No. _____

In The Supreme Court of the United States

OCTOBER TERM, 2020

MARIANN HARRIS,
Petitioner

v.

THE STATE OF NEVADA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW Petitioner, MARIANN HARRIS, and asks leave to file the accompanying Petition for Writ of Certiorari, without prepayment of costs and to proceed in *forma pauperis*. Petitioner's Declaration In Suport of Motion for Leave to Proceed in Forma Pauperis is attached hereto.

DATED this 1st day of March, 2021.

SCOTT L. COFFEE, #5607
Counsel of Record for Petitioner
Chief Deputy Public Defender
309 S. Third St. #226, P.O. Box 552610
Las Vegas, NV 89155-2610
coffeesl@clarkcountynv.gov
(702) 455-5768

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Mariann Harris, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child Support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance (such as welfare)	$	$	$	$
Other (specify):	$	$	$	$
Total monthly income:	$ Ø	$	$ Ø	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$ $ $ Ø

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$ $ $ Ø

4. How much cash do you and your spouse have? $
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		$ $ $	$ $ $ Ø

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value

☐ Other real estate
Value

☐ Motor Vehicle #1
Year, make & model
Value

☐ Motor Vehicle #2
Year, make & model
Value

☐ Other assets
Description
Value

Ø

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
N/A	$	$ Ø
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$ Ø

	You	Your spouse
Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$	$
Health	$	$
Motor Vehicle	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	$ ∅	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much?

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much?

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: January 5, , 2021

(Signature)

No. _____

In The Supreme Court of the United States

OCTOBER TERM, 2020

MARIANN HARRIS,
Petitioner

v.

THE STATE OF NEVADA,
Respondent

On Petition For A Writ Of Certiorari To The Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

SCOTT L. COFFEE, #5607
Counsel of Record for Petitioner
Chief Deputy Public Defender
309 S. Third St. #226, P.O. Box 552610
Las Vegas, NV 89155-2610
coffeesl@clarkcountynv.gov
(702) 455-5768

QUESTION PRESENTED

Mariann Harris was one of two suspects in the death of a child that suffered a closed head injury at her home. After a lengthy accusatory interview, detectives tried to interview Harris a second time. The second interview was scheduled, then Harris told detectives that she had a lawyer. The lawyer called detectives informing them that he was meeting with Harris, that she would not be appearing at the scheduled interview and that if retained he would accompany Harris to future interviews. Detectives stopped attempting to contact Harris or the lawyer.

Harris was also the mother of three young boys that were taken into the custody of Child Protective Services (CPS) pending the police investigation. Harris maintained contact with CPS but did not appear at the initial CPS custody hearing. She told her case worker she was acting on the advice of her attorney.

At trial, the state portrayed Harris as evasive using the failure to participate in a second interview and missing the CPS hearing as substantive evidence of guilt. The trial court granted a new trial, ruling this portrayal was false and violated Harris's Fifth Amendment privilege against self-incrimination. A split Nevada Supreme Court reversed.

The Question Presented:

Is prearrest silence, evidenced by the decision to cease participation in a police investigation and/or an investigative hearing, protected by the Fifth Amendment where the Government is on notice that the defendant had a lawyer and was acting upon counsel's advice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Circuit Authority

State Cases

Rules of the United States Supreme Court

No. _____

In The Supreme Court of the United States

MARIANN HARRIS,
Petitioner

v.

THE STATE OF NEVADA,
Respondent

On Petition for A Writ of Certiorari to The Supreme Court of Nevada

PETITION FOR A WRIT OF CERTIORARI

MARIANN HARRIS respectfully petitions for a writ of certiorari to review the judgment and opinion of the Nevada Supreme Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Nevada Supreme court, whose judgment is sought to be reviewed, are:

- Mariann Harris, Defendant and Appellant below and Petitioner here.
- Clark County District Attorney's Office, Steve Wolfson, District Attorney of Clark County, Appellant and Respondents below and Respondents here.
- Aaron D. Ford, Attorney General of the State of Nevada.

OPINIONS BELOW

The Nevada Supreme Court's *en banc* (4 to 3) "Order of Reversal and Remand" (Pet.App. A) is unpublished. Order denying rehearing (Pet.App. D) is unpublished. Nevada's Supreme Court's Order of Affirmance (Pet.App. B) is unpublished. Petition for Rehearing denied. (Pet.App. E) The trial court's unpublished Decision and Order *exhibits omitted* (Pet.App. C) The Nevada Supreme Court's Order allowing appeal to proceed (Pet.App. F) is procedural only, published at *State v. Harris*, 131 Nev. Adv. Op. 56, 355 P.3d 791 (2015).

STATEMENT OF JURISDICTION

The judgment of the Nevada Supreme Court, and order of reversal and remand granting state's fast track appeal, was entered on May 8, 2017. Pet.App. 1. That Court denied a timely filed petition for rehearing on September 21, 2017. Pet.App. D. The Nevada Supreme Court entered an order of affirmance denying Harris' timely filed appeal on July 31, 2020. Pet.App. B. The Nevada Supreme Court's final judgment, an order denying a timely filed petition for rehearing, was issued on October 1, 2020. Pet.App. E . This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and the MARCH 19, 2020 ORDER of this court extending the deadline for filing a petition for writ of certiorari to 150 days from the date of the lower court judgment "...in light of ongoing health concerns related to the COVID-19 pandemic." 589 U.S.___, 202

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part that "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

This case presents a fundamental question of constitutional criminal law which has left lower state and federal courts across the United States hopelessly divided. Can the Fifth Amendment protection against self-incrimination be invoked prior to arrest?

This court first posed the question in *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) where it was held that prearrest silence could be used for impeachment, but the court expressly chose not to "...consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment." *Jenkins*, 447 U.S. at 236 n.2.

Years later, in *Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013), the court granted certiorari "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." *Salinas*, 570 U.S. at 183.

In a plurality opinion, three justices ruled that Salinas had failed to establish that his silence was made in reliance on the Fifth Amendment, thus a deeply divided court failed to answer the question for which certiorari had been granted. The split remains and the lower courts continue to struggle. This petition presents the much-needed opportunity to provide clarity to the lower courts.

Here, when authorities sought a follow-up interview, Harris unequivocally told them she had legal counsel before she fell silent; her lawyer called to say she would not be

appearing at the time scheduled for the interview. Detectives stopped trying to contact either Harris or the lawyer, thus demonstrating that they were on notice Harris wished to remain silent. Any question as to why Harris stopped talking was answered when she told CPS that she was acting upon the advice of counsel when she missed her initial CPS hearing.

The government's trial case focused on portraying Harris' decisions not to participate in additional interviews or not to attend the CPS hearing as evasive and evidence of consciousness of guilt. In short, Harris was punished for her decision to follow counsel's advice to remain silent.

Following a guilty verdict, the trial issued an "Order and Decision" granting Harris' motion for new trial. Pet.App. C. As summarized by the Nevada Supreme Court, the rationale was that "... Harris invoked her right to remain silent by proving that she consulted an attorney." Pet.App. B. In a closely split decision, the Nevada Supreme Court disagreed and reversed. Pet.App. A.

This case provides a good vehicle for this court to finally decided whether Fifth Amendment privilege can be relied upon prior to arrest. The Nevada Supreme Court was wrong to ignore the importance of placing authorities on unequivocal notice of legal counsel before falling silent plays in establishing invocation, leaving the only real question to be whether the Fifth Amendment protects prearrest silence at all.

1. August 12th, 2011, shortly before midnight, Mariann Harris called 911 to report that her visiting goddaughter had stopped breathing. The cause was eventually determined

to be a hidden closed skull fracture. Authorities suspected abuse by either Harris or Armani Foster, father to her three young children.

Although Harris was alone with the children when 911 was called, Foster had left their home only shortly earlier. Detectives treated both Harris and Foster as potential suspects. The state's medical examiner later determined that the head injury occurred near the time Foster left the home, thus he could not be eliminated as a suspect.

2. Harris and Foster were individually interviewed outside their home. The Harris interview took place. in the back of a police car at around 5:00 A.M. It lasted more than an hour and was accusatory. Following the interviews, Harris and Foster remained locked out of their home so that it could be processed for forensics. Harris went to California to stay with family.

3. Detectives sought follow-up interviews with Harris and Foster. Foster's second interview was on August 14th, 2021. Harris was set to interview the same day, but due to car troubles the interview was rescheduled.

The morning of August 15th, 2021, Harris told detectives that she had a lawyer. She said they would arrive for the interview at about noon. Shortly before noon, an attorney called detectives to check on warrants. He advised that he was meeting with Harris and that she would not be appearing at the scheduled interview. He said that if retained he would bring her to the next interview. Detectives, who had contact information for both Harris and the attorney, stopped all attempts to interview Harris. One

of the detectives testified that in his experience it was the common practice of defense lawyers to advise clients to remain silent.

4. As a result of the suspicious death in the home, Child Protective Services (CPS) took custody of the three children belonging to Harris and Foster. An initial CPS hearing was set for August 17, 2011. Harris maintained contact with CPS but did not appear at the hearing. Notes from the CPS caseworker indicate Harris said the reason for not appearing at the hearing was that her attorney had advised her not to appear.

5. The defense conceded that the injuries were likely the result of abuse, thus leaving the jury with the single question of whom was responsible. Either Harris or Foster could have caused the closed head injury that caused death as both were home at or near the time it likely occurred.

6. The focus of the government's case largely amounted to comparing and contrasting the actions of Harris to those of Foster. The government was aware that Harris had told police she had legal counsel yet chose to portray her decisions not to attend the second interview and not to attend the initial CPS hearing as evasive. The state would later claim that since they did not specifically mention Harris had consulted legal counsel that her actions were appropriately presented as evidence of consciousness of guilt.

7. When it became clear to the trial court that the state had presented only half the story, leaving out that Harris had contacted legal counsel prior to forgoing the second interview, the court was taken aback: "...you can't sit there

and say that she is somehow avoiding. It's clear she's not. She's told everyone where she is." See Trial Tr. 150-4 (September 27, 2013) Shortly later, "I'll be a monkey's uncle if you can sit there and comment after the defendant has contacted an attorney and make it look like she has fled the jurisdiction." *Id.* at 154.[1]

The court also explained "I've been listening to the State's case-in-chief and you're the one that mentioned she never called back. The State presented in opening that she never called back and made it as if she was running from detectives." "So let's just start with I'm not clear why you would ever enter into evidence from the time you see she contacted a defense attorney to portray her to the jury as somehow evading police." *Id.* "It's obvious, it's obvious somebody told her to quit talking to them." *Id.*

8. Harris moved for a mistrial, arguing that her right to remain silent pursuant to the Fifth Amendment had been violated. (Pet. App. A). The trial court denied the mistrial but indicated that based upon the prosecutor's violation of Harris' Fifth and Sixth Amendment rights it would consider a motion for new trial in the event of a conviction. *Id.* The court noted that given that the prosecution was aware a criminal defense attorney had contacted detectives on behalf of Harris, "yet . . . presented the facts in a manner which portrayed Harris subsequent acts as evasive in an effort to show consciousness of guilt, was problematic." Pet. App. A).

---

[1] The district court ruled that the evidence did not support an inference of flight. The Nevada Supreme Court did not take issue with this aspect of the district court's order.

9. When the jury returned a guilty verdict, Harris' filed a Motion for New Trial. As summarized by the Nevada Supreme Court, the trial court's reason for granting the new trial was its' finding that "... Harris invoked her right to remain silent by proving that she consulted an attorney." Pet. App. 4a.

A 4-to-3 vote of the Nevada Supreme Court reversed:

> "Although Detective Boucher testified that it is common for suspects to invoke their Fifth Amendment right to remain silent once they meet with an attorney, any contact Harris had with an attorney is not an unequivocal assertion. Similarly, CPS records revealing Harris' failure to attend her CPS hearing upon advice from counsel is also not an affirmative invocation of her Fifth Amendment right to remain silent, but rather supports an inference of invocation. However, even a reasonable inference whereby "one can circumstantially say that [Harris] lawyered up," as noted by the district court, falls short of the substantial evidence necessary to show that Harris affirmatively invoked her Fifth Amendment right." Pet. App 5a-6a.

