in the proceedings)

MR. COFFEE: Perfect.

MS. MERCER: The language we had proposed, Your Honor, was the "serious and highly provoking injury which causes the sudden heat of passion can occur without direct physical contact and may not be the result of direct physical assault on the defendant."

THE COURT: You've got to read slower. I was at "injury which causes."

MS. MERCER: "...which causes the sudden heat of passion can occur without direct physical contact and need not be the result of direct physical assault on the defendant."

THE COURT: "...which causes the sudden heat of passion..."

MS. MERCER: "...can occur without direct physical contact..."

THE COURT: And?

MS. MERCER: "...and need not be the result of direct physical assault on the defendant."

MR. COFFEE: Very good. Thank you. Apologize to the Court for the --

THE COURT: It's okay. Let me type real quick.

Did you want it before the transitionary instructions, or do you want it after them? Because it can go either way with voluntary manslaughter. It's referenced in both places.

MS. MERCER: Probably before.

MR. COFFEE: Before. Yeah. Right after the initial voluntary manslaughter.

THE COURT: So I will put it after the instruction. They will go in as 15A and B if that's where you want them.

MR. COFFEE: That's fine. That's fine.

MS. MERCER: Perfect.

THE COURT: Well, look and make sure.

MR. ROGAN: That's great.

MS. MERCER: That's perfect.

MR. COFFEE: David says it's good. I trust him.

THE COURT: All right. Okay. Let me type, and then you can have them before you leave, and then we'll give them to the jurors.

(Pause in the proceedings)

THE COURT: Okay. So the first one reads, "If there is some evidence of heat of passion caused by legally adequate provocation, the State has the burden of proving beyond a reasonable doubt that either the defendant was not acting in the heat of passion when he killed or that the passion was not caused by legally adequate provocation. If they have failed to meet this burden but you find the State has proven an unlawful killing, then you must return a verdict of manslaughter."

MR. COFFEE: It should be "voluntary manslaughter," since that's the only one we'd offered.

THE COURT: "...verdict of voluntary manslaughter." That's what I've got.

MR. COFFEE: Oh. Okay.

THE COURT: I may not have read correctly. Okay. Let me send this one to the printer, and then I will type the other one.

(Pause in the proceedings)

THE COURT: And this is the one you'd dictated to me, so let's see how I do on this one.

(Pause in the proceedings)

THE COURT: "The serious and highly provoking injury which causes the sudden heat of passion can occur without direct physical contact and need not be the result of a direct physical assault on the defendant."

MS. MERCER: Perfect.
THE COURT: Is that accurate?
MR. COFFEE: Yeah. I would take out the second "direct."
THE COURT: So it'd just be?
MR. COFFEE: "...a physical assault on the defendant."
THE COURT: Is that okay?
MS. MERCER: Yes, that's fine.
MR. COFFEE: But Roberts's situation where somebody finds his wife with another man.
(Pause in the proceedings)
THE COURT: Okay. Counsel, I'm going to mark 15A and B. Will you please come look at them, and then I will canvass you related to 15A and B. And then I'll make copies for you as soon as you think they're okay.
MR. COFFEE: Very good. Thank you.
THE COURT: Counsel, have you both had an opportunity to review the contents of our proposed additional instructions, Instruction Number 15A and 15B?
MS. MERCER: Yes, Your Honor.
MR. COFFEE: Yes, Your Honor.
THE COURT: Does anyone object to the giving of Court's Instructions 15A and 15B?
MS. MERCER: No, Your Honor.

MR. COFFEE: No, Your Honor.

THE COURT: Okay. Then when the jury returns from lunch we will have copies made for them, we will have a big staple remover and a large stapler, and our first order of business will be to -- for me to read 15A and B and substitute them into their packages.

Anything else?

MR. COFFEE: No.

THE COURT: All right. Thank you. Have a nice lunch. See you about 1:00.

(Court recessed at 11:52 a.m, until 1:03 p.m.)

(Jury is not present)

THE COURT: Counsel, my assistant is even more efficient than any of us noted. He removed the staples, inserted 15A and B, and restapled all the jurors' packs and for the one juror who had it marked at a different place than the others he restored it to that location.

Go get my jurors.

THE CLERK: [Inaudible].

THE COURT: Next in order, whatever that is.

THE CLERK: 31 and 32.

THE COURT: Thank you, Dulce.

(Jury reconvened at 1:04 p.m.)

THE COURT: Counsel stipulate to the presence of the jury?

MS. MERCER: Yes, Your Honor.

MR. ROGAN: Yes, Your Honor.

MR. LOPEZ-NEGRETE: We do, Judge.

THE COURT: You may be seated.

Ladies and gentlemen, after I read the instructions to you we discovered that inadvertently two instructions had been left out of your package. Those are now numbered as 15A and 15B. During the lunch hour my assistant unstapled your packs, put 15A and B after 15, and restapled your packs.

I am now going to read 15A and 15B to you before you begin hearing closing arguments.

(Jury Instructions 15A and 15B read - not transcribed)

THE COURT: Would you like to make your opening statement -- or your closing argument.

MR. ROGAN: Yes, Your Honor. Thank you very much.

STATE'S CLOSING ARGUMENT

MR. ROGAN: It's their fault. It's Echo's fault, it's Joe's fault; they provoked the defendant. If they hadn't engaged in their sinful, backsliding, whoring and whoremongering ways, the defendant never would have shot them. It's their fault. It's Echo's fault that she's dead. If she had only done what he wanted her to do, which is go back to him, she'd be alive today with her kids, and you wouldn't be here and we wouldn't be here.

Ladies and gentlemen, to find the defendant guilty of voluntary manslaughter that's what you'd have to believe, it's Echo's fault and it's Joe's fault for the defendant's conduct, that they provoked him into a state of irresistible passion to take a life, to shoot to kill, to shoot to try to kill.

But that's not what we've proven. We've proven that the defendant acted on his own accord by his own choice after thinking about what he wanted to do and choosing to do it. And today we're going to ask you to hold him responsible for his own conduct and not blame Echo Lucas and not blame Joe Averman for getting shot.

Ladies and gentlemen, in every criminal case the defendant has -- the State has the burden to prove that the crimes that we charged in our information were committed and the defendant is the one who committed those crimes. In this particular case half your job is done. Identity is not an issue. We know that the defendant is the one that shot Echo and killed her, murdered her, and we know that the defendant is the one that shot Joe Averman all in front of those kids. Joe Averman told us that, J[redacted] G[redacted] W[redacted] told us that, J[redacted] W[redacted] told us that, Herman Allen admitted that the defendant told him that he had shot them, and the deputies from Prescott, Arizona, also insinuated the same thing. And so the point is that you don't need to worry about who did it.

It's not a whodunit. You know who did it. Him.

The question that you have in your deliberations are whether all of those crimes that we mentioned at the outset of this case, that's murder with use of a deadly weapon, attempt murder with use of a deadly weapon, carrying a concealed weapon, and child abuse, were committed. That's where your deliberations are going to focus.

Don't forget that there are other crimes that he committed. It's not just murder, it's not just attempt murder. He committed the crime of carrying a concealed weapon. This instruction that you see on the screen, and it's in your packets, tells you that "A person who carries a firearm concealed on his person is guilty of carrying a concealed weapon as long as he doesn't have a permit. And we know that he didn't have a permit for that, because that's what Detective Tate Sanborn told you.

Now, concealed weapon means that it has to be carried on his person, in a pocket, in his waistband, in the bag that he's carrying with him. Concealed so that no ordinary reasonable person or no person could discern that gun just by looking.

What's the facts that prove that he did that? Well, when he came inside that house, 325 Altimira, nobody saw him. Not Joe, not J[redacted], not J[redacted]. And we can presume that if they did, given those text messages that the defendant was

sending to Echo they would have never let him in the house if he had a gun in his hand or a gun on his hip. So the gun must have been concealed in his waistband.

We also know from Joe that he said -- actually it was on cross-examination I think this came out -- that when the defendant shot Echo he had reached to his waistband, pulled out that gun, and shoot [sic]. And J[redacted] corroborates that. When the defendant left the house what did he do? He put that gun in the small of his back and concealed it underneath his shirttails. The gun was not in a holster, it was not in his pocket.

Which leads me to this point. That holster. Where was that holster? It was in a backpack outside of the house. Why? Why would that holster be in that backpack? The reasonable inference from that evidence is this. The defendant placed the gun in its holster inside that backpack when he was coming from Herman Allen's apartment to 325 Altimira. Why? Remember that he had to take a bus. What would people on the bus think if he's carrying around a gun hidden or open carry? He didn't want to incite people. He didn't want to have a reason for police to be called because he was afraid -- or that they were afraid that he was carrying that gun to do something harmful. So he hides it in the backpack. And when he gets to the house what does he do? He discards the backpack on the ground, takes the gun out of the

holster, out of the bag, and hides it on his body so that when he goes to the house Echo is not going to be that alarmed, Joe's not going to be that alarmed, and, more importantly, the children aren't going to be that alarmed.

So when you consider all the evidence and the inferences drawn from that evidence you know that the defendant is guilty of carrying a concealed firearm.

What about child abuse. Counts 4 through 8 allege child abuse or neglect for all of the children inside of that house. Child abuse is a crime that we may not know all the legal intricacies about. We understand what child abuse really is. Sometimes it's beat a child and they're hurt, they're injured. That's child abuse. You deprive them of food or shelter, that's all child abuse. But child abuse can also just be this. Not caring, controlling, or supervising the children. That's what the defendant did.

This statute, this crime encompasses conduct like the defendant admitted. He's not caring for his children appropriately when he takes a gun and unjustifiably kills their mother and shoots his rival in the house in front of the children. Why? We know why. That can cause harm to those kids. They could be injured by the those bullets going off or they could be mentally injured by what they see and what they experience. That's not properly caring for your children.

Under the law, though, it's not enough that we show

that he was negligent or mistreated his kids. We have to show one of two things, either that the kids actually suffered some harm or that his improper care placed them in a situation where they could have been harmed either physically or mentally. And if you look on the screen, that's what you'll see. The kids were -- either suffered unjustifiable physical pain or mental suffering, they actually did that, or they were placed in a situation by the defendant where that could have happened. We actually have both here, don't we.

You heard Amber Gaines testify about her grandchildren, the ones that she cares for now, the oldest, J[redacted], J[redacted], and J[redacted]. And she described their changes in their mental behavior since their mom's murder. You heard J[redacted], bedwetting which only stopped recently, J[redacted] and J[redacted] suffering in school, their grades falling, and seeking treatment for posttraumatic stress disorder, having nightmares and night terrors and sleepwalking, all because of things that this man did. That conduct that he engaged in harmed those kids. And, of course, I'm sure you remember the fact that J[redacted] tried to hurt himself two weeks after the defendant killed J[redacted]'s mom.

So the defendant is guilty of those crimes of child abuse for J[redacted], J[redacted], and J[redacted].

But what about J[redacted] and Je[redacted], the two youngest, Je[redacted], the two-year-old boy, J[redacted], the six-month-old girl? We

didn't hear anything about them, their mental injury, did we? We know that they weren't hurt, they weren't shot. And remember, they're young thankfully. They probably don't know what happened. They were too little. So they probably didn't suffer any mental injury, did they, have any mental suffering? But still, look at that Section B on the television screen, Did the defendant place those kids in a situation where they could have suffered physical pain or mental suffering? The answer to that is an obvious yes. The defendant is shooting his gun three to four times in a location where those kids are, in that hallway, in that living room, in that master bedroom. Think back to that photograph of J[redacted]'s crib. She was in that crib at the time the defendant shot Joe Averman. And you remember that bullet hole that went right past that crib into that mirror, inches away from the crib where J[redacted] was? That's placing a child in a situation where they could have suffered physical pain. J[redacted] could have been shot, J[redacted] could have been shot.

So both of those kids -- all of those kids were placed in harm's way. And for that reason the defendant's guilty of child abuse and neglect for all of those five children.

Now we get to the heart of the matter, the reason we're here, the big crime, murder with use of a deadly weapon. Did the defendant's actions that day constitute murder, or was

it the lesser crime, as the defendant is going to say, of voluntary manslaughter? If you look on the screen now in your instructions, you'll learn that there's essentially three types of killing that are involved in this case. It's first degree murder, second degree murder, and voluntary manslaughter. And I'll go through these and I'll explain the differences between them so that you understand why the defendant is guilty of first degree murder with use of a deadly weapon.

This is a verdict form similar to the one you have in your packet. You have seven options. At the conclusion of your deliberations you're to select one of those seven as long as all 12 of you agree that that is the crime that he committed or all 12 of you agree that he's not guilty of that offense.

So let's start at the bottom, not guilty. Is the defendant not guilty of these crimes? No. He's presumably going to come up here and say that he committed a voluntary manslaughter. That's an unlawful killing of a human person. He was not justified when he shot and killed Echo. He was not acting in self defense. He killed her unlawfully, without an excuse. So your verdict should not be not guilty. It should be something else.

So you have six left. Let's cross of three more. You have to determine whether the defendant committed the

crime of murder with use of a deadly weapon. Deadly weapon is defined in one of your instructions. You can just look to the bottom of that instruction. "You are instructed that a firearm is a deadly weapon." Easy. It's done for you. You're told that it's a deadly weapon. It makes sense. It's designed to kill or cause substantial bodily harm to people. That's what the purpose of a gun is. And you heard Ana Lester get up on the stand and tell you that the firearm that's in evidence, that the gun in evidence is an operable firearm that can cause pain, that can cause death. So you can cross off three more of your possible verdicts.

That means that you're just left with three options. Is the defendant guilty of voluntary manslaughter with use of a deadly weapon, second degree murder with use of a deadly weapon, or first degree murder with use of a deadly weapon?

Let's again start at the bottom? What's voluntary manslaughter? And your instruction looks similar to this and it tells you that voluntary manslaughter is a purposeful killing, a voluntary killing that is committed in the heat of passion, and not just the heat of passion, the sudden heat of passion. It arises suddenly, immediately based upon a provocation that makes the killer want to kill, that he cannot control his emotions to such an extent that he can't stop himself from killing.

And it's not just that. That passion that has

arised, that irresistible desire to kill, the one that the killer, the defendant, can't control has to be provoked in a situation that an ordinary everyday person is also going to be provoked. This is an example on your screen. Father comes home from work, he discovers his young daughter being sexually abused, he becomes so emotionally enraged, unimaginably enraged that he kills the abuser right there, right then. That could be, that may be a situation where a reasonable person in that same situation would also react by killing, would also have that irresistible desire to kill. And I say may be, I say could be because there are significant limitations on whether voluntary manslaughter applies in a particular situation.

And as I will explain, this situation that the defendant was in on July 27th, 2012, was not one where the irresistible desire to take a human life was reasonable. An ordinary person in the defendant's circumstances that day in that room would have not had the desire to kill.

First, as I've said, the circumstances that the defendant was in must have caused him to be something more than angry or enraged. Every murder is accompanied by some kind of emotion. Every murder. Unless it's a psychopath that's killing -- that's doing the killing. Everybody that kills is going to be angry. They're going to be killing out of jealousy or killing out of rage or killing out of whatever

emotion, despair that you can imagine. So simply suffering from an emotion at the time that the killing is done doesn't make it a voluntary manslaughter.

It's something more than that. It's something greater, significantly greater. I would submit to you that it's an emotion, it's an experience that no one in this courtroom has ever felt or will ever feel because it is so rare. It's an irresistible desire to take a human life. We've all been angry in situations, and we have broken bats, punched a wall. And you're thinking to yourself, gosh, I can't believe I just did that, that was stupid.

There was a juror here, potential juror that drove a car through a wall at a restaurant because he was so angry about what his girlfriend or wife was doing. But what didn't he do? He didn't kill. He didn't have that irresistible desire to kill. So it's not just simply an irresistible desire to do harm, it's an irresistible desire to take life.

Second, a limit on voluntary manslaughter is that the provocation -- the response to that provocation has to be reasonable. Let me give you another example. If I'm at home tonight watching television with my wife and I ask her to go get a beer and she doesn't get that beer for me and I become so enraged I get that irresistible desire to kill her and I kill her, is that a reasonable response to the provocation? Is that a reasonable, justified killing because she wouldn't

get me a beer? Absolutely not. That is a limitation on voluntary manslaughter. It has to be a reasonable response to provocation.

So that tells you something, doesn't it? It tells you that you have to know what the provocation is, you've got to know what that trigger was that set the killer off. So I ask you something. What set Troy White off on July 27th, 2012? Do you have any idea? Do you have any idea what was said or done inside that room just before he pulled out that gun and shot and killed Echo Lucas? You don't, do you? Everything that you know about that would be based on speculation or guess. And if you look through those instructions, you'll see that you are prohibited from speculating, you are prohibited from guessing. You have to know. You can draw reasonable inferences from the evidence, but you cannot speculate. Do you have any idea what happened in that room? If your answer is no, the defendant cannot be found guilty of voluntary manslaughter, because you can't decide whether his action was reasonable, you can't decide whether he killed because Echo wouldn't get him a beer. You understand? You don't know what the provoking event is. He can't be found guilty of that crime.

And finally, final limitation I want to talk to you about is that the defendant actually had to have killed in that heat of passion during that time that he had the

irresistible desire to take human life and that he didn't have the time to cool off. So I ask you again, what evidence do you have that the defendant had that irresistible desire to take human life, that emotional frenzy, something that we probably will never experience in our life. What evidence do you have? Joe Averman tells us that when the defendant came in he was irate, he was upset, he was frustrated because Echo wasn't responding to text messages, wasn't responding to his calls. But he wasn't in an irresistible desire to take human life. If he were, when he came to the door he would have killed her right there. But he didn't. So you know that he wasn't in that state at that time.

So what about afterwards? How would you expect a person who has just taken human life because of some provocative triggering event, how would you expect that person to act? You expect them to act irrationally; right? You'd expect them to be, I don't know, similar to someone on drugs, not making any sense when they're talking, not making reasoned judgments, their behavior is erratic.

Was the defendant's behavior afterwards erratic, or was it something different? How did he behave after he killed? Well, after he shot Joe he went into that room and said something along the lines of, might as well kill you, 'cause I'm going to prison anyway. Wait a second. He knew that he was going to prison? He knew the consequences of his

actions immediately after doing that? Is that a person who's acting irrationally, someone who isn't thinking about what he's doing? It clearly shows that he knew what he was doing was wrong. If he knew what he was doing was wrong, his killing wasn't in the heat of passion.

What else does he do? He knows enough to keep those kids -- or try to keep those kids away from their dead mom. He's corralling them. He's telling them to get in the room. Is that someone who's acting erratically or irrationally in the heat of passion right after he killed? No. Of course not.

What else does he do? J[redacted] takes off. He chases after him. He tries to bring him back to prevent him from seeking help so that he doesn't himself get in trouble. The defendant doesn't want the police coming.

What else? He has the presence of mind to go and get the keys to the car, to the Durango when he hears those sirens wailing and get in that Durango and drive off. What's more, he doesn't fly down the street, he doesn't take off at 80 miles an hour in this residential neighborhood. He drives coolly, calmly and collectedly out of that neighborhood someone in a way that wouldn't draw attention by the police that are coming to that house.

But you really don't have to take my word for it, my interpretation of the evidence, because you actually have the

defendant's own voice from that day, from 5 to 7 minutes after he kills his wife, the woman that he professed to so greatly love that her rejection of him caused him to kill her. And how does he sound? Does he sound erratic, upset, consumed by an irresistible passion, or not? Listen to him.

(Portion of 911 call played)

MR. ROGAN: Does that sound like someone who just 5 minutes before or 6 minutes before or 7 minutes before took a life in the heat of passion, or does that sound like someone who is cool, who is calm, who is collected? Does that sound like someone who would have killed in the heat of passion? No. You also know that by the content of what he said. When the dispatch operator's asking what happened does he say, I shot someone? No, he doesn't. He's already distancing himself from responsibility for the crimes that he committed 5 to 7 minutes later when he says, shots were fired. And that failure to take responsibility has continued through this day. That man that you heard on that 911 call was not a man who was acting in the heat of passion.

Let me put it to you this way, too. I expect that the defendant's attorney is going to come up here and regale you with tales of how Echo was a terrible wife, how Joe betrayed him, how they flaunted their relationship, how they got tattoos that said Juicy Joey and how he knew about it and how he was emasculated about it for two months, for two months

just building emotion until this breaking point where the flood of emotion was just too great that the damn broke and he snapped and he killed in the heat of passion. Did all of that go away in 5 to 7 minutes? That's what you'd have to believe if you were to find the defendant guilty of voluntary manslaughter. So cross it off your list. He's not guilty of voluntary manslaughter. It doesn't apply under the facts and circumstances of this case.

That leaves with you two options. Your two options are whether the defendant is guilty of second degree murder with use of a deadly weapon or first degree murder. Now, there's differences between first and second degree murder. Both require, and you'll see this word "malice" in your instructions. And malice is just simply the intent to do something bad, unlawful, something that is provoked by rage or anger or something like that. That's all that malice is. But the difference between first degree murder and second degree murder is this. First degree murder is premeditated murder. Means that the defendant when he killed had the intent to kill, that he deliberated about it, and that he premeditated about it.

And those words to you might seem like they all mean the same thing. And that would be understandable. But they don't. I'll explain why. Wilful murder is the intent to kill. And what that means is, if you look on your screen,

that at the time that he pulled the trigger he intended his actions to cause Echo to die. Deliberation. Did he deliberate about killing Echo? And that means that he weighed the possible consequences of killing her, what's going to happen to him if he does that killing.

And finally, premeditation. And that means that at time that he pulled that trigger that he had the determination to kill her. It's not intent. It's determination. That's what his purpose was. And all of these have been proven by the evidence. All of these are supported beyond a reasonable doubt. And for that reason your conclusion should be that he committed a crime of first degree murder with use of a deadly weapon. If you find in your deliberations that one of these three elements, as we call them, are absent, he's guilty of second degree murder with use of a deadly weapon. But all three are present.

First I want to talk to you about whether first degree murder means that it's a planned murder. And you all can kind of from watching television understand what I mean by that, that someone sits around and decides, well, I'm going to kill my rival, and they put together this plan so that they can kill the person without ever being caught. That's not what first degree murder requires. It doesn't have to be planned in a day or week or month or a year in advance. That's what your instructions tell you. If you look at the

instruction on wilfulness it tells you that there need not be any appreciable space of time between the formation of the intent to kill and the actual killing, it can be like this. Same is true for a deliberate determination. Person can weigh the consequences of their actions in a fraction of a moment and decide to do something.

It's also true for premeditation. You're told that it need not be for a day, an hour, or even a minute, someone can come upon a determination to do something, again, in a fraction of a moment. And the way that we generally explain that is this. If a person is late for work and they're driving down the street and there's a streetlight coming up and they know that if they make that streetlight they're not going to be late for work, but if they get stuck there, they're going to be late, they're going to get in trouble. As they approach that light it turns yellow. At that point the driver has a choice, right, press down on the accelerator or press on that brake pedal, which is it going to be. And how often have we been in that situation. And think back to it. How quickly do we make that choice? Pretty quickly. We make a choice, we weigh the consequences of the action and then we determine what to do and we take that action. That's deliberation, that's premeditation, and that's intent.

And the same is true for murder. Someone could be holding a gun in their hand, their finger on the trigger, and

in a fraction of a moment premeditate, deliberate, and form the intent to kill. It doesn't have to be for weeks, months, days, hours, or minutes. It can be that quickly.

But in this case we are not concerned with that, because the defendant's actions over the preceding three to four weeks evidence that he'd been contemplating, thinking about killing, weighing the consequences of his actions, and that he was thinking about doing that, committing the act of killing. And finally on July 27th he determined, he premeditated to kill Echo Lucas White as he was texting her and calling her and she wasn't responding to his advances. And you might have a question -- there was a juror, a potential juror we had that was talking about it during our juror questioning -- how are we supposed to know what the defendant was thinking at the time, how are we supposed to go back in time to July 2012 and figure out what's in his head. Your instructions tell you. Your instructions tell you that a defendant's state of mind doesn't require the presentation of direct evidence. You can infer the existence of a particular state of mind of the defendant from the circumstances disclosed by the evidence. And look at all the facts and circumstances surrounding what happened, and you can make a conclusion about what he was thinking.

And you also need to bring with that -- when you're doing that to aid you in that determination you can use your

common sense. That's what this common sense instruction tells you. Your not limited to what you see and hear from the witnesses, but you can make reasonable inferences from what they say and the evidence that's in front of you. And when you do that and you try to determine what the defendant's state of mind is you're going to find that he deliberated on killing, that he formed the intent to kill, and that he premeditated about killing.

Intentional killing. What is it? Instructions tell you that an intentional killing can be inferred, ascertained, deduced from the facts and circumstances of a killing, such as the weapon used, why the person was there, why the person was using that weapon, why they had it in the first place.

Also, motive. If you look at the facts and circumstances surrounding Echo's death, did the defendant have a motive to kill? Absolutely. One of the oldest motives in the world, jealousy, rage, despair over the loss of a relationship, an eight-year marriage, children. That's one of the oldest motives in the book. Did he have a motive to kill? Yeah. And what about those text messages. Do they reveal that he was intending to kill Echo at the time that he was there? Think about how gratuitous they were, calling her a cunt, calling her a whore, asking whether she loves sucking Joe's dick. That's malicious intent. That's something that shows, reveals that when he went over there he was angry about

the relationship, he was upset about being scorned, and he brought that gun with him and he intended to kill her.

And don't forget about that gun. How did he use that gun? He brought it over there, he hid it from her, and when he wanted to kill he took it out and at nearly point blank range pointed it at her chest and pulled the trigger. He didn't shoot it up in the air to warn her, he didn't shoot it in her foot to scare her or just injure her. He pointed it at a vital part of her body and pulled the trigger. And we know it was vital because she was dead within a minute on the floor in that craft room. His use of the weapon in the manner that he did proves that he had the intent to kill when he pulled that trigger. So he committed that crime wilfully. He had the intent to kill.

What about whether he deliberated about killing Echo? Deliberation, you're told, is, as I said, weighing consequences. Did Troy deliberate? 2012, July 9th, he posted to his Facebook, "If you love someone, set them free. If they come back, they're yours, if not they never were. I like this version better. If they don't come back, hunt them and down and kill them. Ha ha ha." Do you think he's been thinking about killing someone at the time that he posts this? Maybe, maybe not. Maybe it's just the rage, the upset and emotion that he's feeling.

