No. 15- ___

IN THE

Supreme Court of the United States

RICHARD HABERSTROH,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Confrontation Clause applies to evidence offered by the prosecution to prove a statutory aggravating circumstance that establishes a defendant's eligibility for the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Haberstroh respectfully petitions for a writ of certiorari to review the judgment of the Nevada Supreme Court.

OPINIONS BELOW

The opinion of the Nevada Supreme Court (Pet. App. 1a) is unpublished but is available at 2015 WL 5554576. The relevant trial court proceedings and orders are unpublished.

JURISDICTION

The Nevada Supreme Court issued its opinion on September 18, 2015 and denied rehearing on December 23, 2015. Pet. App. 27a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment of the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

This case presents a recurring and consequential issue in capital cases that divides federal courts of appeals and state courts of last resort. The question is whether the Confrontation Clause applies to evidence offered by the prosecution to prove a statutory aggravating circumstance that establishes a defendant's eligibility for the death penalty.

A. Legal Background

Not all criminal defendants convicted of first-degree murder are subject to the death penalty.

Since 1976, the death penalty has been constitutionally permissible only when imposed after proceedings that also include both an "eligibility decision and [a] selection decision" that meet specific requirements. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994); *see also Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998). Therefore, each jurisdiction that has the death penalty has created a trial process that requires each of these issues to be litigated before capital punishment may be imposed.

Nevada follows the most common approach. There, death penalty trials are bifurcated between (a) a "guilt phase" where the jury determines whether the defendant committed murder, and (b) a "penalty phase" where the jury determines (i) whether the defendant is eligible for a death sentence, and, if so, (ii) whether it believes such a sentence should be imposed. *See* Nev. Rev. Stat. § 175.552(1), (3); *Hollaway v. State*, 6 P.3d 987, 996-97 (Nev. 2000). Some other jurisdictions conduct eligibility determinations during the same phase of trial in which the jury determines whether the defendant committed murder, leaving only the selection issue for the sentencing phase. *See, e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 245-46 (1988) (describing Texas regime at the time). In still other jurisdictions, death penalty trials are trifurcated between a guilt stage, an eligibility stage, and a selection stage. *See, e.g.*, 18 U.S.C. § 3593(d), (e) (federal system).

Regardless of how any given jurisdiction structures and labels its system, the substance of eligibility and selection decisions remains the same. The eligibility determination – the determination at issue here – turns on whether at least one statutorily

enumerated "aggravating circumstance" is present that makes the defendant more culpable than the ordinary defendant convicted of murder. *Tuilaepa*, 512 U.S. at 972. Because such a finding is necessary to expose the defendant to the death penalty, an aggravating circumstance "operate[s] as 'the functional equivalent of an element of a greater offense.'" *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

If the prosecution establishes eligibility for the death penalty, the issue of selection arises. The selection decision depends upon an "individualized determination [made] on the basis of the character of the individual and the circumstances of the crime" and is purely discretionary. *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis omitted). Trial courts accordingly enjoy wide latitude in this sphere, and the ordinary rules of evidence do not necessarily apply. *Id.* at 886-87.

B. Factual And Procedural History

1. Several years ago, petitioner Richard Haberstroh was convicted of first-degree murder and other crimes for abducting, sexually assaulting, and strangling a woman outside of Las Vegas. The jury also found various aggravating circumstances and sentenced him to death. The Nevada Supreme Court upheld the conviction and sentence on direct appeal. *See Haberstroh v. State*, 782 P.2d 1343 (Nev. 1989). But on state post-conviction review, the Nevada Supreme Court vacated his sentence (for reasons not relevant here) and ordered a new penalty phase. *See State v. Haberstroh*, 69 P.3d 676, 687 (Nev. 2003).

2. Petitioner's new penalty phase, conducted in 2013, is the proceeding at issue here. At that partial retrial, the State sought to prove two aggravating circumstances. First, the State alleged that petitioner had previously been convicted of a felony involving the use or threat of violence, *see* Nev. Rev. Stat. § 200.033(2)(b). Pet. App. 2a. Second, the State alleged that petitioner committed the murder while "under sentence of imprisonment," Nev. Rev. Stat. § 200.033(1), because the Nevada Supreme Court has construed that phrase to cover being on parole, and petitioner was on parole when he committed the killing here. Pet. App. 13a-14a. The Nevada Supreme Court has since found that there was insufficient evidence to support the first aggravator, *see* Pet. App. 18a-19a, so the "on parole" aggravator is the only aggravator that matters.

The State did not present any official records of conviction to prove that aggravator. Nor did it present anyone with first-hand knowledge of petitioner's parole status at the time of the murder. Pet. App. 16a. Instead, the State put two witnesses on the stand – an employee of the U.S. Marshal Service and an agent for the Bureau of Alcohol, Tobacco, and Firearms – to recite portions of two presentence investigation reports in which certain probation officers asserted that petitioner was on parole at the time of the murder. 122 Record on Appeal (ROA) 24306-07, 24340-42. One of the testifying witnesses acknowledged that "sometimes mistakes are made" in these types of reports. 122 ROA 24314. And he conceded that he had no way to know whether the reports here were actually correct. "I can only go by what's in the report[s]," he explained. *Id.*

Both before and after the State introduced this hearsay evidence, petitioner objected that the Confrontation Clause prohibited its admission without putting the authors of the reports on the stand. *See* 112 ROA 22315-30 (Dft's Motion to Prohibit Testimonial Hearsay Statements in the Penalty Phase); 116 ROA 23198-99 & 117 ROA 23296-98 (Dft's Proposed Jury Instructions and Objections). The trial court stated that it "tend[ed] to agree with the defense" that the Confrontation Clause should apply to evidence offered to prove aggravating facts. 113 ROA 22524. But because a bare majority of the Nevada Supreme Court had held several years earlier that the Clause did not apply in this setting, *see Summers v. State*, 148 P.3d 778, 781-84 (Nev. 2006) (reproduced at Pet. App. 28a-56a), the trial court was compelled to reject petitioner's objections. 113 ROA 22524; 125 ROA 24999.

The jury found that that the State proved the "on parole" aggravator, and petitioner was again sentenced to death.

3. The Nevada Supreme Court affirmed. As pertinent here, the court rejected petitioner's confrontation claim, reaffirming its earlier holding in *Summers* that the Confrontation Clause does not apply to "hearsay evidence related to the eligibility prong of Nevada's death penalty scheme." Pet. App. 15a-16a. The Nevada Supreme Court also held that the hearsay evidence concerning petitioner's parole status at the time of the murder supplied sufficient evidence to support the "on parole" aggravator. Pet. App. 17a.

4. Petitioner sought rehearing, but the Nevada Supreme Court denied the petition. Pet. App. 27a.

REASONS FOR GRANTING THE WRIT

Thirty-one states and the United States authorize the imposition of capital punishment. In numerous decisions over the past few decades, this Court has defined and clarified the procedural rules the Constitution requires when the prosecution seeks this ultimate sanction. In recent years, though, a substantial split of authority has developed regarding whether the Confrontation Clause applies to evidence that is offered by the prosecution to establish eligibility for the death penalty.

Given the extent of the split and the "fundamental" character of the rights at stake, *Pointer v. Texas*, 380 U.S. 400, 403 (1965), this issue calls for the Court's immediate attention. And this Court should hold that the Confrontation Clause does apply to evidence introduced to establish eligibility for the death penalty.

I. Courts Are Intractably Divided Over Whether The Confrontation Clause Applies To Evidence Offered To Prove Eligibility For The Death Penalty.

1. Two state supreme courts and one federal court of appeals hold that the Confrontation Clause's protections do not apply to evidence offered to establish eligibility for the death penalty.

In the decision at issue here, the Nevada Supreme Court reaffirmed its position – first articulated in *Summers v. State*, 148 P.3d 778, 783 (Nev. 2006) (reproduced at Pet. App. 28a-56a) – that the Confrontation Clause does not apply to evidence offered "to establish eligibility for the death penalty." Pet. App. 15a. The Nevada Supreme Court based its

holding on *Williams v. New York*, 337 U.S. 241 (1949), in which this Court held that a capital defendant did not have the right to confront evidence offered to influence the judge's *selection* decision. *See Summers*, Pet. App. 35a-37a. In the Nevada Supreme Court's view, that decision also applies to evidence offered to prove *eligibility* for the death penalty. *Id.* 37a-38a.[1]

The Idaho Supreme Court likewise holds categorically that "the Confrontation Clause does not apply at [capital] sentencing proceedings." *State v. Dunlap*, 313 P.3d 1, 34 (Idaho 2013). Rejecting a defendant's argument that the trial court erred in allowing the prosecution to introduce two mental health reports to prove two aggravating circumstances, the Idaho Supreme Court ruled that a capital defendant need never be afforded "the opportunity to confront and cross-examine live witnesses in his sentencing proceedings." *Id.* (quoting *Sivak v. State*, 731 P.2d 192, 211 (Idaho 1986)).[2]

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[1] Between *Summers* and this case, the Nevada Supreme Court has repeatedly "affirmed *Summers*' holding" concerning evidence "related to the eligibility prong of Nevada's death penalty scheme." Pet. App. 15a-16a; *see Mendoza v. State*, 2012 WL 1922666, at *8-9 (Nev. May 23, 2012) (unpublished), *cert. denied*, 133 S. Ct. 951 (2013); *Maestas v. State*, 275 P.3d 74, 86

[2] The Idaho Supreme Court claimed that its holding was consistent with *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007), *cert. denied*, 552 U.S. 1144 (2008). But that case involved evidence "relevant only to penalty selection." *Id.* at 335. The Fifth Circuit did not consider whether the Confrontation Clause applies to evidence offered to establish death-eligibility.

The Eleventh Circuit also has held, in the context of evidence offered to prove death-eligibility, that "a defendant does not have a right to confront hearsay declarants at a capital sentencing hearing." *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1074 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 893 (2014); *see also id.* at 1073-77. Like the Nevada and Idaho Supreme Courts, the Eleventh Circuit reads *Williams* as categorically suspending the Confrontation Clause from "capital sentencing proceedings." *Id.* at 1073.[3]

2. The majority of courts that have addressed the issue have held the opposite. Those courts have concluded – as the dissent in *Summers* would have held – that "the Sixth Amendment right to confrontation applies to evidence presented during the eligibility phase of a capital sentencing hearing." *Summers*, 148 P.3d at 787 (Rose, C.J. concurring in part and dissenting in part).

Six state courts of last resort have adopted this position. Five of them adopted the position in the course of finding Confrontation Clause violations in the cases before them. *See State v. Robinson*, 796 P.2d 853, 861-62 (Ariz. 1990) (finding violation), *cert. denied*, 498 U.S. 1110 (1991) & *State v. McGill*, 140 P.3d 930, 942 (Ariz. 2006) (reciting rule), *cert. denied*,

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[3] Like the Idaho Supreme Court, the Eleventh Circuit claimed that its decision was consistent with *Fields*, as well as other federal appellate cases. *Muhammad*, 733 F.3d at 1074. But the Eleventh Circuit overlooked that all of those cases involved only *selection*, not *death-eligibility*, evidence.

549 U.S. 1324 (2007);[4] *Rodgers v. State*, 948 So. 2d 655, 663-65 (Fla. 2006), *cert. denied*, 552 U.S. 833 (2007);[5] *Pitchford v. State*, 45 So. 3d 216, 251, 252 & n.100 (Miss. 2010), *cert. denied*, 563 U.S. 939 (2011); *State v. Bell*, 603 S.E.2d 93, 115-16 (N.C. 2004), *cert. denied*, 544 U.S. 1052 (2005) & *State v. Nobles*, 584 S.E.2d 765, 767-72 (N.C. 2003); *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005), *cert. denied*, 548 U.S. 926 (2006) & 548 U.S. 927 (2006).[6] The sixth court, the Kansas Supreme Court, held in an opinion providing guidance for a remand that the Confrontation Clause categorically applies during "the penalty phase of a capital proceeding." *State v. Carr*, 331 P.3d 544, 723-24 (Kan. 2014), *cert. granted in part and denied in part*, 135 S. Ct. 1698 (2015) (Nos. 14-450 & 14-6810).[7]

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[4] *See also State v. Chappell*, 236 P.3d 1176, 1187 (Ariz. 2010), *cert. denied*, 562 U.S. 1227 (2011) (reaffirming rule); *State v. Greenway*, 823 P.2d 22, 28 n.1 (Ariz. 1991) (same).