As explained shortly, if the Fifth Amendment privilege exist at all prior to arrest, then this ruling runs afoul of the basic logic set forth by this court concerning the invocation of privilege under a variety of other circumstances. The

short version is that there is nothing ambiguous about unequivocally telling detectives you have a lawyer, which puts them on notice as to why you are choosing to remain silent.

10. Neither Harris nor the attorney testified prior to the trial court's decision to grant a new trial. There was no need because what had occurred was just as obvious to the trial court as it was to the detectives that had stopped trying to call Harris after they spoke to her attorney.

When a split Nevada Supreme Court reversed, the lawyer testified at a post-remand evidentiary hearing on August 10,2018. He verified what the trial court knew to be true: Harris had been in his office for the better part of several hours on August 15th, 2011. During this time, the lawyer made a call to an investigating detective and verified that Harris did not have an outstanding warrant. He made detectives aware that he was meeting with Harris, hence the scheduled interview would not be taking place. He had not yet been retained, but if he was, he would be present at the next interview. The lawyer advised Harris not to talk to detectives without an attorney present and that she had a right not to speak with detectives. Asked why, he replied:

> "Well, that's criminal law 101. She denied any liability for the criminal case. I don't remember the details at all and I would be speculating, but my general hunch was, I found her story fairly credible, and that she might be able to be of some assistance, so I told her not to talk to detectives until I was present. And that if nothing else, we could see if we could work out

> a detail with the detectives for some sort of immunity in return for helping them in their investigation."
>
> See Hearing Tr., August 10, 2018, p. 7-6.

Later:

> Q: Would you have mentioned that she had the right to remain silent, something regarding the testimony?
>
> A: I believe that would have been malpractice not to have. I don't have a specific recollection. I'm sure I would have.
>
> *Id.* 8

Harris filed a renewed Motion for New Trial. It was denied.[2] Harris was sentenced to 22 years to life. When Harris appealed, her conviction was affirmed by a panel of the Nevada Supreme Court citing to "law of the case." Pet. App. E.

REASONS FOR GRANTING THE WRIT

"...[T]here can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has

[2] This renewed motion was not heard before the original trial judge, as the trial judge had been appointed during the interim to the Nevada Court of Appeals.

become an essential feature of our legal tradition." *Mitchell v. U.S.*, 526 U.S. 314, 330 (1999). The question presented by the facts of this petition is fundamental: Did Harris' have the right to invoke Fifth Amendment privilege prior to arrest?

I. There is an unresolved split of both federal circuits and state courts of last resort

Jenkins v Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) held that prearrest silence may be used for impeachment because unlike the use of silence as substantive evidence of guilt: "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." The court expressly declined to "...consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment." *Jenkins*, 447 U.S. at 236 n.2.

This unanswered question left a sea of confusion in lower courts and a split of authority. Many held that the Fifth Amendment provided no protection or privilege prior to arrest, leaving defendant's prearrest silence as the subject of fair comment by the prosecution. *United States v. Cornwell*, 418 Fed.Appx. 224, 227 (4th Cir. 2011) (unpublished); *United States v. Zanabria*, 74 F.3d 590 (5th Cir.1996); *United States v. Osuna–Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005); *United States v. Oplinger*, 150 F.3d 1061 (9th Cir.1998), *overruled on other grounds* by *United States v. Contreras*, 593 F.3d 1135 (9th Cir.2010); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *State v. Lopez*, 230 Ariz. 15, 279 P.3d 640, 645 (Ct.App.2012); *State*

v. Leecan, 198 Conn. 517, 504 A.2d 480 (1986); *People v. Schollaert,* 194 Mich.App. 158, 486 N.W.2d 312 (1992); *State v. Borg,* 806 N.W.2d 535 (Minn.2011); *State v. Helgeson,* 303 N.W.2d 342 (N.D.1981); *Salinas v. State,* 369 S.W.3d 176 (Tex. Crim. App. 2012); *State v. LaCourse,* 168 Vt. 162, 716 A.2d 14 (1998).

The question was resolved in the opposite manner by an essentially equal number of circuit courts. *Coppola v. Powell,* 878 F.2d 1562 (1st Cir.1989); *Combs v. Coyle,* 205 F.3d 269 (6th Cir.2000) (also *Seymour v. Walker,* 224 F.3d 542, 560 (6th Cir. 2000); *United States ex rel. Savory v. Lane,* 832 F.2d 1011 (7th Cir.1987) (also *Ouska v. Cahill–Masching,* 246 F.3d 1036, 1049 (7th Cir. 2001)); *United States v. Burson,* 952 F.2d 1196 (10th Cir.1991); *United States v. Moore,* 104 F.3d 377, 389 (D.C.Cir.1997). The same is true of state courts of last resort, with an additional few relying upon state law to reach their conclusion. *People v. Rogers,* 68 P.3d 486 (Colo.App.2002); *People v. Welsh,* 58 P.3d 1065 (Colo.App.2002); *State v. Moore,* 131 Idaho 814, 965 P.2d 174 (1998); *Commonwealth v. Thompson,* 431 Mass. 108, 725 N.E.2d 556 (2000); *State v. Rowland,* 234 Neb. 846, 452 N.W.2d 758 (1990); *State v. Cassavaugh,* 161 N.H. 90, 12 A.3d 1277 (2010); *State v. Leach,* 102 Ohio St.3d 135, 807 N.E.2d 335 (2004); *State v. Palmer,* 860 P.2d 339, 349 (Utah Ct.App.1993); *State v. Easter,* 130 Wash.2d 228, 922 P.2d 1285 (1996); *State v. Fencl,* 109 Wis.2d 224, 325 N.W.2d 703 (1982); *Tortolito v. State,* 901 P.2d 387 (Wyo.1995).

Three decades after *Jenkins,* the Texas Court of Criminal Appeals noted that: "Nearly all of the courts that

have addressed this issue have noted the conspicuous split and the lack of guidance from the Supreme Court." *Salinas*, 369 S. W. 3d at 179. This court granted certiorari in *Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013) "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." *Salinas*, 570 U.S. at 183.

The result in *Salinas* was a deeply divided plurality decision with no single thread attracting a majority of the court. Justice Alito's plurality opinion joined by Chief Justice Roberts and Justice Kennedy, determined that the question need not be resolved as Salinas had simply fallen silent midway through a voluntary interview and failed to establish why he did so. The dissent, authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, opined that Fifth Amendment privilege should have prohibited the prosecution "from commenting on [the defendant's] silence in response to police questioning." *Salinas*, 570 U.S. at 193. Justices Scalia and Thomas, agreed in result but would have gone so far as to rule that the Fifth Amendment privilege never applies prior to arrest. The fractured *Salinas* decision provided some insights, but little clarity. The certiorari question remains unanswered. There is still confusion in the lower courts.

Post *Salinas*, there are several decisions which maintain that the Fifth Amendment provides no protection prior to arrest. *United States v. Wilchcombe,* 838 F.3d 1179, 1184 (11th Cir. 2016); *United States v. Cabezas-*

Montano, 949 F.3d 567, 595 (11th Cir. 2020), cert. denied No. 19-8910, 2020 WL 6551777 (U.S. Nov. 9, 2020); *Buentello v. State*, 512 S.W.3d 508, 521 (Tex. App. 2016).

Other courts reach the opposite conclusion. *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013); *Com. v. Molina*, 628 Pa. 465, 482, 104 A.3d 430, 440 (2014); *State v. Lovejoy*, 24, 89 A.3d 1066, 1074 (2014); *State v. Costillo,* 475 P.3d 803, 810 (2020); See also, *United States v. Zarauskas*, 814 F.3d 509, 515–16 (1st Cir. 2016) (assuming "without deciding, that prosecutorial comment on the defendant's pre-custodial silence violates the Fifth Amendment.")

Those courts denying the privilege note that *Salinas* didn't change anything. The courts upholding the privilege note the passage from Justice Alito's plurality opinion that: "A suspect who stands mute has not done enough to put the police on notice that he is relying on his Fifth Amendment privilege", 133 S. Ct. at 2182. They read this to imply that placing the police on notice of invocation is sufficient to sustain the privilege, hence the privilege exists; Perhaps the most insightful courts are those who simply admit that *Salinas* did little to clear the confusion, leading them to assume without deciding that the privilege exist prior to arrest. *Zarauskas*, 814 F.3d at 515-516. All three camps recognize the continuing split of authority. See, for example, *Id.*; *Okaton*,728 F.3d; and *Wilchcombe*, 838 F.3d.

A well-reasoned analysis was made by the second circuit in *Okatan*, supra. The situation was factually similar to the subject of this petition.

> Unlike Salinas, who simply stopped talking during the course of an interrogation,

> Okatan affirmatively claimed the privilege by placing the authorities on notice that he had a lawyer before he fell silent. See *Salinas*, 133 S.Ct. at 2179 ("[A] witness who desires the protection of the privilege must claim it at the time he relies on it.") (internal quotation marks and ellipsis omitted). Okatan did not use the words "Fifth Amendment" or "privilege against self-incrimination," but such precision is not required. See *Quinn v. United States*, 349 U.S. 155, 164, 75 S.Ct. 668, 99 L.Ed. 964 (1955) ("[N]o ritualistic formula is necessary in order to invoke the privilege."). A defendant must only put an interrogating official "on notice [that he] intends to rely on the privilege." Salinas, 133 S.Ct. at 2179. In the context of custodial interrogation, "an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). Similarly, even when an individual is not in custody, because of "the unique role the lawyer plays in the adversary system of criminal justice in this country," id., a request for a lawyer in response to law enforcement questioning suffices to put an officer on notice that the individual means to invoke the privilege.
>
> *Okatan*, 738 F.3d at 118-119.

Confronted with similar circumstances, the Maine Supreme Court citing to *Okatan*, reached a similar conclusion: "We distinguish Salinas, who had simply

stopped talking, from a defendant who "specifically terminated communication by first telling the investigating detective during a telephone conversation that he wanted to speak with a lawyer and then remaining silent by not returning the detective's telephone calls." *State v. Lovejoy,* 89 A.3d 1066, 1074 (2014).

Both the *Okatan* and *Lovejoy* decisions are rooted in Fifth Amendment jurisprudence yet come to a decision diametrically opposed to the Nevada Supreme Court. That these courts can read the same cases and yet come to such divergent results is evidence of the need for this court to grant certiorari and provide direction.

This case presents the appropriate vehicle to decide the issue as few would question that Harris had the right to consult legal counsel and there is little debate that she was in truth and fact relying upon the privilege and advice of counsel when she chose to remain silent.

II. More than just the courts, the Public and Police need clarity

The extent to which our citizenry may or may not be protected from having to participate in accusatory prearrest interrogation strikes at the very core of our civil liberties. Allowing the refusal to participate to be used as evidence of guilt means the government has the very real ability to compel participation. Every one of us, indigent criminal defendants such as Harris to holders of high office, should be concerned.

Every day, police officers and other agents of the government question people. Every day these people make decisions about whether to participate. When things get

contentious, they consult legal counsel. At a bare minimum, fundamental fairness dictates that we know the likely price of our silence. Given the split of current authority we do not.

Likewise, law enforcement has a real need to know the boundaries of their abilities to "encourage" participation. How far is too far when demanding information? Can an officer simply ignore an unambiguous request for counsel prior to arrest? To what extent do they need to respect a suspect's desire to remain silent prior to arrest? Resolving the question raised in this petition will provide some needed clarity.