But then there's more. He tells Tim Henderson,

Pastor Tim, "The adulterers continue, breathe to continue in their sins. God is helping me as a testimony. The whore and whoremonger are still alive, and I'm not in prison. No joke intended." I'm not in prison? Do you think he's weighing the consequences of certain actions at the time that he writes that message to Tim two weeks before he kills his estranged wife?

What other evidence of deliberation? He tells Herman Allen the same quote about hunting down and killing them a week before he actually does kill Echo and he does shoot Joe. He tells Mike Montalto three hours before he kills, I just want to kill them. This is someone who's deliberating, who's thinking about killing before it's done.

And what does he tell Joe immediately after he kills his wife and has shot Joe two, three times? I might as well kill you, 'cause I'm going to prison anyway. All again evidence that he had been thinking about killing at the time that he pulled the trigger. So he deliberated about killing Echo.

And what about that last element, premeditation? What does it mean? That he formed the determination to kill. Deliberation, you're told, is determining on a course of action as a result of thought. Did he do that? Troy did premeditate. On July 27th, 2012, he starts calling Echo at 2:55 in the morning when he gets up. He has 13 calls between

that time and 8:45 a.m., the time that he got off from work. And he had upwards of 50 to 60 by the end of that morning. There's hundreds of text messages to Echo to which Echo barely responds. How do you think that makes him feel?

Let's take a look at one. 5:44. What's his attitude then? "You treat me like shit and you expect me to just wait for you, to give you your time. You treat me like shit. Can you expect me to take you back?" And it continues.

Look at this one at 6:06 a.m. "I don't think you want a man who's just going to stand around and get walked on all the time. So, you know what, I'm not that man anymore, okay. If you want me, I'm a different man now. I'm not going to be walked all over by you or anyone ever again in my life." What's he thinking about when he's writing this?

And then at 9:51. And in the meantime between 6:06 and 9:51 he's writing tens -- 30, 40, 50 text messages all along those same lines, calling her names, asking for her back, telling her she's a coward. And then at 9:51 he makes a last-ditch effort, doesn't he, a last-ditch effort to win Echo back. He writes, "Please call me when you can. I want to give you my heart. I love you, Echo, sweetie. Please, please stop seeing him if you want us back. Please. You have to. Please. It will never work if you won't let him go," meaning Joe. "Please, please, I'm begging you for one last time. I'm being totally honest. I can't handle it."

And how does Echo respond? Well, she doesn't. She says, "I'm not calling you," at 10:00 o'clock. What do you think that makes the defendant do? What does he write back at 10:06? There's a few text messages in between that he's saying the same thing, call me, call me, call me. What does he write at 10:06? He responds to Echo's message that "I'm not calling you." "Get ready for hell." Do you think he's decided upon a course of action at this time? Do you think he's decided to go over there and confront Echo and to kill her?

The interesting thing is that at this point, at 10:06, Troy goes radio silence for about 15 minutes. Doesn't contact her by cell phone, by calls or text messages. What's he doing during this time? Well, you can deduce that. You can infer what he's doing. You know that from Mike Montalto when the defendant left work at 8:45 he was in his Yesco uniform. He must have gone home; right? Because when he's arrested hours later he's wearing something different. He's wearing a red shirt, black pants. Same red shirt and black pants that Fernando Diaz told you he saw that guy wearing as he was walking down the street, that looks like the defendant, the same red shirt and black pants that J[redacted] and J[redacted] told you that their dad was wearing when he came to that door. He went home and he changed out of that Yesco uniform. And there's pictures of that Yesco uniform inside of Herman

Allen's house.

So that begs the question. From 10:06 to 10:21 where he's not calling, he's not texting, what can we infer that he was doing? Herman Allen also told us that every time on Fridays when he would go over -- the defendant would go over to 325 Altimira he would pack clothes. Mr. Coffee pressed him on this issue. He said, every time; there must have been times when he didn't do that. And Herman Allen said, no, every time he packed clothes. We know the defendant didn't pack any clothes on July 27th, 2012. There were no clothes found in that Durango when it was picked up in Yavapai County, Prescott, Arizona. There was no Yesco uniform inside 325 Altimira. So he went home, he changed. And what did he do? He didn't bring any clothes with him. He brought a gun. Why's he bringing a gun? Why is he bringing a gun concealed in a backpack? The only item of personal property other than his wallet and keys -- I'm sorry, his wallet and cell phone that's in his pocket is a gun. What do you think he's determined to do at this point? What other possible conclusion could there be except that he went to that house to kill Echo? You can't look at these text messages and his conduct and conclude anything different than that's what his plan was.

And what else does he do? He brings an extra magazine, doesn't he? He brings 25 rounds of ammunition.

He's not carrying that gun because he's afraid he's going to run into some gang on the bus. He's bringing that gun with that amount of ammunition to get the job done that he intended to do, kill Joe, kill Echo, maybe more. It's 25 rounds. What do you need 25 rounds for?

And if you need further evidence, just take a look at the text messages that follow. 10:28, "You're a liar." 10:33, "Fuck you." 10:56 Echo writes in all caps, "I don't want to talk to you at all. Not at all." He writes back, "Coward." What else? At 10:57 he says -- he challenges Joe, doesn't he? "I will meet Joe there right now," in caps. 11:01, "I'm not giving you any more fucking time to fuck Joe. Fuck you." 11:05, "Fuck you, you fucking piece of shit." 11:08, "Whore. Bitch. Cunt. Fuck." He's angry now, isn't he? He's angry and he's got a gun and he's travelling on a bus and he's texting her these messages. What's his plan, what's his purpose, what is he going to do? 11:12 text messages get more revolting. He starts insulting her sexually. "How's your pussy?" 11:12, "Is your jaw sore from sucking cock, bitch?" 11:12 again, "Skank. Slut." 11:26, the last text message Troy sends before he kills, before he murders his wife, "But now you're all pissed off now. You think I'm an asshole again. Or just wait and see." Just wait and see. What is she going to wait and see? What's going to happen? Well, we know what happened. He killed her within 20

minutes of sending that text message. He shot her after having an argument in the room, that craft room. Is this evidence of premeditation? Absolutely. Beyond a reasonable doubt he premeditated. And if he premeditated and he deliberated and he wilfully shot Echo with the intent to kill, he committed the crime of first degree murder with use of a deadly weapon beyond a reasonable doubt. No question.

And I can't forget Joe Averman. The final count is attempt murder with use of a deadly weapon. That's for Joe. And you're instructed as to what that is, "An attempt murder is similar failure to kill." The defendant intended to kill Joe, but he didn't get it right. His shots didn't kill him. That's all that it is. So did Joe -- did the defendant specifically intend to kill Joe? Yeah. Absolutely. He didn't like Joe. He had a motive to kill him. He expressed that to Joe numerous times over voicemails. Joe was the one that was screwing his wife. When he shot him don't you think that he intended to kill? And but for the fact that the defendant had bad aim Joe's still with us. He shot him two to three times. Lucky for Joe, he's still around. Lucky for us, the defendant can't shoot straight.

And that's an important point. Simply because the defendant can't shoot straight or that he changed his mind or that he was interfered with, he was stopped from actually finally killing doesn't mean that he's not guilty of attempt

murder. The question is when he pulled the trigger did he have the intent to kill in his head. The answer is yes. Look at all the circumstances. The answer is yes.

Look at this instruction that's on the screen. If he abandoned the attempt to kill because of the approach of other persons or because of a change in his intentions due to a stricken conscience or for any other reason doesn't mean he's not guilty of attempt murder. And you heard what the kids told you, that after Joe was shot they went to their dad and they threw things at him and they tried to get him to stop what he was doing. And to his credit, the defendant did. He could have taken Joe's life right then. He could have put a bullet in his brain, and he chose not to. But does he get a pass for that? Absolutely not. Because at the time that he shot Joe he had the intent to kill. So he's guilty of those -- that ground, too.

Ladies and gentlemen, you have the luxury of 20/20 hindsight, of being able to Monday morning quarterback what happened on July 27th, 2012. You get to look back from today's position and see what he did on July 27th, 2012, and see what he did before. If you do that, if you look back at everything that he did leading up to July 27th, 2012, there's only one conclusion that you can come to, and that conclusion is that the defendant committed the crime of first degree murder, of attempt murder, both with use of a deadly weapon,

child abuse, and carrying a concealed weapon. There can be no other conclusion after you've considered all this evidence. He is guilty of these crimes.

And on behalf of Ms. Mercer and I we ask you to hold him responsible finally for the actions that he committed and find him guilty. Thank you.

THE COURT: Thank you, Mr. Rogan.

Mr. Coffee.

(Pause in the proceedings)

DEFENDANT'S CLOSING ARGUMENT

MR. COFFEE: State did a good job in their closing. Doesn't make them right. Have you figured out why he went there with a gun? You've sat through trial for a week -- two weeks. You've given us a lot of time. And we appreciate it. Bear with us a little more. There's a lot of evidence to go through and a lot to put together here. We'll do it as quickly and efficiently as we can.

So have you figured out why he goes there with a gun? There's two key points that weren't mentioned by Mr. Rogan. Not seen Joe since Joe moved into his house, point one, all right. And some of the -- some of the texts that Mr. Rogan pointed to a moment ago tell you what's going on, too, I'm going to take action, I'm going to take a stand. Do you remember those texts that you saw just a moment ago? He's going to roust Joe. He's going there to throw Joe out of his

house forcefully. He's tired of Joe having been there. We'll go through the texts and explain how that all lays out and why that's the most logical conclusion on the circumstantial evidence here.

Before I do I want to make something else clear from Mr. Rogan's argument. He talked about this irresistible desire to take human life and said, you know, it's -- it is this magical thing, this manslaughter, it is this magical thing and nobody in this room has ever felt this emotion and maybe nobody in the courthouse, maybe nobody in Las Vegas, I suppose. The problem is that's not what the instructions say.

If you take a look at Instruction Number 15, starting at line 8, let's read what it actually says. "The basic inquiry is whether or not at the time of the killing the reason of the accused was obscured or disturbed by passion," okay, he was in an emotional state, right, "to such an extent as would cause an ordinary reasonable person of average disposition," notice it doesn't say perfect person, notice it doesn't say there is one reasonable way to act, "an ordinary person of average disposition to act rashly," doesn't say to kill, it doesn't say ordinary person uncontrollable desire to kill, it says "to act rashly and without deliberation and reflection," okay. It is a snap judgment. That is what we are talking about, a snap judgment. Rashly and without deliberation and reflection and from such passion, rather than

judgment, right. And we know that's what happened here. You know that's what happened here because despite the talk about 27 rounds there are three fired, and as soon as judgment comes back he stops pulling the trigger. You know it. There are three or four rounds fired, and when judgment -- when passion calms down, when he cools and has a moment to reflect he stops firing. That is proof that he was acting in passion, okay.

And we don't have to prove this, by the way. If you look at the other instructions, what has to happen is they have to prove beyond a reasonable doubt that what I told you didn't happen, right. That's how it works. In courtrooms in the United States the State has to prove beyond a reasonable doubt someone's guilt. We don't assume guilty.

There was a cute little parlor trick a couple minutes ago about stoplights and deliberation. Remember that little discussion? Oh, we all know we thought our way through it, right, stoplight on the way in, deliberation, premeditation, right. You are human beings. Does anybody think that is the way the world works? You've ran stoplights. If you're anything like the rest of us, at some point you've ran stoplights. And when it happens you don't think about the lady with the baby carriage across the street or the policeman down the road on the motorcycle who's going to give you a ticket. You don't weigh the consequences of your insurance, okay. You don't do those things. You just go. You just act.

Running a stoplight isn't premeditation and deliberation. It could be, I suppose, if I set up some kind of grand plan and think about things and get everything laid out beforehand and say, you know, I'm going to run it and I hope that guy doesn't give me a ticket and it's worth the 250 bucks and I hope this lady doesn't cross in front of me. But most of the time that's not what happens, that's not the way the world works. It's a parlor trick.

Let's talk about what we've got. You know this, you've seen this, Troy and Echo and the kids were happily married. There is one thing in his life, and this is a fundamental flaw in the State's case and the argument that this was planned and premeditated and deliberate. What is the one thing this man wants more than anything? Every witness, his family back. Every witness, Echo's mother, she would stay at my house -- she talks to Nova, the coroner's investigator, right, and says, she'd stay at my house until the problems were worked out. The coroner's investigator comes in and tells you about the conversation. Mom doesn't remember it, but you know that it happened.

Tim Henderson, Montalto, Herman Allen, J[redacted] and J[redacted], Nina, Joe Averman himself says Troy White desperately wanted his family back. The State has said we're going to get up here and we'll talk about Echo and call her names. I would not disrespect Mr. White in that light. That's not going to

happen. This is a case by and large about Averman. It always has been. Troy wants his kids back. You've heard person after person, including, including Echo's mother, about how much Troy loved those kids, he treated them like his own.

Now, you think about this when we're talking about passion and they say, cool, calm, deliberated. That's what Mr. Rogan just told you, cool, calm, deliberated he went there with a plan, he knew what he was doing. You think about this. As much as he loved those kids is that the plan that he went there with, or did something happen to snap him, did something cause him to become enraged? He wouldn't have done it with the kids around the way he treated the kids, the way he loved the kids if he hadn't been acting in passion. It's the only thing that explains it.

His home. You know, some of us want to move out to the golf course on Southern Highlands and live in a big mansion like people. And for some people houses are simpler. This is an ordinary guy. He's a construction guy. He worked for Unesco. For him that's heaven. For him that's heaven. That's what he wants back, those pictures on the wall, the love that he had with his wife. He met Echo at church. She's 23 years old, they're married six months later. There is an age gap of about 14 or 15 years. And, you know, some of the times age gaps are difficult and they cause problems in marriages, particularly when younger women get involved. You

can see Tim Henderson's post about that. You can see the pictures, though. Although there was an age gap, they were happy together. And they were happy together for years. Everything's about the kids, everything's about the family. USN3BOYS, the stickers on the back, the new babies. This is a guy loved his wife. He didn't go there to kill her. He went there to roust Joe Averman, who'd moved into his home.

And make no mistake. It is Troy White's home. Troy has the keys, he pays the mortgage. With all the -- you know, all these charges that they have stacked -- and that's how this works, right, there are multiple charges and we talk about things. There's no burglary count here. There's no home invasion count here.

MR. ROGAN: Objection, Your Honor.

THE COURT: Overruled.

MR. COFFEE: There is no burglary count here. There is no home invasion count here. And the reason for that is because this is Troy White's home. He had a key, there's no restraining order, there's nothing to prevent him from going into his own home.

Sometimes trouble comes when you least expect it. And in this case it was a close friend, Joe Averman, who was waiting in the wings. And we'll talk about timing in a minute, okay. Joe says he provides comfort. The timing is no coincidence here. Joe divorces in April because of a new

secret love interest that started in March. Remember that? It started in March, I didn't know who it was, I found out -- Dena says she found out in June. It's not revealed to Troy until -- do you think it's a coincidence that the marital problems in what had been a wonderful marriage started in March? Do you think that's a coincidence? They hide it, right. They hide the affair. And it's got to be heartbreaking. And not only is it an affair, it's one of your best friends, okay. This was never Joe's house. You've heard the testimony, well, I stayed there some of the time. Doesn't -- no picture, okay. My typing's not so great some of the times. You know what I mean. There's not a picture of Averman on the wall anyplace, right. He doesn't really have belongings there. According to J[redacted], he spent most of his time in Mom's room. You can read the texts. There's a text someplace that talks about getting him out of my house, out of my bed. And that's what Troy White was going to do. He hadn't stood up for himself. He had let this go on.

Remember when he moves out of the house, also. When he moves out of the house he doesn't know about the relationship. Mommy and Daddy took us to a meal to tell us they were fighting too much and Daddy was going to stay with Herman Allen for a while. And Averman says, the romantic relationship started a couple weeks later when I move in, right. Wants to look good. Averman has a tendency to do

that. He wants to look good. But in fact it started in March, and from March to June if you think they were holding hands, well...

Okay. Shortly after he moves in it gets worse. Joe leaves his job at Marshall's, right, Marshall's Retail. He moves into Troy and Echo's bedroom, okay. Another interesting thing, the kids to this day don't know his last name. Why was there such an attempt to make this look like Joe and Echo had this happy home and Troy had moved on and he's just an angry ex? Why was there such an attempt to do that when the facts don't fit? No pictures on the wall, the kids don't know his last name. And, you know, Joe's never there at the same time as Troy. Ever. Remember, I think one of the jurors may have asked that question, right. After he moves into that house he's never there at the same time.

Troy's blessing. He said -- Averman got on the stand and said, I thought we had his blessing. I mean, that runs contrary to every fiber of the State's case. But if it's convenient and it looks good, right.... Why adopt that position? There's no other evidence. The pictures, texts, the kids, the other witnesses. Nobody but Averman says, well, you know, we thought we had his blessing and this was just a show, okay. Troy's been made to look like something he's not. There's been an attempt to portray him as a mad dog killer on a mission. And we all know that's not true. You've seen it.

You've sat through that. The more distance that can be put between Troy and Echo the less chance you see this for what it is, which is a case of manslaughter. So there's a deliberate attempt to put distance between the two.

The problem is those texts, right. Because when we start looking at Wednesday, and we're going to look at a couple of them, we start looking at Wednesday and we start looking at Thursday when Troy says he's done, he's getting texts that say, "Yeah, right," from Echo, right. And she meets him, begs him to contact her during those texts. You'll see those texts, right. Ordinary common sense. You don't need to be a weatherman to know which way the wind blows.

The jury system is set up with 12 common people because 12 common people, ordinary people do a better job of making these decisions than a stack of [inaudible], right, or some professionals with some kind of agenda. We during jury selection talked to all of you, and it was an extensive vetting process. We filtered out people who weren't here for the right reasons, and you were chosen. You're going to have to look through everything, okay.

There's no place like home. Troy did everything he could to keep his family together. He moved out and stayed on an air mattress, right. He continued to pay bills. He -- this is this mad dog person who's left and has -- continues to pay the bills, you know. And, boy, there's another little fib

that's been -- well, that's not a nice word. There's another little mistruth that's been lobbied here, that it is Troy's choice to move out. He's got seven mouths to feed. He is taking the bus to work, leaving the car at home for the family, camping on an air mattress, not paying any rent, and he told you it was his choice? Do you think he thought he had a choice?

He's trying to do what he can to save his marriage, and in walks Joe. Remember this piece of paper? Take a look. Nevada Power, $278; Century, $77; gas company, $96; Durango, $455; fuel, $200; food, $200; kids, $200; insurance, $190; cash to Echo. Food and fuel. He is supporting everyone, and in walks his friend Joe, who shortly after quits his job and moves into his mom's -- you know, into Echo's bedroom.

In fact, what Facebook proves? Well, it proves Troy was hurt. Anybody doubt that? It proves he was angry. Of course he was angry. Anyone in his situation would be angry. And it proves he's human. You know, manslaughter and the law of manslaughter exists because we are not automatons, we are not robots that make perfect decisions. We are humans with emotions. Facebook proves that. It proves the Echo -- that Troy love Echo, he loves his kids, and he loved his marriage.

Remember what we talked to the detective about, Detective Tate Sanborn. He looked through all those pictures, 700 pages of it. You've seen some of the Facebook pictures up

there, the two of them happy together, right. What did you see? About a hundred photos maybe, give or take 20? Yeah. Almost all were Troy and Echo or the kids, right. This is the guy who lives for his family. Conversations via texts. Look at the green ones. And this on the 20th. You've got to read them bottom to top, because that's the way it works. But Echo's still in this thing, right. On the 20th at 13:00, I guess that's 1:30, yeah, 1:30 p.m., "Hey, can I call you? I've got something at the house. Can I go real quick and get it?" "Just wait, okay. I'm checking out."

"I wish you would stop so we could get along." That's what Troy says. Even with Averman there he wants to get along. "I know why we don't." "Okay. Why?" "Because what I'm doing you hate it." Joe in their house. "Because what I'm doing you hate it," right. And he gets angry and he's increased his vocabulary a bit. But "Don't worry." Look at the last one, 15:22, "Don't worry. I'm fucking gone." Troy. Her response, "Yeah, right." "Yeah, right." She's not done with the relationship despite what people have tried to portray.

23rd, all right, "You're destroying me. I hate you for choosing him over me. Troy." She texts smiley face and two people together and then broken hearts. "Do you want to talk to me?" 10:32. This is from her. "Okay. I'm going to leave you alone," right. He says, "I'm done." Eventually she

says, "I'm going to leave you alone." Here they are in sequence. You can see them in your version. Takes place over a few-minute period at 10:30 in the morning on the 23rd.

And then this starts. Interesting. She sends baby photos to him, starts talking about, I thought you were going to call me after prayer, any chance you would talk to me tomorrow. She sets up the meeting, not him. She does, okay. "I'm hoping from a friendly perspective if at all possible. I know you don't owe me anything. I deserve nothing. But if you would just hear me out one last time. I would meet you somewhere or anything, any chance at all." This is her pulling him back. Now, he said he's done. The State has went through pains to talk about this T.S. Eliot quote, if you love something set it free. It was weeks beforehand, and they say it proves his intention on the day. But he said he's done, and, you know, just when he's out, he's pulled back. And then another picture of the children.

And then the kids, the boys want to talk, that was not me, the boys want to talk on the 25th. "I didn't want to hang up mad. I tried to call you. I tried to call back twice." This is at 11:00 o'clock on the 25th, okay. You know, at this point with everything that's went on, the best friend and the affair and all this stuff you'd have every right in the world to walk away, to say, I want you out of my house. He doesn't. What's he post on Facebook? And this is

the night before the shooting. "Of course I ultimately want my marriage back for many reasons, but I'm shocked that she does. I was moving, and she had. I was seriously almost over, honestly. [Inaudible] So she expects me to stick and wait till her time's ready to come back. I said I love you and I want you back," okay. This is a man so hopeful. It's not a man that's planning on killing. He is looking at reconciliation. "I love you and want you back. But since you're not telling me why you can't come back now and why you need time," and we know why she needs time, because Joe, who's not working, is living in the house, right. "You can't tell me why you need time or even how much time. I told her [inaudible], I wait forever. I'm going to continue where my life was and move on and if and when," again, future plans, "if and when you decide to come back I'm still here, then great."

So what's going on? Well, we know what's going on. And again, it's another indication, circumstantial evidence what he's going to do the house to do is roust Joe, a man who is younger than him, a man who told you multiple times he had no fear of Mr. White, a man who -- you know, I don't remember if we -- there was some talk about the Marines in voir dire, and for some of us the difference between the Marines and the Army National Guard is a world apart, right. But for some folks, if you've never been in the military and if you don't

have any training, if you are shown backpacks in the back of a car before weekend bivouacs, military training is military training. He's going to roust Joe. And he takes a gun with you. Do you blame him?

It's a bad idea ultimately. It turns out tragically for everybody. And don't think that anybody here thinks anything different, okay. Guns introduce a whole, whole lot of danger into a situation. And taking a gun there was the stupidest thing Mr. White ever did, okay. Talk [inaudible]. This is from that last message, and we talked about that a moment ago, okay. The only thing you see in these messages for that time is a plan for the future. How about the MMS messages? "Please call me when you can. I want to get my car keys. I love you, Echo. Love you so much," right. That's at 10:00 o'clock the night before the shooting. 10:00 o'clock the night before the shooting.

And there are texts from Echo. And these are somewhat interesting. And they happen, oh, between 7:00 and 9:00 p.m. the night before the shooting. [Inaudible]. She talks about a country song, and then she says, "Just text, please. Just text. Please please." The deletions. Remember we went through page after page after page after page of the trash cans and the deletions, and we talked to the phone examiner about that. And you were probably wondering why is Mr. Coffee going through this, we've been here all day. Well,

it's to make a point. The messages that she is getting and sending to Troy about reconciliation are out of view of Joe Averman, right. They've been deleted. And you have to wonder if Joe's over her shoulder at some point, because she keeps saying, "Just text, please." Just text, please, okay.

He came over unexpected -- this is another claim that you'd heard from the State. He came over unexpected, out of the blue, hours early planned time, okay. Now, if anybody's familiar with divorce situations or separations, sometimes there are custody agreements, and those things will lay out things to the second, right. I will pick up the kids at 2:00 o'clock, and if it's 2 minutes before 2:00 or 2 minutes after 2:00, somebody's going to get on the phone to a lawyer and be down at Family Court. That's not what this is. This was never that situation. What Herman Allen says is, when he'd leave my house I didn't see him again till the end of the weekend. You remember that, right? Remember Herman Allen said that? I didn't see him again till the weekend. And look at some of the text messages that we see at 5:00 in the morning.

Now, the timing. They were at 5:00 in the morning, there's texts at 4:00 in the morning. But we heard from Echo's mother that's not unusual in this household, right. Texts all hours of the day, that's how we communicated, it was part of the conversation, it's not that unusual. And this is

a guy that gets up at 3:30 a.m. He got up early that day, by the way. He shows up a couple hours earlier than expected. But he's also at work earlier than expected on the 26th. And he works a full shift. You know, if I'm planning a big murder spree, I think the first thing I would like to do is get up and go to work. Sure. Why not? Get up and go to work, I'll feel better about it. Doesn't make any darn sense.

Okay. Look at this one. "I will be coming by the house this morning at 6:00 or 7:00 in the morning." This is the morning of, right. "I will text you when on my way. I will be coming. What you call the police or not, it's my house --" I want to go back to that point, again, right, the rousting. "It's my house. If I want to come by my house and see my kids, I will so. If you're sleeping, I will wake you up. It doesn't matter. I have something to say to you." They know he's coming. He said he may be coming as early as 6:00 or 7:00 in the morning, right. And then he changes his mind. "I'm not coming by the house later. I changed my mind. Because I have to kiss your ass all the time. You'll end up leaving the house, and that's not best for the kids. Since you're not thinking about them, only about yourself and Joe, I have to kiss your ass." Okay. Back and forth. And you heard about this up and down from Herman Allen. That's just who White is, okay.