[5] *See also Braddy v. State*, 111 So. 3d 810, 859-60 (Fla. 2012) (reaffirming that right of confrontation applies to death-eligibility evidence), *cert. denied*, 134 S. Ct. 275 (2013).

[6] *See also Jackson v. State*, 2010 WL 114409, at *5 (Tex. Crim. App. Jan. 13, 2010) (unpublished) (reaffirming *Russeau*), *cert. denied*, 562 U.S. 844 (2010); *Smith v. State*, 297 S.W.3d 260, 276-77 (Tex. Crim. App. 2009) (same), *cert. denied*, 559 U.S. 975 (2010).

[7] The State of Kansas challenged this holding in its petition for certiorari to the extent it applied to "the 'selection' phase of capital sentencing proceedings." Pet. in No. 14-450 at i, 21-27 (emphasis omitted). The State did not challenge the holding as applied to evidence offered to prove death-eligibility. This Court did not grant certiorari on the issue. 135 S. Ct. 1698 (2015).

While holding that the Confrontation Clause does not apply to "selection" evidence, the Fourth Circuit also suggested recently that the right does apply during "the guilt *and eligibility* phases of trial," which it said involve "constitutionally significant factual findings." *United States v. Umaña*, 750 F.3d 320, 347-48 (4th Cir. 2014) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 2856 (2015). And the Solicitor General relied and elaborated upon this distinction in this Court. *See* Br. in Opp. at I, 20-23, *Umaña v. United States*, No. 14-602.

Numerous federal district courts also have held that the Confrontation Clause applies to evidence offered to prove a defendant's eligibility for the death penalty. *See, e.g.*, *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1222 (D. Colo. 2007); *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006); *United States v. Bodkins*, 2005 WL 1118158, at *4-5 (W.D. Va. May 11, 2005); *United States v. Jordan*, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005).

The dissent in *Summers* summarized the reasoning that drives the majority view. Courts in the majority maintain that *Williams* does not apply to eligibility evidence because subsequent cases make clear that such evidence is offered to prove "a new finding of fact" necessary to impose the death penalty, and post-*Williams* case law establishes that the full panoply of constitutional protections applies in this circumstance. *Summers*, Pet. App. 49a (quoting *Specht v. Patterson*, 386 U.S. 605, 608-10 (1967), and citing *Ring v. Arizona*, 536 U.S. 584 (2002)). The *Summers* dissent also stressed that "*Williams* long predates [this] Court's many decisions

since 1976 that recognize that death is different" and that it calls for greater procedural safeguards than in ordinary sentencing proceedings. *Id.* 47a.

3. Courts on both sides of this conflict have recognized that "there is a great deal of disagreement over whether and to what extent" the Confrontation Clause applies to evidence offered to prove death eligibility. *United States v. Mills*, 446 F. Supp. 2d 1115, 1128 (C.D. Cal. 2006); *Pitchford*, 45 So. 3d at 251-52 ("While we are aware of federal authority that the Sixth Amendment does not apply at [capital] sentencing proceedings, this Court's precedent holds otherwise." (footnote omitted)); *State v. Maestas*, 299 P.3d 892, 974 (Utah 2012) (noting "that other courts that have addressed this issue have reached conflicting results," but not deciding the issue itself). One court summed up "the legal landscape" as "a quagmire." *Muhammad v. Tucker*, 905 F. Supp. 2d 1281, 1296 (S.D. Fla. 2012), *rev'd sub nom. Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065 (11th Cir. 2013).

The split will not resolve itself. The Nevada Supreme Court has insisted that it will not extend confrontation rights to sentencing "[a]bsent controlling authority" from this Court, *Summers*, Pet. App. 37a, and no other court has been willing to reexamine its views as the split has widened. Only this Court can secure uniformity on the issue.

II. The Question Presented Is Extremely Important.

The conflict in the lower courts over the applicability of the Confrontation Clause to evidence offered to establish death eligibility is a matter of great consequence.

Time and again, this Court has granted certiorari to determine how a constitutional right enumerated in the Bill of Rights or crystallized in this Court's case law applies in death penalty proceedings. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002) (right to jury trial); *id.* (right to have all elements proven beyond a reasonable doubt); *Simmons v. South Carolina*, 512 U.S. 154 (1994) (right to jury instructions concerning future dangerousness); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (right to question jurors regarding possible bias); *Bullington v. Missouri*, 451 U.S. 430 (1981) (protection against double jeopardy); *Estelle v. Smith*, 451 U.S. 454, 461-63 (1981) (right against self-incrimination).

The right to confrontation is every bit as important as these other rights. The Clause "ensure[s] reliability of evidence" by enabling defendants to challenge prosecutorial evidence "in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). This Court has described cross-examination, in turn, as "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted). It allows defendants to probe and expose exaggerated, mistaken, or fabricated assertions that otherwise would escape detection. And when eligibility for the death penalty is at issue, this truth-distilling function is especially critical because there is a need for "a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

Clarifying the substantive constitutional rules governing capital sentencing proceedings is essential not just to protect defendants' rights, but also to conserve judicial and administrative resources. The sooner this Court resolves whether the Confrontation Clause applies to evidence offered to prove eligibility for the death penalty, the sooner courts and lawyers can respond accordingly during trials and preclude this issue from being continually litigated on appeal and in post-conviction proceedings.

III. This Case Is An Excellent Vehicle For Resolving The Conflict.

This Court has recently given close consideration to two other petitions asking the Court to resolve whether the Confrontation Clause applies to evidence offered to prove death-eligibility. In *United States v. Umaña*, 750 F.3d 320 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2856 (2015) (No. 14-602), this Court rescheduled and then relisted the case before denying certiorari. And in *State v. Dunlap*, 313 P.3d 1 (Idaho 2013), *cert. denied*, 135 S. Ct. 355 (2014) (No. 13-1315), this Court called for the record before denying certiorari. But in *Umaña*, as noted above, the Fourth Circuit had ruled only that the Confrontation Clause did not apply to *selection* evidence; it did not actually resolve whether the Clause applied to *eligibility* evidence. *See supra* at 10. And in *Dunlap*, the State pointed to a host of potential vehicle problems, including that the evidence at issue was purportedly offered – as in *Umaña* – only for selection purposes. *Dunlap* Br. in Opp. 15-16. The State also maintained that that the petitioner failed to raise his confrontation claim properly in the state courts and that even if the Confrontation Clause applied, it

would not have mattered because the evidence at issue was not offered for the truth of the matter asserted. *See id.* 9-15, 19-21.

No such problems exist here. As the Nevada Supreme Court explained, the prosecution introduced the presentence reports at issue here to satisfy "the *eligibility* prong of Nevada's death penalty scheme" – specifically, the "on parole" aggravator. Pet. App. 15a-16a (emphasis added). Furthermore, petitioner squarely argued in the trial court and Nevada Supreme Court that the Confrontation Clause applied to the evidence the State intended to offer to prove death-eligibility, *see supra* at 5, and the Nevada Supreme Court rejected the argument on the merits without noting any procedural defects, Pet. App. 15a-16a. And the State has never disputed – nor could it – that *if* the Confrontation Clause applied here, the recitation of the reports without putting the authors on the stand violated the Clause. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (Confrontation Clause applies to testimonial evidence); *United States v. Johnson*, 349 Fed. App'x 387 (11th Cir. 2009) (unpublished) (per curiam) (assertions in presentence investigation reports are testimonial).[8]

Finally, it is worth noting that the "on parole" aggravator that the evidence here was offered to

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[8] It was clear long before *Crawford* that the Confrontation Clause applied to assertions in reports such as the ones at issue here. *See, e.g., Kirby v. United States*, 174 U.S. 47, 53-55 (1899) (Confrontation Clause barred statements in "a record showing [a] conviction" from being introduced without putting declarants on the stand).

prove is the sole aggravator on which petitioner's death sentence rests. So if petitioner prevails on his claim that the State violated his confrontation rights in proving that aggravator, no "reweighing" of other aggravating circumstances against the mitigating circumstances is necessary or possible. Petitioner's death sentence would have to be vacated.

IV. The Nevada Supreme Court's Holding Is Incorrect.

1. In a series of cases, this Court has held that the protections against double jeopardy, *Bullington v. Missouri*, 451 U.S. 430, 446 (1981), the privilege against self-incrimination, *Estelle v. Smith*, 451 U.S. 454, 463 (1981), and the right to an impartial jury, *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992), all apply with respect to death-eligibility determinations. And most recently, this Court held in *Ring v. Arizona*, 536 U.S. 584 (2002), that the Sixth Amendment's jury-trial guarantee and the constitutional requirement of proof beyond a reasonable doubt apply to evidence offered to prove eligibility for the death penalty. This is because aggravating factors expose defendants to heightened punishment and thus "operate as 'the functional equivalent of an element of a greater offense.'" *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

The Sixth Amendment's Confrontation Clause should similarly extend to the eligibility phase of death penalty proceedings. Just like these other constitutional safeguards, the Confrontation Clause is a "fundamental" rule governing the proof of elements of crimes. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The prosecution should not be able to

expose a defendant to the death penalty without satisfying the Clause's requirements.

Indeed, when state law locates the jury's death-eligibility determination in the guilt phase – by creating a "capital murder" offense, for example – defendants are already afforded the full range of Sixth Amendment trial rights, including the right to confrontation. *See Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988) (describing state systems that determine eligibility at the guilt phase). Those Sixth Amendment protections should not disappear when a state law like Nevada's shifts the eligibility determination to a sentencing proceeding. Just as it makes no difference to "the jury-trial guarantee of the Sixth Amendment" whether statutory aggravators are called "elements of the offense, sentencing factors, or Mary Jane," *Ring*, 536 U.S. at 610 (Scalia, J., concurring), the Confrontation Clause's applicability should not turn on whether death-eligibility is determined at a "guilt" or a "sentencing" phase of a capital trial.

Contrary to the Nevada Supreme Court's assertion, *see Summers*, Pet. App. 35a-38a, this conclusion is not at odds with this Court's decision in *Williams v. New York*, 337 U.S. 241 (1949). In that case, this Court held that the right of confrontation did not apply to information supplied to aid a judge's determination whether to sentence a defendant to death. *Id.* at 251-52. But in New York in the 1940's, a conviction for first-degree murder, standing alone, subjected a defendant to capital punishment. *See id.* at 242 n.2; *Specht v. Patterson*, 386 U.S. 605, 606-07 (1967). The evidence at issue in *Williams* thus pertained only to *selection* – that is, whether to

impose a sentence already "within statutory limits." *Apprendi*, 530 U.S. at 481-82 (emphasis omitted).

Williams has nothing to say about the "radically different situation" where the prosecution offers evidence at a sentencing proceeding in which "a new finding of fact" is necessary to establish *eligibility* for heightened punishment. *Specht*, 386 U.S. at 608. In that situation, this Court has distinguished *Williams* and held a defendant has a right to "be confronted with the witnesses against him" when the prosecution offers evidence to increase punishment from a term of years to life imprisonment. *Id.* at 610. The same should be true when increasing a sentence from life in prison to death. *See Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) (eligibility determinations require "differ[ent] constitutional treatment" from selection determinations); *Bullington*, 451 U.S. at 446 (likening the sentencing regime in *Specht* to an eligibility determination in a modern death-penalty regime).