III. It is a question of fundamental fairness

Virtually everyone would agree that Harris was within her rights to consult with a lawyer before being interviewed, yet these same people would be hard pressed not to take consultation with counsel as evidence of guilt. See *Lakeside v. Oregon*, 435 U.S. 333, 340, n. 10, (1978) (quoting Wigmore, Evidence § 2272, at 426)). For this reason, lower courts are near unanimous that consultation with counsel should not be presented as substantive evidence of guilt.[3]

---

[3] Citing to *U. S. ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973), which it describes as a "seminal decision of the United States Court of Appeals for the Third Circuit", the Connecticut Supreme Court noted: "Likewise, the vast majority of lower case have followed the rule set forth in *Yeager* that prosecutors may not suggest that a defendant's retention of counsel is inconsistent with his or her

If Harris was free to consult with legal counsel and it is common knowledge that the standard practice of legal counsel is to advise their clients to remain silent, why maintain the fiction that retaining counsel and falling silent means anything other than an attempt to rely on the privilege? The plurality opinion in *Salinas* speaks to the importance of placing police and courts on notice of the reasons underlying silence. Doesn't having an attorney call and cancel an interview do that? The reality is that the trial court knew the reasons underlying Harris's silence, so did the detectives. Shouldn't that be enough?

Once in custody, "an accused's [unambiguous] request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) Further, this court has noted that "...asserting one's constitutional right cannot be a crime, nor can it be evidence of a crime." *Camara v. Municipal Court*, 387 U.S. 523, 532–33, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *District of Columbia v. Little*, 339 U.S. 1, 7, 70 S.Ct. 468, 94 L.Ed. 599 (1950)". Shouldn't the same logic apply when an out of custody suspect exercises his right to stop speaking without the presence of counsel? Isn't placing police on notice of such enough to establish invocation of Fifth Amendment privilege?

The standards for determining invocation should be consistent. This is certainly suggested by *Hoffman v.*

---

innocence. The constitutional foundations for these decisions are, however, varied in nature." *State v. Angel T.*, 292 Conn. 262, 278, 973 A.2d 1207, 1218 (2009)).

United States, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951) and *Kastigar v. United States,* 406 U.S. 441, 444, 92 S. Ct. 1653, 1656, 32 L. Ed. 2d 212 (1972). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486-87. "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar*, 406 U.S. at 44.

Given the accusatory nature of the first interview, Harris had every reason to apprehend the dangers of a second interview and that whatever she said might be used against her. In such situations doesn't telling the police you have an attorney, followed by silence place them on notice that you are seeking refuge in the Fifth Amendment? Unlike *Salinas*, Harris affirmatively told police she had a lawyer. This is a far cry from simply standing mute. That the lawyer contacted detectives on Harris' behalf to cancel the scheduled interview is worlds away from the situation in *Salinas.*

Was the trial court obligated to simply stick its head in the sand as to the realities at play and sanction the state's misrepresentation of Harris' decision to stop speaking with police as evasive behavior evidencing consciousness of guilt? Wouldn't this be contrary to fundamental fairness? See *Arizona v. Washington*, 434 U.S 497. at 513 n. 32 (quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976)) holding that for a lawyer to "...make statements to the jury that are

not and cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct ... and fundamentally unfair." See also ABA Standards for Criminal Justice, Standard 3-5.8(a) ("the prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.").

In the words of the trial court, "it was obvious someone told her to stop talking"; in the words of the lawyer giving the advice to stop talking was "criminal law 101." There was no ambiguity in the actions of the detectives who stopped all attempts to contact Harris following the conversation with the lawyer. They all knew that Harris remained silent in reliance upon Fifth Amendment privilege. For the Nevada Supreme Court to find Harris had fallen short of establishing invocation, namely reliance upon the advice of counsel and the protections of Fifth Amendment privilege denies reality.

Simply put, this court should grant certiorari to establish clarity for the lower courts that even prior to arrest invocation of Fifth Amendment privilege does not require magic words. The unambiguous assertion of legal representation followed by silence should be enough to establish invocation of the privilege.

IV. A Contrary decision would invite gamesmanship

In *Davis v. Mississippi*, 94 U.S. 721, FT 6 (1969) this court noted "...the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." If this is to mean anything, it

should mean that common citizens like Harris are protected from having their decision to remain silent in reliance upon the Fifth Amendment mispresented by prosecutors as consciousness of guilt.

Any other conclusion is fundamentally unfair, inviting the sort of gamesmanship this court disavowed in *Missouri v. Seibert*, 542 U.S. 600, 617, 124 S. Ct. 2601, 2613, 159 L. Ed. 2d 643 (2004) ("Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute.")

CONCLUSION

For all the foregoing reasons, this Court should grant certiorari to settle whether Fifth Amendment protections apply in the prearrest context and clarify the holding of *Salinas*.

Respectfully Submitted,
SCOTT L. COFFEE
Chief Deputy Public Defender

By: Scott L. Coffee #5607
Office of the Clark County
Public Defender
309 S. Third St. #226
P.O. Box 552610
Las Vegas, NV 89155-2610
coffeesl@clarkcountynv.gov
Phone: (702) 455-5768
**Counsel of Record*

No.

In the Supreme Court of the United States

MARIANN HARRIS,

Petitioner

v.

THE STATE OF NEVADA,

Respondent

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

CERTIFICATE OF SERVICE

I, SCOTT L. COFFEE, declare that I am over the age of 18 years, not a party to the within cause and a member of the bar of this Court; my business address is 309 South Third Street, #226, Las Vegas, Nevada 89155-2610. I served a true copy of the **PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT** on each of the following, by placing same in an envelope addressed as follows:

Aaron D. Ford, Attorney General
State of Nevada, Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717

Steven B. Wolfson, District Attorney
Attn: Appellate Division
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155

Each said envelope was then, on the 1st day of March, 2021, sealed and deposited in the United States mail at Las Vegas, Clark County, Nevada, the county in which I am employed, with the postage thereon fully prepaid. I certify that all parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 1st day of March, 2021, at Las Vegas, Nevada.

Counsel for Petitioner

No.

In the Supreme Court of the United States

MARIANN HARRIS,

Petitioner

v.

THE STATE OF NEVADA,

Respondent

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

---

WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4,981 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 1st day of March, 2021, at Las Vegas, Nevada.

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
MARIANN HARRIS,
Respondent.

No. 64913

FILED

MAY 08 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a presentence motion for a new trial following a conviction, pursuant to a jury verdict of first-degree murder, child abuse and neglect with the use of a deadly weapon, and two counts of child abuse and neglect. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

This case concerns the homicide of a 14-month-old girl caused by blunt force head trauma. The timeframe of the victim's fatal skull fracture implicated respondent Mariann Harris and investigators also questioned the father of Harris' children, Armani Foster. On the morning the victim died, Homicide Detective Boucher from the Las Vegas Metropolitan Police Department interviewed Harris and Foster. That same day, Child Protective Services (CPS) took custody of Harris' and Foster's children, and police taped off the couple's residence for several days. Harris went to California to stay with her family. Detectives submitted a case against only Harris and police arrested her in California. Prior to opening statements at Harris' trial, the State submitted a proposed jury instruction on flight, which the district court took under consideration. After the jury returned guilty verdicts on all four counts, the court granted Harris' motion for a new trial based on prejudicial prosecutorial misconduct in violation of Harris' Fifth, Sixth, and

Fourteenth Amendment rights under both the U.S. and Nevada Constitutions.

"The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse." *Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (internal quotation marks omitted). Further, we apply the following two-step analysis when considering a claim of prosecutorial misconduct: (1) "whether the prosecutor's conduct was improper," and (2) "whether the improper conduct warrants reversal." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

The State argues that the district court abused its discretion in granting Harris' motion for a new trial. As an initial contention, the State asserts that Harris failed to object to the prosecutor's comments amounting to the alleged misconduct. The State further contends that Harris never invoked her Fifth Amendment right to remain silent. Conversely, Harris concedes that her invocation of the right to remain silent occurred pre-arrest and prior to being Mirandized, but argues that this right exists independently. We conclude that the district court abused its discretion in granting Harris a new trial based on her failure to demonstrate plain error and because there was no prosecutorial misconduct.[1] In particular, Harris did not invoke her Fifth Amendment right and, thus, comments regarding her failure to appear at the second police interview were not improper.

---

[1]We note that Harris first made a motion for mistrial based on a forensic pathologist's testimony. We further note that Harris made another motion for mistrial based on notes in the CPS records, but failed to show prejudice, and the district court denied her motion.

Harris failed to object to the challenged prosecutorial misconduct

"Generally, the failure to object to prosecutorial misconduct precludes appellate review." *Rose v. State*, 123 Nev. 194, 208, 163 P.3d 408, 418 (2007). However, we will review the prosecutorial misconduct for plain error if the error: "(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." *Id.* at 208-09, 163 P.3d at 418 (internal quotation marks omitted).

When Foster testified at trial, the State inquired about the CPS hearing concerning Foster's and Harris' children. Without any objection, Foster stated that he attended the CPS hearing concerning the couple's children, but that Harris had not. Foster subsequently reiterated this answer, without any objection.

When Detective Boucher testified, the State asked him whether he tried to schedule a second interview with Harris. Without objection, he responded that Harris initially agreed to a second interview, but failed to appear. In addition, Detective Boucher testified that he had also scheduled a second interview with Foster, who did appear. Again, his direct testimony failed to elicit any objection.

On cross-examination, Detective Boucher reviewed Harris' phone records and acknowledged that she had received a text message from a law office, indicating the firm's location. The State then objected when Harris' counsel asked the detective, "Do you know if Ms. Harris spoke to an attorney and was advised not to say anything further to you?" Outside the presence of the jury, the district court overruled the objection and admonished the State for putting forth the fact that Harris failed to

show up to a second interview after she had contacted a criminal defense attorney who likely advised her not to speak with police.

Harris failed to object to the testimony of Foster and Detective Boucher improperly elicited by the prosecutor. Therefore, Harris must demonstrate that plain error exists. After reviewing the alleged instances of prosecutorial misconduct to which Harris failed to object, we conclude that plain error does not exist because there was no prosecutorial misconduct.

The State did not engage in prosecutorial misconduct

The district court found that due to Harris' possible retention of an attorney, prosecutorial misconduct occurred during the State's direct examination of Foster, Detective Boucher, and Ms. Hookstra, the CPS caseworker. In particular, the court found that Harris invoked her right to remain silent by proving that she consulted an attorney. Thus, the court found that commenting on Harris' failure to appear at her second police interview and subsequent CPS hearing amounted to prosecutorial misconduct.

The Fifth Amendment states in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against [her]self." U.S. Const. amend. V; *see also* Nev. Const. art. 1, § 8. "We will not disturb a district court's determination of whether a defendant invoked [her] right to remain silent if that decision is supported by substantial evidence." *Maestas v. State*, 128 Nev. 124, 144-45, 275 P.3d 74, 87-88 (2012). However, "[a] person claiming the protection of the Fifth Amendment generally must affirmatively invoke it." *Dzul v. State*, 118 Nev. 681, 689, 56 P.3d 875, 880 (2002). Although personal invocation is preferred, an individual may also invoke her Fifth Amendment right through her

counsel, but there is a difference between an affirmative representation of a client's right by her counsel and speculation by the district court. *Palmer v. State*, 112 Nev. 763, 767, 920 P.2d 112, 114 (1996).

In an analogous case, we were "not convinced that the prosecutor's references to [the defendant's] failure to attend [police] meetings were comments on [the defendant's] silence." *Santillanes v. State*, 104 Nev. 699, 701, 765 P.2d 1147, 1148 (1988). Instead, such references are "specific examples of [the defendant's] *conduct*" and from this "the jury could reasonably infer [the defendant's] consciousness of guilt." *Id.* (emphasis added).