5:31, "I love you. I sent you a voicemail." I

would love for you to listen to it. It is sincere, it isn't mean, it isn't angry. You need to listen to it, please. And remember we talked with the CSI -- I'm sorry, the detective that analyzed all the phones about voicemails. He retrieved voicemails from the phone. Do you remember that? He retrieved the voicemails at 9:41. And the first one, which is around [inaudible] this is a 59-second voicemail. And there's also shortly around this time a 3-minute phone call. Somebody got on the phone and talked to Troy. Echo got on the phone and talked to Troy, right? It's her phone. That happens at 10:00 o'clock in the morning. What happens during that 3-minute phone call? Is there a discussion about him coming over? Don't know. But there's a 3-minute phone call, and we've got some other indication. As to the voicemail, that ended up in the care and custody of the State of Nevada, right? We heard that. I pulled it, I had access to it, I don't remember if I listened to it, but I gave it to the detective. If there's anything worthwhile there --

MR. ROGAN: Objection. Negative inference. Can we approach?

THE COURT: Sustained. Counsel, approach please.

(Bench conference)

THE COURT: You can't ask them to speculate about it.

What else? I scolded him. Did you hear me scold

him?

MR. ROGAN: Thanks.

THE COURT: 'Bye.

(End of bench conference)

MR. COFFEE: How about this. Don't infer anything from that phone call, because the State didn't produce it for you. That's the trouble, okay. The State didn't produce the phone call. We know that. The voicemail, okay. And look at the time in here. 9:53, and look at the text right after, "But not, you're so f-ing selfish that you can't get him out of the house to talk to me." Remember I told you we were going to see some evidence that what he wants is him out of the house? "You're so selfish you can't get him out of the house to talk to me to get you to say that you love me [inaudible]." Okay. He wants Averman out of the house. "Either him or me. It's that simple. Thanks for leading me on. You get no time. You either want to leave him and have all you miss that you told me in the store Wednesday or hang onto him." Proof what he wants. It's not threats, okay.

"Yeah, whatever, Troy." Look at her plans. This is a pretty good indication of them. "If you could have just given me time and space, just a few days. But fuck you. I don't want to be with somebody like your crazy ass. Fuck you," right. That's what she sends him. Well, again, what's going on in the relationship is there's been a discussion, she

said she needed a few days, and at some point he's, no, out, Joe goes, all right. He's tired of living out of a closet. And it's real interesting. If this is a big plan and a big, you know, grant getaway and escape, he leaves all his stuff at Herman Allen's. There was a discussion about clothing and whether or not he took clothing that day. His items are in [inaudible]. You've seen there are things around the house, pictures on the wall, other things. The fact that he doesn't bring clothing is -- doesn't mean much at all.

No evidence it was well-thought-out decision. Very interesting. No plan, right. No premeditation. A design distinctly formed by the time of the killing. A design distinctly formed, I'm going to sneak around in the back door and I'm going to -- no. There's not a design distinctly formed here, no premeditation. No premeditation means no first degree murder. That's how this works, okay. No weighing of consequences. They talk about the consequences and jokes about, thank God I'm not in prison. And, you know, he says some hateful things. But does he weigh the consequences? Does he weigh the trauma that's going to happen to his children, those children that he loved? And those children were traumatized. Nobody's going to minimize that. There are some child abuse counts. You do whatever you feel appropriate with those. Nobody's going to minimize the trauma those children went through. But he doesn't weigh the

consequences for and against things. And if he doesn't weigh the consequences, there's no deliberation.

If you look on the instruction on deliberation, it includes weighing the reasons for and against the action and considering the consequences of the action, period. And the State has to prove that beyond a reasonable doubt. And if he's not done that, if they haven't shown the way, then we're not talking about first degree murder. Because there's no deliberation.

In all cases, also from your deliberation instruction, in all cases the determination must not be formed in passion. He is a ball of passion at this point, okay. And we're not talking about reasonable provocation or these other things that apply to manslaughter. Those are a little different. This is a even if you're a hothead passion, okay. It can't be formed in passion, it must be carried out after there's been time for the passion to subside, all right. Passion end, okay. No deliberation. As soon as he cools down enough to weigh the reason, to consider the consequences, he stops. That is a semiautomatic weapon. It is fired by pulling the trigger if there's a round in the chamber. That's it. It's not, you know, some kind of Bruce Lee move to get the thing to work. These are designed to fire. And it keeps firing in semiauto mode.

A mere unconsidered rash impulse, rash impulse, is

not deliberate even if it includes the intent to kill. Even if for some reason you think that he intended to kill Joe Averman and abandoned it, rather than just he's so out of his head he's just firing shots, right, even if you think he intends to kill, it's not deliberation. It's a rash impulse. That's the way the instruction reads. No deliberation means no first degree murder.

Heat of passion also can include the intent to kill. They make it sound like something again that was impossible, that's a fairy tale that exists only the shores of Disneyland someplace. But heat of passion actually can include the intent to kill. The focus is on provocation. It is an ordinary man standard, not a perfect man standard, okay. A perfect man would not have done what Troy White did. Absolutely true. Not every ordinary man would have done what Troy White did. Probably also true. The question is whether any ordinary man confronted with what he was confronted with in his situation any ordinary reasonable person, okay, any one, would have acted the way he did, rashly. That's the question. Act rashly, without deliberation or reflection from such passion, rather than judgment. Again, when we get to judgment, when he gets his facilities, when there's this cooling down period that's talked about in the instructions he stopped.

And how fast did it happen? You know, there's a --

there's this extension that went on in the State's argument, pointed the gun and then he turned and he pointed it again and he took aim and he wasn't a very good shot. Averman says fast, as fast as he could turn and shoot before I could get across the hall I'm shot twice. Fast. That's what Averman says. That's the truth of the matter. It all happened very quickly.

Okay. And we talked about this a moment ago. There's a little bit of a distinction between heat of passion and lack of deliberation. And it is this. Where heat of passion it is judged on an ordinary man perspective. Lack of deliberation, mere unconsidered rash impulse. It is anyone if they're acting in a mere unconsidered rash impulse even if an ordinary person wouldn't get upset and act on a rash impulse in that instance. Does that make sense? It's a little -- it's a little different standard. Manslaughter is something that recognizes human frailty, and because of that we don't allow people to set up their own standard, okay. It has to be a normal human, ordinary man standard.

Second and first is something different. It has to do with a distinction between deliberation, okay. Even though [unintelligible] provoke applies to the difference between first and second, because [unintelligible] the language in all cases must not be. An ordinary guy, he's a good father, he's a good provider. Would the circumstances cause an ordinary

reasonable person to act rashly and without reflection? Remember the question again isn't would every ordinary reasonable person would act rashly or take [inaudible].

This is not a pass. You know, there's something a little concerning when the State gets up in closing and says it's an attempt to blame somebody else and this is a pass. Look, the law recognizes heat of passion, law recognizes manslaughter, and as much as the institution of the State of Nevada may want to minimize it in this situation, it is a recognized consideration, period. It just is. And there are consequences for that. Nobody's telling you to give Troy White a pass. That would be inappropriate. That's not what we're talking about. But we're talking about recognition of human frailty, which the law allows.

Rash impulse. State's burden [inaudible] went there planning to kill her, that it was festering. That's what they told you in opening. They used that word "festering." But, again, you've seen hopes of reconciliation just a little bit before. He wants Joe out of the house, okay. They haven't proven that their version that he went there to kill them is the only reasonable interpretation. There are many reasons to doubt here. There is missing evidence that might fill in the holes. We talked about voicemails, talked about [inaudible]. There are phones that are seized, right. We asked Tate Sanborn about that, did you seize a phone from Troy White;

yes. They don't bother to analyze it. You can say all day long it doesn't make a difference and it wouldn't have proven anything. But does it matter to you they didn't bother to analyze that? Because you're stuck relying on things like Joe Averman. And what are Joe Averman's words about taunting messages, for example? I don't remember if I said those words. Is that something you might remember in the course of this, you'd sent 20 messages? Is that something you might remember, is that the sort of thing you -- I'm not sure about that. Look at Troy's phone if you want to pick a fight with me on that point, if you want to disagree with me. Analyze his phone. Analyze Averman's phone. That never happened, because, as the State said, it's not a whodunit. So they did as much as they thought they needed to, okay.

It's Echo and Joe's house. Look around. Look at the pictures. Tate Sanborn, same thing, you can tell relationships by pictures on the wall. You heard that answer from him, right. Look around the house. It's not Echo and Joe's house.

The gun is proof of a plan. Well, you know, there's a few things with the gun. First off, one of the children said it wasn't unusual for dad to carry a gun when he was going to Herman Allen's and to work. J[redacted] said it. So I don't know how much that proves. And there's been much made of two clips, okay. Clip pouch. If you store a gun and the

clips together, which probably makes sense, right, ordinary folks, you don't need to be a weatherman, the second clip is there. The fact that he brought a second clip and additional ammunition doesn't mean much other than maybe they were stored together, right. You pick up, the thing is one unit. Doesn't mean that he's going there planning to unload 27 rounds. In fact, the facts are contrary to him unloading 27 rounds, as we have heard. Three shots fired, maybe four. Semiautomatic click and fire.

The children were home. We've talked about that already.

Getting a divorce. When there was talk about divorce and he wouldn't get the paperworks and everything else. But that's not was going on. He was hopeful. And you've seen, just give me a few days, we'll get back together, right. Let her die. But he called 911. He did call 911, and there were problems. Initially Averman didn't remember what he had said to the officers, and I think eventually the excuse was, I was on pain medication so maybe what I told them at the hospital, I don't know. But there was confusion about 911. He tried to call. His phone wouldn't work. And he asked for medical. And that's some kind of damning statement from this perspective, I guess, that he asked for medical instead of police. Somebody's been shot, okay. We don't know if the call was dropped or not. Again, we heard about phone

problems.

Had foresight after the shooting. Really? He had foresight after the shooting? As soon as he realizes what has happened, as soon as he comes to his senses, as soon as he cools down he tries to move his kids into another room because he doesn't want them to see the horrible thing that's happened. That's not foresight, all right. That's not planning.

The guy down the street, Mr. Diaz, the tool man, remember, and he says, I'm suspicious of everybody because I've got tools in my front yard. Remember him? He says, he says, not knowing Troy, I've never seen him before, there was a change in demeanor, there was a change in how Troy was acting from when he went into the house to when he left the house. He was upset and confused. Herman Allen, who's known him for years, he was upset and confused. Joe Averman, upset, confused, irrational. After the shooting irrational. Averman' word. And yet the State says calm, cool and collected after the shooting. I don't remember any witnesses that say calm, cool and collected after the shooting. Not a single one. So why make the claim?

Okay. What does Averman say about when he arrives? Oh, boy. He didn't want to do it at first, but finally he admitted nothing out of the ordinary, nothing out of the ordinary particularly. And there's a telling little comment

when he comes in with the kids. Remember that? Remember that, when he comes in the door with the keys? Mommy, Mommy, Daddy's here. That's what happens. Mommy, Daddy's here, okay. He doesn't come in guns blazing. He agrees to talk -- now, how must that have felt? According to Averman, he has to give Troy permission or he asks for Joe's permission to go talk to his wife. That must have been a wonderful thing for Mr. White. As provoking as that is, he doesn't pull out the gun, and he doesn't shoot. He just says, Joe, please can I talk to her for a little while. And they go in the back bedroom.

And what do they do in the back bedroom? Do they start yelling immediately? No. They talk, right. Averman says it, the kids say it. It starts as a talk, and it escalates. It escalates. Remember the question to Averman? Safe bet conversation was about you. Oh, I don't know. I don't know. Do you know based on the circumstantial evidence? Do you know? Of course you do. The conversation is about Averman. And this whole he went there to kill Echo is ridiculous. Averman's the subject of his ire. Echo as a target makes no sense. He wanted to be back together with her. You've seen the texts. And this bumper sticker, remember? There was this question, have you ever heard that quote before, Detective; I think I may have seen it on a bumper sticker someplace, right, the hunt it down and kill it

quote from weeks before.

MR. ROGAN: I'm just going to object at this point. That -- none of that stuff is in evidence that was just on that last slide.

THE COURT: Overruled. Counsel approach, please.

(Bench conference)

THE COURT: Mr. Rogan, illustrative or demonstrative portions of quotes that were given, they're just illustrations.

MS. MERCER: The photos?

THE COURT: They're not photos. They're illustrative.

MR. ROGAN: [Inaudible].

MR. COFFEE: No.

THE COURT: These are things I've seen my kids do.

MR. COFFEE: Yeah. It's just -- it's demonstrative.

THE COURT: Okay. All right.

(End of bench conference)

MR. COFFEE: And none of these were admitted into evidence. These are just demonstrative aids. But Detective Sanborn had said, seen it on a bumper sticker. And there are bumper stickers out there that say the same. You don't convict people of murder for writing a quote from a bumper sticker. It doesn't prove intent to kill, okay.

The photos prove nothing. There was a question from

Mr. Rogan to his detective. Well, photos on the wall don't prove anything. Yeah, they do. They prove relationships. And you know that. You know that. That's common sense.

And remember I said the State's had this case for two years and quite a few months, almost three years. Defense has had the case for a long time. Soon you are going to be the people that decide the facts. Not me, not the two fine attorneys sitting at counsel table. It's not Detective Sanborn. Ordinary people. How the jury system works. So what happened? Troy shows up early and he's got a gun with him, he's going to roust Joe Averman. And he's calm enough to tell Echo as much. He takes her into the back room, and they talk. And it starts as a talk, but at some point it escalates. We know that. That is beyond dispute. At some point she says, no, Troy, don't. And the State has I think taken that to mean that he's going to shoot her and is thinking about things. He's going to throw Joe out of the house. I'm done with your boyfriend, I'm done with my house. Circumstantial evidence all points that direction, right. And Echo tries to stop him. Don't believe it? Remember what Averman said shortly afterwards. And we went through it and this is in the record verbatim. "I don't know if maybe she saw he was going for the gun. I don't know what she tried to do. It looked -- 'cause it just kind of at that point like he pushed her back a little and then he shot her, okay. Like I

don't know if she was trying to like wrestle the gun or something. Like I said, as soon as I opened the door I just seen him like kind of push back and shoot her." She gets stuck in the middle. She's going out that door, protective of Averman, and she gets stuck between the two of them. And he is coming out of the room. What does he say coming out of his bedroom? Everything that has happened for the past two months comes rushing back to his head, and he sees red. When this man has been with his children who's laid with his wife comes walking out of the bedroom he goes after him. And Echo tries to stop him. She gets between the two. He pulls her back and he's in such a rage he fires a shot at her and then fires two more at Averman. By the time he realizes what's happened it is too late to do anything. Prove me wrong, State. That is the most likely set of events, the most likely scenario of what happened.

The provoking event here, the injury -- and remember you've got these Supplemental Instructions 15B. The highly provoking injury need not be physical, it doesn't have to be a physical assault, okay. It can be a mental injury. It can be a mental assault, a callous insult. And normally words aren't enough to do it, okay. I call you a bad name, I don't get to -- you don't get to pull out a gun and shoot me. But you've the history that they do. When Averman decides to interject himself into the conversation and he sees Averman coming out

the door that is a highly provoking injury, that is a injury of the most highly provoking type. And remember the way these instructions were. The State has to prove beyond a reasonable doubt that I am wrong about that. That's the way the instructions are laid out.

It's the first time he's seen Joe since the betrayal. Remember that. They stayed separated. They'd never been in the house together. That adds to it. It's not a situation where they'd worked out their differences. They'd never seen each other, okay. The aftermath, the cleanup, the tragedy is beyond words. What happened to the children is horrible. What happened to Echo is horrible. He's not asking for a pass for that. But he is asking for recognition of human frailty. When you read the instructions you've got a highly provoking injury, it's a sudden quarrel, he went into the house quietly. He went into the house quietly. It is a sudden quarrel. Who would not be provoked by Averman coming out of the bedroom in your own house to interject himself? Who wouldn't be provoked by that? It is manslaughter.

Now, if for some reason -- well, you can read the rest of the instruction.

Attempt murder is a little interesting, okay. Attempt murder requires express malice, and that is the deliberate intentional to kill, all right. If the shots are fired at Averman in the heat of passion and he meets the other

qualifications for heat of passion, because of the way it's charged, there's no lesser charge like attempt voluntary manslaughter. That's just not a -- that's just not a crime. It is not guilty on the attempt murder. The State makes the charging decisions in a case. He's not been charged with battery with use of a deadly weapon, for example, for shooting Averman. He's not been charged with battery substantial bodily harm, and that is not something for you to contemplate. You are confined to the instructions. If you think he had the deliberate intent to kill Averman -- well, the deliberate intention would make it attempt murder. But again, if it's in the heat of passion and otherwise qualified it is a not guilty on the attempt murder.

So please do what you were selected to do. Do your duty. Consider everything. Return a verdict of manslaughter. We appreciate your time and patience.

THE COURT: Ladies and gentlemen, we're going to take a short recess before we hear the final closing argument. During this recess you're admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial, or read, watch, or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including, without limitation, social media, texts, newspapers, television, the Internet, and radio, or form or express any opinion on any

subject connected with the trial until the case is finally submitted to you.

We'll see you in a few minutes outside Courtroom 14A.

(Jury recessed at 2:55 p.m.)

THE COURT: Counsel, we have a couple of objections during the defense closing argument. Is there any additional record anyone believes needs to be made?

MR. ROGAN: Just with regard to the negative inference about the voicemails, Your Honor. The other two objections, after hearing the remainder of Mr. Coffee's argument, I understood where he was going, and it was not objectionable. And so I agree with those two.

The one was the negative inference regarding the voicemails. That was completely improper under --

MS. MERCER: Glover.

MR. ROGAN: -- Glover -- thank you, Ms. Mercer -- from 2009 that you can't infer from evidence that's not admitted that it would have been detrimental to the State's case. And for that reason we objected. It was sustained rather quickly, and I thank the Court for that.

THE COURT: And I think Mr. Coffee rephrased it so that the jurors were clear that they weren't supposed to make a negative inference on the voicemails.

MR. ROGAN: He did.

THE COURT: Anything else? I didn't feel I need to give a curative instruction given what he said he was going to do when he went up.

MR. ROGAN: And the State didn't ask for one.

THE COURT: Okay. Anything else?

MR. COFFEE: No.

THE COURT: All right. Does anybody remember who gave me these papers?

All right. We'll be in recess for a short period of time while the jurors get ready for the last part. Because we may have a penalty phase, I'm going to sequester --

(Court recessed at 2:56 p.m., until 3:06 p.m.)

(Jury is present)

THE COURT: Counsel stipulate to the presence of the jury?

MS. MERCER: Yes, Your Honor.

MR. COFFEE: Yes, ma'am.

THE COURT: You may be seated.

Your final argument.

STATE'S REBUTTAL

MS. MERCER: Thank you, Your Honor.

Ladies and gentlemen, this case is not about passion. This case is about possession. This case is about this man's inability to let this 29-year-old mother of five children go. He treated her like a dog treats a fire hydrant.

You're mine, and you're always going to be mine.

The defense made some interesting, very creative arguments about the text messages and that they would show that he intended to kick Joe out of the house. Fortunately for you, you have their entire conversation. It's State's Exhibit 85. And what will become abundantly clear to you from this entire conversation is that at about approximately 8:30, 9:00 a.m. the defendant realized Echo was never coming back. Was she confused? Probably so. They'd been married for five years. They had five kids together. She had not worked during the entire marriage. The idea of leaving someone and being a single mom of five children was probably frightening, and she probably still had feelings for him at some point. But that [unintelligible] happened over and over again in the weeks leading up this murder. It was not a highly provoking injury to defendant on this day.

The reason the defendant went to that house is because she wouldn't take him back. 10:35:51 a.m. on July 27th, 2012, "You get no time. You either want to leave him and have all that you miss that you told me in the store that Wednesday or -- you prove what you wanted. I will say it again. You are driving me crazy," this is 10:52 already, "because you tell me you want me back and then you stay with Joe." 10:52 again. "You fucking telling me you're going to come back to me and [inaudible] need your fucking time with

Chelsea. That's fucking driving me crazy." 10:58, "'Cause you suck. You lead me on. You can't make a decision. You want me, you want him." The text messages proceed in that fashion.

And then at 11:24:59 a.m., "You know I'm only crazy like this because of what you're doing to me. For the record, I wouldn't be this way if you would just stop and come back to me. You should have spent your time before you told me you wanted me back, and then you could just come back and it's all good. But now you're all pissed off again and now you think I'm an asshole again or just wait and see."

This is a crime about possession, not passion. He wanted her to come back right then and there. And when she wouldn't he killed her. And when he murdered her he murdered her with premeditation, deliberation, and wilfulness, just as my co-counsel already went through. I'm not going to go through it again.

Defense counsel showed you a photo at the very end of his slides that was clearly meant to rouse your passions and make you angry at Echo and feel sympathy for his client. I'll just take the opportunity to remind you of Instruction 32 that says, "A verdict may never be influenced by sympathy or prejudice or public opinion." In other words, the decision that you have to make today, the decision about whether this woman was murdered or whether she was killed in the heat of

passion is dictated by your head and not your heart.

Now let's talk about all the evidence that directly contradicts defense counsel's statement that the defendant went over to that house to roust Joe out of it. The first thing the defendant does when he goes to that house is ask to talk to Echo. Not Joe. Echo. Because he's pissed that she won't come back to him right then and there. He doesn't say to Mike Montalto two hours before -- three hours before the murder, I'm going to go over there and kick this guy out of my house. What he says to him is, I just want to kill them.

Then at 4:28 a.m. he sends a text message to her that says, "I have something to say to you." Not to Joe. He doesn't say, I'm coming over to kick Joe out of the house. He says, "I have something to say to you." Because he's angry with her.

The defense counsel would have you believe that they were a happily married couple, but they wouldn't have been separated if their marriage was all that great. And a family man doesn't say the kind of things the defendant was saying in those text messages to his wife, this woman that he allegedly loved so much. And it doesn't negate the fact that he hated them. Throughout those text messages he repeatedly says, I hate you, I hate you're doing. Not, I'm mad at Joe. Not, I want Joe out of the house. I hate you.

They would also have you believe that he wouldn't

have done all this if there hadn't been the heat of passion and that the -- that if he'd been planning this murder spree he would have done a better job. Well, there is another alterative to the defense counsel's theory. The other alternative is that he went over there and never intended on anybody leaving that house. Twenty-five rounds of ammunition.

They would also have you believe that the defendant acquiesced to this because he was -- this alternative living really kind of arrangement with Joe and Echo because he was so hopeful about repairing the marriage and that was the only reason. That he was just doing it to appease Echo. But then when you look through the Facebook messages that have been admitted into evidence you'll see that there are comments that the defendant makes about the fact that they're not divorced yet because of the cost of the divorce itself. That's why he was allowing Echo and Joe to stay in that home. He knew that he would have to pay child support, and he knew that he would have to support Echo in another home. It was cheaper. And you can see that throughout the text messages, too. He says, "I've never had so much trouble paying a simple bill. Let's just live together."

A few very simple reasons why this is not the heat of passion and voluntary manslaughter. Because malice -- the presence of malice means that it can't be manslaughter. There's an instruction in your packet that tells you -- it's

Instruction Number 13. It tells you that voluntary manslaughter is an unlawful killing of another without malice.

Instruction Number 5 then tells you that an unlawful killing with malice is murder. When the defendant killed Echo Lucas White he was full of malice towards her. Full of it. This was not a heat of passion killing. He was full of malice. There are two types of -- the instructions also tell you that malice aforethought is an intentional doing of a wrongful act without adequate provocation. And I'll come back to that later. With malice aforethought. And it says that malice aforethought can arise from anger," which he was clearly full of, hatred, which he voiced for you in text message over and over again, I hate you, I hate what you're doing to me, you're fucking destroying me, "revenge," this was clearly revenge, because she wouldn't come back to him right then and there, "ill will, spite, or a grudge."

Both types of malice exist in this case. There is express malice and implied malice. Express malice is the deliberate intention to kill. And the evidence of that express malice is the defendant's repeated comments to his friend and on his Facebook, if you love someone and you let them go, well, I like this version better, hunt them down and kill them. That's on July 9th, 2012. That's 16 days before the murder. And then he says, "God is really helping as a testimony to the whoring and whoremonger are still alive and

I'm not in prison. No joke intended." Mind you this is a private message that he sent his friend and he's expressing this malice towards his wife that he allegedly loves so much. And he says, "No joke intended." That's on July 14th, 13 days before the murder.

Then he repeats that same thing to Herman Allen approximately seven days before the murder. And then just three hours before the murder he tells Mike Montalto, I just want to kill them. And how does Mike Montalto respond? Think about your kids, don't say stuff like that, you need to be around to care for them. But it didn't stop him. He weighed the consequences and he disregarded the consequences, going back to what my co-counsel addressed earlier.

Then at 10:06, "Get ready for hell." He's not saying, get ready for me to come kick Joe out. He's saying, "Get ready for hell," because I'm going to come kill you and kill Joe. And then 11:26, "Just wait and see." Just wait and see what? He's not saying, just wait and see, I'm going to come kick Joe out of the house and you're going to be mine again. There's also implied malice. The circumstances of the killing showed a [unintelligible] and malignant heart. You have dozens of texts in which he says he hates her, that she can make all this hate go away if she'll just leave him and get back with the defendant.

He also made derogatory comments to the children.

This loving father is telling his nine-year-old son that Mommy's fornicating in their bed. Remember J[redacted] runs across the start to the neighbor and says, my dad just shot my mom because she's cheating on him. This loving father? A loving father tells an eight- and nine-year-old child that? You have literally pages full of hateful, hateful, hateful text messages to this woman.

The defendant was angry with her when he went to that house. He was jealous that she had chosen Joe over him. You heard witnesses say, yes, he was a jealous possessive man. Mike Montalto told you the defendant would drop his wife off down the street -- or have his wife drop him off down the street so that co-workers wouldn't she her because she was such a cute gal. You also heard from Amber Gaines that he was jealous and threatening. He refused to move on, and he refused to let her move on. He was humiliated. We know that from the message to Tim Henderson. "I'm humiliated. Please don't share this with anyone else." And he acted out of revenge because she wouldn't leave Joe.

And what does he do? He takes that firearm to have a conversation with his wife, this wife that he wants to get back together with? He takes a loaded firearm into his house with his five children there when he's so full of hatred that he's been sending her literally over a hundred text messages telling her how much he hates her and what a big whore she is.

And he shoots her in the chest.