2. Even apart from the formal logic of the *Ring/Apprendi* rule concerning findings of fact that expose defendants to heightened punishment, this Court's jurisprudence makes clear that confrontation rights should apply to evidence offered to prove death-eligibility. The Confrontation Clause applies, by its terms, to "all criminal prosecutions," U.S. Const. amend. VI, and this Court has held that a death-eligibility proceeding is tantamount to "a trial on the issue of guilt and innocence." *Bullington*, 451 U.S. at 444; *accord id.* at 446. Furthermore, "[b]ecause the death penalty is unique 'in both its severity and its finality,'" this Court has repeatedly "recognized an acute need for reliability in capital

sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998) (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.)); *see also Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (noting the "heightened need for reliability in the determination that death is the appropriate punishment" (internal quotation marks omitted)); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stressing that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

As discussed above, there is no tool for ensuring the reliability of prosecutorial evidence more vital than the right of confrontation. *See supra* at 12-13. The Clause requires testimonial statements to be given in open court subject to "testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). And centuries of experience have shown that this process "is much more conducive to the clearing up of truth" than hearsay evidence. 3 William Blackstone, Commentaries on the Laws of England *373 (1768); *see also Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (confrontation allows jury to determine whether testimonial assertions are "worthy of belief"); Matthew Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better"). This safeguard should not be denied where defendants most need it – during proceedings determining whether they will be sentenced to death.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 13, 2016

APPENDIX A

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority, SCR 123.

IN THE SUPREME COURT OF
THE STATE OF NEVADA

RICHARD HABERSTROH A/K/A RICKY HICKEY A/K/A PATRICK JAMES HICKEY A/K/A GERALD HABERSTROH A/K/A LEE DIVINCENT, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 88913-9 **FILED** SEP 18 2015 Tracie K. Lindeman Clerk of Supreme Court By: *S. Young* Deputy Clerk

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Early in the morning on July 21, 1986, appellant Richard Haberstroh abducted a young woman, Donna Kitowski, from a grocery store parking lot in Las Vegas. He took her into the desert outside the city, robbed her, sexually assaulted her, and strangled her with a ligature. The strangulation caused irreparable brain damage and ultimately Kitowski's death. A jury convicted Haberstroh of first-degree murder, first-degree kidnapping, sexual assault, and robbery, each with the use of a deadly weapon, and sentenced him to

death. His judgment of conviction was affirmed on direct appeal. *See State v. Haberstroh*, 105 Nev. 739, 782 P.2d 1343 (1989). Haberstroh eventually obtained relief from the death sentence and a second penalty hearing as the result of post-conviction proceedings. *State v. Haberstroh*, 119 Nev. 173, 69 P.3d 676 (2003). At the second penalty hearing, the jury found two circumstances aggravated Kitowski's murder – (1) the murder was committed while Haberstroh was under a sentence of imprisonment and (2) he had been previously convicted of a felony involving the use of threat of violence – and, concluding that the mitigating circumstances did not outweigh the aggravating circumstances, sentenced him to death. This appeal followed.

Issues relating to jurors

First, Haberstroh argues that the district court erred by granting the prosecution's challenges for cause against two jurors because their views on the death penalty did not disqualify them from serving on the jury. "The test for evaluating whether a juror should have been removed for cause is whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Weber v. State*, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (internal quotation marks omitted).

With respect to prospective juror Anwar, in her questionnaire she expressed her belief in the death penalty but also indicated her discomfort with it; she expressed that the appropriateness of the death penalty depended on the nature of the case and that

life in prison was the better option. Her answers during voir dire reflect a stronger opposition to the death penalty, where she indicated that she would not consider the death penalty because she did not believe "in killing someone as an option for punishment," although she acknowledged that if the crime was significant enough – something akin to mass murder – she might consider the death penalty. When pressed by the district court as to whether she could consider the death penalty, she responded that she could not. As to prospective juror Gregan, he expressed in his questionnaire that he would consider the death penalty where the crime was severe but would not automatically vote for or against it. During voir dire, when asked whether he could consider all possible punishments, Gregan said that he would prefer not to sit on a death penalty jury and repeatedly expressed discomfort with the death penalty. When pressed by the prosecutor and the district court as to whether he could consider the death penalty, he responded that he could not. We conclude that the district court did not abuse its discretion by excusing these two prospective jurors for cause. *See United States v. Gabrion*, 719 F.3d 511, 528 (5th Cir. 2013) (concluding that trial court did not abuse its discretion by excluding prospective juror who equivocated as to whether he could consider death penalty); *Walker v State*, 635 S.E.2d 740, 746-47 (Ga. 2006) (same); *State v. Tinsley*, 143 S.W.3d 722, 733 (Mo. Ct. App. 2004) (same).

Second, Haberstroh argues that the district court abused its discretion by dismissing juror Henshaw near the end of trial, over his objection, where there was no misconduct and juror Henshaw indicated that

he could be fair and impartial after revealing to the district court that he had been contacted the previous day by an investigator working on behalf of Henshaw's nephew who was a defendant in an out-of-state capital prosecution. When asked if his ability to be fair and impartial in this case was affected by his nephew's circumstances, Henshaw initially responded that he did not believe that it would affect his ability to be fair and impartial but that it caused him to "search [his] soul a little bit more." Henshaw made several subsequent comments about how the information about his nephew affected him but maintained that he could remain fair and impartial. In excusing him, the district court concluded that no misconduct had occurred but acknowledged that Henshaw "did seem emotional in talking about these matters" and had "obviously" thought about his nephew's case and what could potentially happen to him. Noting Henshaw's representation that he could consider all the sentencing options, the district court nevertheless expressed concern that his performance as a juror would be affected or influenced by emotions and his connection to his nephew's case. Given the district court's broad discretion regarding for-cause challenges, *see Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001) (observing that trial court enjoys broad discretion in ruling on for-cause challenges because those rulings involve factual determinations), and its ability to observe Henshaw's demeanor during the inquiry, *see id.* (noting that "[t]he trial court is better able to view a prospective juror's demeanor than a subsequent reviewing court"), we conclude that the district court ruling is supported by the record and there was no abuse of discretion in removing

Henshaw.[1] *See* NRS 16.080 (providing that "[a]fter the impaneling of the jury and before the verdict, the court may discharge a juror upon a showing of . . . any other inability to perform the juror's duty"); NRS 175.071 (providing that "[i]f, before the conclusion of the trial, and there being no alternate juror called or available, a juror dies, or becomes disqualified or unable to perform the juror's duty, the court may duly order the juror discharged").

Third, Haberstroh argues that misconduct occurred when one or more jurors failed to acknowledge during jury selection that they did not believe that a life-without-parole sentence meant that a defendant would not be eligible for parole. As evidence of this misconduct, he suggests that two notes sent out during deliberations that questioned the meaning of a life-without-parole sentence contradicted the jurors' representations in their questionnaires that they understood that they must assume that a life-without-parole sentence meant the defendant would not be released on parole. In response to the notes, the district court directed the jurors to consult relevant instructions explaining the sentencing options. Because Haberstroh concurred with the district court's response and made no assertion of misconduct below,

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[1] We reject Haberstroh's contention that reversal is warranted because the alternate juror who replaced Henshaw was unfavorably disposed to him. He did not challenge the alternate juror for cause on any basis and therefore cannot now complain that she was unqualified or unsuitable to serve as a juror. *See Moore v. State*, 122 Nev. 27, 126 P.3d 508 (2006) ("Failure to object during trial generally results in a waiver thereby precluding appellate consideration of the issue.").

we review his claim for plain error. *See Saletta v. State*, 127 Nev., Adv. Op. 34, 254 P.3d 111, 114 (2011); *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). Merely requesting the district court to explain the meaning of a life-without-parole sentence is not convincing evidence of misconduct and absent some indication of an intentional misrepresentation during voir dire, Haberstroh's allegation is nothing more than supposition. *See Maestas v. State*, 128 Nev., Adv. Op. 12, 275 P.3d 74, 85 (2012) ("'[W]here it is claimed that a juror has answered falsely on voir dire about a matter of potential bias or prejudice,' the critical question is whether the juror intentionally concealed bias." (quoting *Lopez v. State*, 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989))). Accordingly, he has not shown error that is unmistakable from a casual inspection of the record. *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (defining "plain" error).

Fourth, Haberstroh argues that the voir dire process was unfair because the district court rejected his request to alternate between the prosecution and the defense with respect to who first questioned each prospective juror on the ground that the prosecution questions the prospective jurors first "under the law." While nothing in the statute or this court's jurisprudence requires that the prosecution be afforded the first opportunity to query prospective jurors, *see* NRS 175.031, Haberstroh articulates no specific prejudice from the district court's ruling and therefore, we conclude that a new penalty hearing is not warranted on this ground. *See Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937-38 (1978)

(acknowledging that scope and manner of voir dire falls within the district court's sound discretion and that discretion is afforded considerable latitude on review). We also reject Haberstroh's contention that voir dire was unfair because the district court improperly limited his inquiry into the prospective jurors' willingness to impose a life sentence, as the record shows that he was able to query them about whether they could consider a sentence of life with the possibility of parole. *See Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006) (noting that the scope of voir dire rests with the district court's discretion and its decisions are entitled to considerable deference).

Challenges to the fairness of the penalty hearing

Haberstroh contends that his penalty hearing was unfair because the jury was deprived of the opportunity to consider an appropriate sentence. In this, he makes several arguments that we have previously rejected, including that the district court should have granted his request to exclude witnesses from the courtroom during the testimony of other witnesses, *Witter v. State*, 112 Nev. 908, 917, 921 P.2d 886, 892 (1996) (holding that the exclusionary rule does not apply to the penalty phase of a capital trial), *abrogated on other grounds by Nunnery v. State*, 127 Nev., Adv. Op. 69, 263 P.3d 235 (2011); the district court erred by denying his motion to bifurcate his penalty hearing, *see Weber v. State*, 121 Nev. 554, 584, 119 P.3d 107, 128 (2005) (holding that the district court is not obligated to bifurcate the penalty hearing); and his constitutional due process rights were violated by allowing the State to present the final closing

argument, *see Blake v. State*, 121 Nev. 779, 800, 121 P.3d 567, 580 (2005) (rejecting argument that due process concerns require allowing the defense to argue last at the penalty hearing). Haberstroh's arguments provide no compelling reason to abandon our prior decisions. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (explaining that under stare decisis doctrine, this court will not overturn precedent absent compelling reason).

Haberstroh next contends that he was unfairly prejudiced by the prosecution's introduction of "other matter" evidence, *see* NRS 175.552(3), including his juvenile and adult criminal history along with uncharged misconduct evidence including allegations that he sexually assaulted three other women. Haberstroh's complaint concerning the "other matter" evidence based on hearsay lacks merit as hearsay is allowed in a capital penalty hearing as long as the evidence is reliable and relevant, and its probative value is not substantially outweighed by the danger of unfair prejudice. *Summers v. State*, 122 Nev. 1326, 1332 n.17, 148 P.3d 778, 783 n.17 (2006). He further argues that much of the "other matter" evidence was highly suspect, impalpable, and stale. He refers to his juvenile and adult criminal history that included offenses for which he was not convicted or the charges were dismissed, specifically noting the evidence that he sexually assaulted two women and evidence linking him to a number of thefts from women that occurred approximately a month after Kitowski's murder. Evidence of uncharged crimes is relevant and "may be admitted at a capital penalty hearing as other matter evidence" because a sentencing decision "should be

based on the entirety of a defendant' character, record, and the. circumstances of the offense, but it may be excluded from a capital penalty hearing if it is impalpable or highly suspect." *Nunnery*, 263 P.3d at 249 (internal quotation marks and citations omitted). Although much of Haberstroh's criminal history references offenses and incidents that occurred decades ago, before his current lengthy incarceration for Kitowski's murder, it is no less relevant to the issue of his character and record and presenting that evidence did not render the proceedings unfair.

Jury instructions

Haberstroh challenges two jury instructions related to the definition and scope of mitigating circumstances and the district court's decision to strike his argument concerning the deliberative process and failure to give a curative instruction.

Haberstroh first contends that the "moral culpability" language in the jury instruction defining mitigating circumstances should not have been included because it erroneously conveyed to the jury that mitigating circumstances must relate to the offense and explain or justify the offense. This court considered a similar instruction in *Watson v. State* and explained that "'the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant [mitigating] evidence.'" 130 Nev. Adv., Op. 76, 335 P.3d 157, 173 (2014) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). "A reasonable likelihood is more than a mere possibility that the jury misunderstood

the law, but a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." *Id.* (internal quotation marks omitted).