Here, *Santillanes* supports a conclusion that Harris' *conduct* of failing to appear for her second interview with police and subsequent CPS hearing, not her silence, was admissible to show consciousness of guilt. Although Detective Boucher testified that it is common for suspects to invoke their Fifth Amendment right to remain silent once they meet with an attorney, any contact Harris had with an attorney is not an unequivocal assertion. Similarly, CPS records revealing Harris' failure to attend her CPS hearing upon advice from counsel is also not an affirmative invocation of her Fifth Amendment right to remain silent, but rather supports an inference of invocation. However, even a reasonable inference whereby "one can circumstantially say that [Harris] lawyered up," as noted by the district court, falls short of the substantial evidence necessary to show that Harris affirmatively invoked her Fifth Amendment right. Therefore, commenting on Harris' failure to appear at her second

police interview and subsequent CPS hearing did not violate her Fifth Amendment right and, thus, did not amount to prosecutorial misconduct.[2]

With regard to the district court's subsequent denial of the State's flight instructions, we will not disturb the district court's decision in settling jury instructions absence an abuse of its broad discretion. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (internal quotation marks omitted). "We have cautioned that flight signifies something more than a mere going away. It embodies the idea of going away with a consciousness of guilt, for the purpose of avoiding arrest." *Weber v. State*, 121 Nev. 554, 581-82, 119 P.3d 107, 126 (2005) (internal quotation marks omitted). Due to the possibility of undue influence by a flight instruction, we will carefully scrutinize the record to determine if the evidence warranted such an instruction. *Id.* Further, flagrantly disobeying a court's order may constitute prosecutorial misconduct. *See Valdez*, 124 Nev. at 1194, 196 P.3d at 480.

Here, the State proposed a jury instruction on flight prior to opening statements, which the district court took under submission without opposition. The prosecutor mentioned during the State's opening

---

[2]We further conclude that Harris' Sixth and Fourteenth Amendment rights were not violated. *See Patterson v. State*, 129 Nev. 168, 175, 298 P.3d 433, 437 (2013) (stating that the Sixth Amendment right to counsel in all criminal prosecutions does not attach until the commencement of adversarial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment") (internal quotation marks omitted); *see also Kaczmarek v. State*, 120 Nev. 314, 328, 326, 91 P.3d 16, 26, 24 (2004) (stating that the Fifth and Sixth Amendments apply to the states through the Fourteenth Amendment).

argument that Harris never showed up for her scheduled second interview with the detectives, and that she appeared to place a newspaper in front of her face as an effort to elude the police. The State argues that there was strong evidence of flight warranting a jury instruction. We disagree and conclude that there was no evidence of flight because Harris did not leave Nevada for the purpose of avoiding arrest. Rather, her departure to California constitutes a mere going away since she left in order to stay with family while her residence was taped off for several days. Thus, because of the district court's broad discretion and possibility of undue influence, we conclude that the court did not abuse its discretion in refusing the State's instruction on flight. However, the district court waited to rule on the State's proposed instruction on flight long after taking it under submission; therefore, we further conclude that the State did not engage in prosecutorial misconduct by insinuating flight after it was ordered not to do so.

Near the end of trial, the district court ruled that the State could not argue flight. Following the court's ruling, Ms. Hookstra, the CPS worker who took custody of Harris' and Foster's children when the victim died, testified. Harris objected when the State inquired into the conversation Ms. Hookstra had with Harris. Harris' counsel then brought to the district court's attention, during a bench conference, CPS records indicating that Harris told Ms. Hookstra: "I've hired an attorney and the attorney told me not to show up for a CPS hearing." The district court sustained Harris' objection as to Ms. Hookstra testifying that she had advised Harris of the CPS hearing and ordered the State not to discuss the CPS hearing. Following the court's ruling from the bench conference, the

CPS records were not presented to the jury and Ms. Hookstra did not comment on the CPS hearing.

The State abided by the district court's order not to argue flight. Ms. Hookstra's testimony never revealed that Harris failed to show up to the CPS hearing. Further, any reference insinuating flight was entirely absent from the State's closing arguments. Therefore, no prosecutorial misconduct occurred.[3] Accordingly, we

[3]We note that the district court determined that even if the individual grounds for prosecutorial misconduct were insufficient to grant a new trial, the cumulative effects of misconduct warrants a new trial. However, as we conclude that there was no prosecutorial misconduct, there can be no cumulative error.

ORDER the district court order granting respondent's presentence motion for a new trial REVERSED AND REMAND for sentencing.

_____, J.
Douglas

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 15
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk

STIGLICH, J., with whom CHERRY, C.J., GIBBONS, J., agree, dissenting:

On appeal, this court reviews a district court's grant or denial of a motion for a new trial for a "palpable abuse" of discretion. *Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (internal quotation marks omitted). In reviewing the district court's determination, its "findings of fact are entitled to deference and will not be disturbed on appeal if they are supported by substantial evidence." *Browning v. State*, 124 Nev. 517, 531, 188 P.3d 60, 70 (2008).

Given the facts of this case, the decision to grant a new trial fell within the clear discretion of the district court. Notably, the majority concludes that the district court erred in finding that prosecutorial misconduct occurred. I disagree.

Viewed in a vacuum, each individual instance of alleged prosecutorial misconduct may not constitute improper commentary on Harris' exercise of her Fifth Amendment rights.[1] Nonetheless, this court

---

[1]Even if I were inclined to agree that the issues are limited to whether Harris' Fifth Amendment rights were violated, I do not believe that *Santillanes* stands for the proposition that the failure to appear at a police interview, on its own, is evidence of consciousness of guilt. Notably, in both *Santillanes* and *Maresca v. State*, upon which *Santillanes* relies, the defendants in question both failed to appear for police interviews, and then made nearly immediate attempts to either avoid arrest or flee the country. *Santillanes v. State*, 104 Nev. 699, 701, 765 P.2d 1147, 1148

continued on next page . . .

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIANN JASMINE HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78113

FILED

JUL 31 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder and two counts of child abuse and neglect. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Appellant Mariann Harris was arrested and tried for murder and child abuse and neglect with use of a deadly weapon of 14-month-old D.J., and two counts of child abuse and neglect involving Harris's children, R.F. and M.F. A jury found Harris guilty of all charges.[1] Prior to sentencing, the district court granted Harris's motion for a new trial. Following the State's appeal, we determined that the district court abused its discretion by granting Harris a new trial, and we reversed and remanded the matter to the district court for sentencing. *See State v. Harris*, Docket No. 64913 (Order of Reversal and Remand, May 8, 2017) (hereinafter Remand Order). The district court sentenced Harris to serve an aggregated prison term totaling 22 years to life.

[1]While the jury found Harris guilty of all counts, the district court granted Harris's post-trial motion to merge the murder count with the child abuse and neglect with use of a deadly weapon count based on double jeopardy.

On appeal, Harris argues that (1) the district court improperly treated the two counts of child abuse and neglect as felonies under NRS 200.508(1) rather than gross misdemeanors pursuant to NRS 200.508(2)(b)(1), and that the State failed to provide sufficient evidence to support her convictions for these counts; (2) the State improperly vouched for Armani Foster, a State witness; (3) the State improperly commented on Harris's outburst made during trial; (4) the State violated Harris's Fifth Amendment right to remain silent by commenting on her failure to appear for a police interview and a CPS hearing when Harris did so on the advice of counsel;(5) the State committed prosecutorial misconduct by representing Harris's failures to appear as evidence of guilt; (6) the State committed prosecutorial misconduct by violating the district court's ruling regarding the jury instruction on flight, and (7) cumulative error warrants reversal. Having reviewed Harris's contentions and for the reasons discussed below, we affirm the judgment of conviction.

Child abuse and neglect counts

Harris argues that the district court erred by denying her motion to adjudicate and sentence the abuse and neglect convictions as gross misdemeanors, contending that it is unclear whether the jury convicted her under NRS 200.508(1)(b)(1), a felony, or NRS 200.508(2)(b)(1), a gross misdemeanor. *See* NRS 200.508(1)(b)(1) (detailing that "[a] person who willfully causes a child . . . to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect" commits a category B felony); NRS 200.508(2)(b)(1) (explaining that a person statutorily responsible for a child's safety "who permits or allows that child . . . to be placed in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect" commits a

gross misdemeanor). Harris relies on *Ramirez v. State* to support her argument. 126 Nev. 203, 209-10, 235 P.3d 619, 623-24 (2010) (granting the defendant a new trial, in part, because the State failed to articulate the predicate felony supporting the second-degree-felony-murder conviction by including language from both NRS 200.508(1) and NRS 200.508(2) on the charging document and pertinent jury instruction).

We disagree with Harris, as she misapplies our holding in *Ramirez*. There, we clarified that "NRS 200.508(1) addresses scenarios where the person charged under the statute directly committed the harm." 126 Nev. at 209, 235 P.3d at 623. However, "NRS 200.508(2), by contrast, addresses situations where a person who is responsible for the safety and welfare of a child fails to take action to protect that child from the abuse or neglect of another person or source." *Id.* In *Ramirez*, it was unclear whether the jury convicted the defendant of second-degree felony murder under NRS 200.508(1) or NRS 200.508(2) because the jury could have determined that the defendant's boyfriend killed the victim based on conflicting evidence presented at trial. *Id.* at 209-10, 235 P.3d at 623-24. Because second-degree murder requires an immediate and direct causal connection between the defendant's act and the victim's death, we determined that NRS 200.508(2) could not support the defendant's conviction for second-degree felony murder and granted the defendant a new trial based on this ambiguity. *Id.*

The circumstances surrounding Harris's conviction are distinguishable from those in *Ramirez*. Here, the State charged Harris with first-degree murder of D.J., and the jury convicted Harris of the same. The State also pursued charges of child abuse and neglect involving R.F. and M.F., maintaining that they witnessed Harris beat and kill D.J. The jury likewise convicted Harris of these crimes. Although the indictment

contained language from both subsections (1) and (2) of NRS 200.508, Harris's murder conviction leaves no doubt that Harris, as "the person charged under the statute[,] directly committed the harm" to R.F. and M.F under NRS 200.508(1)(b)(1). *See Ramirez*, 126 Nev. at 209, 235 P.3d at 623. In addition, the indictment specified that it accused Harris of "CHILD ABUSE & NEGLECT (Felony – NRS 200.508)." Thus, we conclude that the district court properly treated the child abuse and neglect counts as felonies pursuant to NRS 200.508(1)(b)(1).

Relatedly, Harris argues that the State presented insufficient evidence to support her child abuse and neglect convictions. We disagree. When reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This court will not disturb a verdict supported by substantial evidence. *Id.* "Circumstantial evidence alone may support a judgment of conviction." *Collman v. State*, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

To sustain a conviction under NRS 200.508(1), the State needed to prove beyond a reasonable doubt that Harris placed R.F. and M.F "in a situation where [they] *may* [have] suffer[ed] physical pain or mental suffering as the result of abuse or neglect"—not that they did in fact so suffer. *See* NRS 200.508(1) (emphasis added). Harris concedes on appeal that R.F. and M.F. were in the apartment during the time that D.J. was beaten to death. Furthermore, Harris does not challenge the sufficiency of the evidence supporting her first-degree murder conviction. Therefore, we

hold that sufficient evidence existed for a reasonable jury to conclude beyond a reasonable doubt that Harris beat and killed D.J. in the apartment with R.F. and M.F. present, and that R.F. and M.F. "may [have] suffer[ed] physical pain or mental suffering as the result." NRS 200.508(1).

Witness vouching

Harris argues that the State improperly vouched for Armani Foster through the testimony of Detective Boucher and Detective Kisner. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) ("A prosecutor may not vouch for the credibility of a witness . . . ."). Specifically, Harris maintains that the detectives improperly testified "that Foster acted appropriately during" police interviews by responding to their accusations with anger and animosity. Because Harris did not object to the detectives' testimony, we review this claim for plain error. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (holding that this court reviews all unpreserved errors "for plain error without regard as to whether they are of constitutional dimension"). Having considered these statements in context, we conclude that the detectives' testimony reflected their opinions based on professional experience, and that the State did not vouch for Foster. Therefore, there was no plain error.