Then what's he do? He prevents Joe from calling 911. He took Joe's phone. That, oh my phone's not working thing, that was said to appease the children, who were saying, please call an ambulance, Mommy's dying. He said that to shut them up. You heard him on the phone with 911. Be quiet. Stop it. If he really wanted to call for help he would have taken the phone that he just grabbed from Joe and called 911. He didn't. He doesn't call 911 until he realizes that his oldest son has run out of the house and across the street and is calling the police already. The son's call came in at 11:50 a.m. His call doesn't come in until almost 11:54 a.m. You heard J[redacted] testify that when J[redacted] ran out of the house barefoot, practically naked, wearing nothing but his boxer shorts, the defendant chased after him. The defendant chased after J[redacted] and said, J[redacted], J[redacted], come back. That's why he called the police or called medical, I should say. At that point she was probably already dead.

Then what does he do? He leaves the children, this loving father of five, this family man sitting here, who allegedly acted out of this heat of passion, leaves his five children -- well, technically not J[redacted], because J[redacted]'s escaped, but four of them in the home with their dead mother. Because there's malice, it's not manslaughter. It's that simple.

But it's also not voluntary manslaughter, because there was no sudden heat of passion. This was something that the defendant had been dealing with for two and a half months. This relationship was not new to him. This is not a man who has no idea his wife's cheating on him, walks in the house and finds them in bed. He knew about it, he approved of the living arrangement however weird it was because it saved him money. That's not sudden heat of passion. They'd been separated for months, he'd known about Joe since early June, Joe moved in in late June. His text messages will show you that he knew when Joe was over at that house. This wasn't a secret then. And he wasn't surprised to find Joe at that house that morning. That's also abundantly clear from the text messages leading up to the murder. "I know Joe's there. Why won't you just send him away so we can talk." He knew what he was going to find when he went to that house.

And there'd been repeated talk about getting back together. This was not the first time that Echo said, hey, I love you, I want to work things out. There were ups and downs throughout the separation. And you can see that from the text messages. There are texts from 7/17, 7/19, 7/23, 7/24, and 7/26, and then the Facebook message to Lisa Piggot [phonetic] on 7/27, which is technically I think 7/26, because it's UTC time. But all of those text messages from those days will show you that there had been conversations about getting back

together.

Another reason it's not voluntary manslaughter is that this was not a serious and highly provoking injury sufficient to excite an irresistible passion in a reasonable person. It's an ordinary reasonable person. It's not the defendant. It's what would a normal reasonable person do under the circumstances.

If the fact that Echo was trying to get back to him, back together with him were supposedly this serious and highly provoking injury, then why didn't he kill her before when she'd done the same thing? Because it's not a serious and highly provoking injury. And he'd had time to cool. This had been going on for two and a half months. This wasn't something that just all of a sudden happened. He knew that Joe was going to be at that house.

As for the conversation that took place in that bedroom, it wasn't about moving Joe out of the house, it was about the defendant wanting her back and her not being willing to go back. J[redacted] told you that he heard -- the only things he heard from that conversation were, no, Troy, please don't, fine, I'll stop seeing Joe. There's no conversation about moving Joe out of the house. That is the extent of the conversation that we know occurred in that room. That is not a serious and highly provoking injury sufficient to excite irresistible passion in a reasonable person. An ordinary

person under those circumstances does not shoot and kill his wife and then turn and shoot another person two times in front of the five children.

Relationships go bad every day. People get their hearts broken. People get cheated on. People get left to raise children by themselves. But they don't respond by going out and killing someone. They might send hateful messages and they might send hateful voicemails, but you don't shoot and kill the person you supposedly love.

And a reasonable person who knows that his estranged wife is seeing someone for over a month and a half doesn't go to the home where his wife and five children are and gun them down in front of their children. He's not allowed to set up his own standard of conduct. In other words, he's not allowed to create the situation that he created by going to that house when he was so angry because she wouldn't come back to him and then say, it's just heat of passion. He created that situation. He did not need to be at that house. He was not supposed to be at that house. He wasn't supposed to be at that house until 3:00 or 4:00 that afternoon. He doesn't get the benefit of having created that situation.

And there was a sufficient interval to cool down. There were two and a half months to cool down. At any given point he could have said, you know what, Echo, I'm tired of your crap, I'm moving on, I'm done with you. But he didn't.

Even if you're only looking at July 27th, he had plenty of time to cool down. He had nine hours to cool down from the time that he realized she was not coming back to him. And if you want to narrow it down even further, he had an hour-long bus ride to cool down, an hour-long bus ride. But he doesn't. He doesn't cool down. Instead, he goes to that house armed with a weapon and murders his wife and attempts to murder Joe Averman in front of the five children.

The instruction tell you that, "Thus, the killing shall be attributed to deliberate revenge and determined by you to be murder." This was murder. This was murder with wilfulness, premeditation, and deliberation. This was first degree murder with use of a deadly weapon, and the State is going to ask that you find the defendant guilty of first degree murder with use of a deadly weapon as to this 29-year-old mother of five children, Echo Lucas White, who was gunned down in front of those five children on July 27th of 2012.

We're also going to ask that you return a verdict of guilty as to Joe Averman, the attempt murder with use of a deadly weapon. The defendant absolutely intended to kill Joe Averman when he shot at him. The only thing that stopped him was those kids.

And obviously we're going to ask that you find him guilty of the five counts of child abuse and the carrying concealed weapon.

THE COURT: Thank you.

Ladies and gentlemen, we have a very high-tech way in Department 11 of selecting alternate jurors. I have a coffee can. I have 14 poker chips with numbers written on it. And we drew two. The two numbers that we drew were Number 9 and Number 14. So, Mr. Jones and Ms. Cloutier, if you would remain in the room with me for a little bit as I have the officer take charge of the other jurors.

Would you swear the officer, please.

THE CLERK: Yes, Your Honor.

(Officer sworn)

(Jury retired to deliberate at 3:34 p.m.)

THE COURT: Could you please swear the officer to take custody of the alternates.

THE CLERK: Yes, Your Honor.

(Officer sworn)

THE COURT: Now, Ms. Rose, are you taking them to the deliberation room, or are you taking them to the front conference room?

MS. ROSE: The other jury deliberation room.

THE COURT: So if you would follow the officer, please. Take your items with you. We may have to have you come back in to begin deliberations with the other group.

(Alternate jurors recessed at 3:34 p.m.)

THE COURT: Mr. Coffee, did you have an opportunity

to review the State's clean laptop computer to make a determination as to whether it is clean and whether the wi-fi has been disabled on it?

MR. COFFEE: I think they're in the process of deleting a PowerPoint right now. Right?

MS. MERCER: No. We're just ejecting the thumb drive.

(Pause in the proceedings)

MR. COFFEE: The best I can tell from my limited examination.

THE COURT: Do you have someone who is more technically adept than you that can give me a higher level of comfort?

MR. COFFEE: I'm actually fairly technically adept. I build my own computers and things. But without going through file by file --

THE COURT: So then when you -- why are you giving me a limitation, then, on your review?

MR. ROGAN: Judge, I can affirm that there's --

MR. COFFEE: Because we're not going through all the folders and everything, it's almost impossible to tell.

THE COURT: Well, that's true. But are there icons on -- are there menu choices, anything like that?

MR. COFFEE: No, no, no.

MR. ROGAN: No.

THE COURT: All we've got on there is a Windows Media Player so if they want to put the 911 calls in there to listen to them, they're there.

MR. COFFEE: That's it.

THE COURT: Right?

MR. ROGAN: That's right.

MR. COFFEE: Yeah.

MS. MERCER: Well, there's other programs, but the programs won't do anything for them.

THE COURT: Is it passworded?

MS. MERCER: Yes. But it's a very simple password that we'll write down on a stickie.

THE COURT: Thank you.

MR. COFFEE: I hope the password doesn't start with a J.

MR. ROGAN: It does not.

THE COURT: You know, I didn't finish with the other people. They're coming back tomorrow morning before you guys may come back.

So take that. They're going to bring you the laptop computer in just a minute, Kevin.

All right. So let's talk about Item Number 2 after you give the clean laptop to the clerk so she can then give it to the marshal.

I haven't yet received any jury instructions for a

penalty phase from anyone.

MR. ROGAN: That's correct, Your Honor.

THE COURT: Where are they?

MR. COFFEE: They're pretty --

MS. MERCER: They're stock.

MR. COFFEE: Yeah. I was going to say that they're pretty -- I've only done a few penalty phases on non-capital cases, and they're pretty short. It's essentially a long sentencing hearing. I mean, I don't think we're going to have a lot of dispute on penalty phase instructions.

MS. MERCER: We can send them to you right now, Your Honor.

THE COURT: That'd be lovely. The issue was I don't have them.

Come on up. The clerks had another question for you. And that's because we're paranoid in this department. Do you have your exhibits for use in the sentencing hearing -- or the penalty phase if we should get there?

MR. COFFEE: We can use what we used from the trial phase; right?

THE COURT: Absolutely. Those are all in evidence already. So there are not at this point additional exhibits you anticipate using?

MS. MERCER: If there is, it'll probably be one more.

THE COURT: Okay. When you come to have the verdict read, whether that's tonight or tomorrow, and remember we have one juror who has to leave at 4:45, so when you come bring that additional exhibit so the clerk can mark it. You're going to email me and Mr. Coffee potential jury instructions for penalty phase. And the reason I ask this is I'm going to be ready just in case. Regardless of what the decision is, if I'm ready, then we're going to roll into it. If we're not -- if, you know, it's a second degree or voluntary manslaughter or not guilty, we won't worry about it. But I'd rather be prepared than not be prepared.

MR. COFFEE: I have a preliminary hearing on Jerry Howard that's got a ton of media coverage and whatnot. We are waiving the preliminary hearing, but I'm going to be stuck until probably 9:30 or 10:00 o'clock tomorrow.

THE COURT: That's okay. I have to see the folks from Sands versus Jacobs again tomorrow morning at 8:30, because I didn't finish with them, and I told them I wasn't going to talk to them anymore when they started bringing up new issues. Because I went through everything that was on calendar today, even though it took longer. But then other issues, it's like, yeah, no, you're not raising all the other stuff, we'll talk about that tomorrow.

If the jury's still deliberating, I'll have them come in at 9:00 or 9:30, Mr. Coffee, and then you come when

you're ready or don't come and we'll call you.

MR. COFFEE: Fine. I will be here -- I should be done by then.

(Pause in the proceedings)

THE COURT: Mr. Coffee, will you work with the D.A. to go through the pouches to make sure there's nothing incriminating in there.

Okay. The plan is to let the jurors go at 4:45 so that our one juror can meet the commitments that we agreed he would be able to do if we selected him. So we will do that. And if they haven't reached a verdict, I will send them home, I will have the two alternates return and be sequestered, and hopefully things will work out. But please send me those jury instructions so I can do some work on them in the back hallway. Have a nice evening. We'll be in touch.

MR. COFFEE: All right. The Court will let us know when they send them? I've got children to pick up is my only --

THE COURT: What?

MR. COFFEE: I've got children to pick up before 6:00. So the Court will let us know when we send them at 4:45?

THE COURT: They will be going home at 4:45 because you have one juror who has to leave.

MR. COFFEE: No. I understand that. But, you know,

sometimes they get motivated and want to work through or something.

THE COURT: Oh. We will email you to let you know we have let them go home.

MR. COFFEE: Perfect. That's what I was asking.

THE COURT: And what time they decided to come back.

MR. COFFEE: Perfect. Perfect.

THE COURT: Were there any more questions for me while I have on my thinking cap?

All right. Thank you.

(Court recessed at 3:44 p.m., until the following day, Friday, April 17, 2015, at 11:02 a.m.)

* * * * *

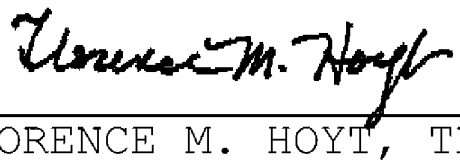
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

10/15/15

DATE

we would like to hear what happened
efore and prior to the moment of
e shooting

COURT'S EXHIBIT 37 C286857 4-17-15

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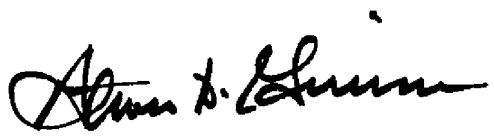


CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA Plaintiff vs. TROY RICHARD WHITE Defendant	.	CASE NO. C-286357 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

JURY TRIAL - DAY 8

FRIDAY, APRIL 17, 2015

APPEARANCES:

FOR THE STATE:	ELIZABETH MERCER JEFFREY S. ROGAN Deputy District Attorneys
FOR THE DEFENDANTS:	SCOTT L. COFFEE DAVID LOPEZ-NEGRETE Deputy Public Defenders
COURT RECORDER:	TRANSCRIPTION BY:
DEBRA WINN District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, FRIDAY, APRIL 17, 2015, 11:05 A.M.

(Court was called to order)

(Jury is present)

THE COURT: Good morning, ladies and gentlemen.

Counsel, you can be seated.

Ms. Clerk, if you could please take roll of the jurors and the alternate jurors.

THE CLERK: Yes, Your Honor.

(Jury roll called)

THE COURT: We received your note. We have found the portion of the testimony that you wanted replayed, and we're going to now hope when we hit "play" that everything works.

(Playback of testimony of Michael Montalto)

THE COURT: Ladies and gentlemen, does that complete the portion of the testimony of Mr. Montalto that you wished us to play?

JURORS: Yes.

THE COURT: All right. Hold on a second.

Counsel, can you approach, please.

(Bench conference)

THE COURT: One of the jurors has asked for Mr. Averman's testimony to be played. Because it's rather long, I'm going to send them to lunch before we do that, and then I'm going to -- there's also a question from Ricky Gulati that

we're going to address now.

(End of bench conference)

THE COURT: Mr. Gulati, you had a question. You're writing it down. Sweet.

JUROR NUMBER 6: Yes.

THE COURT: Counsel, come back.

(Bench conference)

THE COURT: You know that my practice is to mark as Court's exhibits the questions we get and then separately mark their answers -- if you want to look at them, they're there -- as well as all the jury questions that have been submitted during the course of the trial.

"Can you take it back to 4:18 and play it over again."

(End of bench conference)

THE COURT: So we're going to replay the portion that's about 4:18 to about 4:21.

(Portion of Michael Montalto's testimony replayed)

THE COURT: Ladies and gentlemen, does that complete the portions of the testimony of Mr. Montalto that you wanted to see?

JURORS: Yes.

THE COURT: We've also received a request to see Mr. Averman's testimony. Because that testimony is rather long, I'm going to have you go to lunch, and then when you come back

if you can give me any more definition as to the portion of Mr. Averman's testimony you would like to see, then I can try and narrow it down. Otherwise, we can play the whole thing for you.

All right. So at this time I'm going to let --

Dan, wasn't your table downstairs ready?

MR. KUTINAC: Yes, Your Honor.

THE COURT: Okay. So if all of you, including the alternates, would go with the marshal, who will escort you to lunch. And then we'll see you after lunch.

(Jurors recessed at 11:30 a.m.)

THE COURT: So we'll wait and see. They're going downstairs to lunch. So maybe if we could meet back here at 1:30.

MR. COFFEE: Done deal.

MR. ROGAN: Your Honor, which juror number was it that requested that? Was that Number 6 again?

THE COURT: No. That was Number 13, Ms. Avitia.

MR. COFFEE: Oh. That's Averman?

THE COURT: No -- yes, the Averman one.

The foreman submitted the request on Mr. Montalto.

Number 6 is Ricky Gulati wanted that portion played again.

Okay. So we'll see you guys later. I'm going to do my conference call now. See you at 1:30. I'm hoping they

will narrow it when they come back from lunch.

(Court recessed 11:32 a.m., until 1:28 p.m.)

(Jury is present)

THE COURT: Good afternoon, ladies and gentlemen.

Counsel stipulate the presence of the jury?

MS. MERCER: Yes, Your Honor.

MR. COFFEE: Yes, Your Honor.

THE COURT: Ladies and gentlemen, has the jury reached a verdict?

JUROR NUMBER 11: Yes.

THE COURT: Has the jury selected a foreman?

JUROR NUMBER 11: Yes.

THE COURT: Sir, you have the verdict forms?

JUROR NUMBER 11: Yes, I do.

THE COURT: Could you hand them to the marshal, please. Thank you, Mr. Schulman.

The clerk will now read the verdict of the jury out loud.

THE CLERK: Yes, Your Honor.

"District Court, Clark County, Nevada. The State of Nevada, plaintiff, versus Troy White, defendant. Case Number C-286357, Department Number 11. Verdict.

"We, the jury in the above-entitled case, find the defendant Troy White as follows.

"Count 1, murder with use of a deadly weapon.

Guilty of second degree murder with use of a deadly weapon.

"Count 2, attempt murder with use of a deadly weapon. Guilty of attempt murder with use of a deadly weapon.

"Count 3, carrying a concealed firearm or other deadly weapon. Guilty of carrying a concealed firearm.

"Count 4, child abuse, neglect, or endangerment as to J[redacted] W[redacted]. Guilty of child abuse, neglect, or endangerment.

"Count 5, child abuse, neglect, or endangerment as to J[redacted] W[redacted]. Guilty of child abuse, neglect, or endangerment.

"Count 6, child abuse, neglect, or endangerment as to J[redacted] W[redacted]. Guilty of child abuse, neglect, or endangerment.

"Count 7, child abuse, neglect, or endangerment as to J[redacted] W[redacted]. Guilty of child abuse, neglect, or endangerment.

"Count 8, child abuse, neglect, or endangerment as to J[redacted] W[redacted]. Guilty of child abuse, neglect, or endangerment.

"Dated this 17th day of April 2015 by Mr. Jeffrey Schulman, Foreperson."

Ladies and gentlemen of the jury, is this your verdict as read, so say you one, so say you all?

JURORS: It is.

THE COURT: Do either of the parties wish to have the jury polled?

MR. ROGAN: Not the State, Your Honor.

MR. COFFEE: No, Judge.

THE COURT: Thank you.

The clerk will now record the verdict in the minutes of the court.

Ladies and gentlemen, you are now completed with your jury service, and you are going to be discharged as jurors. I want to thank you both for the time and attention that you paid during this case, which was long and required a lot of thought on yourselves, and also the dedication that you showed in being here with us every day. So the service that you've provided is what makes our system work. We truly appreciate it. Thank you so much.

At this time you can talk to anybody you want to about the case. Sometimes for some of the lawyers it's helpful to find out things they did that you thought were effective and things they did that weren't effective. It's part of the learning process for lawyers just like it is for everybody else as they go through their profession. So if you want to talk to them, you are free to. There's a spot down on the third floor while you're getting your vouchers and processing out where they'll be able to talk to you if you want to. However, if somebody should persist in wanting to

talk to you after you've told them you don't want to talk to them, let the marshal know, and he'll help get you to your car.

So thank you very much. And for those alternates who didn't get to participate in the deliberations, thank you. Because you were here just for the same amount of time as the other jurors, and we truly appreciate you. Without having you here it wouldn't work.

So thank you. And due to you our system works. I'm going to come around and shake your hands, and then we'll let you go down to the third floor and process out.

(Jurors discharged)

MR. COFFEE: ...on the first degree count, according to Mr. Lopez-Negrete.

THE COURT: Well, we're going to look real quick. Dulce, if you'd look.

Okay. So he's going to be -- remain incarcerated pending his sentencing on no bail.

Sir, part of the process, since it's a second degree, is we have to have a presentence investigation report prepared. They tell us they do that on a 50-day time frame currently. So we're going to set your sentencing in 50 days. If counsel either side would like to provide a sentencing memorandum in conjunction with the sentencing, I would be happy to read it prior to sentencing.

So we're going to give you a sentencing date now. Your file will be referred to P&P for a PSI.

THE CLERK: It'll be June 1 at 9:00 a.m.

THE COURT: Okay. And, counsel, I want to compliment all of you on the good job you did. Everybody was well prepared, the exhibits were very well organized, and the trial flowed very well. So thank you very much for your attention, your professionalism, and the hard work you put in. Thank you.

MS. MERCER: Thank you, Your Honor.

MR. ROGAN: Thank you. Thanks to the Court's staff, as well.

THE PROCEEDINGS CONCLUDED AT 1:35 P.M.

* * * * *

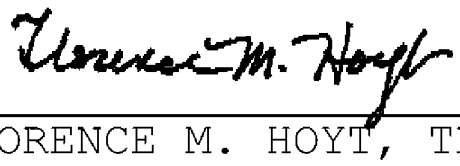
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

10/15/15

DATE

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CLERK OF THE COURT

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BY DULCE MARIE ROMEA, DEPUTY

VER

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TROY WHITE,

Defendant.

CASE NO: C-12-286357-1

DEPT NO: XI

VERDICT

We, the jury in the above entitled case, find the Defendant TROY WHITE, as follows:

COUNT 1 – MURDER WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

☐ Guilty of First Degree Murder with Use of a Deadly Weapon

☐ Guilty of First Degree Murder

☒ Guilty of Second Degree Murder with Use of a Deadly Weapon

☐ Guilty of Second Degree Murder

☐ Guilty of Voluntary Manslaughter of a Deadly Weapon

☐ Guilty of Voluntary Manslaughter

☐ Not Guilty

///

///

COUNT 2 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

☒ Guilty of Attempt Murder with Use of a Deadly Weapon

☐ Guilty of Attempt Murder

☐ Not Guilty

COUNT 3 – CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON

(please check the appropriate box, select only one)

☒ Guilty of Carrying a Concealed Firearm

☐ Not Guilty

COUNT 4 - CHILD ABUSE, NEGLECT, OR ENDANGERMENT

(J[redacted] W[redacted])

(please check the appropriate box, select only one)

☒ Guilty of Child Abuse, Neglect, or Endangerment

☐ Not Guilty

COUNT 5 - CHILD ABUSE, NEGLECT, OR ENDANGERMENT

(J[redacted] W[redacted])

☒ Guilty of Child Abuse, Neglect, or Endangerment

☐ Not Guilty

COUNT 6 - CHILD ABUSE, NEGLECT, OR ENDANGERMENT

(J[redacted] W[redacted])

☒ Guilty of Child Abuse, Neglect, or Endangerment

☐ Not Guilty

COUNT 7 - CHILD ABUSE, NEGLECT, OR ENDANGERMENT

(J[redacted] W[redacted])

☒ Guilty of Child Abuse, Neglect, or Endangerment

☐ Not Guilty

COUNT 8 - CHILD ABUSE, NEGLECT, OR ENDANGERMENT
(J[redacted] W[redacted])

☒ Guilty of Child Abuse, Neglect, or Endangerment

☐ Not Guilty

DATED this 17 day of April, 2015

FOREPERSON

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. TROY RICHARD WHITE, Defendant.	CASE#: C286357-1 DEPT. XI

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

MONDAY, JULY 20, 2015

RECORDER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING

APPEARANCES:

For the State: ELIZABETH A. MERCER, ESQ.
JEFFREY S. ROGAN, ESQ.
Deputy District Attorneys

For the Defendant: SCOTT L. COFFEE, ESQ.
DAVID LOPEZ-NEGRETE, ESQ.
Deputy Public Defenders

RECORDED BY: JILL HAWKINS, COURT RECORDER

MONDAY, JULY 20, 2015 AT 9:37 A.M.

THE COURT: Now can we go to Troy White. Good morning, Mr. White, how are you today?

THE DEFENDANT: I'm fine.

MS. MERCER: And, Your Honor, may the parties approach quickly?

THE COURT: Sure.

[Bench conference -- not transcribed]

MS. MERCER: She's indicating that she'd give consent, Your Honor.

THE COURT: Okay. Ms. Gaines, I understand that you are giving consent for any video to include J[redacted]s face today.

SPEAKER AMBER GAINES: Absolutely.

THE COURT: All right. I just wanted to ask because I don't know if you remember, during the trial I ordered that the faces be blurred because the adoption hadn't occurred yet.

SPEAKER AMBER GAINES: I appreciate that. Thank you so much.

THE COURT: All right. Anything else, counsel?

MS. MERCER: No, Your Honor.

THE COURT: This is the time set for entry of judgment imposition of sentence. Is there any legal cause or reason why judgment should not be pronounced against you at this time?

MR. COFFEE: Judge, the only legal cause or reason is the typographical errors that we mentioned at the bench in the Pre-Sentence Investigation Report. Parole and Probation has been contacted. They're in the process of doing a supplemental PSI. I don't see anything that's going to affect the sentencing

decision, but we'd ask that the Court accept the supplemental PSI before a JOC is signed. The parties are in agreement as to what the mistakes in the current PSI are. They have to do -- they're on page four -- and it has to do with number four, carrying a concealed weapon that says second offense. Actually there is no prior conviction for that.

The second mistake in the PSI has to do with number five, and that has to do with -- it says with criminal gang and there's no criminal gang alleged or no criminal gang involvement in Mr. White's past. I think the Court was aware of that and the context of the document makes it pretty clear. I don't think tht it was going to affect the Court's decision this morning, but we do expect that it could affect housing situations at the prison and we wanted to make sure it was on the record that we've asked to have that corrected and contacted the appropriate party.

THE COURT: There's no objection from the State to those corrections.

MS. MERCER: No, Your Honor.

THE COURT: So, based upon the representations and the lack of objection, the PSI is ordered to be amended to modify the offenses shown on page four to correctly reflect the charges and on page five to modify the mention of the gang issue. Anything else?

MR. COFFEE: No, Judge.

MS. MERCER: No, Your Honor.

THE COURT: Mr. Coffee, please prepare an order and send it over so P and P will be directed prior to my rendition of sentence to modify the PSI. Anything else, any other legal reason?

MR. COFFEE: No, Judge.

MS. MERCER: No, Your Honor.

THE COURT: Sir, by virtue of the jury's verdict, I adjudge you guilty of count one, guilty of second degree murder with use of a deadly weapon; count two, guilty of attempt murder with use of a deadly weapon; count three, guilty of carrying a concealed firearm; count four, guilty of child abuse, neglect or endangerment related to J[redacted] W[redacted] count five, guilty of child abuse, neglect or endangerment related to J[redacted] W[redacted]; count six, guilty of child abuse, neglect or endangerment related to J[redacted] W[redacted]; count seven, guilty of child abuse, neglect or endangerment related to J[redacted] W[redacted] and count eight, child abuse, neglect or endangerment as to J[redacted] W[redacted]

Sir, have you had an opportunity to review the Pre-Sentence Investigation Report and discuss it with your counsel dated May 26th?

THE DEFENDANT: Yes, I have.

THE COURT: And do you understand that this morning I've ordered that certain modifications being made to that document. Are there any other errors that you noted in reviewing that document with your counsel?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. Is there anything you'd like to tell me before I hear from the attorneys?