We conclude that there is not a reasonable likelihood that the jury applied the mitigation instruction in a way that limited its consideration of relevant mitigating evidence for three reasons. First, although the first paragraph of the instruction used in this case uses the "moral culpability" language addressed in *Watson*, the instruction allowed the jury to consider as a mitigating circumstance "any desire to extend mercy to the [d]efendant." Second, because all of the mitigating circumstances found by the jurors related to Haberstroh's character or background, the jurors clearly understood that they could consider mitigating circumstances unrelated to the crime itself. Finally, nothing in the prosecutor's arguments suggested to the jury that it could not consider evidence of Haberstroh's character and record as mitigating evidence.

Haberstroh contends that the following jury instruction was erroneous because it implied that the mitigating circumstances had to be related to the crime rather than any reason for a sentence less than death.

> *Murder of the first degree may be mitigated* by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime. Defendant submits the

> following mitigating circumstances support a sentence less than death.

He proposed an alternative instruction that replaced "Murder in the first degree" with "A sentence of death." We conclude that the district court did not abuse its discretion by giving the instruction. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). The language tracks the language found in NRS 200.035 (circumstances mitigating first-degree murder), and does not imply that mitigation is limited to the circumstances of the offense.

Haberstroh next argues that the district court erred by striking his explanation of the weighing process during opening statements and failing to offer a curative instruction because it was a correct statement of the law under *Evans v. State*, 117 Nev. 609, 636, 28 P.3d 498, 517 (2001). Defense counsel informed the jurors that if any one juror finds that the aggravators do not outweigh the mitigating circumstances, they deliberate on the options of life with or without the possibility of parole. At the prosecution's request, the district court struck that portion of counsel's argument as an incorrect statement of law and advised the jury that it would be instructed later in the proceedings. The district court later acknowledged that defense counsel's opening statement was correct but declined to give counsel's proposed curative instruction and instead instructed the jury on the deliberative process in accordance with *Evans.* While the district court erred by striking the challenged comments, Haberstroh suffered no prejudice because the jury was correctly instructed before deliberations began and jurors are presumed to

follow their instructions. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001).[2]

Aggravating circumstances

Haberstroh argues that the two aggravating circumstances found – he was under a sentence of imprisonment when he murdered Kitowski and he had a prior conviction for a felony involving the use or threat of violence – are invalid.

Under sentence of imprisonment

Haberstroh argues that the under-sentence-of-imprisonment aggravating circumstance is invalid because the State was precluded from seeking it. In this, he contends that the trial court's decision in his prior penalty hearing that the aggravating circumstance did not apply to persons on parole was equivalent of an acquittal on the aggravating circumstance and therefore double jeopardy precluded the State from seeking it in the second penalty hearing. Because Haberstroh did not challenge the aggravating circumstance on this ground below, we review for plain error affecting his substantial rights. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). We conclude that the State's use of the under-sentence-of-imprisonment aggravating circumstance did not violate double jeopardy principles where the trial court in the first penalty hearing

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[2] Haberstroh asserts that the prosecutor committed misconduct by misrepresenting the law regarding the weighing process at the eligibility phase of the jury's sentence determination. Haberstroh suffered no prejudice because the jury was correctly instructed on the law. Therefore, no relief is warranted on this claim.

dismissed the aggravating circumstance based on a misunderstanding of the law. *See Poland v. Arizona*, 476 U.S. 147, 149-51 (1986). Therefore, Haberstroh has not demonstrated plain error.

Haberstroh next argues that the under-sentence-of imprisonment aggravating circumstance is invalid because it violates ex post facto principles as this court did not acknowledge that it applied to persons on parole until years after Kitowski's murder. Because he did not object to the aggravating circumstance on this ground below, his claim is reviewed for plain error affecting his substantial rights. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. We have recognized that the Supreme Court has applied ex post facto principles "to the judicial branch through the Due Process Clause, which precludes the judicial branch 'from achieving precisely the same result' through judicial construction as would application of an ex post facto law." *Stevens v.* Warden, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998) (quoting *Bouie v.* Columbia, 378 U.S. 347, 353-54 (1964)). "This 'judicial ex post facto' prohibition prevents judicially wrought retroactive increases in levels of punishment in precisely the same way that the Ex Post Facto Clause prevents such changes by legislation." *Id.* Haberstroh points to *Parker v.* State, 109 Nev. 383, 393, 849 P.2d 1062, 1068 (1993), and *Geary v. State*, 110 Nev. 261, 266, 871 P.2d 927, 930 (1994), as the first cases where this court established that the under-sentence-of-imprisonment aggravating circumstance included persons on parole and suggests that because they were decided after the murder in this case, applying them to him would be an ex post facto violation. In concluding that NRS 200.033(1)

encompasses probationers, *Parker* relied on two cases – *Grant v. State*, 99 Nev. 149, 659 P.2d 878 (1983), and *Adams v. Warden*, 97 Nev. 171, 626 P.2d 259 (1981) – both of which predated Kitowski's murder (1986) and Haberstroh's first trial (1987). In those cases, we concluded that a grant of probation is a suspension of execution of a state prison sentence, not a suspension of the sentence; therefore a person on probation, although not incarcerated, is under a sentence of imprisonment. *Grant*, 99 Nev. at 150, 659 P.2d at 878-79; *Adams*, 97 Nev. at 172, 626 P.2d at 260. While *Grant* and *Adams* do not concern NRS 200.033(1), they were instructive as to the meaning of "under a sentence of imprisonment" at the time Haberstroh murdered Kitowski. Based on our reasoning in *Grant* and *Adams* and the use of NRS 200.033(1) with respect to probationers in other capital cases tried around the time of Kitowski's murder, *see, e.g., Browning v. State*, 124 Nev. 517, 539, 188 P.3d 60, 75 (2008); *Bejarano v. State*, 122 Nev. 1066, 1070, 146 P.3d 265, 268 (2006); *Nevius v. State*, 101 Nev. 238, 243, 699 P.2d 1053, 1056 (1985), the meaning of "under sentence of imprisonment" expressed in *Parker* was not "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'" *Stevens*, 114 Nev. at 1221, 969 P.2d at 948 (quoting *Bouie*, 378 U.S. at 354), and therefore applying the aggravating circumstance consistent with *Parker* does not violate judicial ex post facto principles. Therefore, Haberstroh has not demonstrated plain error.[3]

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[3] We reject Haberstroh's contention that the under-sentence-

Haberstroh next asserts that the under-sentence-of-imprisonment aggravating circumstance fails to perform the narrowing function required by the Eighth Amendment. He encourages this court to overrule *Parker* and hold that this aggravating circumstance does not apply to parolees and probationers. We decline to overrule *Parker, see Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008), and further conclude that Haberstroh is not entitled to relief as he fails to adequately explain why the aggravating circumstance fails to perform the constitutional narrowing function where it applies to a discrete group of defendants.

Haberstroh further contends that the prosecution. established the under-sentence-of-imprisonment aggravating circumstance through substantial hearsay over his objection, leaving him unable to cross-examine his accusers as to the allegation that he was on parole when Kitowski was murdered. He suggests that the Sixth Amendment right to confrontation should apply to capital penalty trials, "especially when the evidence at issue applies to an aggravating circumstance that is necessary to establish eligibility for the death penalty." He urges this court to reconsider its contrary decision in *Summers v. State*, 122 Nev. 1326, 1327, 148 P.3d 778, 779 (2006), "insofar as it concerns aggravators and the death penalty." We have affirmed *Summers*' holding, including challenges to the admission of hearsay evidence related to the eligibility prong of

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of-imprisonment aggravating circumstance is unconstitutionally vague on the ground that there was no authority from this court holding that it could apply to a person on parole prior to the decision in *Parker*.

Nevada's death penalty scheme. *See Thomas v. State*, 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006); *Johnson v. State*, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006). We are not persuaded that it is appropriate to alter that holding. *See Miller,* 124 Nev. at 597, 188 P.3d at 1124.

Haberstroh further argues that reversal of his death sentence is warranted because the prosecution introduced false and misleading evidence to support the under-sentence-of-imprisonment aggravating circumstance. Because he did not object to the challenged evidence, his claim is reviewed for plain error. *Valdez*, 124 Nev. at 1190, 196 P.2d at 477. Haberstroh points to a federal agent's explanation of what it means to expire a sentence. Because the agent's explanation did not take into account sentence credits that may accelerate the expiration of a sentence, he argues that the testimony was misleading and prejudicial. We conclude that he has not shown plain error as other evidence showed that he was on parole at the time of Kitowski's murder.

Finally, Haberstroh argues that insufficient evidence supports the under-sentence-of-imprisonment aggravating circumstance. In this, he contends that the State should have introduced official documentation establishing that he was on parole at the time of Kitowski's murder or testimony from a federal parole officer or other official charged with determining when his federal sentence expired, instead of presenting hearsay evidence and testimony from witnesses who had no personal knowledge of his parole status. While the type of evidence Haberstroh suggests was not presented, there is no authority

compelling to State to prove the aggravating circumstance through any particular means. Further, the State presented sufficient evidence from which the jury could infer that he was under a sentence of imprisonment at the time of the murder. *See Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The jury learned that Haberstroh had two 1974 convictions pursuant to the National Motor Vehicle Theft Act (NMVTA) (also known as the Dyer Act) for which he received two concurrent six-year prison terms. He was paroled from those offenses on February 16, 1978. While on parole, he absconded but was eventually apprehended and incarcerated at the Leavenworth county jail in Kansas. On July 18, 1978, he attempted to escape from the Leavenworth County jail. On August 3, 1978, he pleaded guilty to escape and was sentenced to five years in prison to run consecutively to the two concurrent six-year terms he received on the NMVTA convictions. His sentences related to the NMVTA convictions expired on May 2, 1980. Haberstroh then started serving the sentence for the escape conviction. He was paroled on the escape conviction on December 2, 1983, had his last contact with his parole officer in January of 1985, and thereafter absconded from parole. A bench warrant was issued on August 28, 1985. Testimony was introduced explaining that a sentence does not continue to run when a person is in absconder status and that from the time the bench warrant issued until the time of Kitowski's murder, Haberstroh was still under the sentence for the Leavenworth escape. The

jury also learned that Haberstroh admitted as his previous trial that he was a parole violator when he "came out here," apparently referring to Las Vegas, which his presentence investigation report indicates occurred in February of 1985.

Prior-violent felony aggravating circumstance

The prior-violent-felony aggravating circumstance is based on Haberstroh's felony conviction for escape from the Leavenworth County jail. During his escape, he threatened jail officer Michael Weber with a shank. The State supported this aggravating circumstance in part by introducing Weber's testimony from Haberstroh's first trial where he described the circumstances of Haberstroh's escape. Haberstroh pleaded guilty to escape. He complains that this aggravating circumstance is invalid because the State failed to present sufficient evidence to show that the felony escape conviction involved the use or threat of violence for the purpose of NRS 200.033(2)(b) in accordance with *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 127 P.3d 520 (2006).

Redeker addressed what evidence may be relied on to satisfy NRS 200.033(2)(b). 122 Nev. at 172, 127 P.3d at 526. In that case, the State alleged a prior-violent-felony-conviction aggravating circumstance based on the defendant's second-degree arson conviction, which was based on a guilty plea. *Id.* at 168, 127 P.3d at 523. We concluded that where, as with second-degree arson, it is not readily apparent from the statutory elements that the offense involves the use or threat of violence, the factfinder may look beyond the statutory elements to determine whether the prior offense involved the

use or threat of violence but that NRS 200.033(2)(b) "does not indicate that no limits should be placed on the sort of evidence that can be considered in making that determination." *Id.* at 172, 127 P.3d at 526. In those circumstances, the fact-finder may consider the charging documents, jury instructions, written plea agreement, transcript of plea colloquy, and "any explicit factual finding by the district court judge to which [the defendant] assented" underlying the prior conviction to determine whether the offense involved the use or threat of violence for purposes of NRS 200.033(2)(b). *Id.* at 172-73, 127 P.3d at 526; *see Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 335-36, 184 P.3d 369, 37 4 (2008).