Harris's in-court outburst

Harris argues that the State committed misconduct by referencing Harris's outburst at trial during closing arguments to establish consciousness of guilt. During Detective Boucher's testimony regarding his initial interview with Harris at the crime scene, Harris interjected, "She died and you didn't tell me. Like what do you mean? What do you mean? You didn't tell me, you didn't have the heart to tell me." Neither party objected to the outburst, nor did the district court otherwise address it.

Then, during rebuttal argument, the State referenced this outburst by stating, "Remember the outburst: Oh, how dare you, Detective, not tell me." The State then argued that other evidence contradicted Harris's assertion that she was unaware of D.J.'s death when she first spoke with Detective Boucher.

As Harris did not object to the prosecutor's comment, we likewise review this contention of misconduct for plain error. *See Martinorellan*, 131 Nev. at 48, 343 P.3d at 593. Because no prosecutorial misconduct occurred, we conclude that Harris fails to demonstrate plain error, *see Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (explaining that the appellant must demonstrate plain error, "meaning that it is clear under current law from a casual inspection of the record[,]" for this court to remedy a forfeited error), *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018).

Fifth Amendment violation and prosecutorial misconduct allegations

Harris next maintains that the State (1) violated her Fifth Amendment right to remain silent by commenting on her failure to appear for a police interview and a CPS hearing when Harris did so on the advice of counsel, (2) committed prosecutorial misconduct by representing Harris's failures to appear as evidence of guilt, and (3) committed prosecutorial misconduct by violating the district court's ruling regarding the jury instruction on flight. The State answers that the law-of-the-case doctrine bars these arguments, as this court considered the same during the State's earlier appeal. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (explaining that the law-of-the-case doctrine provides that the law announced by this court on appeal dictates "the law of the case on all subsequent appeals in which the facts are substantially the same[,]" and operates to bar the reconsideration of claims previously decided on their

merits by this court) (internal quotation marks omitted)). We agree with the State.

First, we already determined that Harris did not affirmatively invoke her Fifth Amendment right. *See* Remand Order at *5 ("[E]ven a reasonable inference whereby 'one can circumstantially say that [Harris] lawyered up,' as noted by the district court, falls short of the substantial evidence necessary to show that Harris affirmatively invoked her Fifth Amendment right." (second alteration in original)); *see also* U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); Nev. Const. art. 1, § 8 ("No person shall . . . be compelled, in any criminal case, to be a witness against himself . . . .").

Despite Harris's contention that attorney Craig Mueller's testimony at an evidentiary hearing before sentencing establishes otherwise, we conclude that Mueller's testimony that he spoke with detectives about the existence of a warrant falls short of the substantial evidence necessary to conclude that Harris affirmatively invoked her Fifth Amendment right through counsel. *See* Remand Order at *4-5 (explaining that an individual may invoke her Fifth Amendment right personally or though counsel, "but there is a difference between an affirmative representation of a client's right by her counsel and speculation by the district court" (citing *Palmer v. State*, 112 Nev. 763, 767, 920 P.2d 112, 114 (1996))). Because Mueller's testimony does not constitute new or different evidence affecting this court's prior conclusion that Harris did not invoke her Fifth Amendment right, we hold that the law-of-the-case doctrine bars reconsideration of this claim. *See Rippo v. State*, 134 Nev. 411, 427-28, 423 P.3d 1084, 1100-01 (2018) (explaining that the law-of-the-case doctrine may

not apply to bar the relitigation of claims where the appellant provides substantially new or different evidence).

Second, based on our conclusion that the State did not violate Harris's Fifth Amendment right, we previously determined that the State did not commit prosecutorial misconduct by representing Harris's failures to appear as evidence of guilt. Remand Order at *5-6. Moreover, we reasoned that Harris's failures to appear were admissible as *conduct* evidencing consciousness of guilt, as opposed to silence that may implicate the Fifth Amendment. *Id.* at *5 (citing *Santillanes v. State*, 104 Nev. 699, 701, 765 P.2d 1147, 1148 (1988) (determining that a jury may reasonably infer the defendant's consciousness of guilt from the defendant's *conduct* of failing to attend a previously agreed-upon meeting with police)). Because Harris now seeks to reargue the merits of our prior holding, the law-of-the-case doctrine bars this argument as well.

Third, we already determined that the State did not violate the district court's ruling regarding the jury instruction on flight, such that no prosecutorial misconduct occurred. *Id.* at *7-8. Specifically, we recognized that the State commented on Harris's failure to appear at the scheduled police interview and her apparent attempt to conceal her face with a newspaper to elude arrest in its opening statement. *Id.* at *6-7. However, we further determined that the district court took the State's proposed jury instruction on flight under submission prior to opening statements without opposition, and that the district court did not rule on the instruction until much later. *Id.* at *7. Thus, we concluded that the State abided by the district court's ruling not to argue flight following Jill Hookstra's testimony regarding the CPS hearing. *Id.* at *7-8. As we previously addressed this

argument, the law-of-the-case doctrine likewise bars Harris's attempt to relitigate this issue on appeal.

Cumulative error

Finally, Harris argues that cumulative error warrants reversal. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Having found no errors on the part of the district court, we conclude that this argument lacks merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Parraguirre

_____, J.
Hardesty

_____, J.
Cadish

cc: Hon. David M. Jones, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX C

Electronically Filed
01/22/2014 12:06:33 PM

ORDR

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff(s), v. MARIANN HARRIS, Defendant(s)	CASE NO. C275959 DEPT NO. XV

DECISION AND ORDER

This matter having come on for hearing on February 27, 2014 at 9:00 a.m., the matter having been decided in Chambers based on the moving papers and pursuant to EDCR 2.23(c), this Court makes the following Decision and Order.

///

///

///

///

///

///

///

///

///

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT EIGHTEEN
LAS VEGAS NV 89155

FACTS

In August 2011, Jannet Simms and Defendant Marianne Harris were best-friends of approximately one year. Jannet Simms was a 21 year-old single mother to a three (3) year old girl named Darnella and the victim in this case, a 14 month-old toddler named Dyon. The Defendant was from a very large family, one of approximately 14 siblings. During August of 2011, the defendant was pregnant with her fourth baby, and had three boys, ages three (3) years, two (2) years, and six (6) months old. The Defendant was the victim's "Godmother" and she often watched the victim together with her own children. Jannet Simms and the Defendant had "play dates" and they routinely watched each other's children. The Defendant and Jannet Simms were so close to one another that they had portraits taken of both of them with both families' children together, and they both displayed the portraits in their respective residences. Additionally, both mothers had keys to each other's residences. The Defendant had toys, diapers, and girl's baby clothes for the victim at her residence for times when the victim would go over to play with the Defendant's children. Before August 2011, the Defendant had no contact with law enforcement or Child Protective Services (CPS).

The Defendant and Armani Foster had been dating for seven (7) years and he was the father of her children. Armani Foster is a self-admitted "Rolling 60's Crip" gang-member from Los Angeles, but since moving to Las Vegas, he had steady employment at Burlington Coat Factory. He admitted that he committed prior acts of domestic violence on the Defendant during the course of their relationship; the year before he even put his knee into the Defendant's pregnant stomach as he strangled her during a fight. (Trial Tr. p. 148-149, Sept. 26, 2013). Notably, after the Defendant was arrested and incarcerated on this murder charge, Armani Foster acknowledged that he had lost custody of their oldest

son to CPS after he took the child to the hospital with injuries to the child's face. (See Exhibit 1, Trial Tr. 112:5-19, Sept. 26, 2013).

On August 10, 2011, the Defendant asked to babysit the victim because she hadn't seen her "Goddaughter" in a while. Ironically, Jannet Simms was looking for childcare because she was moving from her apartment and she wanted to be able to pack without the disruption. On August 10, 2011, Jannet Simms dropped the victim off at the Defendant's residence, and the Defendant began babysitting her. The parties dispute the amount and ages of bruises on the victim at the time the Defendant began to babysit the victim, although Jannet Simms acknowledged the victim did have some bruises when she dropped the victim off. The victim spent the next three (3) days at the Defendant's home, playing with the Defendant and her children in their apartment.

On August 12, 2013 at approximately 10:00 p.m., Armani Foster arrived home at the residence after he got off of work that day. The Defendant, his three children and Dyon were all home. Armani Foster planned to go out to the Strip that evening to party and look for girls. Armani Foster was home for approximately an hour; **from around 10:00 p.m. until 11:00 p.m.** (Trial Tr. 62-79, Sept. 26, 2013). Armani Foster's cell phone records, later obtained by the police, confirm this time frame. After Armani Foster left the residence, at 11:52 p.m., the Defendant called 9-11 because the victim was not breathing. Paramedics arrived and rushed the victim to UMC trauma. Despite there being no "apparent fatal" injuries observed at the hospital, the victim died at 12:28 a.m. on August 13, 2011.

The next day, August 14, 2011, Dr. Larry Simms, a forensic pathologist, performed an autopsy on the victim. The victim had suffered approximately 32 areas of acute blunt force injury, primarily bruises and abrasions which were inflicted near the time of death as they had not healed. After shaving the child's hair from her scalp, he observed a closed

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

wound which he described as a depressed skull fracture. Furthermore, Dr. Simms observed bleeding and hemorrhages underneath the skin and the scalp. He opined the victim died from blunt head trauma due to child abuse, and the manner of death was homicide. Dr. Simms testified that, in his opinion, the victim sustained the "fatal injury" to her head at approximately 11:00 p.m. because she was pronounced dead at UMC at 12:28 a.m. (Exhibit 2, Trial Tr. 278:6-7, Sept. 25, 2013). Given a hypothetical range of time of fatal injury to the head based on the findings, Dr. Simms opined that the skull fracture occurred one to three hours prior to death, ***or between 9:30 p.m. and 11:30 p.m***. (Exhibit 3, Trial Tr. 320:1-22, Sept. 25, 2013).

At trial, the parties did not dispute that the victim's death was a result of a homicide/murder. The only question for the jury was whether it was this Defendant who perpetrated the blunt force trauma with a bar stool rung/metal bar/blunt object to the head which caused the victim's death.

Both the Defense and the State acknowledged that either the Defendant or Armani Foster, the defendant's boyfriend ***could have caused*** the injuries which killed the victim in this case. Significantly, the prosecutor stated in closing argument the following to the jury:

> " ...That leaves two individuals. ... there's only a one-hour period ***where Armani could have done this***. The defendant again has a higher probability, more time, more opportunity, to have committed these –committed this beating against Dyon."

(See Attached Exhibit 4, Trial Tr. 14:4-8, Oct. 1, 2013) (Emphasis Added).

Also significant in this case is the fact that the jury was continuously shown the victim's autopsy photograph throughout the entire trial. (See Exhibit 5, attached and sealed as a Court's Exhibit for purposes of this Order). The Court actually observed

various jury members crying during the display of the photograph during the trial. Many of the jurors also cried after the verdict in this case.

Both Defendant and Armani Foster gave an initial statement to homicide detectives within a few hours after the victim's death. Their residence was "frozen and searched" pursuant to a search warrant. Furthermore, the police taped-off the Defendant and Armani Foster's residence for several days, almost a week, while "processing the scene" on three different occasions. CPS took custody of the Defendant and Armani Foster's children.

As a result, the Defendant went to stay with her family in Victorville/Apple Valley, California. The Defendant did not give another statement to the police, although Armani Foster gave a second statement to the police. Four (4) days after the victim's death, LVMPD Homicide Detectives submitted the case to the Clark County District Attorney's Office against the Defendant only. Armani Foster was never arrested or charged with the murder of the victim, and thereafter the District Attorney's Office filed an indictment alleging the Defendant murdered the victim by blunt trauma using a metal pipe (a broken bar stool rung from the apartment).