THE DEFENDANT: Yes, Your Honor. I'd like to say that I'm sorry for my actions on July 27, 2012 for shooting my wife. I think about her every day and miss her every day; for shooting Joseph Averman. I'm sorry also for the emotional and mental problems I have caused my children because of my actions. I'm sorry that I even took a gun there that day. I know that I feel -- I know that sorry is not enough. I'm sorry for my wife's family and her friends and the grief that I've caused them and the heartache that I've caused them. I wish there was something I could do or say

to take it away and change everything that I've done. That's all I'd like to say. Thank you.

THE COURT: Thank you, sir. In addition, sir, your counsel and the State had both provided sentencing memorandums as well as some letters in support and a statement from at least one of the victims. Did you get a chance to review those as well?

THE DEFENDANT: No; but we've talked over them.

THE COURT: Okay. So, you've reviewed the contents with your counsel?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Thank you. State's position.

MS. MERCER: Thank you, Your Honor. And, Your Honor, I know that the Court has reviewed the sentencing memorandum which we filed back in June. So, I'll keep my arguments brief.

The State in its sentencing memorandum took the position that the recommendation of the Department of Probation and Parole should be followed by the Court, and the State still stands by that position. The Department of Probation and Parole recommended a total of 39 years to life when you added it all up. Based upon the facts of this case as well as the Defendant's prior history of violence, that sentencing is reasonable.

This was not the Defendant's first time acting violently towards a significant other. During the course of the State's preparation for this trial, we spoke to a number of witnesses that were noticed by the defense, colleagues of the Defendant. One of those people who attended church with him advised us that she heard testimony from him about how he was previously violent with another ex-wife and in fact held a knife to her at some point.

In addition, we learned that he was violent with Echo Lucas White at least three times prior to taking a firearm with him on a bus, riding a bus for an hour and a half, and then murdering her in front of her five children. The most recent of those events occurred a month prior and when the Defendant acted violently toward her, he also told her I'm going to kill you. And then a month and three days later she's murdered in front of her five children. He then left those five children to watch their mother dying, initially refused to call for help and any effort whatsoever to save her life. He also shot and wounded Joseph Averman two times and didn't seek for him until Jodey escaped from the house and he knew that the police were going to be coming.

When he shot and killed Echo Lucas White, he took from those who loved her a mother, a daughter, a sister, an only daughter at that, and a friend to many. In speaking to those her loved her you can tell that she was a bright light in their world and that their worlds were very dimmed -- I'm sorry, Your Honor. Mr. Rogan is going to step in.

THE COURT: Okay.

MR. ROGAN: Your Honor, as Ms. Mercer was saying, their whole family has been affected by this crime, and you can see them all here today, tears in their eyes crying over what this man has done. And although he has apologized today, an apology is meaningless to them because they don't have their daughter and their sister and their mother any longer. And, in fact, of her children only three are here today because the other two are so distraught over what this man did that they could not even come to Court and face him and speak to this Court about how his actions affected them and their lives.

One of these children is, in fact, in such emotional distraught -- has

experienced such emotional distress that he has had difficulty at home and is now in a group home through the Department of Family Services because and solely because of the actions of this man. It is going to take years of therapy for him to recover. That is the one child that was there that day and saw his father murder his mother.

Your Honor, this is the second time this year that I have had to be in a sentencing where a father has killed a mother, a father has killed his wife. It's too many. This community has experienced this too many times and we need to send that message to this community that these actions of people like the Defendant are not going to be forgotten and that they're going to be treated appropriately by prosecutors, by the police, and by the Courts.

It's not often that we see a recommendation like we see in the PSI here today essentially asking for the maximum possible punishment under the counts that the Defendant was convicted. We think that it's appropriate given the number of victims to this crime that each of these cases be run consecutive, each of these counts be run consecutively as we've indicated in our sentencing memorandum for a total of 39 years to life in prison. There nothing in the law that prohibits this although the sentencing memorandum of the defense seems to suggest otherwise. NRS 200.508 does not prohibit consecutive sentences if it's in fact authorized by law. And we think that that is an appropriate punishment for the victims who are here today and for the community at large that this man serve that significant period of incarceration. Thank you.

THE COURT: Thank you, Mr. Rogan. Mr. Coffee.

MR. COFFEE: The State says we think the PSI is reasonable. I don't know how reason plays in a case like that.

This is an anomaly for what, from what I've been able to tell, was a decent man most of his life who acted with the worst judgment possible in the most violent way possible and took the life of his wife. If there were a way to bring her back, if throwing a rope over something in this courthouse and videotaping would resurrect her somehow, I couldn't argue against it, but it won't. And while Mr. Rogan would like to send a message to the community, and I understand that, the problem is in these emotional situations there's a limited amount of control that sending a message is going to have. The Court's just not going to be able to give a harsh sentence to Mr. White and stop these sorts of crimes. Whatever the Court decides today is going to be a harsh sentence. There's no question about that; whatever the Court imposes.

The Pre-Sentence Investigation Report and the jury, despite the notes and the emails and the texts, saw fit to convict Mr. White of second degree murder as opposed to first. It is always troubled me, and we include it in the sentencing memorandum, that there is a certain dependence on the manner in which the State charges that defines where they're at with sentencing. The child abuse and neglect in this particular case is exactly on point.

There's a recent case named *Johnson* in the Nevada Supreme Court that talks about legislative intent with concurrent and consecutive time. And if you look at 200.508 it talks about the act or omission that results in the abuse and neglect, and here the act or omission from beginning of trial from prelim all the way through has been the killing of Echo White. And I think the devastation that was caused may certainly call for something towards the long end of the sentence on the second degree murder. We don't take issue with that. We'd ask the Court to follow the recommendation of parole and probation as to that count. And I believe the

recommendation is around 16 years, give or take.

The act of shooting Joseph Averman is an independent action we'd ask the Court to give consecutive time if the Court thinks that is appropriate as to Mr. Averman. It may well be given the facts of the case. Given the fact that Mr. White turned himself in, that he's got no record, the other things that weighed in his favor, I would ask the Court to consider perhaps four to ten and a consecutive four to ten for Mr. Averman, understanding that it would run consecutive to the underlying sentence for Ms. White. But those are the two primary people that were hurt.

Now I understand that the family was devastated. Please do not take this as me saying there aren't mothers and children who were affected by this. All the family members they absolutely loved Echo. She was vivacious. I don't think anybody loved Echo -- and that's the dilemma of this case -- I don't think anybody loved her more than Mr. White at least at some point. And I don't know what went on his head to go there with a gun that night. Mr. White has been repentant since I have represented him. It's been three years, four years at this point. He regularly breaks down if I show him pictures. I don't think he's acting in apologizing for the Court.

You've got a evaluation from Greg Porter, Dr. Greg Porter, concerning whether or not he's a future threat for child abuse and neglect. Given the facts of this case, I think it's pretty obvious that that was going to come back as a low risk, but the law requires that we do that and it did it. It did come back as a low risk.

I think the spirit of 200.508 is for concurrent time for the child abuse counts and I think it can be taken into consideration with the verdict that the jury returned with the second degree murder and with the attempt murder of Joseph Averman. We laid out law from a number of other states. Nevada doesn't have

some strict guidelines concerning concurrent time. Of the other states that have looked at it when they're talking about concurrent time, have all come to the conclusion that a lot of it depends on if it's part and parcel with the underlying offense, and here it certainly is. The fact that the children were home makes it worse. I don't deny that. But I think that, again, it calls for a longer sentence on the second degree murder with perhaps a consecutive sentence for Mr. Averman. There's nothing I can do or say that will change anything that Mr. White did that day and nothing he can do. But I think the recommendation of parole and probation at 39 years with consecutive time for everything essentially gives him a life without parole at his age. How old are you right now, Troy?

THE DEFENDANT: Forty-seven.

MR. COFFEE: Forty-seven. Maybe with health care maybe it's not life without but it's pretty close. He's going to have a life tail I expect regardless of what the Court does. If the Court sentenced him someplace in the 20 to 25 year range he's going to be 70 before he's even eligible for parole. I think that's appropriate. I think the Court could do that taking into consideration everything that's been done and that's what we're going to ask the Court to do.

THE COURT: Okay. Thank you.

MS. MERCER: And, Your Honor, there are --

THE COURT: Hold on a second. Mr. White, is there anything else you'd like to say before I hear from the victim speakers?

THE DEFENDANT: No, Your Honor.

THE COURT: Thank you. All right.

MS. MERCER: There are four witnesses, Your Honor, four people who would like to give a victim impact statement, and the first one is Amber Gaines.

THE COURT: Okay. Ms. Gaines, if you would come to the podium, please. We have to swear you in.

AMBER GAINES

[having been called as a speaker and being first duly sworn, testified as follows:]

THE VICTIM IMPACT SPEAKER: State your name, spelling your first and last for the record.

THE VICTIM IMPACT SPEAKER: Amber Gaines, A-M-B-E-R GA-I-N-E-S.

THE COURT: Ma'am, first I'd like to tell you that I am as well sorry for your loss.

THE VICTIM IMPACT SPEAKER: I know. Thank you.

THE COURT: If you would tell me how this incident has affected you and your family.

THE VICTIM IMPACT SPEAKER: I'm going to try to do this without crying; okay. My name is Amber Gaines. My daughter was Echo. Words cannot express the pain and anguish our family has endured. His decision to take my daughter's life with no regard is unimaginable. The loss is Echo is beyond words. No more birthdays, no more family gatherings or laughter; the hugs and opportunity to say I love you are forever gone. I'm sorry.

THE COURT: It's okay, ma'am.

THE VICTIM IMPACT SPEAKER: Our family is forever broken, of course. On July 27th of 2012 my beautiful child was shot to death. I'm trying to share the word how Echo's murder has impacted my grandchildren and myself and my family. He took my rest and he took my peace. I have lost faith and trust in people. I have trouble finding joy in the simple pleasures of being happy. Life was so much fun when she was in it. It doesn't seem right anymore and nothing seems right. The

despair is so overwhelming that it takes my breath away at times. Echo was loving, fun, kind, and her heart as big the world. Her murderer, Troy, took a daughter, a best friend, a mother. I watch her children struggle on a daily basis since the loss of their mommy. Their world has been shattered like no other. We are now painfully aware that there are such horrible violence and evil men in this world.

As I read this it still seems so unbelievable that some monster would take my child of God away from us all. Echo was my only child. She was my gift. He took her away. He played God. The children will always carry despair of murder with them. The man they once called dad is now the very scary guy in the closet. We miss Echo so terribly bad. It's a feeling that cannot even be described. I was so -- I wish so badly I could have taken that bullet for her so she could be with her beautiful children and watch them grow. She had a thirst for life, a contagious personality, and everyone who came in contact with Echo became a friend.

She was the most precious gift in my life. I miss her smile, her silly ways. I miss how she was always say to me, cheer up, Charlie, when I was feeling down. We shared the same heartbeat for nine months but really for 29 years. She was life, my angel, my best friend, my Echo, my daughter; the love she had for me, her children, her friends, how strong she was.

I just want to everyone to know what a wonderful person Echo was. The emotional and physical damage this has caused our family is nothing less than nightmare. My beautiful child is gone by his --- of him. Her five children, J[redacted] J[redacted], J[redacted], J[redacted], and J[redacted] have lost their reasons of being.

She wanted so badly to become a grandmother one day. We used to tease one another about what a cool granny she would be. Echo will never get to be that grandmother nor will she ever get to see her babies grow into adults. Echo

is a name we use in our home on a daily basis and always will keep her memory alive. As for now, we have just memories and hopes of seeing her again in God's time. Thank you.

THE COURT: Thank you. Ms. Mercer, any questions for Ms. Gaines?

MS. MERCER: No, Your Honor.

THE COURT: Ms. Gaines, wait a minute. Mr. Coffee, any questions for Ms. Gaines?

MR. COFFEE: No; thank you, Ms. Gaines.

THE COURT: Your next speaker.

MS. MERCER: It's Michael Gaines, Your Honor. And for the record, he's Amber's -- I mean -- Echo's step-father.

MS. MERCER: And, Your Honor, Ms. Gaines has just indicated that he's also going to read Jesse's statement to the Court, if that's okay.

THE COURT: Mr. Gaines, if you'd come forward to the podium and be Sworn, please

MICHAEL GAINES

[having been called as a speaker and being first duly sworn, testified as follows:]

THE COURT CLERK: Please state your full name, spell your first and last.

THE VICTIM IMPACT SPEAKER: Michael Gaines. I'm the father now of J[redacted] and J[redacted] and the grandfather of the other children.

THE COURT: And, sir, again, sorry for your loss. If you could tell us how this has impacted -- I understand you're going to read J[redacted]s statement as well.

THE VICTIM IMPACT SPEAKER: I will. I have J[redacted]s here.

My mommy was great mom. She did everything for me. She was teaching me to tie my shoes. She would just -- she was just with me and my brother

all day. I still have nightmares of the day he shot her. She tried to talk but all I heard was gurgling and the sound of air coming from the bullet hole in her. I wish Troy would have died and my mommy was still alive. Every day I think about her short life. Life has been full of doubt. When I think of her I can't think of anything wrong with her. I miss her more than anything even now. I hope to see her again one day. My love for her is a bond that can never be broken. I love her to the moon and back and she could always say that to me too. I miss all the games we played and the Rock Band. We had the whole set. What happened that day I will never forget and I will never call him dad again forever ruining my life. I will always be haunted by what he did that day. I love you, Mommy, to the moon and back. Love, J[redacted]

THE COURT: Thank you, sir. Sir, is there anything else you'd like to tell us or how this impacted you and the family?

THE VICTIM IMPACT SPEAKER: This impacted everybody in the family, I mean, tremendously. The oldest, J[redacted], witnessed the shooting. He's the one that ran out the house and called for the police. When I was doing my impact statement, he ended up going to Monte Vista Mental for anger problems, and he's been through five foster homes. But me and him talked one day and he was telling me what had happened, and he was crying, and he swore that he could have stopped him. He said I could have done something. He said I could have got a knife, I could have stopped him. And he was crying. And I took him by the shoulders and looked him right in the eye and I said, look, there was another man in the house that was shot too, and I said you were nine years old, there's nothing you could do. He still thinks that he could have done something to save his mom, and to me, that was one of the hardest things. That's something that's never going to leave him.

The other kids are affected bad too, but he is going to have a problem the rest of his life. I mean, we really tried to get him on the right track and try to put some light into his life, but it's just dark and he can't seem to snap out of what happened that day.

THE COURT: Thank you, sir.

THE VICTIM IMPACT SPEAKER: I mean, you see how it's affected my wife. She'll never be the same person she was when I married her 20 years ago. The boys, just it's a horrible thing, and we're all doing our best just to make sure the boys can have a good life.

THE COURT: Thank you, sir.

THE VICTIM IMPACT SPEAKER: I know there's no bringing her back. What he did was one of the most horrible acts, and it didn't just affect these five kids but there's two more kids back there for their mother too, and they have to live with that as well. There's other grandparents. There's so many people that it's messed their lives up bad. That's all I have to say.

THE COURT: Ms. Mercer, Any questions for Mr. Gaines?

MS. MERCER: No, Your Honor.

THE COURT: Mr. Coffee?

MR. COFFEE: No; thank you, sir.

THE COURT: Your next speaker.

MS. MERCER: Your Honor, the next speaker is Trish Lucas and she was Echo's step-mother.

TRISH LUCAS

[having been called as a speaker and being first duly sworn, testified as follows:]

THE COURT CLERK: Please state your full name, spelling first and last.

THE VICTIM IMPACT SPEAKER: Trish Lucas, T-R-I-S-H L-U-C-A-S.

THE COURT: And ma'am, again, I'm sorry for your loss. If you could tell us how this has affected you and your family.

THE VICTIM IMPACT SPEAKER: I met Echo in 1998 and a couple of years after that, I married her dad and became her bonus momma she called me. In our family, there's no steps and there's no exes. Words cannot express the pain that Don and I have felt since July 27th when Echo was taken from us.

We adopted Echo's two oldest children she had at a very, very young age. Echo struggled with that for a while and eventually was grateful that she was able to keep a relationship with S[redacted] and C[redacted] and that they were still in the family. When Echo was killed, we watched both our children struggle with emotions no child should ever have to struggle with. We've had a lot of therapy and my son starting acting out in school and at home. My daughter has had to go to therapy trying to stay strong for her daddy because he's never been the same since losing Echo.

Echo was his heart; he's broken now. He's not the same. That day when he lost Echo he lost a part of himself, my kids lost a part of their father, the babies lost a part of their grandfather. That day that he lost her we took home all five kids with no clothes, no diapers, no shoes, just whatever they had on that day when J[redacted] ran out of the house to call the police to try to save his mom's life. It was the worst day of my life.

Since then Don has adopted the two babies and we're just trying to have them strive and live a happy life and remind them who their mommy is every single day. J[redacted] was only six months old when her mommy was taken from her. It breaks my heart because we're sitting at the dinner table and she's talking to her

cousin and she says I don't have a mommy. And we reminded her who mommy is; her mommy is in heaven, her mommy is here with us, but she'll never -- her mommy will never be able to see her get married, pick out a wedding dress.

My kids were just getting to know Echo because she was staying with her dad on the weekends. She was going through a divorce and she's staying with her dad on the weekends and we were just getting a very good relationship with her and were just taken from her -- she was taken from them again just like when they were little, and it's not fair. Echo once told me that she would have a million children if she could because that's what she knew she was good at, being a mom. Troy took her from all the children, mine included. I just ask that you give him the maximum sentence for all of the charges that he's convicted of.

THE COURT: Thank you, ma'am. Ms. Mercer, any questions?

MS. MERCER: No, Your Honor.

MR. COFFEE: No, Judge.

THE COURT: Thank you, ma'am. Next speaker.

MS. MERCER: Your Honor, the next speaker is J[redacted] G[redacted]. I'm not sure if he can reach the microphone.

THE COURT: I'm going to have him stand on the side. J[redacted], if you could come up here. Kevin, pull out the flap and put the microphone there, please.

MS. MERCER: Your Honor, is it okay if Ms. Gaines stands next to him?

THE COURT: It is.

THE VICTIM IMPACT SPEAKER: When my mommy died --

THE COURT: Hold on, J[redacted], we're going to swear you in. Remember when you sat in the witness stand and we swore you in.

J[redacted] G[redacted]

[having been called as a speaker and being first duly sworn, testified as follows:]

THE VICTIM IMPACT SPEAKER: When my mommy died, the world turned up. There were no more days of fun. I cannot see the world without her and my family was helping me cope with her death, but I still don't have my mommy. I remember times when we would finger paint and go the park and play hide and seek. I remember her bake us biscuits with warm peanut butter at 2 a.m. in the morning because she loved us. I miss all that so much. The death of my mom has totaled my life that I could never be fixed -- that I thought could never be fixed. As time goes on my Gigi and Pappa we talk about my mommy and all the fun times we had. I miss you, Mommy. Love, J[redacted]. And I hope you can hear me.

THE COURT: Thank you, sir, and I'm sorry for your loss. Any questions for J[redacted], Mr. Coffee?

MR. COFFEE: No, thank you.

THE COURT: Thank you, sir. Any additional speakers?

Mr. White, in accordance with the laws of the state of Nevada, I now sentence you on count one to a term of life with possibility of parole after ten years, plus an enhancement for use of a deadly weapon of 76 to 192 months.

On count two, I sentence you to a period of 76 to 192 months plus an enhancement of 76 to 192 months for use of a deadly weapon; that count to run consecutive to count one.

On count three, I sentence you to a period of 19 to 48 months; that count to run concurrent to counts one and two.

On count four, I sentence you to a period of 24 to 60 months; that count to run consecutive to counts one and two.

On count five, I sentence you to a period of 24 to 60 months; that count to run

concurrent to all other counts.

On count six, I sentence you to a period of 24 to 60 months; that count to run concurrent to all other counts.

On count seven, I sentence you to a period of 24 to 60 months; that count to run concurrent to all other counts.

On count eight, I sentence you to 24 to 60 months; that count to run concurrent to all other counts.

By my calculation, the aggregate sentence is a 31 to life; does anyone disagree with that math?

MS. MERCER: No, Your Honor.

MR. COFFEE: Court's indulgence.

THE COURT: While Mr. Coffee's doing that math, sir, in addition you have to pay an administrative assessment of $25, a $3.00 DNA administrative assessment, extradition costs of $335.50, DNA testing costs of $150 and submit yourself to DNA testing, a $250 defense assessment. Credit for time served should be about 1,050 days according to my calculation.

MS. MERCER: Court's indulgence.

MR. COFFEE: Judge, I --

MS. MERCER: I think it's a little bit more than that.

MR. COFFEE: I think it's actually a little bit --

MR. NEGRETE: We calculated 1,088 from the date of the offense which is July 27th until today.

MR. COFFEE: Enhancement for the deadly weapon was 76 also.

THE COURT: Seventy-six and 192 on both one and two.

MR. COFFEE: Okay. I should be quicker at math. I apologize, Judge.

THE COURT: I did it ahead of time which is what I'm asking you to confirm.

MR. COFFEE: Okay.

THE COURT: So, you're asking for credit for the time he was in the Arizona custody as well?

UNKNOWN SPEAKER: Correct.

THE COURT: All right.

MS. MERCER: Your Honor, I calculated it at 1,075 but I'll submit it to the Court.

THE COURT: 1,088 days credit.

Mr. Coffee, have we done the math yet?

MR. COFFEE: I am almost there. I'm going to assume that the Court is correct now that we've -- Court's indulgence. It's easier to correct it now.

THE COURT: It's okay. Math is important and it's not something most lawyers are good at. Take your time.

MR. COFFEE: We believe it's 34 to life, Judge.

THE COURT: Thirty-four. Okay. The aggregate sentence, sir, is 34 to life. Counsel may have made a mistake but that's our best estimate of doing the math. \It would be included specifically in your Judgment of Conviction as well.

MR. COFFEE: And if the math is wrong I'll talk with Mr. Rogan and I'll get a calculator that's smarter than me and we'll correct it with the Judgment of Conviction.

MS. MERCER: Thank you, Your Honor.

THE COURT: Anything else?

MR. COFFEE: No.

MS. MERCER: No.

THE COURT: All right. Have a nice day.

[Proceedings concluded at 10:17 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Patricia Slattery

PATRICIA SLATTERY
Court Transcriber

Electronically Filed
07/24/2015 07:25:45 AM

CLERK OF THE COURT

JOC

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TROY RICHARD WHITE
#1383512

Defendant.

CASE NO. C286357-1

DEPT. NO. XI

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; COUNT 2 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.010, 200.030, 193.330, 193.165; COUNT 3 – CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony) in violation of NRS 202.350(1)(d)(3); and COUNTS 4, 5, 6, 7 and 8 – CHILD ABUSE, NEGLECT OR ENDANGERMENT (Category B Felony) in violation of NRS 200.508(1); and the matter having been tried

before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; COUNT 2 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.010, 200.030, 193.330, 193.165; COUNT 3 – CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony) in violation of NRS 202.350(1)(d)(3); and COUNTS 4, 5, 6, 7 and 8 – CHILD ABUSE, NEGLECT OR ENDANGERMENT (Category B Felony) in violation of NRS 200.508(1); thereafter, on the 20th day of July, 2015, the Defendant was present in court for sentencing with counsel SCOTT COFFEE, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $250.00 Indigent Defense Civil Assessment Fee, $335.50 Extradition Costs and $150.00 DNA Analysis Fee including testing to determine genetic markers plus $3.00 DNA Collection Fee, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: **COUNT 1** – LIFE with the eligibility for parole after serving a MINIMUM of TEN (10) YEARS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; **COUNT 2** - a MAXIMUM of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; CONSECUTIVE to COUNT 1; **COUNT 3** – a MAXIMUM of FORTY-EIGHT

(48) MONTHS with a MINIMUM Parole Eligibility of NINETEEN (19) MONTHS, CONCURRENT WITH COUNTS 1 & 2; **COUNT 4** – a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONSECUTIVE TO COUNTS 1 & 2; **COUNT 5** – a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; **COUNT 6** – a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; **COUNT 7** – a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; **COUNT 8** – a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; with ONE THOUSAND EIGHTY-EIGHT DAYS (1,088) DAYS credit for time served. The AGGREGATE TOTAL sentence is LIFE with a MINIMUM OF THIRTY-FOUR (34) YEARS.

DATED this 23rd day of July, 2015

ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

014
JESSIE L. FOLKESTAD, ESQ.
Nevada Bar #14518
THE LAW OFFICE OF CHRISTOPHER R. ORAM
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
TROY WHITE

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

TROY WHITE, Petitioner, vs. THE STATE OF NEVADA, Respondent.	CASE NO. C-12-286357-1 DEPT. NO. 1

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

DATE OF HEARING:
TIME OF HEARING:

1. Name of institution and county in which you are being presently imprisoned or here and how you are presently restrained of your liberty: High Desert State Prison, Clark County, Nevada.

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Nevada.

3. Date of Judgment of Conviction: July 24, 2015

4. Case number: C-12-286357-1

(a) Length of sentence:(b)If sentence is death, state any date upon which execution is scheduled: Mr. White was sentenced on July 20, 2015 as follows: COUNT 1 to a MINIMUM of TEN (10) YEARS and a MAXIMUM of LIFE, plus a CONSECUTIVE term of a MINIMUM OF SEVENTY-SIX (76) MONTHS and a MAXIMUM ONE HUNDRED NINETY-TWO (192)

MONTHS for the Use of a Deadly Weapon; on COUNT 2 to a MINIMUM of SEVENTY-SIX (76) MONTHS and a MAXIMUM of ONE HUNDRED NINETY-TWO (192) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS for the Use of a Deadly Weapon; CONSECUTIVE to COUNT 1; on COUNT 3 to a MINIMUM of NINETEEN (19) MONTHS and a MAXIMUM of FORTY-EIGHT (48) MONTHS, CONCURRENT WITH COUNTS 1 & 2; on COUNT 4 to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS, CONSECUTIVE TO COUNTS 1 & 2; on COUNT 5 to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS, CONCURRENT with ALL OTHER COUNTS; on COUNT 6 to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS, CONCURRENT with ALL OTHER COUNTS; on COUNT 7 to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS, CONCURRENT with ALL OTHER COUNTS; and on COUNT 8 to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of SIXTY (60) MONTHS, CONCURRENT with ALL OTHER COUNTS; with ONE THOUSAND EIGHTY-EIGHT DAYS (1,088) DAYS CREDIT FOR TIME SERVED; for an AGGREGATE TOTAL SENTENCE of a MINIMUM OF THIRTY-FOUR (34) YEARS to a MAXIMUM of LIFE.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes _____ No __X__

If "yes" list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged: Count 1: Murder with use of a deadly weapon, Count 2: Attempt Murder with use of a deadly weapon, Count 3: Carrying a Concealed Firearm or other deadly weapon, and Counts 4-8: Child Abuse, Neglect or Endangerment.