Officer Weber's testimony revealed that Haberstroh threatened him with a shank during the escape but that testimony is not the type of evidence that may be used to establish this aggravating circumstance under *Redeker* because it did not involve any explicit factual finding by the trial judge to which Haberstroh assented. Although the documentary evidence introduced – copies of his petition to plead guilty, the indictment, and the judgment of conviction – may be considered under *Redeker*, none of those documents indicate that Haberstroh's escape involved the use or threat of violence. Because insufficient evidence supports the aggravating circumstance, it is invalid.[4]

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[4] Since we conclude that the prior-violent-felony aggravating circumstance was not validly established, but that the error does not merit reversal, we do not consider Haberstroh's remaining challenges to the validity of this aggravator.

Because the prior-violent felony aggravating circumstance is invalid, we must consider whether Haberstroh's death sentence may be upheld. *See Clemons v. Mississippi*, 494 U.S. 738, 741 (1990) (holding that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review"); *Pertgen v. State*, 110 Nev. 554, 563, 875 P.2d 361, 366-67 (1994) ("Reweighing involves disregarding the invalid aggravating circumstances and reweighing the remaining permissible aggravating and mitigating circumstances").

In mitigation, the Jury heard evidence concerning Haberstroh's family history and background. His parents and older siblings were deceased. The family was plagued by alcoholism; his mother drank alcohol while pregnant with him. Haberstroh's sister, Judith, was tasked with caring for her younger siblings, including Haberstroh. Judith resented that duty and physically abused her charges, with Haberstroh receiving the brunt of the abuse. On at least one occasion, Judith placed him in a dark closet for hours. An aunt discovered him in the closet; it appeared that he had been hung by his neck and was in and out of consciousness. His father struck him with a belt with sufficient force to leave welts. When Haberstroh was a teenager, his father engaged him in fist fights as a disciplinary tool. His mother imposed punishment by requiring him to kneel on the floor on top of dry grains of rice. Haberstroh dropped out of school in the sixth

grade. Psychological evaluations completed while Haberstroh was in elementary school revealed that he had an IQ of 87, had deep feelings of inadequacy, suffered from the effects of his mother's alcoholism and emotional instability, suffered from depression, and had issues with females in his life, including his mother. He acted out in class, disturbed other children, and acted immaturely for his age. Haberstroh was prescribed tranquilizers, which he took four times a day. When he reached 16 years old, Haberstroh began huffing paint on a regular basis. He married at age 17 but divorced within one year and joined the Navy. His abuse of alcohol and other substances continued, and he had disciplinary problems during his brief time in the Navy. After his discharge from the service, Haberstroh's alcohol abuse continued, and he was unable to maintain steady employment and engaged in various criminal activities. No family members have visited Haberstroh during his incarceration.

The jury also heard evidence that Haberstroh had not engaged in any assaultive misconduct in the past 27 years of incarceration and no disciplinary infractions in the past 10 years of incarceration. Previous confinements in the federal prison system noted two fistfights. He obtained his GED in 1981, which decreased the likelihood that he would be involved in serious violence in prison. His age, 58, also suggested a lower risk of violence in prison. Haberstroh suffers from a number of health issues, including fatigue, shortness of breath, low heart rate, diabetic neuropathy, peripheral artery disease, cardiovascular disease, and high blood pressure. His

diabetes places him at risk for diabetic retinopathy, which can lead to blindness and kidney damage. He is also in need of dental care and routine health screenings. A neuropsychologist explained that Haberstroh suffered from mental impairments that are consistent with fetal alcohol syndrome and that had been diagnosed with attention deficit hyperactivity disorder (ADHD). A psychologist related that Haberstroh suffered from cognitive deficiencies and that he. has adjusted well to incarceration due the highly structured prison environment. Finally, the jury learned about how parole operates and the factors the Parole Board considers in determining whether parole should be granted, as well as the conditions of confinement at the Ely correctional facility.

As other matter evidence, *see* NRS 175.552(3), the State introduced evidence of Haberstroh's extensive juvenile and adult record, including arrests/convictions for multiple instances of larceny of a motor vehicle, possession of burglary tools, theft of money, forgery, absconding from juvenile probation, eluding a police officer, two convictions under the NMVTA, escapes from incarceration, numerous parole violations, strong-arm robbery, unauthorized use of a vehicle, and trespassing. The jury also heard evidence that Haberstroh sexually assaulted a woman after abducting her at knifepoint from a grocery store parking lot. Another woman testified about an incident on May 1, 1986, where a man abducted her from a grocery store parking lot, forced her to drive her car to a secluded area, and sexually assaulted her. The State introduced evidence linking Haberstroh to thefts involving several women in August 1986 –

approximately one month after Kitowski's murder; he was never charged with those offenses. While the prior-violent-felony aggravating circumstance is invalid, the jury could nevertheless consider evidence that Haberstroh threatened a guard with a shank to effectuate his escape from the Leavenworth jail in selecting the appropriate sentence after weighing the aggravating and mitigating circumstances. *See* NRS 175.552(3) ("During the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible."); *Browning v. State*, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008) (observing that the focus of a capital penalty hearing is on a defendant's "character, record, and the circumstances of the offense"). Kitowski's mother, stepfather, and two brothers testified about the devastating impact of Kitowski's murder and described her as a caring, loving, helpful, and phenomenal sister. Kitowski's 28-year-old son, an infant when she was murdered, is unable to speak about his mother's death.

Considering all of the evidence presented, we conclude that the jury would have found Haberstroh death eligible absent the prior-violent-felony aggravating circumstance. The remaining under-sentence-of-imprisonment aggravating circumstance is compelling as it indicates that Haberstroh had not been amenable to rehabilitation or restraint. Further, in light of his extensive juvenile and adult criminal history, including the sexual assault of two women under circumstances similar to Kitowski's murder, we

conclude that the jury would have imposed death absent the prior–violent-felony aggravating circumstance.

Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravating circumstances found, (2) the verdict was rendered under the influence of passion, prejudice or any other arbitrary factor, and (3) the death sentence is excessive. First, as explained above, the prior-violent-felony aggravating circumstance is invalid because the State failed to prove beyond a reasonable doubt that Haberstroh's conviction for escape involved the use or threat of violence under NRS 200.033(2)(b), but the under - sentence - of - imprisonment aggravating circumstance was proved through evidence presented during the penalty hearing. Second, nothing in the record indicates that the jury acted under any improper influence in imposing death. Although the jurors did not find all of the mitigating circumstances Haberstroh proffered, at least one juror found that the murder was mitigated by his family history of alcoholism, the physical abuse he suffered from his parents and older siblings, his mental deficiencies, and his current age. These findings evidence a reflective jury. Third, the death sentence is not excessive. Although Haberstroh presented credible mitigation evidence, the nature and circumstances of his crimes, his lengthy criminal record, and evidence of his other sexual assaults of women are compelling factors that favor a death sentence. Under the circumstances, we conclude that based on the crime and the defendant,

the death sentence is not excessive. *See generally Dennis v. State*, 116 Nev. 1075, 1084-87, 13 P.3d 434, 440-42 (2000) (discussing and applying excessiveness analysis).[5]

Because review of this appeal reveals no errors that warrant reversal of Haberstroh's death sentence, we

ORDER the judgment of the district court AFFIRMED.[6]

Hardesty, C.J. Hardesty	*Parraguirre*, J. Parraguirre
Cherry, J. Cherry	*Saitta*, J. Saitta
Gibbons, J. Gibbons	*Pickering*, J. Pickering

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[5] We reject Haberstroh's constitutional challenges to his death sentence based on a 28-year delay between the time the offenses occurred in 1986 and the penalty hearing in 2013, *see Jones v. State*, 539 S.E.2d 154, 158-59 (Ga. 2000) (finding meritless a "'waiting for execution is intolerably cruel' argument"), the lack of a constitutionally adequate clemency process, *see Nunnery v. State*, 127 Nev., Adv. Op. 69, 263 P.3d 235, 257 (2011), and the failure of the capital penalty scheme to genuinely narrow the defendants eligible for the death penalty, *see Leonard v. State*, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001). We further reject Haberstroh's claim of cumulative error, as the cumulative effect of any errors established do not require reversal of the death sentence. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (noting factors to consider in cumulative-error analysis).

[6] The Honorable Michael Douglas, Justice, did not participate in the decision in this matter.

cc: Hon. Elissa F. Cadish, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEVADA

RICHARD HABERSTROH A/K/A RICKY HICKY A/K/A PATRICK JAMES HICKEY A/K/A GERALD HABERSTROH A/K/A LEE DIVINCENT, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 63466 **FILED** DEC 23 2015 Tracie K. Lindeman CLERK OF SUPREME COURT By *N. Wilcox* DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).[1]

It is so ORDERED.

Hardesty, C.J.		*Paraguirre*,	J.
Cherry,	J.	*Saitta*,	J.
Gibbons,	J.	*Pickering*,	J.

cc: Hon. Elissa F. Cadish, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

15-39437

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[1] The Honorable Michael Douglas, Justice, did not participate in the decision in this matter.

APPENDIX C

SUPREME COURT OF NEVADA

CHARLES ANTHONY SUMMERS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 45683

Dec. 28, 2006

OPINION

HARDESTY, J.

We primarily consider in this appeal whether the Confrontation Clause of the Sixth Amendment to the United States Constitution and the United States Supreme Court's holding in *Crawford v. Washington*[1] apply to evidence admitted during a capital penalty hearing. We conclude that they do not apply. We conclude that this issue, along with the others appellant Charles Summers raises on appeal, does not warrant reversal of his conviction and sentence. Therefore, we affirm.

FACTS

Guilt phase

Summers was an illegal drug dealer. Sometime in 2003, he entered into an informal agreement with Frederick Ameen, an addict who owed him money. Summers agreed to provide Ameen with drugs to sell, primarily "crack" cocaine, and to pay for a motel room

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[1] 541 U.S. 36 (2004).

from which he could sell the drugs; Ameen was to give Summers the profits from the sales.

On the night of December 28 and early morning of December 29, 2003, Ameen and his associate Albert Paige were in a room at the La Palm Motel in Las Vegas that Summers had rented for Ameen to sell illegal drugs in accordance with their agreement. Summers warned Ameen that only certain people were to be allowed in the motel room. That night, Ameen and Paige were in the room smoking crack cocaine with three other people, one of whom was Donna Thomas, a prostitute and friend of Ameen. When Summers later arrived accompanied by Andrew Bowman, he was upset about the number of people in the room. Ameen told everyone to leave; Paige and Thomas stayed behind.

Bowman briefly left the motel room, but he soon returned and handed Summers a .38 caliber handgun.[2] Summers stood in front of Ameen and Thomas, who were sitting on a bed. Paige was sitting at a small table, and Bowman stood by the door. Summers put on a small glove and resituated the handgun, which was in the pouch of his sweater. Summers told Paige that if he wanted to kill him that he would have, but that Paige was playing him "for some type of fool."

Summers pulled out the handgun, pointed it at Thomas, and asked Ameen who she was. Ameen explained to Summers that Thomas was a friend, that he had told Thomas about Summers, and that he had

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[2] Bowman testified at trial that Summers actually had the handgun when the two initially entered the motel room.

instructed her to let Summers enter the motel room. Summers asked Thomas if she knew who he was. Thomas replied in the negative. Ameen reminded Thomas that he had previously told her about Summers. Thomas began to speak when Summers shot her.

Summers then pointed the handgun directly at Paige and pulled the trigger. But the handgun misfired. Summers then pointed the handgun at Ameen, but Ameen did not see Summers pull the trigger. Summers and Bowman then left the room. Thomas later died from the gunshot wound.