LVMPD swabbed the bar stool rung that prosecutors argued was the deadly weapon used to kill the victim in this case for DNA evidence. However, the District Attorney's Office never presented any DNA or fingerprint analysis to the jury on the alleged murder weapon **despite prosecutor's acknowledgement during closing argument** (cited above) **that either the defendant or Armani Foster "could have" killed the victim in this case**. (Emphasis Added).

PROCEDURAL HISTORY

On August 13, 2011, the victim was pronounced dead. On August 17, 2011 LVMPD Homicide Detectives submitted a case against the Defendant to the Clark County District Attorney's Office. By September 2, 2011, the Grand Jury issued an indictment

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

charging Defendant with Count 1 – Murder, Count 2 – Child Abuse & Neglect with Use of a Deadly Weapon, Count 3 – Child Abuse & Neglect, and Count 4 – Child Abuse & Neglect. Accordingly, an arrest warrant issued for the Defendant on September 2, 2011. Officers rebooked the Defendant, pursuant to the arrest warrant, on the same day.

Defendant was arraigned in District Court on September 8, 2011, entered a plea of not guilty, and invoked the 60-day rule. The Court set a jury trial for November 7, 2011, with Calendar Call on November 3, 2011. On October 6, 2011, Defendant waived the 60-day rule, and counsel indicated his intention to file a Writ of Habeas Corpus. The Court reset the jury trial for July 16, 2012.

The Court heard argument on Defendant's Petition for Writ of Habeas Corpus on November 3, 2011. The Court denied Defendant's petition, finding that the State presented evidence that established probable cause before the Grand Jury.

The parties appeared for their first Calendar Call on July 12, 2012. At that time, Defense counsel requested the trial date be reset because the coroner who performed the autopsy on the victim had been unavailable. The State did not oppose the continuance, and the Court reset trial for February 19, 2013.

The parties appeared for their second Calendar Call on February 14, 2013. Both parties requested the trial date be reset so there was an opportunity to review the CPS records related to this case. The Court granted the request, and reset trial for July 8, 2013.

The parties appeared for their third Calendar Call on June 27, 2013. At that time, the State presented an Ex Parte Motion and Order to Compel Testimony, directed at the Clark County Fire Department employees who treated the victim on August 12-13, 2011, which was signed and filed in open court. There was further discussion concerning the trial date, and the Court continued Calendar Call to the next trial stack, vacating the July 8 trial setting.

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

The parties appeared for their fourth Calendar Call on July 18, 2013. Pursuant to a joint request of the parties, the Court reset the Jury Trial for September 23, 2013. On September 19, 2013, the parties appeared for their final Calendar Call, and both sides announced ready. Neither side filed any Motions in Limine prior to trial.

The Defendant's trial began on September 23, 2013 and concluded on October 1, 2013. The Defendant made three (3) mistrial motions during the course of the trial based on prosecutorial misconduct and one (1) based on the coroner changing his testimony as to what he told the defense in pretrial. The Court agreed with the Defendant that the State had committed misconduct; however, the Court attempted to remedy the situation with a less drastic measure and waited to rule on the motion until after verdict, since there was a possibility of a not guilty verdict based on the Defendant and Armani Foster both being present during the time period that the fatal injuries were inflicted upon the victim.

On October 2, 2013, the jury returned guilty verdicts on all counts. At the request of Defendant's counsel, the Court set Status Check: Post Trial Motions for October 8, 2013.

On October 8, 2013, the parties appeared before the Court for Status Check. Defense counsel indicated his intent to file timely post-trial motions. Pursuant to discussion by counsel, the Court ordered the entire trial transcript prepared and further set the hearing for all Post Trial Motions on February 27, 2014.

Pursuant to NRS 175.381(2) and 176.515(4), Defense counsel timely filed his Motion for Judgment of Acquittal and Motion for a New Trial on October 8, 2013. Pursuant to EDCR 2.23(c), this Court issues this Decision and Order without further argument.

///

///

DISCUSSION

Did the State commit prosecutorial misconduct during jury trial which violated this defendant's fifth, sixth and fourteenth amendment constitutional rights to a fair trial which now require this Court grant defendant a new trial?

As a preliminary matter, no motions in limine were filed by either side in this case prior to trial. Thus, for purposes of this decision, the Court will detail the chronology of events that occurred for purposes of analysis of its decision, as the Court was unaware of the issues involved until the last part of the trial.

On September 23, 2013, the first day of trial, prior to opening statements, the State and the Defendant submitted proposed jury instructions to the Court. In the instructions, the State requested this Court give a "flight instruction." (See Attached Exhibit 6).

The next day, September 24, 2013, during opening statement by the State, the prosecutor told the jury the following: first, that sometime after the initial interview of both the Defendant and Armani Foster, detectives wanted to re-interview both. The detectives were able to find Armani Foster; however, "the defendant never shows up for her second interview." (See Attached Exhibit 7, Trial Tr., 32, Sept. 26, 2013). On August 17, 2011, four days after the victim died, the detectives obtained an arrest warrant for the defendant and requested the FBI--- IRAT Team to apprehend the defendant. The FBI--- IRAT Team went to the defendant's family's residence in Victorville, but she was not at the home. Soon after that, the FBI IRAT Team apprehended the Defendant at a nearby Starbucks Coffee Shop. The prosecutor told the jury that the defendant appeared to be putting up a newspaper as officers entered the coffee shop, in an effort to avoid apprehension. (See Attached Exhibit 7, Trial Tr., 31-34, Sept. 26, 2013).

On September 26, 2013, Armani Foster testified before the jury. He told the jury that he and the Defendant got into a fight the day after the victim died. Further, he testified

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

that the Defendant's family came from California to get her since they both had no place to stay. On direct examination, the prosecutor asked Armani Foster if he had shown up to Family Court on August 17, 2011 for a CPS hearing for his own children, since they were taken by CPS on the morning the victim died in this case. Armani Foster testified that he showed up on behalf of his children. The prosecutor then asked whether the Defendant went to Family Court for the CPS case to get her own children back, and Armani Foster answered "no." (See Attached Exhibit 8, Trial Tr., 99: 10-25 and 100: 1-3, Sept. 26, 2013).

Significantly, a **juror** asked Armani, "Did you say if the Defendant was with you when you went to CPS on August 17th?" Armani Foster testified, "...No, I didn't say that." (See Attached Exhibit 9, Trial Tr., 180: 4-7, Sept. 26, 2013).

The prosecutor on follow-up again emphasized that Armani Foster showed up to the CPS hearing for their children on August 17, 2011, and highlighted that the Defendant did not go to court for her children. (See Exhibit 10, Trial Tr., 183: 20-25 and 184: 1-4, Sept. 26, 2013).

The next day, September 27, 2013, LVMPD Homicide Detective Dolphus Boucher testified that he initially interviewed both the Defendant and Armani Foster at approximately 5:00 a.m. on the morning of August 13, 2011. He then conducted a follow-up or second interview with Armani Foster the next day on August 14, 2011. On direct examination, the prosecutor asked Detective Boucher if he tried to set up a second interview with the Defendant. Detective Boucher testified that the Defendant agreed to show up for the second interview on August 14, 2011, but then could not make it back from California to meet with detectives, and thereafter failed to show up for the interview on that date or the date of August 15, 2011. (See Exhibit 11, Trial Tr., 108 -110 and 140-141, Sept. 27, 2013).

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

Detective Boucher acknowledged on cross-examination that on August 15, 2011 at 8:58 a.m., the day she failed to show up to be interviewed again, the Defendant's cellular phone records showed the Defendant received a text from Mueller, Hines and Associates, an attorney's office, stating "Cross street is Bonneville and 8th". (See Exhibit 12, Trial Tr., 142: 13-25 and 143: 1-8, Sept. 27, 2013). **The *State* objected** to the defense's next question, "Do you know if Ms. Harris spoke to an attorney and was advised not to say anything further to you?" Id.

Thereafter, the jury was excused and outside the presence of the jury, this Court admonished the prosecutor as to why she would have put forth the fact that the Defendant failed to show up to the detective bureau to a second interview if the Defendant had contacted a criminal defense attorney who probably told her not to talk to the police. The prosecutor responded that ***eventually***, Mr. Mueller was not retained by the defendant. The prosecutor could not advise the Court as to whether Mr. Mueller had advised the defendant to invoke her Fifth Amendment right to remain silent, regardless of whether or not he was ultimately retained by her family. (See Exhibit 13, Trial Tr., 144-158, Sept. 27, 2013). Further, the Court highlighted the fact that, just because Mr. Mueller had not called the detective back when he said he would did not mean that the defendant had not retained him or a different criminal defense lawyer during that time period, or that the Defendant had not invoked her Fifth Amendment right to remain silent on advice from him or another attorney.

This Court did not grant a defense mistrial at that time, but indicated that it would consider a motion for a new trial if the Defendant was convicted due to prosecutorial misconduct for commenting at trial on both the Defendant's Fifth and Sixth Amendment rights in front of the jury at trial. Significantly, this Court stated that the State's portrayal to the jury of the defendant not making another statement to the police or going to

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

California to stay with her family while her residence was being processed by the police, was "disingenuous" in light of the fact that the documentation/discovery reflected the Defendant had clearly contacted a criminal defense attorney. Id. Further, the fact that the prosecutors knew from discovery the Defendant had contacted a criminal defense attorney, and that the detectives were contacted by Mr. Craig Mueller-a criminal defense attorney who advised them that he was calling on the defendant's behalf, yet the prosecution purposely chose to present the facts the way they did to the jury in an effort to show consciousness of guilt, was problematic.

The following trial day, on September 30, 2013, outside the presence of the jury, the State, Defense, and the Court made another record of what had occurred. (Exhibit 14, Trial Tr., 4-19, Sept. 30, 2013). The Court admonished the prosecution not to question anymore witnesses and to pretrial the witnesses prior to testimony regarding the Defendant's failure to make another statement to the police or characterize anymore testimony that the Defendant had been "fleeing" as the records were clear that either she or her family had contact with an attorney. Id.

Soon after the Court's admonishment, the State presented CPS worker Jill Hookstra, who took custody of the Defendant and Armani Foster's children on August 13, 2011, the date that the victim died. The prosecutor asked the CPS worker on direct examination if she had a conversation with the Defendant regarding an upcoming protective custody hearing involving her children. The defense objected in front of the jury again. At the bench, which is reported but not heard by the jury, the defense again advised the Court that the State was trying to insinuate that the Defendant was guilty because she didn't show up to her CPS hearing, and significantly, "there was a note in the CPS records that [Defendant] told Ms. Hookstra, "I've hired an attorney and the attorney

told me not to show up for a CPS hearing." (See Exhibit 15, Trial Tr., 84-85, Sept. 30, 2013).

Thereafter, the Court dismissed the jury and outside the presence, the defense made another motion for mistrial. (See Attached Exhibit 16, Trial Tr., 88-98, Sept. 30, 2013). In support of its mistrial motion, the defense submitted, and the Court marked as the "Court's Exhibit 46", a CPS document that the prosecution had turned over during discovery. (See Attached Exhibit 17, CPS Record from August 17, 2011). That document reflects CPS caseworker Hookstra's note regarding a telephone call with the Defendant, the mother referenced in the note, stating:

> Telephone call to the mother. This Specialist inquired why the mother had not appeared at the PC Hearing. **The mother stated that her attorney advised her to not show up** and that she left the state and is currently in California. The mother states that she is staying with the maternal grandmother, either until she is arrested or returns to Las Vegas to see her children.

The Court denied the Defendant's mistrial motion in an effort to determine what the verdict would be; a less drastic measure in light of the fact the jury could have found the Defendant "not guilty" which would have rendered this motion moot, and double jeopardy would have barred retrial. However, the jury did find the Defendant guilty of all counts and this motion followed.

LAW

Pursuant to NRS 176.515(4), a motion for new trial based on grounds other than newly discovered evidence, must be made within seven (7) days after the verdict. Here, the Defendant filed her motion for a new trial on October 8, 2013, six (6) days after the verdict in this case. Accordingly, the Defendant's motion for a new trial was timely made in this case.