8. What was your plea? (Check one)

(a) Not guilty __X__

(b) Guilty _____

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty was the finding made by: N/A

(check one)

(a) Jury ____X____

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No ____X____

12. Did you appeal from the judgment of conviction?

Yes ____X____ No _____

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 68632

(c) Result: Order of Affirmance

(d) Date of result: April 26, 2017

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from a judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes _____ No ____X____

16. (a) (1) Name of court: N/A

(2) Nature of proceedings:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion?

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b)as to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

(5) Result: _____

(6) Date of Result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____

(5) Result: _____

(6) Date of Result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

_____

(c) As to any third or subsequent additional applications or motions, give the same information above, list them on a separate sheet of paper and attach. N/A

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? N/A

(1) First petition, application or motion?

Yes _____ No _____

(2) Second petition, application or motion?

Yes _____ No _____

(3) Third or subsequent petitions, application or motions?

Yes _____ No _____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten page in length.)

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17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: No

18. If any of the grounds listed in No. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included in on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five typewritten pages in length.) N/A

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No. This Petition is timely filed.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes _____ No X

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: At trial and on appeal: Clark County Public Defender

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack.

Yes _____ No X

If yes, specify where and when it is to be served, if you know:

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting the same.

(a) This Petition has been filed for the purposes of stopping the one year time limitation as remittitur from direct appeal issued on May 22, 2017. The undersigned was recently retained to represent Mr. White and has yet to receive the file from prior counsel. Thus, Petitioner would respectfully raise issues as they become necessary. Additionally, Petitioner would respectfully request this Court allow the undersigned to supplement this petition by setting a briefing schedule.

Wherefore, Petitioner prays that this Honorable Court allow the undersigned to Supplement this Petition as necessary.

DATED this 24 day of April, 2018.

Respectfully submitted

JESSIE L. FOLKESTAD, ESQ.
Nevada State Bar #14518
LAW OFFICE OF CHRISTOPHER R. ORAM
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
TROY WHITE

VERIFICATION

Under the penalty of perjury, the undersigned declares that she is an attorney licensed to practice law in the State of Nevada and I am the attorney for the petitioner in the above entitled matter.

I have read the foregoing Petition, know the contents thereof, and Petitioner, authorizes me to commence this Petition for Writ of Habeas Corpus (post-conviction).

Dated this 24 day of April, 2018.

JESSIE L. FOLKESTAD, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of April, 2018, I served a true and correct copy of the foregoing document entitled **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** to the Clark County District Attorney's Office by sending a copy via electronic mail to:

CLARK COUNTY DISTRICT ATTORNEY
motions@clarkcountyda.com

I, an employee of Christopher R. Oram, Esq., hereby certify that on this 24 day of April, 2018, I did deposit in the United States Post Office at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**, addressed to the following:

Warden, High Desert State Prison
Brian E. Williams
P.O. Box 650
Indian Springs, Nevada 89070

Adam Paul Laxalt
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

An Employee of Christopher R. Oram, Esq.

SUPP
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
TROY WHITE

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. TROY WHITE, Defendant.	CASE NO. C-12-286357-1 DEPT. NO. 1

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Defendant, TROY WHITE, by and through his counsel of record, CHRISTOPHER R. ORAM, ESQ., hereby submits his supplemental brief in support of Defendant's Petition for Writ of Habeas Corpus.

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CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

This Supplement is made and based upon the pleadings and papers on file herein, the Points and Authorities attached hereto, and any oral arguments adduced at the time of hearing this matter.

DATED this 20th day of December, 2018.

Respectfully submitted

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STATEMENT OF THE CASE

On December 27, 2012, Mr. Troy White was charged by way of Information with Count 1: Burglary while in possession of a firearm, Count 2: Murder with use of a Deadly Weapon, Count 3: Attempt murder with use of a Deadly Weapon, Count 4: Carrying a Concealed Firearm or other Deadly Weapon, Counts 5-9: Child Abuse, Neglect or Endangerment. An Amended Information was filed on March 24, 2015, removing the burglary count and charging an additional count of child abuse, neglect, or endangerment. On April 6, 2015, a Second Amended Information was filed which amended the text of the document, but not the substance.

Mr. White's jury trial began before the Honorable Elizabeth Gonzalez on April 6, 2015. The trial concluded on April 17, 2015, with Mr. White having been found guilty of all counts.

Mr. White was sentenced on July 20, 2015, as follows: Count 1: Life with parole after a minimum of ten (10) years, plus a consecutive term of one hundred ninety-two (192) months with minimum parole eligibility of seventy-six (76) months for the use of a deadly weapon; Count 2: a maximum of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months, plus a consecutive term of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months for the use of a deadly weapon; consecutive to Count 1; Count 3: a maximum of forty-eight (48) months with a minimum parole eligibility of nineteen (19) months, concurrent with counts 1 and 2; Count 4: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, consecutive to counts 1 and 2; Count 5: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; Count 6: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; Count 7: a maximum of sixty (60) months with a

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minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; Count 8: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts. Mr. White received one thousand eighty-eight days (1,088) days credit for time served.

Mr. White received an aggregate total sentence of life with a minimum of thirty-four (34) years.. The Judgment of Conviction was filed on July 24, 2015. An Amended Judgment of Conviction was later filed on February 5, 2016, striking the aggregated sentence language from the Judgment.

Mr. White filed a timely Notice of Appeal on August 12, 2015. The Nevada Supreme Court affirmed Mr. White's conviction and sentence on April 26, 2017. Remittitur issued on May 22, 2017.

On April 24, 2018, Mr. White filed a timely post-conviction Petition for Writ of Habeas Corpus.

STATEMENT OF THE FACTS

On July 27, 2012, Officer Darren Martine was dispatched to 325 Altamira Road, Clark County, Nevada (A.A. Vol. 6 p. 1162-1163).[1] As Officer Martine approached the residence, he observed some children outside of the residence acting in an extremely "excited manner." (A.A. Vol. 6 p. 1164).

As officers entered the residence, a male was observed lying in the master bedroom in obvious physical distress (A.A. Vol. 6 p. 1167-1168). Across the hall, in another room, police located an adult female lying on her back suffering from an apparent gunshot wound (A.A. Vol. 6 p. 1168). The injured male was able to inform police that he had been shot (A.A. Vol. 6 p. 1170). The male also stated the individual who shot him was named "Troy." (A.A. Vol. 6 p. 1171-1172).

The female was identified as Echo Lucas. An autopsy was performed on Echo by Dr. Lisa Gavin (A.A. Vol. 6 p. 1074). Dr. Gavin noted Echo died as a

[1] The Statement of Facts is adduced from the direct appeal appendix (NSC No. 68632)..

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result of a gunshot wound to the abdomen (A.A. Vol. 6 p. 1089). There was stippling located, establishing that the barrel of the gun was between six to twelve inches away when fired (A.A. Vol. 5 p. 1082).

At the time of trial, J[redacted] G[redacted] was ten years old. J[redacted] explained that he was at home with his four siblings[2], his mother and her boyfriend when his father, Troy White entered the residence. According to J[redacted], Mr. White entered the residence and asked to speak with Echo. Echo agreed, and the two went into a craft room where a verbal argument ensued. Then, J[redacted] testified that Mr. White shot his mother's boyfriend (later identified as Joseph "Joe" Averman) and then shot his mother (A.A. Vol. 4 p. 862-864). J[redacted] then observed his father place the firearm in the back of his waistband area (A.A. Vol. 4 p. 868).

J[redacted] W[redacted] a sibling of J[redacted], also testified. J[redacted] was eleven at the time of trial (A.A. Vol. 5 p. 913). J[redacted] claimed that he and his sibling, J[redacted] were throwing objects at Mr. White and attempting to hit him to get him to stop the violence (A.A. Vol. 4 p. 935). J[redacted] testified that he did not throw anything at his father (A.A. Vol. 5 p. 896).

J[redacted] then fled the residence and went to a neighbors house to get help. The neighbor called 911 (A.A. Vol. 5 p. 936).

J[redacted] testified that when Mr. White entered the residence, he seemed "mellow"(A.A. Vol. 5 p. 955). Mr. White had previously stated that he hated Joe because he was cheating with Echo (A.A. Vol. 5 p. 957). J[redacted] also noted that his father was often in possession of a gun (A.A. Vol. 5 p. 964).

After the shooting, Mr. White left the residence in a 2008 Dodge Durango. Mr. White drove to Yavapai, Arizona, where he turned himself into authorities (A.A. Vol. 5 p. 1032).

Officer James Jaeger was the booking officer who first encountered Mr.

[2]Mr. White was the biological father to three of the children (A.A. Vol. 6 p. 1263).

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White. Officer Jaeger explained that the defendant surrendered without incident and informed him that a gun and ammunition was located under the spare tire of the vehicle (A.A. Vol. 6 p. 1105-1110). Mr. White also told the officer that he had been involved in a shooting in Las Vegas (A.A. Vol. 6 p. 1114).

A search of the Dodge Durango unearthed a 9mm taurus handgun and ammunition (A.A. Vol. 5 p. 1000-1005).

Police located a backpack with an empty gun holster, near the driveway of the residence (A.A. Vol. 6 p. 1197). Police also located a cell phone attributed to Echo which was digitally analyzed by the Las Vegas Metropolitan Police Department (A.A. Vol. 6 p. 1201). Detectives learned that Mr. White did not have a permit to carry a concealed weapon (A.A. Vol. 6 p. 1204-1205). Police also learned that Mr. White worked at Yesco (A.A. Vol. 6 p. 1214). Weeks before the shooting, Mr. White allegedly posted a quote on his Facebook page which read:

> "Have you heard the quote, 'If you love someone set them free, if they come back their yours, if not they never were'? I like this version instead, 'If you love someone set them free, if they don't come back hunt them down and kill them!" ha, ha, ha (A.A. Vol. 6 p. 1224).

Another statement on the Facebook page read, "The adulterers leave to continue in their sins." (A.A. Vol. 6 p. 1226), as well as "God is really helping me as a testimony. The whore and whoremonger are still alive and I'm not in prison. No joke intended." (A.A. Vol. 6 p. 1226). Mr. White also allegedly wrote "I'm humiliated that Echo would cheat on me with another backslider from The Potter's House."(A.A. Vol. 6 p. 1227).[3] Mr. White also wrote that he believed Echo had been cheating on him for approximately five or six months (A.A. Vol. 6 p. 1228).

Police noted numerous family photographs depicting Mr. White and Echo with the children (A.A. Vol. 6 p. 1233-1235).

A week after Mr. White posted the statement about hunting down and killing someone, he posted, "My ex said to me, I want it all back, the family, the

[3]The Potter's House is a church in Las Vegas where Mr. White and Echo met and attended services.

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little things she missed about me and us." (A.A. Vol. 6 p. 1239).

Mr. Michael Montalto worked at Yesco Sign Company (A.A. Vol. 6 p. 1307). Mr. White worked at Yesco for approximately five or six years prior to the incident (A.A. Vol. 6 p. 1308). Mr. Montalto testified Mr. White worked the 5:00 a.m. to 1:30 p.m. shift (A.A. Vol. 6 p. 1309). In the weeks leading up to the shooting, Mr. White would complain that he could not sleep so he would arrive at work early (A.A. Vol. 6 p. 1309). At approximately 4:30 a.m., on July 27, 2012, Mr. Montalto received a phone call from Mr. White indicating he wanted to arrive early at work so he could get off early (A.A. Vol. 6 p. 1310). Allegedly, Mr. White appeared depressed and made a statement that he wanted to "kill them." (A.A. Vol. 6 p. 1313). Mr. Montalto was aware that Mr. White was staying with a friend, having left the marital home (A.A. Vol. 6 p. 1314). The comment that he wanted to "kill them" was out of character for Mr. White (A.A. Vol. 6 p. 1322-1323).

DNA analysis established Mr. White's DNA on the firearm (A.A. Vol. 7 p. 1365).

Joseph "Joe" Averman met Mr. White at The Potter's House Church in 2004 (A.A. Vol. 7 p. 1405). The two grew to become close friends (A.A. Vol. 7 p. 1407). After becoming friends, Mr. White met Echo and the two married (A.A. Vol. 7 p. 1407). Eventually, Joe and Echo began to develop a close friendship (A.A. Vol. 7 p. 1409). Echo began to confide in Joe that she was having marital problems (A.A. Vol. 7 p. 1410-1411).[4] In approximately March or April of 2012, Joe and Echo began to have an affair (A.A. Vol. 7 p. 1413). Joe learned that the two had separated in June of 2012 (A.A. Vol. 7 p. 1414). According to Joe, his affair with Echo occurred after the two separated (A.A. Vol. 7 p. 1414). Joe would stay over night at Echo's residence on a frequent basis (A.A. Vol. 7 p. 1415).

Monday through Friday, Echo cared for the children. Mr. White would take

[4]Two of Echo's five children ([redacted] and [redacted]) had a different father then Mr. White. Their father was named Travis (A.A. Vol. 7 p. 1411).

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care of the children on weekends at the residence and Echo would leave (A.A. Vol. 7 p. 1415-1416).

According to Joe, Mr. White would contact him by phone or text expressing frustration about the affair (A.A. Vol. 7 p. 1418). On July 26, 2012, Joe spent the night at 325 Altamira with Echo and the five children (A.A. Vol. 7 p. 1418-1419). On the morning of July 27, the children were watching television and Joe was watching Netflix (A.A. Vol. 7 p. 1421). Joe testified that he heard one of the children say that "daddy's here" (A.A. Vol. 7 p. 1423). Joe believed this occurred shortly before noon (A.A. Vol. 7 p. 1423). Both Joe and Echo walked out to the hallway (A.A. Vol. 7 p. 1423-1424). Joe then observed Mr. White in the hallway (A.A. Vol. 7 p. 1424). Joe believed Mr. White was expected to arrive in the afternoon, and it was unusual for him to arrive so early (A.A. Vol. 7 p. 1424-1425). Mr. White retained a key to the house (A.A. Vol. 7 p. 1425).

Mr. White deactivated the alarm and stated that he wanted to talk to Echo for five minutes (A.A. Vol. 7 p. 1425). Echo and Mr. White then went into the craft room to speak (A.A. Vol. 7 p. 1426). Joe heard Echo state, "Troy, no, just stop." (A.A. Vol. 7 p. 1428). Joe then went to open the door to the craft room and Echo was attempting to leave (A.A. Vol. 7 p. 1429-1430). Mr. White then grabbed her arm and pulled her back (A.A. Vol. 7 p. 1430). Mr. White then pushed her against the wall and shot her (A.A. Vol. 7 p.1430). Mr. White then proceeded to shoot Joe (A.A. Vol. 7 p. 1432).

Joe testified that Mr. White stated "...If he was going to go to prison he was going to kill me. And then he stood over me with a gun to my forehead." (A.A. Vol. 7 p. 1435). At one point, J[redacted] grabbed a phone and gave it Joe to call for help (A.A. Vol. 7 p. 1436). Mr. White took the phone from Joe before he could call 911 (A.A. Vol. 7 p. 1436). Joe acknowledged that the house was in Mr. White's name and Mr. White would pay the mortgage (A.A. Vol. 7 p. 1449-1450). Joe recalled that he told police Mr. White had not sent threatening messages to

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him (A.A. Vol. 7 p. 1455-1456). Joe admitted Mr. White's behavior and demeanor became irrational (A.A. Vol. 7 p. 1470-1471). At one point, Joe heard Mr. White state that he tried to call 911 but could not get the phone to work (A.A. Vol. 7 p. 1471). Joe admitted that he was unemployed during the relevant time period and was not contributing to any of the bills (A.A. Vol. 7 p. 1478). Joe admitted that he may have, but was not sure, if he sent taunting text messages to Mr. White (A.A. Vol. 7 p. 1502)

Mr. White called 911 at 11:53 a.m., approximately three minutes after J[redacted]'s 911 call (A.A. Vol. 8 p. 1574). In the call, Mr. White requests medical assistance and states that there were "shots fired." (A.A. Vol. 8 p. 1576).

Mr. Timothy Henderson is a Christian Minister who was affiliated with the Potter's House Church (A.A. Vol. 8 p. 1585). Approximately ten years prior, Minister Henderson became friends with Echo and Mr. White (A.A. Vol. 8 p. 1586). When Minister Henderson became aware of Echo's infidelity, he posted statements on Facebook concerning the affair. Essentially, Minister Henderson stated that he was so upset that if saw "this dude" (Joe Averman) he would "beat his..." (A.A. Vol. 8 p. 1591). The Minister admitted that he was embarrassed he had made such angry statements that were viewed by Mr. White (A.A. Vol. 8 p. 1591).

Mr. Bradley Berghuis had been a detective assigned to the Computer Forensic Lab (A.A. Vol. 8 p. 1650-1651). An analysis was done of a phone located at the scene. Through Mr. Berghuis, the State elicited numerous text messages between Mr. White and Echo (A.A. Vol. 8 p. 1661-1680). The text messages reveal the frustration and breakdown in the marriage.[5]

The corner's investigator testified that Echo's mother informed him that the

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[5]Mr. Berghuis testified that he was asked to conduct an examination on a white apple Iphone in this case (A.A. Vol. 8 p. 1662). Mr. Berghuis testified that an examination usually follows a "service request" and a "search warrant", unless a search warrant is not required (A.A. Vol. 8 p. 1653). At the conclusion of this testimony, the State rested.

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marriage was happy until she met her new boyfriend (A.A. Vol. 8 p. 1735). Echo's mother also told the investigator that Echo could live with her until the marriage reconciled (A.A. Vol. 8 p. 1735). Joe Averman's ex-wife testified that he was a compulsive liar (A.A. Vol. 8 p. 1745).

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.[6]

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing *Strickland v. Washington,* 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. *Strickland,* 466 U.S. at. 694, 104 S. Ct. 2068; *Davis v. State*, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Love*, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing *Lockhart v. Fretwell*, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); *Strickland*, 466 U. S. at 687 104 S. Ct. at 2064.

The United States Supreme Court in *Strickland v. Washington*,466 U.S. 668, 104 S. Ct. 2052 (1984), established the standards for a court to determine when

[6] To preclude any argument by the State that Mr. White has not contended counsel violated the *Strickland* standard, every argument presented below is based upon this standard.

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counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. *Strickland* laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. The Nevada Supreme Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the United States Supreme Court in *Strickland v. Washington*, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." *Bennett v. State*, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 Nev. 1996).

In meeting the prejudice requirement of ineffective assistance of counsel claim, Mr. White must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine confidence in the outcome. Kirksey v. State, 112 Nev. at 980. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." *Mazzan v.*

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State, 105 Nev. 745,783 P.2d 430 Nev. 1989); *Olausen v. State*, 105 Nev. 110,771 P.2d 583 Nev. 1989).

The Nevada Supreme Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. *Kirksey v. Nevada*, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See *Jones v. Barnes*, 463 U.S. 745, 751-54, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. *Daniel v. Overton*, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); *Leaks v. United States*, 841 F. Supp. 536, 541 (S.D.N.Y. 1994), aff'd, 47 F.3d 1157 (2d Cir.). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. *Duhamel v. Collins*, 955 F.2d 962, 967 (5th Cir. 1992); *Heath*, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. *Heath*, 941 F. 2d at 1132.

In the instant case, Mr. White's proceedings were fundamentally unfair. The defendant received ineffective assistance of counsel.

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II. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE BY FAILING TO FORENSICALLY ANALYZE MR. WHITE'S CELL PHONE.

After Mr. White surrendered, police recovered a phone attributed to Mr. White. During cross-examination of the homicide detective, defense counsel established that police never conducted a forensic examination of the phone (A.A. Vol. 6 p. 1259). Additionally, during the cross-examination of Joe Averman, defense counsel questioned Mr. Averman about alleged threatening voice mails left by Mr. White (A.A. Vol. 7 p. 1503). However, defense counsel refreshed Mr. Averman's memory with his testimony from the preliminary hearing wherein he testified that he also received text messages (A.A. Vol. 7 p. 1503).

In this case, Mr. White was accused of sending text messages and leaving voice messages of threatening nature. Yet, counsel made no effort to ensure that the phone was forensically analyzed to disprove allegations made by the State and Mr. Averman.

Mr. White's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, due to the failure to defense counsel to conduct an adequate investigation. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

[F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." *See U.S. v. Gray*, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." *Id.* at 712. See also *Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); *Birt v. Montgomery*, 709 F.2d 690, 701

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(7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

In *State of Nevada v. Love*, 865 P.2d 322, 109 Nev. 1136, (1993), the Nevada Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses.

In *Love*, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. *Love*, 109 Nev. 1136, 1137.

"The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, at 2070, 80 L. Ed.2d 674 (1984). The Nevada Supreme Court reviews claims of ineffective assistance of counsel under a reasonable effective assistance standard enunciated by the United States Supreme Court in *Strickland* and adopted by the Nevada Supreme Court in *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504, (1984); *see Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Under *Strickland*, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S. Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S. Ct.

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at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S. Ct. at 2068.

"An error by trial counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment. *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. Thus, *Strickland* also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id. at* 694, 104 S. Ct. at 2068. Additionally, the *Strickland* court indicated that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id. at* 696, 104 S. Ct. at 2069.

Here, defense counsel was left to cross-examine the State's witnesses regarding the failure to forensically analyze Mr. White's phone. The State's witnesses were making claims that Mr. White had delivered threatening voice mails and text messages to Mr. Averman, without any corroboration. It was incumbent upon defense counsel to obtain a forensic analysis of the phone to properly determine whether the State's witnesses were accurate or whether they could easily have been impeached.[7] Mr. Averman's testimony may have been easily defeated had trial counsel been prepared for these type of allegations. Based on the foregoing, Mr. White will request funding for a forensic analysis of his phone.

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[7] For instance, Mr. Averman initially testified that he was employed during the relevant time period. This testimony was to dispel the notion that Mr. Averman was freeloading off Mr. White. Then, on cross-examination, he was forced to reveal that he was not employed at the time of the incident.

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III. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT TO THE STATE'S INSINUATION OF PRIOR UNKNOWN ACTS OF DOMESTIC VIOLENCE.

Echo Lucas' mother testified at trial. During her testimony, the State asked the following question and she gave the following answer[8]:

> Q: You don't know what things the defendant might have done to her, or what she might have done to him?
> A: No, I'm not aware. (A.A. Vol. 8 p. 1600).

The State asked a question that would have clearly sent a message to the jury that Mr. White had been violent with his wife.[9] Requesting that the mother speculate to what "things" Mr. White may have done to her, signaled to the jury that there was issues of domestic violence. Undoubtedly, the State will argue that there was no actual evidence of the bad act. Then why did the State ask a question that would lead any reasonable listener to the conclusion that the prosecutor was aware of prior acts of domestic violence.

In fact, the insinuation is more powerful then an actual presentation of a bad act. The insinuation invites the jury to use their imagination in determining what violent acts Mr. White had committed in the past.

This case represents an example of the complete erosion of the Nevada Supreme Court's historical development of NRS 48.045(b). In 1997, the Nevada Supreme Court provided the lower courts with a three part test in determining the admissibility of prior bad acts. See *Tinch v. Nevada*, 113 Nev. 1170, 946 P.2d 1061 (1997). In *Tinch*, the Nevada Supreme Court held that a trial court "...must determine, outside of the presence of the jury, that: 1) the incident is relevant to

---

[8]The prosecution insinuated that there may have been bad acts to a lesser degree with the following question and answer.

> Q: At the beginning of 2012 did you learn that he may not be such a wonderful husband to Echo?
> A: Absolutely, yes. (A.A. Vol. 8 p. 1635).

[9]During sentencing, the State argued that Mr. White had committed domestic violence in the past.

the crime charged; 2) the act is proven by clear and convincing evidence; and 3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." 113 Nev. 1170, 1176. (citing *Walker v. State*, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996).

Moreover, the Nevada Supreme Court noted in *Tinch* that "we acknowledge that some of our prior cases have misstated the third prong "the evidence is more probative than prejudicial" See eg. *Cipriano v State*, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995); *Berner v. State*, 104 Nev. 695, 697, 765 P.2d 1144, 1146 (1998). These cases are modified to reflect the correct standard as set forth in this opinion." *Id.* at n. 5.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *See, Taylor v. State*, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). *See also, Beck v. State*, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See*, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... *Cipriano v. State*, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). *See also, Crawford v. State*, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991). *Petrocelli*, 101 Nev. 46, 692 P.2d 503 (1985) A trial court deciding whether to admit such acts must conduct a hearing on the matter outside the presence of the jury. See *Petrocelli v. State,* 692 p.2d 503 (1985).

> "The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." *Bonacci v. State*, 96 Nev. 894, 620 P.2d 1244 (1980), citing, *Brown v. State*, 81 Nev. 397, 400, 404 P.2d 428 (1965).

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NRS 48.045(2)'s list of permissible nonpropensity uses for prior-bad-act evidence is not exhaustive. *Bigpond v. State*, 128 Nev. _, 270 P.3d 1244, 1249 (2012). Nonetheless, while "evidence of 'other crimes, wrongs or acts' may be admitted ... for a relevant nonpropensity purpose," id. (quoting NRS 48.045(2)), "'[t]he use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.'" Id. (quoting *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001)). Thus, "'[a] presumption of inadmissibility attaches to all prior bad act evidence.'" *Id.* (quoting *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)).

"[T]o overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Bigpond*, 128 Nev. at_, 270 P.3d at 1250. In addition, the district court "should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes." *Tavares*, 117 Nev. at 733, 30 P.3d at 1133.

The Nevada Supreme Court reviews a district court's decision to admit or exclude prior-bad-act evidence under an abuse of discretion standard. *Fields v. State*, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009).

The prosecutors question provided an invitation to speculate as to the sinister acts Mr. White may have committed in the past. Trial counsel did not

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object to this question and appellate counsel did not raise the issue on appeal.[10] Here, trial and appellate counsel failed to preclude the prosecution from insinuating extraordinarily prejudicial innuendo against Mr. White.