Summers was arrested for the incident and charged with several crimes. The State filed a notice of intent to seek a death sentence. The guilt phase of Summers's jury trial began on March 28, 2005. Summers contended in his defense that it was Ameen who shot Thomas, not him. To support this theory, Summers called a former gang member incarcerated at the Lovelock Correctional Center, Terrence Lee Collins, who testified that he had previously purchased crack cocaine from Summers and that Ameen once confessed to him that he shot Thomas. He also testified that Ameen and Paige had devised a theory to blame Thomas's murder on Summers. Summers also presented evidence that an anonymous tip to the police blamed Thomas's murder on another man and identified Ameen as an accomplice to the crime.

After a four-day trial, the jury found Summers guilty of the first-degree murder of Thomas with the use of a deadly weapon, the attempted murder of Paige

with the use of a deadly weapon, and of assaulting Ameen with the use of a deadly weapon.

Penalty hearing

Prior to the penalty hearing, Summers moved to bifurcate the hearing into eligibility and selection phases. The district court denied the motion without explanation.

During the one-day penalty hearing, the State first presented victim-impact evidence from Thomas's sister and father. They testified that Thomas was the mother of three children, two girls and a boy, and had worked hard to support them before she moved to Las Vegas and "got caught up in life."

The State then presented numerous witnesses who testified about Summers's juvenile and adult criminal history while both in and out of custody, as well as exhibits containing approximately 835 pages of documents regarding that history. These documents included: Las Vegas Metropolitan Police Department (LVMPD) records and arrest reports; a 1996 judgment of conviction for robbery and possession of a stolen vehicle; juvenile and family court records; LVMPD gang unit investigation cards; and Clark County Detention Center and Nevada Department of Correction (NDOC) records, which included inmate disciplinary reports.

LVMPD Officer Patrick Rooney testified that Summers was arrested as a juvenile in 1992 for hitting a woman in the head with a bottle. LVMPD Detective Patrick Paorns testified that Summers was also arrested that year for his participation in a carjacking with the use of a deadly weapon. LVMPD Officer Brian

Morse testified that Summers was arrested three years later in 1995 as a juvenile for robbery—stealing a woman's purse—and possession of a stolen vehicle. LVMPD Officer Timothy Schoening testified that Summers was also arrested that year for beating a man with a bottle. LVMPD Officer Clayton Shanor testified about Summers's disciplinary problems while incarcerated, including fighting and verbal outbursts.

LVMPD Officer Andrew Pennucci testified that he stopped Summers in 2003 for jaywalking. During the stop, Summers turned away from Officer Pennucci and reached beneath his jacket into his waistband. Officer Pennucci testified that he ordered Summers to stop, but Summers did not comply. Officer Pennucci drew his handgun, pointed it at Summers, and ordered Summers to take his hand from his waistband. Summers complied and said, "Okay. Okay. I have a gun." Officer Pennucci seized a loaded .22 caliber semiautomatic handgun with a bullet in the chamber from Summers. Summers was arrested for the incident.

Summers's former juvenile probation officer, Gregory Stanphill, testified that Summers was a very sophisticated juvenile. And LVMPD Officer Thomas Bateson testified about Summers's gang affiliations. Several other witnesses, including the Warden of Camps for the NDOC, testified that Summers was a discipline problem while he was in custody.

Summers called several family members to testify on his behalf: his uncle, nephew, second cousin, grandmother, and sister. They testified that Summers was the youngest of three children, his mother and

father drank alcohol and used illegal drugs, and his father sometimes beat his mother. Summers's mother and father had since died. Summers had an impoverished childhood, sometimes not having enough food to eat and going to school in dirty clothes. The members of his family also testified about their love for Summers, his belief in God, and how they would write to him while he was in prison. Summers had asked to be removed from the courtroom prior to the start of the hearing and, therefore, did not make a statement in allocution.

The State finally called NDOC Officer Jeffery Moses, who had arrived at the hearing late because of a delayed airline flight. Officer Moses testified that he found a six-inch-long weapon in Summers's prison cell in 1997 and that Summers took responsibility for having it.

The jury found four circumstances aggravated the murder. Three of the aggravators were found pursuant to NRS 200.033(2)—that the murder was committed by a person who had been convicted of a felony involving the use or threat of violence. These three aggravators were based on Summers's 1996 conviction for robbery and instant convictions for assault with the use of a deadly weapon and attempted murder with the use of a deadly weapon. The other aggravator was found pursuant to NRS 200.033(3)—that the murder was committed by a person who knowingly created a great risk of death to more than one person.

The jury found six mitigating circumstances: the absence of parental guidance; impoverished living conditions and environment; pressured into gang

activity; mentors were criminals, gang members, and drug dealers; lack of recommended psychological treatment; and a continuing supportive family. The jurors concluded that the aggravating circumstances outweighed the mitigating but imposed upon Summers a sentence of life without the possibility of parole for Thomas's murder.

The district court later entered a judgment of conviction on June 30, 2005, sentencing Summers to two consecutive terms of life in prison without the possibility of parole for the first-degree murder with the use of a deadly weapon, and various concurrent and consecutive terms for the attempted murder and assault convictions. When Summers was asked by the district court during sentencing if he had anything to say, Summers replied, "It is what it is." This appeal followed.

DISCUSSION

I. *Application of the Confrontation Clause and Crawford v. Washington to a capital penalty hearing*

Summers contends that the Confrontation Clause and *Crawford* apply to a capital penalty hearing and therefore the admission of nearly 835 pages of documentary exhibits containing testimonial hearsay violated his right to confrontation.[3] We disagree.

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[3] The State contends that this issue was properly preserved for our review. Although Summers's objections to the admission of the documents were less than specific, we conclude that they were sufficient to preserve this issue for our review.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court held in its 2004 opinion *Crawford* that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her.[4]

We have never fully addressed the relevance of the Confrontation Clause in a capital penalty hearing. This court recognized in *Lord v. State*[5] that the right to confrontation applies in capital penalty hearings in one respect: admitting a nontestifying codefendant's confession generally violates a defendant's right to confrontation under *Bruton v. United States.*[6] *Lord* addressed only the *Bruton* question and did not otherwise explore the right to confrontation at a capital penalty hearing.[7] We limit *Lord* to its facts.

Guiding our decision today is the Supreme Court's 1949 opinion *Williams v. New York.*[8] The Court recognized in *Williams* that "most of the information now relied upon by judges to guide them in the

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[4] 541 U.S. at 68-69.

[5] 107 Nev. 28, 43-44, 806 P.2d 548, 557-58 (1991).

[6] 391 U.S. 123, 137 (1968).

[7] *Cf. Kaczmarek v. State,* 120 Nev. 314, 335-36, 91 P.3d 16, 31 (2004) (concluding that barring a defendant from cross-examining a witness regarding her opinion on the proper sentence during a capital penalty hearing did not violate the Sixth Amendment).

[8] 337 U.S. 241 (1949).

intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination."[9] The Court rejected the contention that a death sentence based on information from witnesses whom the defendant had not been permitted to confront violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[10]

Williams has since been relied upon for the proposition that the Confrontation Clause does not apply to capital sentencing.[11] Although the continuing viability of *Williams* has been called into question,[12] in our view, and that of the Ninth Circuit Court of Appeals, it remains good law.[13] *Crawford* did not overrule *Williams.*[14] Indeed, the Supreme Court has yet to address whether its opinion in *Crawford* has any

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[9] *Id.* at 250.

[10] *Id.* at 242-52.

[11] *See, e.g., Szabo v. Walls,* 313 F.3d 392, 398 (7th Cir. 2002) (citing *Williams* for the proposition that "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing"); *Bassette v. Thompson,* 915 F.2d 932, 939 (4th Cir.1990); *see also U.S. v. Littlesun,* 444 F.3d 1196, 1198-1200 (9th Cir. 2006) (citing *Williams* in holding that *Crawford* did not alter its jurisprudence that hearsay is generally admissible at noncapital sentencing), *cert. denied,* 549 U.S. 885 (2006).

[12] *See U.S. v. Brown,* 441 F.3d 1330, 1361 n. 12 (11th Cir. 2006); *Maynard v. Dixon,* 943 F.2d 407, 414 n. 5 (4th Cir. 1991) (recognizing that conflicting authority exists as to whether the Confrontation Clause applies in capital penalty hearings).

[13] *See Littlesun*, 444 F.3d at 1200.

[14] *Id.*

bearing on any sentencing proceedings, capital or otherwise.[15]

The Court in *Crawford* indicated no intent or basis to extend the Sixth Amendment to capital penalty hearings. No federal circuit courts of appeals have extended *Crawford* to a capital penalty hearing, and the weight of authority is that *Crawford* does not apply to a noncapital sentencing proceeding.[16]

We have recognized that under NRS 175.552(3) hearsay is generally admissible[17] in a capital penalty hearing.[18] Absent controlling authority overruling *Williams* and extending the proscriptions of the Confrontation Clause and *Crawford* to capital penalty hearings in Nevada, we are not persuaded to depart

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[15] *See U.S. v. Katzopoulos,* 437 F.3d 569, 574 (6th Cir. 2006) ("An issue unaddressed by *Crawford* is whether the Sixth Amendment right to confront witnesses applies similarly at sentencing.").

[16] *See, e.g., U.S. v. Luciano,* 414 F.3d 174, 179 (1st Cir. 2005); *U.S. v. Martinez,* 413 F.3d 239, 242-43 (2d Cir. 2005), *cert. denied,* 546 U.S. 1117 (2006); *U.S. v. Stone,* 432 F.3d 651 (6th Cir. 2005), *cert. denied,* 549 U.S. 821 (2006); *U.S. v. Roche,* 415 F.3d 614, 618 (7th Cir. 2005), *cert. denied,* 546 U.S. 1024 (2005); *U.S. v. Brown,* 430 F.3d 942, 943-44 (8th Cir. 2005); *Littlesun,* 444 F.3d at 1199-1200; *U.S. v. Chau,* 426 F.3d 1318, 1323 (11th Cir. 2005).

[17] Evidence must still be reliable and relevant, and the danger of unfair prejudice must not substantially outweigh its probative value. *See Hollaway v. State,* 116 Nev. 732, 746, 6 P.3d 987, 997 (2000); *Parker v. State,* 109 Nev. 383, 390-91, 849 P.2d 1062, 1066-67 (1993).

[18] *See Thomas v. State*, 114 Nev. 1127, 1147, 967 P.2d 1111, 1124 (1998).

from our prior jurisprudence and extend to capital defendants confrontation rights under *Crawford.*

We therefore conclude that neither the Confrontation Clause nor *Crawford* apply to evidence admitted at a capital penalty hearing and the decision in *Crawford* does not alter Nevada's death penalty jurisprudence. Because Summers did not enjoy a right to cross-examine[19] the declarants who were the source of alleged testimonial hearsay within documentary exhibits admitted at his capital penalty hearing, he has shown no error occurred on this issue.

The concurring and dissenting justices in this appeal would extend the Supreme Court's holdings in *Ring v. Arizona*[20] and *Crawford* and hold that the right to confrontation applies to the jury's eligibility determination in a capital sentencing proceeding. Notwithstanding this conclusion, however, the separate concurring and dissenting opinion recognizes that the Confrontation Clause does not apply to the jury's deliberations with respect to the penalty that should be imposed on a defendant whom the jury has found to be death eligible. Even assuming that our dissenting and concurring colleagues have correctly foreseen that the Supreme Court will someday hold that *Crawford* and the Confrontation Clause are applicable to the eligibility phase of a capital sentencing proceeding, in our view, Nevada's capital

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[19] But this court has recognized in *Buschauer v. State,* 106 Nev. 890, 894, 804 P.2d 1046, 1048-49 (1990), a limited right to cross-examination during a criminal sentencing proceeding. Our decision today does not overrule *Buschauer.*

[20] 536 U.S. 584 (2002).

sentencing scheme permitting unbifurcated penalty hearings would remain constitutionally viable. We submit that such a holding would not require penalty hearings to be fragmented into phases where the jury separately considers and answers the factual questions relating to whether: (1) the alleged aggravating and mitigating circumstances have been established, (2) the aggravating circumstances outweigh any mitigating circumstances, and (3) the penalty of death should actually be imposed on a defendant whom the jury has found to be death eligible.