Next, the Court must decide whether the prosecution committed misconduct which would be grounds to set aside the verdict and order a new trial in this case. "There can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." Mitchell v. U.S., 526 U.S. 314, 330; 119 S. Ct. 1307, 1316 (1999). The United States and Nevada Constitutions provide that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amends. V, XIV; Nev. Const. art. 1, § 8. A defendant can assert his right against self-incrimination in any proceeding, whether investigatory or adjudicatory, administrative or judicial, civil or criminal. Kastigar v. U.S., 406 U.S. 441, 444; 92 S. Ct. 1653, 1656 (1972). The United States Supreme Court instructs courts to liberally construe the right against self-incrimination in favor of protecting a defendant's rights. Hoffman v. U.S., 341 U.S. 479, 486; 71 S. Ct. 814, 818 (1951). Applying these principles, the Ohio Supreme Court held:

> Allowing the use of pre-arrest silence, evidenced here by the pre-arrest invocation of the right to counsel, as substantive evidence of guilt in the state's case-in-chief undermines the very protections the Fifth Amendment was designed to provide. To hold otherwise would encourage improper police tactics, as officers would have reason to delay administering *Miranda* warnings so that they might use the defendant's pre-arrest silence to encourage the jury to infer guilt. (Citations omitted). Use of pre-arrest silence in the state's case-in-chief would force defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand to explain their prior silence.

State v. Leach, 807 N.E.2d 335, 341 (Ohio 2004), citing State v. Easter, 922 P.2d 1285, 1291 (Wash. 1996). An increasing number of jurisdictions follow this reasoning. See, e.g., Weitzel v. State, 863 A.2d 999, 1002 (Md. 2004).

Based upon the foregoing, the Court cannot allow a conviction to stand wherein the prosecution implied Defendant's "consciousness of guilt" based on her invocation of her Fifth and Sixth Amendment rights. This would erode an accused's right to remain silent

after retention of counsel by allowing the state to present a disingenuous picture to the jury which forces into issue defendant's pre-arrest silence and her decision to consult counsel – especially where the accused declines to assist the government with case preparation against him. State v. Keene, 938 P.2d 839, 841 (Wash. Ct. App. 1997). The Fifth Amendment guards against the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. Doe v. U.S., 487 U.S. 201, 210-11; 108 S. Ct. 2341, 2348 (1988).

Here, the Defendant cooperated with the police and gave an approximately one hour interview to detectives immediately after the victim died in this case. In the days thereafter, she was in contact with the police, until Craig Mueller, a criminal defense attorney, contacted LVMPD to tell them he was meeting with the Defendant later that same day. He told the detectives that he would call them back the next day if he was retained. Apparently, Mr. Mueller did not call back the next day, but the following day the CPS records indicate that "on advice from counsel" she was not going to be attending the CPS hearing to address the Family Court. Based on these facts, the State maintains that there is no evidence to suggest that she had retained counsel solely because Mr. Mueller did not call LVMPD the day after he said he would. However, there could be a myriad of reasons why Mr. Mueller did not call the detectives back. Here, the prosecution chose to believe, rely, and continue to argue to this Court that the Defendant did not invoke her Fifth Amendment right to remain silent after consultation with Mr. Mueller. The prosecution's beliefs are clearly belied by the CPS records.

Finally, the Nevada Supreme Court has held that an "implied attorney-client relationship" is formed in situations like this case where a criminal defendant seeks legal advice from an attorney, but later does not "retain" the attorney. Todd v. State, 931 P.3d 721, 725 (1997) (Emphasis Added). "The attorney-client relationship 'may be established

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

through preliminary consultations, even though the attorney is never formally retained and the client pays no fee'." Id. (Citations Omitted).

From the LVMPD records, CPS records, and evidence adduced at trial, it was clear that the Defendant cooperated with the police until the day she met with Craig Mueller. After that, the defendant did not initiate contact, nor did she respond to police telephone calls. Significantly, as Detective Boucher even **explained to the jury on cross-examination**, once a suspect meets with an attorney, it is common for them to invoke their Fifth Amendment right and stop cooperating with police on advice from counsel.

Throughout the entire trial, State disingenuously, and in clear contradiction to the Court's repeated directives (as shown in the exhibits attached) continued, over and over again, to use a "compare and contrast method" in an effort to paint Armani Foster as cooperative and caring for his children, while portraying the Defendant as failing to cooperate with police and/or failing to show up for her own children's CPS hearing. This portrayal was false, as the evidence clearly showed that the Defendant had met with counsel, was acting on advice of counsel when she chose to remain silent, and when she did not appear at the CPS hearing for her own children.

Next, and for the same reasons cited above, the prosecutors committed misconduct in mischaracterizing the Defendant going to California as "flight." The prosecutors submitted a flight instruction prior to opening and from there intentionally portrayed the Defendant as fleeing from the police. However, the evidence at trial reflected that the Defendant was pregnant with her fourth child and had nowhere to live in Las Vegas. LVMPD froze her apartment for approximately one week while processing her residence on three different occasions. Testimony showed the defendant routinely visited her family who lived in the Victorville/Apple Valley area of California,

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

a close distance from Las Vegas. Jannet Simms, defendant's best friend and the victim's mother, was threatening the defendant after the victim's death, a fact confirmed by the LVMPD records and the detectives' reports reflecting that they had to call Jannet Simms to request she stop threatening the Defendant. Armani Foster had previously committed domestic violence on the Defendant, and Jannet Sims testified before the jury that Armani Foster threatened her after the victim died. Although the Defendant did not admit to the police that it was "Armani Foster" threatening her, the Defendant did tell the police that she was staying with family due to "threats." Finally, both LVMPD and CPS records reflect the detectives knew the Defendant's location where she was staying with family in California. The testimony adduced at trial reflected the Defendant kept in touch with her CPS caseworker and told her of the Defendant's exact location even though she also told the caseworker that, on advice of counsel, she would not be appearing in Family Court.

As an aside, the prosecution's arguments and insinuations to the jury that "flight" and consciousness of guilt existed was contrary to the evidence in this case. The prosecution made claims that the Defendant "turned off her phone" when that evidence simply did not exist as there was no indication the Defendant knew that a warrant for her arrest had been issued in the days that followed or that she was aware the police were coming to apprehend her. Simply stated, it was just as likely that the Defendant's phone battery could have died or that her phone was turned off. There was absolutely nothing in evidence to show that she was "fleeing" from police apprehension.

A flagrant violation of a district court order can be basis granting a new trial. See Valdez v. State, 196 P.3d 465, 480 (Nev. 2008), citing McGuire v. State, 677 P.2d 1060, 1063 (Nev. 1984). There are even instances in which a failure to obey a court's order will result in the manifest necessity of a mistrial. Glover v. Eighth Judicial Dist. Court of State

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

ex rel. County of Clark, 220 P.3d 684 (2009). For a lawyer to "make statements to the jury that are not and cannot 'be supported by proof is, if it relates to significant elements of the case, professional misconduct...and fundamentally unfair.'" Id. at 692, quoting Arizona v. Washington, 434 U.S. 497; 98 S. Ct. 824 n. 32 (1978).

Here, the prosecution did just that by continuing to assert the issue of flight long after it was clear it could not be established by any admissible evidence. The prosecution repeatedly violated this Court's orders by continuing to present to the jury insinuations of flight long after they were ordered to stop. This type of misconduct frustrates the public interest in having a just judgment reached by an impartial tribunal, and creates a risk that the entire jury panel may be tainted. Id.

In this case, the prosecution published Exhibit 5, the autopsy photograph of the 14-month old baby, throughout the ***entire*** trial. This Court observed that the jurors were visibly shaken; some cried throughout the proceedings. The Defendant and prosecution all agreed this was a murder of the child as a result of child abuse/neglect. The jurors were left to decide only who the killer was: the Defendant or Armani Foster, as both had the opportunity during the one-hour period to inflict the injuries to the victim. The actions by the prosecutors to use a compare-and-contrast method to show the Defendant's consciousness of guilt by her decision to consult and follow the advice of a criminal defense attorney, by invoking her right to remain silent during later investigation by police, during the Family Court proceedings, and by staying with her family as she was pregnant and locked out of her residence by police, was overly prejudicial to the Defendant.

Accordingly, the Court finds that the prosecutorial misconduct throughout the trial violated the Defendant's Fifth, Sixth, and Fourteenth Amendment rights under the U.S. Constitution and Articles 3 and 8 of the Nevada Constitution. This misconduct prejudiced the Defendant, and based on that prejudice, a new trial is warranted.

ABBI SILVER
DISTRICT JUDGE
DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

Should this Court grant a new trial based on conflicting evidence, burden-shifting by the prosecution or minimizing?

Based on the testimony of the State's expert witness, Dr. Simms the forensic pathologist, the fatal injuries that occurred in this case could have been inflicted at a time both the Defendant and Armani Foster were in the presence of the victim. Further, the prosecutor even **acknowledged this** in his closing argument when he stated:

> "...That leaves two individuals. ... there's only a one-hour period ***where Armani could have done this***. The defendant again has a higher probability, more time, more opportunity, to have committed these – committed this beating against Dyon."

(See Attached Exhibit 4, Trial Tr., 14: 4-8, Oct. 1, 2013) (Emphasis Added).

Although it appears the prosecutor conceded reasonable doubt in argument based on the evidence, this Court has already ruled a new trial is warranted based on the prejudice which occurred as stated above. Accordingly, this issue is moot.

Should this Court grant a new trial based on Dr. Simms' "changed" opinions after he testified in the State's Case-In-Chief?

As an aside, unlike the facts of the unpublished opinion Hill v. State, No. 47991 (Nev. Feb. 29, 2008)(order reversing and remanding), cited by the defendant, the Court would note that in this trial, the Defendant presented the testimony of Dr. Rothfeder to the jury to rebut the prosecutions claims that the numerous injuries (besides the fatal head injury) were much older than 12-18 hours as opined by Dr. Simms. Dr. Rothfeder is a pediatrician in Salt Lake City, Utah with a 40-year practice, specializing in emergency medicine. In Hill, the reasoning behind the Nevada Supreme Court's reversing the District Court's denial of a mistrial motion was due to that pathologist's change in testimony because the defendant's entire defense rested on the pathologist's prior opinion which

he did not testified to at the trial. The Nevada Supreme Court stated that the defendant was severely prejudiced since the defense had no opportunity to rebut the change in the pathologist's testimony regarding self-defense. In this case however, the Defendant had retained an expert, and that witness testified before the jury as to contrary opinions regarding the ages of the bruising on the victim, which supported the Defendant's theory that numerous bruises were much older and occurred prior to the Defendant watching the victim in this case. Thus, the prejudice to the Defendant in this case does not rise to the level of prejudice reached in the Hill case.

However, the Court has already ruled that the Defendant is entitled to a new trial for the reasons stated above; thus, this issue is moot. However, upon retrial, this Court would grant the Defendant leave to continue the trial date if the Defendant finds she needs more time or it may be necessary to obtain a ***forensic pathologist*** to rebut Dr. Simms' testimony regarding the ages of the injuries to the victim at ***autopsy***. Further, the Defendant's counsel may call his investigator to the stand to impeach Dr. Simms' testimony if that becomes necessary, which was not done at the first trial.

Did the prosecutors present evidence of "improper vouching" which constituted prosecutorial misconduct?

Because the Court has already found that prosecutorial misconduct occurred for which a new trial must be granted, this Court declines to make a ruling on this issue as it is now moot.

However, during the new trial in this case, the prosecution is instructed that the State may not elicit testimony from detectives as to "their belief" that Armani Foster had a

"soft spot" for the victim. These types of statements regarding what they believe Armani Foster feels or thinks are clearly improper. Further, the parties are encouraged to file motions in limine regarding specific testimony adduced at the prior trial.

Should a new trial be granted because the prosecutor in her rebuttal argument improperly disparaged defense counsel?