IV. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO ENSURE THE POLICE OBTAINED A WARRANT TO FORENSICALLY ANALYZE THE PHONE ATTRIBUTED TO ECHO LUCAS IN VIOLATION OF THE SIXTH, FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Authorities seized an iPhone attributed to Ms. Lucas, at the scene (A.A. Vol. 8 p. 1711-1712). The State conducted a forensic analysis of this phone. Then, the State called Mr. Bradley Berghuis, a detective who was assigned to computer forensics to testify regarding the contents of the phone (A.A. Vol. 8 p. 1650). The State then introduced numerous text messages in order to establish the State's theory of the case. [11]

In the discovery, Detective Berghuis drafted an examination report. On page two of this report, it provides:

> Authorization to search the electronic storage devices in reference to this case is granted by:
>
> Per Detective T. Sandborn P, #5450, the listed device (iPhone- 4S) belongs to the victim of a homicide and no one has standing to contest search and examination of the device. (Examination Report, p. 2). (Attached as Exhibit A.)

If in fact Ms. Lucas was the owner and sole individual who would have

---

[10]When there is not an objection, all but plain error is waived. *Dermody v. City of Reno*, 113 Nev. 207, 210-11, 931 p.2d 1354, 1357 (1997). Plain error asks:

> "To amount to plain error the 'error must be so unmistakable that it is apparent from casual inspection of the record." *Vega v. State*, 126 Nev._,_, 236 P.3d 632, 637 (2010). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice." *Valedez*, 124 Nev. at 1190, 196 P.3d at 477. Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights. *Martinorellan v. State*, 131 Nev. _,_, 343 P.3d 590, 593 (2015).

[11]There is almost no dispute that the State considered the text messages to be proof establishing the defendant's state of mind at the time of the crime and shortly before hand.

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standing, this issue would admittedly be invalid. However, counsel can not locate proof of this assertion.[12]

In *Riley v. California,* 134 S. Ct. 2473, 189 L. Ed 2d 430 (2014), the United States Supreme Court considered whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The United States Supreme Court unanimously held that police officers generally could not without a warrant, search digital information on the cell phones seized from defendants. *Id.*

Recently, the United States Supreme Court considered the issue whether a suspect had a legitimate privacy interest in cell phone information held by a third party. *See Carpenter v United States,* 138 S. Ct. 2206, 201 L. Ed. 2d 507, (2018). In *Carpenter,* the United States Supreme Court determined that the government was required to have a warrant, supported by probable cause, to obtain cell site records from a third party to be utilized in a trial against a defendant. *Id.*

Mr. White respectfully request that this court order the State to produce evidence establishing that only Ms. Lucas had singular standing over the forensically analyzed cell phone. It should be noted that the text messages in question were between Mr. White and Ms. Lucas. There is a clear privacy interest in communication between two people operating cell phones to communicate. In this case, the detectives did not possess a warrant to forensically analyze the data on the cell phone.

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[12] Post-Conviction counsel for Mr. White has scoured the file attempting to locate phone records demonstrating the ownership of the cell phone to no avail.

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V. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT AND RAISE ON APPEAL IMPROPER PROSECUTORIAL ARGUMENT.

During closing argument, the prosecutor patently mischaracterized the standard of proof necessary to find the defendant guilty of manslaughter. The jury was instructed on manslaughter (Instruction No. 13-14) Admittedly, the jury was properly instructed as follows:

> A killing committed in the heat of passion, caused by a provocation sufficient to make the passion irresistible, is voluntary manslaughter even if there is an intent to kill, so long as the circumstances in which the killer was place and the facts that confronted him were as also would aroused the irresistible passion of the ordinarily reasonable man if likewise situated. (A.A. Vol. 10 p.1939).

The jury was also instructed in Instruction 13 as follows:

> Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation. Manslaughter must be voluntary, upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible.
>
> In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

Pursuant to clearly established law, manslaughter requires provocation upon a sudden heat of passion. If the jury finds this standard, the jury can find the defendant guilty of manslaughter even though there was an intent to kill. Essentially reducing the level of culpability from a murder conviction to manslaughter. At no time is the jury ever instructed that the provocation must result in a irresistible desire to kill. The law does not permit an individual to kill based upon provocation. The law simply allows a lower level of culpability based on the circumstances. This concept was completely ignored by the prosecutor. In fact, the prosecutor argued:

> It is something more than that. It's something greater, significantly greater. I would submit to you that it's an emotion, it's an experience that no one in this court room has ever felt or will ever feel because it's so rare. It's an irresistible desire to take a human life. We've all

> been angry in situations, and we have broken bats, punched a wall. And your thinking to yourself, gosh, I can't believe I just did that, that was stupid. (A.A. Vol. 9 p. 1810).
>
> There was a juror here, potential juror that drove a car through a wall at a restaurant because he was so angry about what his girlfriend or wife was doing. But what didn't he do? He didn't kill. He didn't have that irresistible desire to kill. So it's not just simply an irresistible desire to do harm, it's an irresistible desire to take human life.(A.A. Vol. 9 p. 1810).

If the State were to argue that the prosecutor simply misspoke, the prosecutor again reiterated this improper argument. The prosecutor argued:

> And finally, final limitation I want to talk to you about is that the defendant actually had to have killed in the heat of passion during that time that he had the irresistible desire to take human life and that he didn't have the time to cool off. (A.A. Vol. 9 p. 1811-1812).

The prosecutor further stated, "but he wasn't in an irresistible desire to take human life." (A.A. Vol. 9 p. 1812). Undoubtably, the State will argue that Mr. White has not correctly cited to the record. The State will argue that these statements were taken out of context. Mr. White will invite the State and the Court to view the entirety of the prosecutor's closing argument. Having carefully reviewed the entire closing argument, it is clear that the prosecutor informed the jury that in order to find Mr. White guilty of manslaughter, they must find the provocation resulted in an irresistible desire to kill.

The prosecutor was correct when he said that this is extraordinary rare. That is because this standard does not exist. For the law to permit justification in killing would result in a verdict of not guilty because of self defense. The law does not permit an individual to kill based on sufficient provocation. Rather, the law reduces the level of culpability from murder to manslaughter. Courts have repeatedly frowned upon prosecution mistaking the standard of proof. *See Holmes v. State,* 114. Nev 1357, 972 P. 2d 337, 343 (1988) (holding that any misstatement by prosecutors of the standard is reversible error); *Sullivan v. Louisiana,* 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (holding that misstating law and reasonable doubt is so egregious that it is never harmless); *Cage v. Louisiana,*

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498 U.S. 39, 111 S. Ct. 328, 112 L, Ed. 2d 339 (1990) (holding that any equation of reasonable doubt with substantial doubt or moral certainty as well as any other definition that would confuse jurors or lead them to believe that the State's burden is less significant then it is, is unconstitutional) (overruled on other grounds by *Estelle v. McGuire,* 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Here, the prosecutor repeatedly informed the jury that the State's burden of proof was much less then the law required. The prosecutor argued to the jury an impossible standard for Mr. White and a standard which was opposite to the law and the instructions. Counsel for Mr. White did not object. This issue was not raised on appeal. Had the issue been objected to and raised on appeal the result on appeal would have mandated reversal. Mr. White received ineffective assistance of counsel pursuant to *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

VI. MR. WHITE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO OBJECT AND RAISE ON APPEAL THE DISTRICT COURT'S GIVING OF INSTRUCTION NUMBERS 18 AND 28 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.[13]

Mr. White received ineffective assistance of counsel for failing to object to these jury instructions at trial. Mr. White also received ineffective assistance of appellate counsel for failing to raise the error concerning the giving of these instructions on appeal.

A. THE REASONABLE DOUBT INSTRUCTION

INSTRUCTION NO. 27

The trial court's reasonable doubt instruction given improperly minimized the State's burden of proof. The jury was given the following instruction on reasonable doubt:

[13] The undersigned has raised this issue to the Nevada Supreme Court numerous times and acknowledges that the Court has always denied the issue. The issue is presented because the Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

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> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation (Instruction Number 27).

The instruction given to the jury minimized the State's burden of proof by including terms "It is not mere possible doubt, but is such a doubt *as would govern or control a person in the more weighty affairs of life*" and "Doubt, to be reasonable, must be *actual*, not mere possibility or speculation." This instruction inflates the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. *See Victor v. Nebraska*, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); *Cage v. Louisiana*, 498 U.S.39, 41 (1990); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Mr. Colvin recognizes that the Nevada Supreme Court has found this instruction to be permissible. *See e.g. Elvik v. State*, 114 Nev. 883, 985 P.2d 784 (1998); *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998).

B. EQUAL AND EXACT JUSTICE

The trial court's "equal and exact justice" instruction improperly minimized the State's burden of proof. The court provided the following instruction to the jury:

INSTRUCTION NO. 38

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law, but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada (Instruction Number 38).

By informing the jury that it must provide equal and exact justice between the defendant and the State, this instruction created a reasonable likihood that the

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jury would not apply the presumption of innocence in favor of Mr. White and would thereby convict and sentence based on an lesser standard of proof than the constitution requires. *Sullivan v. Louisiana,* 508 U.S. 275, 281 (1993).

Based on the foregoing, Mr. White would respectfully request this Court reverse his convictions.

VII. MR. WHITE IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS BASED UPON CUMULATIVE ERROR.

In *Dechant v. State*, 10 P.3d 108, 116 Nev. 918 (2000), the Nevada Supreme Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, the Nevada Supreme Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction." *Id.* at 113 citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The Nevada Supreme Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. *Id.*

Based on the foregoing, Mr. White would respectfully request that this Court reverse his conviction based upon cumulative errors of trial and appellate counsel.

VIII. MR. WHITE IS ENTITLED TO AN EVIDENTIARY HEARING.

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable claim of ineffective assistance. *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir.1990); *Hendricks v. Vasquez*, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also *Morris v. California*, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); *Harich v. Wainwright*, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim,

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we must remand to the district court for an evidentiary hearing."); *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

In the instant case, an evidentiary hearing is necessary to question trial counsel and appellate counsel. Mr. White's counsel fell below a standard of reasonableness. More importantly, based on the failures of trial and appellate counsel, Mr. White was severely prejudiced, pursuant to *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 205, (1984).

Under the facts presented here, an evidentiary hearing is mandated to determine whether the performance of trial counsel and appellate counsel were effective, to determine the prejudicial impact of the errors and omissions noted in the petition, and to ascertain the truth in this case.

CONCLUSION

Wherefore, Mr. White respectfully requests this Court grant his Petition finding he received ineffective assistance of counsel.

Dated this 20th day of December, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2018, I served a true and correct copy of the foregoing document entitled **SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** to the Clark County District Attorney's Office by sending a copy via electronic mail to:

CLARK COUNTY DISTRICT ATTORNEY
motions@clarkcountyda.com

BY:

/s/ Nancy Medina
An employee of Christopher R. Oram, Esq.

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EXHIBIT A

1ST EXAM

NO PASS CODE

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
COMPUTER FORENSICS LAB

Examination Report

Event Number: 120727-1826

Examiner: Detective Brad Berghuis, P#4154

I. Examiner qualifications:

I, Detective Brad Berghuis P#4154, am a Police Officer with the Las Vegas Metropolitan Police Department, currently assigned as a forensic examiner to the Computer Forensics Lab, having been employed by the Department for 21 years.

I currently have more than 3800 hours of police specific training, of which more than 1000 hours is in areas relevant to conducting examinations on electronic storage devices and associated technical concepts.

Certifications I hold related to the computer Forensics Field include:

DATE	CERTIFICATION
Aug 2006	US Secret Service (B-Cert) Computer Evidence Recovery
July 2007	Guidance Software – EnCE (Encase Certified Examiner) Renewed July 2012 Expires July 2015.
May 2008	CompTIA – A+ Certified IT Technician
May 2008	CompTIA – Network Plus
Oct 2009	ACE – AccessData Certified Examiner
Oct 2011	Cellebrite - Certified UFED Mobile Device Examiner
Oct 2011	Cellebrite - Certified UFED Physical Examiner

(My complete LVMPD training record is available upon request.)

II. Search Authorization:

Authorization to search the electronic storage devices in reference to this case is granted by:

Per Detective T. Sanborn, P#5450, the listed device (iPhone-4S) belongs to the victim of a homicide and no one has standing to contest the search and examination of the device.

III. Scope of exam:

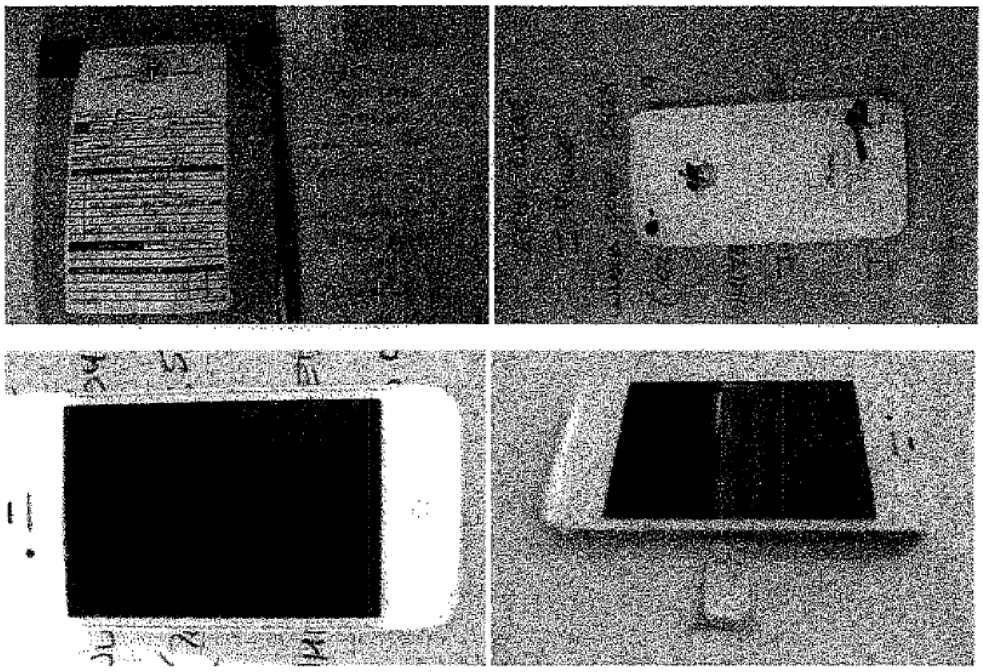
Examination of the digital storage device(s) in this case will consist of a complete extraction of the phone's contents.

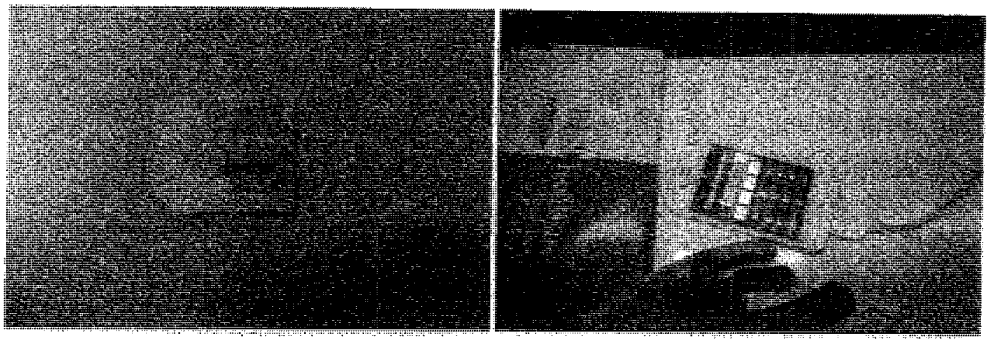
"A complete download of the victim's i-Phone, to include all stored media, call logs, text messages, contacts, etc... The phone belonged to the victim, who is now deceased, so there are no search warrant/standing issues. Any questions, please call Detective Tate Sanborn, desk. ext. 3604, cell. [redacted]-5622."

IV. Evidence to be examined:

The digital storage devices consist of items in the custody of the Las Vegas Metropolitan Police Department, under Event Number 120727-1826. Specifically, the following evidence items were examined:

(1) **Package #1, Item #1**, (description) White Apple, A1387, iPhone-4S, SN-C39GHB4XDTFC contained a Verizon SIM card (ICCID-8931440880610648132.





NOTE: It is the recommendation of the Computer Forensics Lab that the original computers, cell phones, digital devices, and etc. imaged and examined under this event number, be retained in the LVMPD Evidence Vault until adjudication of the case.

V. Approved CFL tools

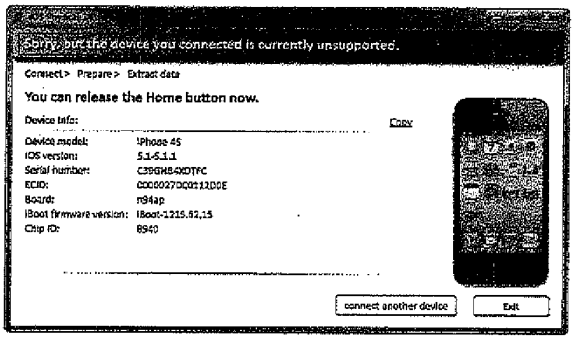
The following is a list of the specific tools used to image and examine the electronic storage devices in this case:

(1) Susteen's Secure View v3.11
(2) Cellebrite – UFED (hardware).
(3) Ramsey Faraday Safe/Container (RF-Blocker)
(4)

VI. Exam findings and Analysis

(1) **Package #1, Item #1**, (description) **Package #1, Item #1**, (description) White Apple, A1387, iPhone-4S, SN-C39GHB4XDTFC contained a Verizon SIM card (ICCID-8931440880610648132).

The White Apple, A1387, iPhone-4S, was placed into a Ramsey Faraday container and the battery was charged in preparation for examination. The Ramsey Faraday box/container was used to isolate the phone from radio signals such as WiFi, Bluetooth, and the mobile provider's network. This is done to preserve the integrity of the digital data contained within the mobile phone. Once the phone was sufficiently charged it was powered-on inside the Faraday box where I attempted to configure the phone into airplane mode which disables the WiFi, Bluetooth, and Cellular radios. Unfortunately, the phone was passcode locked. I subsequently used Cellebrite's application to verify that I would not be able to acquire and extract the data from the phone, and recover limited information such as model, iOS version, serial number, and etc... .



[View the related Cellebrite report here.]

As a result of the lack of success, I removed the Verizon SIM card (ICCID-8931440880610648132) and performed a separate examination and extraction of the SIM card using Secure View.

The results were very limited and provided the IMSI (International Mobile Subscriber Identity) which can be used to subpoena subscriber information is necessary. The ICCID and one phone number was recovered.

For additional details please view the related report created by Secure View from the hyperlink provided.

[View the related Secure View report here.]

(1) Identified issues

The iPhone-4S was passcode locked and currently no one has a solution for such a condition.

(2) Additional information

Case investigators / detectives need to review all reports and bookmarks for relevancy and compliance with the search warrant.

(3) Relevant terms and definitions

[View the Relevant terms and definitions document here.]

OPPS
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TROY WHITE,
#1383512

Defendant.

CASE NO: C-12-286357-1
DEPT NO: XXVIII

STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO OBTAIN EXPERT AND PAYMENT FOR FEES

DATE OF HEARING: MARCH 27, 2019
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COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through CHARLES THOMAN, Chief Deputy District Attorney, and moves this Honorable Court for an order denying the Defendant's Petition For Writ Of Habeas Corpus And Motion To Obtain Expert And Payment For Fees.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 12, 2017, Defendant Troy White ("White") was charged by way of Information with the following counts: Count 1, BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060); Count 2, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); Count 3, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 4, CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 5, 6, 7, 8, and 9, CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

On February 4, 2013, White filed a pre-trial Petition for Writ of Habeas Corpus, to which the State filed a Return on March 19, 2013. On March 27, 2013, the district court granted White's Petition as to Count 1 only and denied the Petition as to Count 2 through 9. The State filed a Notice of Appeal that same day.

On August 8, 2014, the Supreme Court filed an Order affirming the district court's dismissal of Count 1, holding that a person cannot burglarize his own home. On March 24, 2015, the State filed an Amended Information with the following charges: Count 1, MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); Count 2, ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 3, CARRYING A CONCEALED FIREARM OR OTHER DEADLY WEAPON (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 4, 5, 6, 7, and 8, CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508(1)).

Jury trial began on April 6, 2015, and concluded on April 17, 2015. The State also filed a Second Amended Information on April 6, 2015, charging the same counts as listed in the Amended Information. On April 17, 2015, the jury returned a verdict as follows: as to Count 1, Guilty of Second Degree Murder with Use of a Deadly Weapon; as to Count 2, Guilty of

Attempt Murder with Use of a Deadly Weapon; as to Count 3, Guilty of Carrying a Concealed Firearm or Other Deadly Weapon; and as to Counts 4, 5, 6, 7, and 8, Guilty of Child Abuse, Neglect, or Endangerment.

White was sentenced on July 20, 2015 as follows: as to COUNT 1, to LIFE with the eligibility for parole after serving a MINIMUM of TEN (10) YEARS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; as to COUNT 2, to a MAXIMUM of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS, plus a CONSECUTIVE term of ONE HUNDRED NINETY-TWO (192) MONTHS with a MINIMUM parole eligibility of SEVENTY-SIX (76) MONTHS for the Use of a Deadly Weapon; CONSECUTIVE to COUNT 1; as to COUNT 3, to a MAXIMUM of FORTY-EIGHT (48) MONTHS with a MINIMUM Parole Eligibility of NINETEEN (19) MONTHS, CONCURRENT WITH COUNTS 1 & 2; as to COUNT 4, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONSECUTIVE TO COUNTS 1 & 2; as to COUNT 5, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 6, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 7, to a MAXIMUM of SIXTY (60) MONTHS with a 11 MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; as to COUNT 8, to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS, CONCURRENT with ALL OTHER COUNTS; with ONE THOUSAND EIGHTY-EIGHT DAYS (1,088) DAYS credit for time served. The AGGREGATE TOTAL sentence was LIFE with a MINIMUM OF THIRTY-FOUR (34) YEARS. White's Judgment of Conviction was filed July 24, 2015, but an Amended Judgment of Conviction was filed February 5, 2016, removing the aggregate sentence total language.

On August 12, 2015, White filed a Notice of Appeal. On May 25, 2017, the Nevada Supreme Court issued its Order affirming White's Judgment of Conviction. On April 24, 2018, White filed a post-conviction Petition for Writ of Habeas Corpus. White filed a Supplement to the Petition for Writ of Habeas Corpus on December 20, 2018. The State's Response follows.

STATEMENT OF FACTS

At sentencing, the district court judge relied on the following factual synopsis set forth in White's Supplemental Pre-Sentencing Report:

> On July 27, 2012, Las Vegas Metropolitan Police Department officers were dispatched to local residence regarding a shooting. Upon arrival, officers observed a female, later identified as victim #1 (VC2226830) lying on the floor in a bedroom in the residence. Victim #1 was unconscious and had an apparent gunshot wound to her chest. A male, later identified as victim #2 (VC2226831), was lying on the floor outside the doorway to the bedroom and he also had apparent gunshot wounds. Five children, later identified as nine year old minor victim #3 (VC2226832), five year old minor victim #4 (VC2226833), eight year old minor victim #5 (VC2226834), six month old minor victim #6 (VC2226835), and two year old minor victim #7 (VC2226836), were also present in the house.
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> Medical personnel responded and transported victim #1 and victim #2 to a local trauma hospital. Officers later learned that victim #1 arrived at the hospital and after attempts to revive her, she was pronounced dead. Victim #2 underwent surgery to treat his injuries.
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> During their investigation, officers learned that victim #1 was married to a male, later identified as the defendant, Troy Richard White, for approximately eight years. They have three children in common, identified as minor victim #5, minor victim #6, and minor victim #7, and she has two additional children, identified as minor victim #3 and minor victim #4, with another male.
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> In June 2012, victim #1 and Mr. White separated and Mr. White moved out of the family home. However, when Mr. White exercised his visitation on the weekends, he would stay in the home and victim #1 would stay elsewhere.

Towards the end of June 2012, Mr. White became aware that victim #1 was dating victim #2. Victim #1 and victim #2 talked about finding their own place, but Mr. White insisted that victim #1 stay in the home and advised her that it was okay for victim #2 to stay there as well.

On the date of the offense, Mr. White went to the residence and told victim #1 that he needed to speak with her in a back room. Victim #1 agreed and went into a bedroom with Mr. White. After approximately five minutes, victim #2 heard victim #1 yell at Mr. White to stop and thought she was in trouble. Victim #2 opened the bedroom door and saw Mr. White shove victim #1 and then shoot her once in the chest or stomach. Mr. White then turned, shot victim #2, and victim #2 fell to the ground. One bullet struck victim #2 in the arm and another bullet struck him in the left abdomen. One of the bullets that struck victim #2 traveled through his body, penetrated the back wall to the room, and exited the residence. At the time victim #2 was shot, he was standing within feet of the crib which contained six month old minor victim #6.

After shooting victim #2, Mr. White stood over him and showed him the gun. Mr. White told victim #2 that he was going to jail and he was going to kill him. Mr. White also asked victim #2, "How does it feel now?" As victim #2 lay on the floor, Mr. White kept coming into the residence to threaten him. Mr. White finally left the residence and victim #2 heard a car leave.

Once Mr. White fled the scene, minor victim #3 ran to a neighbor's house to call for police.

Later that date, Mr. White turned himself in at the Yavapai County Sheriff's Department in Arizona. Upon being questioned, Mr. White reported that he was wanted in the Las Vegas area for shooting someone. He stated he fled in the vehicle that was now parked in the sheriff's department lot. Mr. White further stated the gun he used to shoot people in the Las Vegas area was inside the vehicle in the spare tire compartment area.

On August 10, 2012, Mr. White was extradition back from Arizona and booked accordingly at the Clark County Detention Center.

Supplemental PSI filed August 3, 2015, at 4-5.