In this, we note that this court generally presumes that juries follow district court orders and instructions.[21] In *Tavares v. State*,[22] for example, this court implicitly recognized that jurors are intellectually capable of properly following instructions regarding the limited use of prior bad act evidence. If jurors can perform an act of intellectual discrimination permitting consideration of prior bad act evidence for one purpose, but not for another, they are most certainly intellectually capable of following a clear instruction directing that they must refrain from considering testimonial hearsay in deciding a capital defendant's death eligibility, but that they may nonetheless consider such evidence in deciding whether to actually impose a death sentence on a defendant whom they found eligible to receive it.[23] Our

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[21] *See Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

[22] 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[23] *See also Harris v. New York,* 401 U.S. 222 (1971) (statements elicited from a defendant in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), can be used to impeach the

view in this respect is confirmed by the fact that the jurors in the instant case found the aggravating circumstances outweighed the mitigating circumstances but did not sentence Summers to death. Thus, the jury's verdict in this case clearly evinces the jury's capability to intellectually discriminate between the types of evidence presented and to impose a just sentence.

II. *Other claims raised by Summers on appeal*

In addition to his Confrontation Clause and *Crawford* claim, Summers raises four other claims on appeal. We have carefully reviewed each of these claims, and we conclude that they do not warrant any relief.

First, Summers contends that juror 661 was biased because one of the prosecutors once dated her daughter. However, Summers did not challenge juror 661 for cause, and our review of her examination during voir dire does not reveal that she was biased or improperly seated in violation of his constitutional right to a fair and impartial jury.[24]

Second, Summers contends that the district court committed judicial misconduct and failed to exercise

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defendant's credibility, even though they are inadmissible as evidence of guilt, so long as the jury is instructed accordingly); *Spencer v. Texas,* 385 U.S. 554 (1967) (evidence of a defendant's prior convictions could be introduced for purposes of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt).

[24] *See Weber v. State,* 121 Nev. 554, 585, 119 P.3d 107, 125 (2005); *see also United States v. Martinez-Salazar,* 528 U.S. 304, 313 (2000); *Ross v. Oklahoma,* 487 U.S. 81, 88 (1988).

self-restraint and impartiality during his counsel's cross-examination of State witness Albert Paige by interpreting Paige's answers and failing to admonish Paige for answering questions with questions. However, the cross-examination of Paige was contentious, and the district court was acting to maintain control over the trial and did so without clear objection from Summers.[25]

Third, Summers contends that the district court abused its discretion by denying separate motions for a mistrial. One motion was made during the guilt phase based on a statement by State witness Frederick Ameen regarding threats to his life. However, this statement was not elicited by the State, and the district court ordered it stricken. The other motion was made during the penalty hearing and was based on several instances of alleged prosecutorial misconduct. We discern no misconduct in the instances cited by Summers on appeal. Summers has failed to demonstrate the district court abused its discretion by denying either of his mistrial motions.[26]

Finally, Summers contends that he was denied a fair trial because of cumulative error.[27] For the reasons

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[25] *See Oade v. State,* 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998) (holding that "[a] trial judge has a responsibility to maintain order and decorum in trial proceedings" and allegations of "[j]udicial misconduct must be preserved for appellate review").

[26] *See Rudin v. State,* 120 Nev. 121, 142, 86 P.3d 572, 586 (2004).

[27] *See Hernandez v. State,* 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.").

already discussed above, we conclude that Summers is not entitled to relief on this claim or any other he raises on appeal.

CONCLUSION

Neither the Confrontation Clause nor *Crawford* extends to evidence admitted during a capital penalty hearing. We conclude that this issue, along with the others Summers raises, does not warrant reversal of his conviction or sentence. We affirm.

BECKER, GIBBONS and PARRAGUIRRE, JJ., concur.

ROSE, C.J., with whom MAUPIN and DOUGLAS, JJ., agree, concurring in part and dissenting in part.

Although I agree with the majority that Summers is not entitled to relief, I dissent in regard to the majority's conclusion that the Confrontation Clause and *Crawford v. Washington*[1] do not apply to capital penalty hearings. The majority opinion relies on a fifty-seven-year-old United States Supreme Court case that was decided well before any of the United States Supreme Court's more recent death penalty pronouncements. The United States Supreme Court has not addressed this precise issue but has given very clear indications that *Williams v. New York*[2] is no longer viable. I elect to follow those clear indications.

The Sixth Amendment to the United States Constitution provides that a criminal defendant enjoys

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[1] 541 U.S. 36 (2004).

[2] 337 U.S. 241 (1949).

the right "to be confronted with the witnesses against him." *Crawford* holds that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant.[3] The Supreme Court has yet to address whether *Crawford* has any bearing on sentencing proceedings or capital penalty hearings,[4] which, as discussed below, are not equivalent.

This court has already recognized that the right to confrontation applies in capital penalty hearings in at least one respect. In *Lord v. State,* we held that admission of a nontestifying codefendant's confession generally violates a defendant's right to confrontation.[5] *Lord* did not otherwise explore the scope of the right to confrontation at a capital penalty hearing.[6]

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[3] 541 U.S. at 68-69.

[4] *See U.S. v. Katzopoulos,* 437 F.3d 569, 574 (6th Cir. 2006) ("An issue unaddressed by *Crawford* is whether the Sixth Amendment right to confront witnesses applies similarly at sentencing.").

[5] 107 Nev. 28, 43-44, 806 P.2d 548, 557-58 (1991) (applying *Bruton v. United States,* 391 U.S. 123, 137 (1968)).

This court has also recognized a limited right to cross-examination during a criminal sentencing proceeding. *See Buschauer v. State,* 106 Nev. 890, 894, 804 P.2d 1046, 1048-49 (1990) (holding that where a victim-impact statement refers to specific prior acts of the defendant, due process requires, among other things, an opportunity to cross-examine the accuser, but declining to bar all hearsay evidence in an impact statement).

[6] *Cf. Kaczmarek v. State,* 120 Nev. 314, 335-36, 91 P.3d 16, 31 (2004) (concluding that barring a defendant from cross-examining a witness regarding her opinion on the proper

Further exploration of this question requires the initial recognition that a capital penalty hearing has two distinct aspects: an eligibility phase and a selection phase. The Supreme Court has identified and described these two aspects.[7] During the eligibility phase, "the jury narrows the class of defendants eligible for the death penalty."[8] In the selection phase, "the jury determines whether to impose a death sentence on an eligible defendant."[9] Moreover, the Supreme Court accords these two phases "differing constitutional treatment."[10]

It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.[11]

This court has similarly distinguished two aspects of a capital penalty hearing, specifically in regard to the jury's treatment of evidence. Although NRS 175.552(3) provides broadly that during a penalty hearing "evidence may be presented concerning

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sentence during a capital penalty hearing did not violate the Sixth Amendment).

[7] *Buchanan v. Angelone,* 522 U.S. 269, 275 (1998).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 275-76.

aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence," the last type of evidence—"other matter" evidence—is not admissible to determine death eligibility.

> "Other matter" evidence is *not* admissible for use by the jury in determining the existence of aggravating circumstances or in weighing them against mitigating circumstances. Such use of this evidence would undermine the constitutional narrowing process which the enumeration and weighing of specific aggravators is designed to implement.[12]

Therefore, jurors may consider "other matter" evidence only in the selection phase, after they have determined whether the defendant is eligible for a death sentence.[13]

As I will explain, a defendant is entitled to confront the witnesses against him in the eligibility phase of a capital penalty hearing because it is during this phase that the jury must determine whether the elements of capital murder have been established.

The majority observes that hearsay evidence is generally admissible in a capital penalty hearing under NRS 175.552(3), but such a statutory provision must yield to any contrary requirement under the Confrontation Clause. The majority also relies on the

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[12] *Hollaway v. State,* 116 Nev. 732, 746, 6 P.3d 987, 997 (2000) (citation omitted); *see also Evans v. State,* 117 Nev. 609, 635–37, 28 P.3d 498, 516-17 (2001).

[13] *Hollaway*, 116 Nev. at 746, 6 P.3d at 997.

Supreme Court's 1949 decision in *Williams v. New York,* which rejected the contention that a death sentence based on information from witnesses whom the defendant had not been permitted to confront violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[14] The Court was concerned that sentencing judges would lose access to a good deal of relevant information if they could only consider information "given in open court by witnesses subject to cross-examination."[15] *Williams,* however, is nearly 60 years old and is no longer authoritative given the Supreme Court's subsequent jurisprudence.

The Supreme Court has not directly addressed this issue since *Williams.* In pre-*Crawford* decisions, the Seventh and the Fourth Circuit Courts of Appeals have relied on *Williams* in concluding that the Confrontation Clause does not apply to capital penalty hearings.[16] Other federal courts have not considered the matter to be so settled,[17] and the Eleventh Circuit

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[14] 337 U.S. 241, 242-52 (1949).

[15] *Id.* at 250.

[16] *Szabo v. Walls,* 313 F.3d 392, 398 (7th Cir. 2002) (citing *Williams* for the proposition that "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing"); *Bassette v. Thompson,* 915 F.2d 932, 939 (4th Cir. 1990).

[17] *See Maynard v. Dixon,* 943 F.2d 407, 414 n. 5 (4th Cir. 1991) (recognizing that conflicting authority exists as to whether the Confrontation Clause applies in capital penalty hearings); *U.S. v. Lee,* 374 F.3d 637, 649-50 (8th Cir. 2004) (addressing whether appellant's confrontation rights were violated during his capital penalty hearing where the government did not contest that he had such rights); *U.S. v. Hall,* 152 F.3d 381, 406 (5th Cir.

Court of Appeals has recognized a right to cross-examination at capital penalty hearings.[18] In other decisions predating *Crawford,* state courts have also reached differing conclusions on whether the Sixth Amendment right to confrontation applies to capital penalty hearings.[19]

The majority emphasizes that the Supreme Court has not overruled *Williams.* But this does not justify rigid adherence to *Williams* given the undeniable evolution of the Court's jurisprudence on this matter over the succeeding decades as well as the weight of authority from other courts that have reached this issue. *Williams* long predates the Supreme Court's many decisions since 1976 that recognize that death is different; these decisions have established separate penalty hearings in capital cases[20] and afforded a

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1998) (assuming, without deciding, "that the Confrontation Clause applies to the sentencing phase of a capital trial"), *abrogated on other grounds by United States v. Martinez-Salazar,* 528 U.S. 304 (2000).

[18] *U.S. v. Brown,* 441 F.3d 1330, 1361 n. 12 (11th Cir. 2006); *Proffitt v. Wainwright,* 706 F.2d 311 (11th Cir. 1983) (concluding that the Confrontation Clause extends to capital penalty hearings in regard to the right to cross-examine the author of a psychiatric report; limiting its holding in *Proffitt v. Wainwright,* 685 F.2d 1227, 1251-55 (11th Cir. 1982)).

[19] *Compare, e.g., Sivak v. State,* 112 Idaho 197, 731 P.2d 192, 211 (1986) (holding that a capital defendant does not have confrontation rights in a penalty hearing), *and State v. Grisby,* 97 Wash.2d 493, 647 P.2d 6, 15-16 (1982), *with Walton v. State,* 481 So.2d 1197, 1200 (Fla. 1985).

[20] *See Gregg v. Georgia,* 428 U.S. 153, 195 (1976) (stating that concerns that the death penalty not be imposed in an arbitrary or capricious manner "are best met by a system that provides for a bifurcated proceeding at which the sentencing

number of constitutional safeguards in those hearings.[21] In 1983, the Supreme Court justified its conclusion that expert testimony on future dangerousness is admissible at a capital penalty hearing by recognizing that "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, *who would have the benefit of cross-examination* and contrary evidence by the opposing party."[22] Given all this subsequent case law, *Williams*'s conclusion that no distinction need be made between capital penalty hearings and noncapital sentencing proceedings[23] is no longer viable.[24]

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authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information").

[21] *E.g., Ring v. Arizona,* 536 U.S. 584 (2002) (holding that the Sixth Amendment requires a jury to find the facts rendering a defendant eligible for death); *Bullington v. Missouri,* 451 U.S. 430, 446 (1981) (holding that the Double Jeopardy Clause applies to capital penalty decisions); *Gardner v. Florida,* 430 U.S. 349, 362 (1977) (plurality opinion) (holding that due process was denied when a death sentence was based in part on information that a defendant had no opportunity to deny or explain).

[22] *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983) (emphasis added).

[23] *See* 337 U.S. at 251.

[24] *See Hatch v. State of Okl.,* 58 F.3d 1447, 1465 (10th Cir. 1995) ("The Court has since discredited some of the logic that undergirded its decision in *Williams.*"), *overruled in part on other grounds by Daniels v. U.S.,* 254 F.3d 1180, 1188 n. 1 (10th Cir. 2001).

Indeed, in *Specht v. Patterson* in 1967, the Supreme Court expressly declined to extend *Williams* to a "radically different situation" and held that the right to confrontation, among others, applied at a sentencing hearing where the sentence might be based on "a new finding of fact."[25] In 1981, the Court noted the similarity between the sentencing hearing in *Specht* and a capital penalty hearing.[26] And in 2002 in *Ring v. Arizona,* the Court held that aggravating circumstances function as elements of capital murder and under the Sixth Amendment right to a jury trial, must be found by jurors, not judges.[27] Consequently, *Specht* and *Ring* are more apposite than *Williams* to the issue of the Confrontation Clause's application to the eligibility phase of a capital penalty hearing.

Given the trend in the Supreme Court's decisions over the last four decades and its specific holdings in *Ring* and *Crawford,* I conclude that the Sixth Amendment right to confrontation applies to evidence presented during the eligibility phase of a capital penalty hearing. This conclusion is supported by a number of other judicial decisions by both state courts[28] and federal district courts.[29]

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[25] 386 U.S. 605, 608-10 (1967).

[26] *See Bullington*, 451 U.S. at 446.

[27] 536 U.S. at 609.

[28] *See State v. McGill,* 213 Ariz. 147, 140 P.3d 930, 942 (2006) (recognizing that confrontation rights extend to the aggravation phase, but not to the penalty phase, of a bifurcated capital penalty hearing); *Rodgers v. State,* 948 So.2d 655, — 2006 WL 3025668, at *4-6 (Fla. Oct. 26, 2006); *Russeau v. State,* 171 S.W.3d 871, 880-81 (Tex.Crim.App. 2005), *cert. denied,* 548 U.S. 927 (2006).

On the other hand, I see no basis in either *Ring* or *Crawford* to extend the Sixth Amendment confrontation right to the selection phase of a capital penalty hearing.[30] As stated above, the Supreme Court has accorded the two aspects of capital penalty hearings "differing constitutional treatment,"[31] stressing "the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment" only in regard to the eligibility phase, while permitting "broad inquiry" in the selection phase.[32] The selection phase of a capital penalty hearing is analogous to a noncapital sentencing hearing, where the sentencer decides the actual sentence based on the offense, which has already been established, and its accompanying

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[29] *See U.S. v. Johnson,* 378 F.Supp.2d 1051, 1060-62 (N.D. Iowa 2005) (applying confrontation rights to the eligibility phase); *U.S. v. Bodkins,* 2005 WL 1118158, at *4-5 (W.D. Va. May 11, 2005) (same); *U.S. v. Jordan,* 357 F.Supp.2d 889, 902-03 (E.D. Va. 2005) (same); *see also U.S. v. Mills,* 446 F.Supp.2d 1115, 1135 (C.D. Cal. 2006) (applying confrontation rights to all phases of a capital penalty hearing).

I am aware of but one court since *Ring* and *Crawford* that has reached a result that may be contrary to this conclusion. *See Call v. Polk,* 454 F.Supp.2d 475, 501-04 (W.D.N.C. 2006) (concluding that a state court did not render a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court).

[30] *Ring,* 536 U.S. at 597 n. 4 (noting that Ring did not argue the Sixth Amendment required the jury to determine whether to impose death and that the plurality opinion in *Proffitt v. Florida,* 428 U.S. 242, 252 (1976), observed that such a requirement has never been suggested).

[31] *Buchanan*, 522 U.S. at 275.

[32] *Id.* at 275-76; *cf. Hollaway*, 116 Nev. at 746, 6 P.3d at 997.

sentencing parameters.[33] And the weight of authority is that the Confrontation Clause and *Crawford* do not extend to noncapital sentencing proceedings.[34] I therefore conclude that the right to confrontation does not apply to evidence presented during the selection phase of a capital penalty hearing.

In this case, however, the penalty hearing was conducted in a single proceeding, without any bifurcation of the eligibility and selection phases. So the issue is how to apply the Confrontation Clause and *Crawford* to such an unbifurcated capital penalty hearing.

This court has never required bifurcated proceedings in capital penalty hearings.[35] Yet we have also never precluded district courts from bifurcating penalty hearings, and district courts certainly have the discretion to do so. Indeed, bifurcation is the better practice since it prevents the possibility that jurors will be improperly influenced by "other matter"

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[33] Selection-phase evidence, of course, to be admissible must still be reliable and relevant, and the danger of unfair prejudice must not substantially outweigh the probative value of the evidence. *See Hollaway,* 116 Nev. at 746, 6 P.3d at 997; *Parker v. State,* 109 Nev. 383, 390-91, 849 P.2d 1062, 1066-67 (1993).

[34] *See, e.g., U.S. v. Stone,* 432 F.3d 651 (6th Cir. 2005), *cert. denied,* 549 U.S. 821 (2006); *U.S. v. Roche,* 415 F.3d 614, 618 (7th Cir. 2005), *cert. denied,* 546 U.S. 1024 (2005); *U.S. v. Brown,* 430 F.3d 942, 943-44 (8th Cir. 2005); *U.S. v. Littlesun,* 444 F.3d 1196, 1199-1200 (9th Cir. 2006), *cert. denied,* 549 U.S. 885 (2006).

[35] *Johnson v. State,* 118 Nev. 787, 806, 59 P.3d 450, 462 (2002); *see also Weber v. State,* 121 Nev. 554, 584, 119 P.3d 107, 128 (2005); *McConnell v. State,* 120 Nev. 1043, 1061-62, 102 P.3d 606, 619 (2004).

evidence in determining the existence and the weight of aggravating circumstances and mitigating circumstances. And bifurcation is also better because it provides two distinct proceedings in which the right to confrontation first applies and then does not apply. Given the practical difficulties that arise when the two aspects of a penalty hearing are not separated into distinct proceedings, I would hold that when a capital penalty hearing is not bifurcated, the Confrontation Clause and *Crawford* must apply to the entire hearing.

When a capital penalty hearing is bifurcated, the eligibility phase remains insulated from the broad range of "other matter" evidence admissible during the selection phase. Furthermore, bifurcation permits confrontation issues to be dealt with solely in the eligibility phase, when the jury is still determining whether the elements of capital murder exist. Once that determination has been made, presentation of evidence in the selection phase can then proceed without confrontation concerns. When a penalty hearing is not bifurcated, the State's eligibility-phase evidence and selection-phase evidence are mingled in a single presentation, giving rise to the risk that the jury's initial death-eligibility determination will be affected by selection-phase evidence that is irrelevant to death eligibility.

This court has recognized this risk previously but held that appropriate instructions can meet the concern that jurors might consider improper evidence in determining death eligibility.[36] This approach is no

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[36]*See Evans,* 117 Nev. at 635–37, 28 P.3d at 516-17; *see also Hollaway,* 116 Nev. at 746, 6 P.3d at 997.

longer satisfactory, however, because the *Ring* and *Crawford* decisions present us with heightened constitutional, as well as practical, concerns. *Ring* has accentuated the gravity of the jury's task in determining the elements of capital murder. We must not permit this task to be improperly affected either by "other matter" evidence or by testimonial hearsay evidence that has not been subjected to cross-examination. These risks cannot adequately be addressed through devising additional instructions or requiring courts to determine which evidence presented by the State is subject to an intermittently arising right of confrontation on the part of the defendant over the course of an unbifurcated penalty hearing.

Bifurcation precludes these risks and presents a workable solution that promotes the efficient administration of justice.[37] An unbifurcated hearing does not. Thus, I conclude that where a hearing is unbifurcated, the Confrontation Clause and *Crawford* must apply to evidence admitted during the entirety of the hearing—both its eligibility and selection aspects.

The majority contends that I am requiring capital penalty hearings to be bifurcated. I have made no such requirement and have merely concluded that *Crawford's* protections should be applied differently depending on whether the proceeding is bifurcated. Accordingly, here, because Summers's capital penalty hearing was not bifurcated, his right to confrontation

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[37] *See U.S. v. Mayhew,* 380 F.Supp.2d 936, 957 (S.D. Ohio 2005) (recognizing that bifurcation of a capital penalty hearing alleviates concerns over the Confrontation Clause and *Crawford*).

applied to testimonial hearsay throughout the entire hearing.

Further, I disagree with the majority that limiting instructions will sufficiently protect a defendant against a constitutional violation in a death penalty proceeding. The discrete evidentiary distinctions made in the eligibility and selection phases of a capital penalty hearing are not easily compartmentalized. In addition, emotions are elevated in most death penalty cases making it much more difficult to ignore certain evidence for one purpose but then use that same evidence for another purpose.

As has often been said, death is different. With regard to jurors' ability to follow limiting instructions in this difficult and emotional area, I believe "that the practical and human limitations of the jury system cannot be ignored."[38] Eligibility determinations in death penalty cases are situations where the system's fallibility must be conceded. Accordingly, I disagree with the majority, and I conclude that limiting instructions cannot cure this potential for violation of constitutional rights in death penalty hearings.

The final question is whether Summers's confrontation rights were violated. Summers contends that the admission of documentary exhibits consisting of nearly 835 pages during his penalty hearing violated his confrontation rights. These documents included LVMPD records and arrest reports; a 1996 judgment of conviction for robbery and possession of a stolen vehicle; juvenile and family court records;

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[38] *Bruton v. United States*, 391 U.S. 123, 135 (1968).

LVMPD gang unit investigation cards; and inmate disciplinary reports.[39]

However, Summers has not demonstrated any prejudice. He not only initially failed to provide this court with copies of the documents on appeal,[40] but he has failed to specify any statements within these documents that violated the Confrontation Clause or to explain how they were prejudicial. Review of the documents reveals that they do include some statements containing testimonial hearsay. Thus, these statements were likely admitted in violation of the Confrontation Clause and *Crawford.*

Nevertheless, this court may deem a constitutional error harmless where it is clear beyond a reasonable doubt that the verdict rendered was " 'surely unattributable to the error.' "[41] I am confident that any Confrontation Clause errors that occurred here were harmless beyond a reasonable doubt. Even if the testimonial hearsay had been stricken, the basic information damaging to Summers's case still would have been presented to the jury, *i.e.,* the nature and number of his prior arrests, convictions, and inmate disciplinary violations. Also, it is pertinent that

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[39] In *Thomas v. State,* 114 Nev. 1127, 1147-48, 967 P.2d 1111, 1124-25 (1998), this court held that prison inmate disciplinary reports may be admissible under the business records exception to the hearsay rule. *See* NRS 51.135. In light of *Crawford,* the continuing viability of *Thomas* for this proposition is doubtful where the disciplinary reports contain testimonial statements.

[40] *See* NRAP 10(a)(1); NRAP 11(a)(1).

[41] *Flores v. State,* 121 Nev. 706, 721, 120 P.3d 1170, 1180 (2005) (quoting *Chapman v. California,* 386 U.S. 18, 24 (1967)).

Summers was sentenced only to a term of life in prison without the possibility of parole, not death, even though the jury found that the aggravating circumstances outweighed the mitigating circumstances. Given Summers's extensive criminal history and the nature of the murder in this case, it is clear beyond a reasonable doubt that even if testimonial statements within the documentary exhibits had been excluded from evidence, the jury still would not have imposed a sentence of life with the possibility of parole.

Therefore, I concur with the majority's conclusion that reversal of Summers's sentence is not warranted.

MAUPIN and DOUGLAS, JJ., concur.