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ARGUMENT

White has brought five grounds for relief in his Petition for Writ of Habeas Corpus alleging ineffective assistance on the part of trial and/or appellate counsel. For the reasons set forth below, all of White's claims of ineffective assistance of counsel are without merit. As the individual claims are without merit, there is no error to cumulate, therefore White has not established cumulative error. Finally, as none of White's claims have merit and there is no error to cumulate, White is not entitled to an evidentiary hearing. For the following reasons, White's post-conviction Petition for Writ of Habeas Corpus, his request for an evidentiary hearing, and his motion to obtain a cell phone expert and fees for a forensic analysis of that phone should be denied.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are 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). In essence, the court must "judge the reasonableness of counsel's

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

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). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (Emphasis added). A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

I. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FORENSICALLY ANALYZE WHITE'S CELL PHONE

White's first claim of ineffective assistance of trial counsel alleges that "counsel made no effort to ensure that the phone was forensically analyzed to disprove allegations made by the State and Mr. Averman." Petition at 13. As set forth by White, "[t]he State's witnesses were making claims that Mr. White had delivered threatening voice mails and text messages

to Mr. Averman . . . [i]t was incumbent upon defense counsel to obtain a forensic analysis of the phone to properly determine whether the State's witnesses were accurate or whether they could have been easily impeached." Id. White also alleges Mr. Averman's testimony "may" have been easily defeated had trial counsel obtained a forensic analysis of White's cell phone. Id.

White's claim here fails for multiple reasons. Pursuant to NRS 34.735(6) and Hargrove, 100 Nev. at 502, 686 P.2d at 225, a petitioner must support his allegations with specific facts that entitle him to relief; further, pursuant to Molina, 120 Nev. at 192, 87 P.3d at 538, allegations that counsel was ineffective for failure to investigate must show how a better investigation would have rendered a more favorable outcome probable. White offers no facts indicating that such a forensic analysis *would* have provided witness impeachment evidence, only the bare and naked assertion that such an analysis *could* have provided impeachment evidence. Petition at 15. The cell phone in question was White's personal cell phone; he better than anyone would have been able to assert that such messages were not sent by him to Mr. Averman. Yet, despite personal knowledge of whether the messages sent from White's phone came from White himself, White has set forth no affidavit or declaration in support of his allegations that an analysis of the phone would have shown that another party sent the messages in question, nor any indication of what such an analysis would have uncovered. White's bare allegations also do not establish that a forensic analysis would have rendered a more favorable trial outcome probable, as he cannot establish that a forensic analysis would have uncovered evidence that would have impeached Mr. Averman's testimony. Even if a forensic analysis would have uncovered evidence favorable to White, there would not be a reasonable probability that the results of the trial would have been different, as there were multiple eye witnesses to the murder of Echo Lucas. Thus, pursuant to Hargrove and Molina, White's bare, naked assertions cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had counsel obtained a forensic examination of White's phone.

For the reasons set forth above, White has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. White's claim of ineffective assistance of counsel on this matter should therefore be denied.

II. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGED ALLEGATIONS OF PRIOR BAD ACTS

White's second claim of ineffective assistance of trial counsel alleges that the State made an "insinuation" of "extraordinarily prejudicial innuendo" at trial, that trial counsel was ineffective for failing to object to such innuendo, and that appellate counsel was ineffective for failing to raise this issue on appeal. Petition at 16, 19. For the reasons set forth below, this claim should be denied.

White's claim of ineffective assistance on counsel on this count is replete with legal and factual non-sequiturs. First, the State must point out that White has, whether intentionally or unintentionally, misstated the record in his Petition.[1] In Section III of his Petition, White sets forth the following: "Echo Lucas' mother testified at trial. During her testimony, the State asked the following question and she gave the following answer . . . . Requesting that the mother speculate as to what 'things' Mr. White may have done to her, signaled to the jury that there was (sic) issues of domestic violence." Petition at 16. While Echo Lucas's mother, Amber Gaines, did indeed testify at trial, the State did not ask her the questions that White quotes in his Petition. Those questions were asked of State's witness Timothy Henderson, a minister with The Potter's House Church, where the victim and White worshipped together. Trial Transcript, Day 6, at 39. White refers multiple times to "her" testimony, incorrectly attributing the relevant exchange to Ms. Gaines and not to Mr. Henderson (presumably Reverend Henderson). Petition at 16-19. This is relevant to understand the context of these

[1] The misstatement of the record may be due to White's curious decision to cite not to the record in the District Court, but to the Appellate's Appendix ("A.A.") filed alongside White's direct appeal in Nevada Supreme Court case 68632. White has cited to the A.A. throughout his Petition; in an effort to assist the District Court in finding the relevant portions of the record, the State will cite to the District Court record in its Opposition.

questions, as the victim's minister's intimate knowledge of a marital relationship would be different than that of the victim's mother.

Second, White appears to argue that the following vague question was bad act evidence or an insinuation thereof:

> Q: You don't know what things the defendant might have done to her, or what she might have done to him?
> A: No, I'm not aware.

Petition at 16. White then admits that the question, or "insinuation," is not bad act evidence: "the insinuation is more powerful than an *actual* presentation of a bad act." Id. This begs the question, how could insinuating that a defendant committed a bad act possibly be worse than actually presenting a specific bad act? White provides no legal authority for this assertion, and as such this argument should be summarily rejected. Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that Jones' unsupported contention should be summarily rejected on appeal). Another question posed by the State is also alleged to be an "insinuation" of a bad act:

> Q: At the beginning of 2012 did you learn that he may not be such a wonderful husband to Echo?
> A: Absolutely, yes.

Id at 16, n. 8. A plain reading of the transcript shows that these questions were elicited to show that Mr. Henderson, the minister of The Potter's House Church, lacked intimate knowledge of White and the victim's relationship, and not to establish a prior bad act. The question asked immediately prior to the first question White quoted in his Petition is as follows:

> Q: Just so we're clear, you have no idea the things that might have upset either Echo or the defendant in the course of their relationship that caused it to ultimately end in early 2012; correct?
> A: No, I'm not aware of that. No.

Trial Transcript, Day 6, at 39. The question asked immediately prior to the second question was meant to demonstrate that while White may have been a good father to his children, he was not a good husband to his wife:

> Q: You were asked where the defendant was a wonderful dad. Do you remember that question?
> A: Yes.
> Q: And your answer was yes?
> A: Yes.

Trial Transcript, Day 6, at 74. Even without examining these questions in context, the questions are so facially vague that a reasonable juror would not have understood them as a reference to a prior act of domestic violence. In the first question, Rev. Henderson was unaware of what "things" White may have done to Ms. Lucas or vice versa, thus there can be no inference of any specific bad act committed by White. In the second question, Rev. Henderson merely agreed that even with his limited knowledge of their marital affairs, White was "not [] such a wonderful husband" to Ms. Lucas. This could have referred to any number of things that would make White a bad husband and not to specific acts of domestic violence.

As White accurately guessed, the State asserts there is no evidence of any prior bad act in the preceding questions. Instead, White alleges that the jury could only have inferred that the State was referring to prior bad acts because it mentioned White's history at sentencing, well after the trial had concluded and outside the presence of the jury. Such an argument is a factual non-sequitur; the jury could not have inferred that the State was referring to acts of domestic violence if the only evidence of such was introduced months after the jury had already entered its guilty verdicts.

White's legal non-sequitur is puzzling; despite his assertion that the questions solicited of Rev. Henderson insinuated bad acts, as indicated by his extensive legal citations regarding bad acts, he also argues—absent any legal authority—that vague insinuations of bad acts are "more powerful than bad acts." Petition at 16. The questions posed of Rev. Henderson referenced no specific bad acts whatsoever committed by White. It is thus impossible to

analyze such questions under a bad act framework, which requires the court determine whether evidence is relevant to the crime charged, proven by clear and convincing evidence, and that the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. Nevada, 113 Nev. 1170, 946 P.2d 1061 (1997). Objecting to these questions on a "bad act" basis would thus have been futile, as there was no legal basis for such an objection; pursuant to Ennis, 122 Nev. at 706, 137 P.3d at 1103, counsel cannot be ineffective for failing to make futile objections or arguments.

Further, White has not shown a reasonable probability that the result of the trial would have been different had the State not posed such questions or if trial counsel had objected to them, as there were multiple eye witnesses to the murder of Echo Lucas and substantial evidence showing that White was guilty of that murder. Thus, White cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to these alleged bad acts.

White's sole argument that appellate counsel was ineffective on this issue was that appellate counsel did not raise such on direct appeal. Petition at 19. As set forth above, there was no legal or factual basis for such an argument on appeal; appellate counsel cannot be ineffective for failing to raise futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

For the reasons set forth above, White has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his trial counsel or appellate counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. White's claim of ineffective assistance of counsel on this matter should therefore be denied.

III. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SUPPRESS THE EVIDENCE OBTAINED FROM THE VICTIM'S CELL PHONE

White asserts trial counsel was ineffective for failing to "ensure the police obtained a warrant to forensically analyze the phone attributed to Echo Lucas in violation of the Sixth, Fourth, and Fourteenth Amendments to the United States Constitution." Petition at 19. The

meaning of this assertion is unclear; White identifies no legal support for the proposition that defense counsel has a duty to prospectively instruct police to obtain a warrant prior to conducting a search under the Fourth Amendment, nor a duty to prospectively prevent police from performing a search until a warrant is obtained. Further, while White asserts that the search in question was conducted in violation of the Fourth, Sixth, and Fourteenth Amendment, he does not specify whose constitutional rights were violated from this allegedly improper search; his own, or those of Ms. Lucas. Ordinarily, if trial counsel wishes to prevent the introduction of evidence that was obtained in violation of a defendant's constitutional rights, counsel will move to suppress such evidence after its collection and prior to trial. See State v. Lloyd, 129 Nev. 739, 741, 312 P.3d 467, 468 (2013). The State will proceed under the assumption that White is arguing trial counsel was ineffective for failing to suppress the information from Ms. Lucas's cell phone that was allegedly obtained in violation of White's Fourth, Sixth, and Fourteenth Amendment rights.

First, White has no standing to bring this claim. By sending messages from his phone to Ms. Lucas's phone, White had no legitimate expectation in the privacy of his messages once they were displayed and stored on Ms. Lucas's phone. See Smith v. Maryland, 442 U.S. 735, 743–44, 99 S.Ct 2577, 2581 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). Thus, whether Ms. Lucas had singular standing over the cell phone is ultimately irrelevant; as White has no legitimate expectation of privacy in the text messages voluntarily sent to and stored on Ms. Lucas's cell phone, he has no standing to contest its search.

If this court does conclude that White has standing to raise this claim, the State's substantive response to White's claim is as follows. White's argument here rests on two unsupported arguments: one, that someone other than Ms. Lucas had standing to assert a violation of her right to be protected from unreasonable search and seizure via the investigation of her cell phone; and two, that it is the State's burden to establish that only Ms. Lucas had the standing to challenge a search of her phone. Petition at 20. The former has no factual support, while the latter has no legal support.

While White argues that Riley v. California, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) and Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018) support his aforementioned assertions, such cases are easily distinguishable. In Riley, the defendant's personal cell phone was searched after he was taken into custody; here, the cell phone belonged to the victim. 134 S. Ct. at 2481. Thus, unlike in Riley where the defendant had standing to assert a Fourth Amendment violation, White has submitted no evidence that he has standing to assert a Fourth Amendment violation as it pertains to a search of Ms. Lucas's cell phone. Carpenter on the other hand is wholly inapplicable to the instant case, as it was decided three years after White's trial and is not retroactive. Even if Carpenter was retroactive however, the case is easily distinguishable. Carpenter held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through cell-site location information (CSLI), and that the Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier. 138 S. Ct. at 2217. In this case, the State did not introduce evidence of White's location as captured by CSLI; instead, the State introduced the substance of the texts sent by White to Ms. Lucas's phone. Neither Riley nor Carpenter stand for the proposition that the State must produce evidence to establish that a deceased victim was the only individual with standing to contest a search of her cell phone, and White has provided no other law in support of such argument. As this contention is unsupported by legal citation, it may be summarily dismissed pursuant to Jones, 113 Nev. at 468, 937 P.2d at 64.

As trial counsel did not object to this issue, all but plain error is waived. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997). "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate[ ] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the

appellant demonstrates that the error was prejudicial to his substantial rights. Martinorellan v. State, 131 Nev. Adv. Op. 6, 343 P.3d 590, 593 (2015). White cannot demonstrate plain error here for the reasons listed above; he has no standing to contest the search of Ms. Lucas's cell phone because he voluntarily sent messages to it, thus eliminating his legitimate expectation of privacy in those messages. And even if this court finds he had a legitimate expectation of privacy in those messages, he has not shown that he has standing to challenge a search of Ms. Lucas's phone. Further, White has produced no legal support for the assertion that the State must demonstrate that no person other than a decedent victim may have standing to contest a search of a decedent's cell phone. White's substantial rights have thus not been violated and the failure of trial counsel to contest the search of Ms. Lucas's cell phone is not plain error.

Thus, White has not shown a reasonable probability that the result of the trial would have been different had counsel moved for suppression of the information gained from Ms. Lucas's cell phone, as there were multiple eye witnesses to the murder of Ms. Lucas and substantial evidence showing that White was guilty of that murder. Thus, White cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to the introduction of White's text messages.

For the reasons set forth above, White has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his trial counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. White's claim of ineffective assistance of counsel on this matter should therefore be denied.

IV. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ARGUMENT BY PROSECUTOR RE: HEAT OF PASSION AND MANSLAUGHTER

White argues that the prosecutor "patently mischaracterized the standard of proof necessary to find the defendant guilty of manslaughter." Petition at 21. White then immediately contradicts this assertion by stating "[a]dmittedly, the jury was properly instructed" as to the standard of proof on manslaughter. Id. Despite White's concession that

the jury was properly instructed as to the relevant standard of proof, White argues that the State's closing argument somehow nullified the jury instructions, that trial counsel was ineffective for failing to object to that closing argument, and that appellate counsel was ineffective as well for failing to raise this issue on appeal. Petition at 21. White's claims are without merit and should be denied.

Bizarrely, yet generously, White makes multiple arguments against his own claim in the State's favor: "[u]ndoubtedly, the State will argue that Mr. White has not correctly cited to the record. The State will argue that these statements were taken out of context." Petition at 22. The State indeed notes that White has not correctly cited to the record, as all of his citations refer to the Appellate's Appendix attached to his direct appeal in Nevada Supreme Court case 68632. White's blatant refusal to cite to the appropriate record in this case renders the instant claim appropriate for summary dismissal, as his contentions are not properly supported. Jones, 113 Nev. at 468, 937 P.2d 64. Further, by admitting to this court that his unsupported claim takes the State out of context, White concedes that his claim is obviously frivolous, unnecessary, unwarranted, and a waste of judicial resources. In further support of this conclusion, White has already admitted that the jury *was* properly instructed on the proper standard of proof. However, the State notes that White cites to "A.A. Vol. 10 p.1939" to show the "heat of passion" instruction that was given to the jury, the instruction at page 1939 of the A.A. is *not* what White cited in his Petition. White asserts that the jury was properly instructed on the heat of passion defense as follows:

> A killing committed in the heat of passion, caused by a provocation sufficient to make the passion irresistible, is [V]oluntary [M]anslaughter even if there is an intent to kill, so long as the circumstances in which the killer was place (sic) and the facts that confronted him were [such] as also would [have] aroused the irresistible passion of the ordinarily reasonable man if likewise situated.

Petition at 21. Page 1939 of the Appellate's Appendix, however, reads as follows:

> The heat of passion which will reduce a Murder to Voluntary Manslaughter must be such a passion as naturally would be aroused

> in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and that facts that confronted him were such as also would have aroused the irresistible passion of the ordinarily reasonable man, if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.

Appellate's Appendix, NV. S. Ct. Case 68632; Jury Instructions, filed April 17, 2015, at 17.

The State believes White wished to cite to Jury Instructions, filed April 17, 2015, at 16, which shows the actual heat of passion instruction given to the jury, minus White's numerous clerical errors. Regardless of the improper citation, the State is baffled at White's decision to bring a claim of ineffective assistance of counsel for failing to object to argument based on a paraphrasing of a jury instruction that White agrees was proper.

Nevertheless, even if White's Petition could be construed to allege that the State committed any specific wrongdoing in its argument—which it did not—the State emphatically denies that its closing argument in any way directed the jury to disregard the written jury instructions regarding the standard of proof necessary to find the White guilty of manslaughter. Indeed, White has cited to no such language in the State's closing because it does not exist. Instead, White merely asserts—without support—that "the prosecutor repeatedly informed the jury that the State's burden of proof was much less than the law required." Petition at 23.

Rather than instructing the jury to disregard the jury instructions, the State's closing argument illustrated how White did not possess a provocation sufficient to manifest a passion so "irresistible" that he could not control himself in the killing of Ms. Lucas. As noted above, this is merely a paraphrase of the "heat of passion" defense as cited by White. Indeed, unlike the prototypical example of a man finding another man in bed with his wife and being so overcome with passion that he kills without thought or judgment, here White had been

separated from Ms. Lucas for months, and he knew that the victim and her boyfriend had been seeing each other for some time prior to the killing. See Supplemental PSI filed August 3, 2015, at 4-5. Further, White did not suddenly walk into a bedroom and find the decedent victim and another man in the embrace of passion; instead, Mr. Averman walked into a room where White and the victim were arguing, then White opened fire, killing Ms. Lucas and wounding Mr. Averman. Id. The State's argument that White did not possess "irresistible" passion that overcame his judgment in the killing of Ms. Lucas is nothing more than a paraphrasing of a proper jury instruction and in no way suggested a different burden of proof.

As the State's argument was proper and the jury was correctly instructed on the burdens of proof associated with manslaughter and the heat of passion defense, any objection to such at trial would have been futile. Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. While White argues that raising this issue on appeal "would have mandated reversal," White sets forth no argument that removing the allegedly improper language from the State's closing would create a reasonable probability that the result of either the instant trial or any trial subsequent to remand would have been or would be different. Petition at 23.

For the reasons set forth above, White has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. White's claim of ineffective assistance of counsel on this matter should therefore be denied.

V. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE REASONABLE DOUBT AND EQUAL AND EXACT JUSTICE INSTRUCTIONS

White argues that trial counsel and appellate counsel were ineffective for failing to challenge the following jury instruction on reasonable doubt:

> INSTRUCTION NO. 27
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation.

Jury Instructions, filed April 17, 2015, at 31; Petition at 23-24. White also argues counsel was ineffective for failing to challenge Instruction Number 38 on "Equal and Exact Justice," which reads as follows:

> INSTRUCTION NO. 38.
> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed, and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

Jury Instructions, filed April 15, 2015, at 42; Petition at 24-25.

White concedes his arguments regarding Instruction Number 27 have no legal merit, however, as the Nevada Supreme Court has already found Instruction Number 27 permissible in Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998) and Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). As to the second challenged instruction, White also asserts that Instruction Number 38 improperly minimized the State's burden of proof and was thus improper pursuant to Sullivan v. Louisiana, 508 U.S. 275, 281 (1993), yet provides zero legal analysis in support of this assertion. Further, White has failed to cite to controlling case law directly adverse to his arguments regarding the propriety of the "equal and exact" jury instruction:

> Appellant contends that the district court denied him the presumption of innocence by instructing the jury to do "equal and exact justice between the Defendant and the State of Nevada." *This instruction does not concern the presumption of innocence or burden of proof.* A separate instruction informed the jury that the defendant is presumed innocent until the contrary is proven and that the state has the burden

> of proving beyond a reasonable doubt every material element of the crime and that the defendant is the person who committed the offense. Appellant was not denied the presumption of innocence.

Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). Nevada Rule of Professional Conduct 3.2(a)(2) states that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. The State takes this opportunity to ensure that White's counsel is aware of Leonard, lest it fail to be mentioned in White's potential Reply.

As set forth above, there are controlling Nevada cases directly adverse to White's arguments that the challenged jury instructions were improper; thus, any objection to them at trial would have been futile, as would be any argument that they were improper on direct appeal. Trial counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. White sets forth no argument that an alternate, acceptable jury instruction would create a reasonable probability that the result of his trial would have been different. Petition at 23-25.

For the reasons set forth above, White has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. White's claim of ineffective assistance of counsel on this matter should therefore be denied.

VI. WHITE HAS NOT ESTABLISHED CUMULATIVE ERROR

White asserts that all of the alleged errors contained in his Petition warrant a finding of cumulative error. Petition at 25. However, in the instant Petition, White has alleged multiple ineffective assistance of counsel claims, and multiple claims of ineffective assistance of counsel do not establish cumulative error.

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The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive an appellant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); *see also* Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

However, the doctrine of cumulative error should not be applied to ineffective assistance of counsel claims, and the Nevada Supreme Court has stated its hesitance to do so. In McConnell v. State, when the defendant argued that his claims of ineffective assistance of counsel amounted to cumulative error, the Nevada Supreme Court plainly said about the application of the cumulative error standard to ineffective assistance claims, even after acknowledging that some courts have applied that doctrine saying, "[w]e are not convinced that this is the correct standard." McConnell v. State, 125 Nev. 243, at 259, 212 P.3d 307, at 318.

Ineffective assistance of counsel claims are a rare breed of claims in that harm is an element of the alleged error. That is to say, there can be no harmless ineffective assistance of counsel error because prejudice (or harm) is a required element of proving the ineffective assistance in the first place. Deficient performance, in and of itself, is not an error without accompanying prejudice. And if prejudice exists, a reversal of the verdict is automatic.

Since there can be no harmless ineffective assistance of counsel, it stands to reason that there cannot be cumulative error as to defendant's claims of the ineffective assistance variety. Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas Petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

If, however, this Court does determine that parts of unsuccessful ineffective assistance of counsel claims can amount to harmless individual errors, and to the extent that Defendant argues such a thing as cumulative ineffective assistance of counsel, the State submits there was no ineffective assistance.

Here, White explicitly claims cumulative error based on ineffective assistance of counsel, and requests that the Court overturn his conviction. Petition at 25. However, White was unable to demonstrate prejudice on any of his ineffective assistance of counsel claims. Thus, since none of his ineffective assistance of counsel claims are prejudicial or demonstrate error, there cannot be a finding for cumulative error. Lee v. Lockhart, 754 F.2d 277, at 279 (cited by McConnell, at FN 17).

VII. WHITE IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

This Court can resolve the issues raised by White's claims without expanding the record, as White's claims are questions of law and require no expansion of the record to properly determine. White has failed to demonstrate prejudice by any of counsel's actions,

thus all claims of ineffective assistance of counsel are without merit. The evidence necessary to resolve all of White's claims are contained entirely within the trial court record and require no further investigation or testimony. Thus, White has failed to show that an evidentiary hearing is warranted pursuant to NRS 34.770, and his request for such should be denied.

VIII. WHITE IS NOT ENTITLED TO EXPERT FEES

When requesting funds to appoint an expert, a Petitioner is required to affirmatively establish the reasonableness of the request:

> Petitioner also raises a challenge to his conviction, arguing that there was constitutional infirmity in the trial court's refusal to appoint various experts and investigators to assist him. Mississippi law provides a mechanism for state appointment of expert assistance, and in this case the State did provide expert psychiatric assistance to Caldwell at state expense. But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than "the general statement that the requested expert 'would be of great necessarius witness.'" 443 So.2d 806, 812 (1983). Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. Cf. Ake v. Oklahoma, 470 U.S. 68, 82-83, 105 S. Ct. 1087, 1096-1097, 84 L.Ed.2d 53 (1985) (discussing showing that would entitle defendant to psychiatric assistance as matter of federal constitutional law). We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought.

Caldwell v. Mississippi, 472 U.S. 320, 323, n.1, 105 S. Ct. 2633, 2637, n.1 (1985); see also Ake v. Oklahoma, 470 U.S. 68, 82-83, 105 S. Ct. 1087, 1096-1097 (1985) (issue must be a substantial trial factor in order to require appointment of defense psychiatrist).

NRS 7.135 vests this Court with discretion to provide Petitioner with the requested resources. "[T]rial courts have the inherent right . . . to order payment of such reasonable amounts as they, in their discretion, deem proper and necessary." State v. Second Judicial District Court, 85 Nev. 241, 245, 453 P.2d 421, 423-24 (1969). However, the Nevada Supreme Court has cautioned that "the law does not require an unlimited expenditure of resources in an effort to find professional support for . . . [a defendant's] theory." Sonner v. State, 112 Nev.

1328, 1340, 930 P.2d 707, 715 (1996) (cert. denied, 525 U.S. 886, 119 S. Ct. 199 (1998)); see also Pertgen v. State, 105 Nev. 282, 284, 774 P.2d 429, 430-31 (1989) (a state is not constitutionally obligated to provide a defendant as many psychiatrists as it takes to come up with one who will proclaim the defendant insane). A district court must create a record demonstrating that a defendant requesting public assistance for defense experts is indigent and that the services requested are reasonably necessary. Widdis v. Second Judicial District Court, 114 Nev. 1224, 1229-30, 968 P.2d 1165, 1168-69 (1998). The burden is upon the defendant to establish the necessity for the consumption of scarce resources. Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001) (abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011)).

White's request for funding for a forensic analysis expert to analyze his own cell phone is without merit. As set forth by the State in Section I, *supra*, the cell phone in question was White's personal cell phone; he better than anyone would have been able to assert that such messages were not sent by him to Mr. Averman. Yet, despite personal knowledge of whether the messages sent from White's phone came from White himself, White has set forth no affidavit or declaration in support of his allegations that an analysis of the phone would have shown that another party sent the messages in question, nor any indication of what such an analysis would have uncovered. White's bare allegations also do not establish that a forensic analysis would have rendered a more favorable trial outcome probable, as he cannot establish that a forensic analysis would have uncovered evidence that would have impeached Mr. Averman's testimony. Even if a forensic analysis would have uncovered evidence favorable to White, there would not be a reasonable probability that the results of the trial would have been different, as there were multiple eye witnesses to the murder of Echo Lucas. Further, any analysis of White's own phone would only corroborate the highly incriminating evidence found on Ms. Lucas's cell phone. Thus, pursuant to Hargrove and Molina, White's bare, naked assertions cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had counsel obtained a forensic examination of White's phone. As a result, White has not established reasonableness or a connection to a

significant factor as required by Widdis, and as such this Court should summarily deny the request. Widdis, 114 Nev. at 1229-30, 968 P.2d at 1168-69.

CONCLUSION

For the reasons set forth above, the State requests this court DENY White's Petition For Writ Of Habeas Corpus And Motion To Obtain Expert And Payment For Fees.

DATED this 25th day of March, 2019.

Respectfully submitted,

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BY _____
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Opposition to Defendant's Petition for Writ of Habeas Corpus and Motion to Obtain Expert and Payment for Fees, was made this 26th day of March, 2019, by Electronic Filing to:

CHRISTOPHER ORAM, ESQ.
EMAIL: contact@christopheroramlaw.com

_____
Secretary for the District Attorney's Office

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