After a review of the trial transcript, the disputed comment was a proper "invited response" by the Defendant. Further, based on the arguments by the Defendant during opening and closing, the prosecutor's comments were not misconduct in this Court's opinion.

Should a new trial be granted due to Cumulative Error?

Even if this court finds the individual grounds for requesting a new trial based upon prosecutorial misconduct to be independently insufficient for granting a new trial, the court can consider the cumulative effects of misconduct committed in the instant case. See Valdez, 196 P.2d at 481. Where prosecutorial misconduct infects the trial with unfairness, the resulting conviction violates constitutional due process guarantees. Darden v. Wainwright, 477 U.S. 168, 181; 106 S. Ct. 2464, 2471 (1986). A determination of guilt should not be based on fear or vengeance, but rather compelled on an intellectual basis after an impartial and fair assessment of the testimony that has been presented. Commonwealth v. Reynolds, 386 A.2d 37, 40 (Pa. Super. Ct. 1978). "The prosecutor's job isn't just to win, but win fairly, staying within the rules." U.S. v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993). Here, the prosecution's repeated acts of misconduct, in direct defiance of this Court's numerous Orders, deprived Defendant of her Due process and fair trial guarantees. In Neal v. State, 787 P.2d 764 (Nev. 1990) the Nevada Supreme Court held that prosecutorial misconduct is not harmless beyond a reasonable doubt when the

defendant's credibility is crucial to his defense and the prosecutor's improper comments are deliberate and repetitious. Id. at 765.

CONCLUSION

For the foregoing reasons, the Defendant's Motion for a New Trial is GRANTED. The new ***firm*** trial date is Monday, March 3, 2014 at 9:00a.m. The ***firm*** set for calendar call is Thursday, February 27, 2014 at 9:00 a.m.

DATED this 22nd day of January, 2014.

JUDGE ABBI SILVER
EIGHTH JUDICIAL COURT XV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, the foregoing was e-served, e-mailed, or a copy of the above document was placed in the attorney's folder in the Clerk's Office, or mailed to the following:

Dena Rinetti, DDA dena.rinetti@clarkcountyda.com
Scott Coffee, DPD coffeesl@clarkcountyNV.gov

Gail M. Reger
Judicial Executive Assistant

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
MARIANN HARRIS,
Respondent.

No. 64913

FILED

SEP 21 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Cherry, C.J.
Cherry

Douglas, J.
Douglas

Gibbons, J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Eighth Judicial District Court Dept. 15
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk

17-31962

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIANN JASMINE HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78113

FILED

OCT 01 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, J.
Parraguirre

_____, J.
Hardesty

_____, J.
Cadish

cc: Hon. David M. Jones, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

20-36023

APPENDIX F

131 Nev., Advance Opinion 56

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
MARIANN HARRIS,
Respondent.

No. 64913

Appeal from a district court order granting a prejudgment motion for a new trial. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

Appeal is allowed to proceed.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Ryan J. MacDonald, Deputy District Attorney, Clark County,
for Appellant.

Philip J. Kohn, Public Defender, and Scott L. Coffee, Deputy Public Defender, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, SAITTA, J.:

In this opinion, we consider whether this court has jurisdiction to review the State's appeal from an order granting a prejudgment motion

15-22991

for a new trial in a criminal matter. Because the plain language of NRS 177.015(1)(b) authorizes such an appeal, and because the unique policy concerns identified in our decision in *State v. Lewis*, 124 Nev. 132, 136, 178 P.3d 146, 148 (2008), do not apply, we hold that this court has jurisdiction to consider an appeal by the State from an order granting a prejudgment motion for a new trial.

FACTUAL AND PROCEDURAL HISTORY

On October 2, 2013, a jury returned verdicts finding respondent Mariann Harris guilty of first-degree murder, child abuse and neglect with the use of a deadly weapon, and two counts of child abuse and neglect. Prior to sentencing, Harris filed a timely motion for a new trial, which the district court granted. Pursuant to NRS 177.015(1)(b), the State appealed from the order granting the motion for a new trial. Because this court has held that NRS 177.015(1)(b) only permits appeals from district court orders "resolving *post-conviction* motions for a new trial," *Lewis*, 124 Nev. at 136, 178 P.3d at 148, we ordered the State to show cause why the appeal should not be dismissed for lack of jurisdiction.

DISCUSSION

The State argues that the *Lewis* holding is based on a rationale that has no application to its right to appeal in a criminal case. The State, therefore, requests this court to revisit *Lewis* as it relates to appeals from orders granting prejudgment motions for a new trial.

The plain language of NRS 177.015 allows for the State to appeal any order granting a new trial

Whether NRS 177.015(1)(b) authorizes the present appeal is an issue of statutory interpretation. "[W]hen the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it." *State v. Colosimo*, 122 Nev. 950, 960, 142

P.3d 352, 359 (2006) (internal quotations omitted). "[P]rovisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of [the] statute[ ] and should not be read to produce unreasonable or absurd results." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

NRS 177.015(1)(b) provides, in relevant part, that any aggrieved party, whether it is the State or the defendant, may appeal "from an order of the district court . . . granting or refusing a new trial." Thus, the plain language of NRS 177.015(1)(b) clearly authorizes an appeal from an order granting a motion for a new trial and does not limit the right to an appeal based on when the motion was filed or when the order resolving it was entered.

State v. Lewis holds that NRS 177.015(1)(b) only authorizes appeals from post-conviction motions for a new trial

This court has had a prior opportunity to consider the State's right to appeal pursuant to NRS 177.015(1)(b) from a prejudgment order granting relief. In *Lewis*, this court held that the State did not have a statutory right to appeal from an order granting a presentence motion to withdraw a guilty plea. 124 Nev. at 136, 178 P.3d at 148. In reaching this decision, the court observed that NRAP 3A, which governs civil appeals, used language similar to the provision in NRS 177.015(1)(b) regarding an appeal from an order granting or refusing a new trial and that the language in NRAP 3A had been interpreted to only allow for an appeal from an order denying a post-judgment motion for a new trial. 124 Nev. at 135, 178 P.3d at 148. Noting these similarities and that this court had treated a motion to withdraw a guilty plea as tantamount to a motion for a new trial, the *Lewis* court stated that it saw no reason to construe the

same language in NRS 177.015(1)(b) in an inconsistent manner. 124 Nev. at 134-36, 178 P.3d at 147-48.

The court further determined that "compelling policy justifications" supported a holding disfavoring appeals from intermediate orders and for requiring a final judgment "before this court is vested with jurisdiction." *Id.* at 136, 178 P.3d at 148. Those policy justifications include ensuring that there is a complete record for appellate review and "promoting judicial economy by avoiding . . . piecemeal" review of intermediate orders. *Id.* at 136, 178 P.3d at 148 (internal quotations omitted). Based on these policy justifications, this court held that, "pursuant to NRS 177.015(1)(b), [it] has authority to review determinations of the district court resolving *post-conviction* motions for a new trial, as well as post-conviction motions that are the 'functional equivalent' of a motion for a new trial" and determined that an order granting a prejudgment motion to withdraw a guilty plea is not appealable "because it is an intermediate order of the district court." *Id.* at 136, 137, 178 P.3d at 148, 149.

Lastly, the *Lewis* court addressed the State's argument that by refusing to hear an appeal from a district court order granting a presentence motion to withdraw, the State would be deprived of its right to appellate review of an erroneous decision by the district court because the State cannot appeal from an acquittal. 124 Nev. at 136-37, 178 P.3d at 149. The court noted that the district court has "vast discretion" in the grant or denial of a presentence motion to withdraw a guilty plea and found that the State "generally suffers no substantial prejudice" when a motion to withdraw a guilty plea is granted because "[t]he State may proceed to trial on the original charges or enter into a new plea bargain

with the defendant." *Id.* at 137, 178 P.3d at 149. Therefore, the court did not find the State's argument to be compelling. *Id.*

Thus, the rationale behind *Lewis* is that despite its plain language, NRS 177.015(1)(b) does not include intermediate orders, which it describes as any order entered before a judgment of conviction, because that would be inconsistent with the final judgment rule and the policy reasons supporting that rule. However, this rationale is less persuasive when applied to the unique policy considerations regarding presentencing orders granting a new trial in criminal cases and when considering the different effects of granting a motion to withdraw a guilty plea versus granting a motion for a new trial.

The unique policy rationale regarding presentence orders granting a new trial in a criminal case shows that NRS 177.015(1)(b) should be interpreted differently than NRAP 3A(b)(2)

In *Lewis*, the State argued, as it does here, that precluding the appeal would leave the State without a remedy when a motion is granted before judgment. 124 Nev. at 136-37, 178 P.3d at 149. In rejecting this argument, the *Lewis* court used a policy rationale that is specific to a motion to withdraw a guilty plea and inapplicable to a motion for a new trial. *Id.* at 137, 178 P.3d at 149. The *Lewis* court's primary focus was on the "vast discretion" that the district court has in deciding a motion to withdraw a guilty plea and the idea that the State suffers "no substantial prejudice" when a prejudgment motion to withdraw a guilty plea is granted because it "may proceed to trial on the original charges or enter into a new plea bargain." *Id.* But in focusing on considerations that are specific to a prejudgment motion to withdraw a guilty plea, the court lost sight of the appeal provision's context—a motion for a new trial. In that context, the district court has discretion in deciding the motion, but that

discretion is not as "vast" as with a prejudgment motion to withdraw a guilty plea, which may be granted for any reason that is fair and just. *See State v. Second Judicial Dist. Court*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) ("The granting of the motion to withdraw one's plea before sentencing is proper where for any substantial reason the granting of the privilege seems 'fair and just.'"); *see also* NRS 176.165. While this court suggested it would be a "rare circumstance[ ]" when the State could assert that a district court "has exceeded the broad boundaries of judicial discretion in allowing a defendant to withdraw a plea before sentencing," *Lewis*, 124 Nev. at 137, 178 P.3d at 149, it is significantly more likely that the State can demonstrate that a district court exceeded its discretion in granting a motion for a new trial, particularly given the potential injustice if the defendant obtains an acquittal following an improvidently granted new trial. And the prejudice to the State is far more substantial when a motion for a new trial is granted—the significant time and resources expended to conduct the first trial are wasted.

These interests outweigh the policy justifications that this court relied upon in *Lewis* to preclude the State from appealing a prejudgment order granting a new trial. The efficiency of the final judgment rule loses some weight when put against the costs, both financial and societal, of an improvidently granted new trial. In this respect, there is no valid reason to distinguish between an order granting a new trial that is entered before final judgment (not appealable after *Lewis*) and one entered after final judgment (appealable).

We therefore hold that because *Lewis* eliminates an appeal that the Legislature plainly afforded the State and because the rationale in *Lewis* is inapplicable to orders granting prejudgment motions for a new

trial, *Lewis* is overruled to the extent that it would not permit an appeal by the State from an order granting a prejudgment motion for a new trial.

Lewis is not overturned in situations of an appeal of an interlocutory order denying a motion for a new trial

We do not, however, extend our holding to authorize a defendant to appeal from a prejudgment order *denying* a motion for a new trial. A prejudgment order denying a motion for a new trial is an intermediate order that can be reviewed on appeal from the judgment of conviction. *See* NRS 177.045. Thus, concluding that NRS 177.015(1)(b) does not authorize an appeal from a prejudgment order denying a motion for a new trial will not eliminate a defendant's right to challenge the order; rather, it merely mandates how and when a defendant may challenge the order. In contrast, allowing a defendant to appeal from intermediate orders would cause confusion in the district court about its jurisdiction to proceed with sentencing and entry of the judgment, which could cause extensive, unnecessary delay in both. Thus, the policy considerations expressed in *Lewis* remain valid in that context, and we hold that *Lewis* should remain undisturbed as it applies to orders *denying* a prejudgment motion for a new trial.

CONCLUSION

Because the plain language of NRS 177.015(1)(b) clearly authorizes an appeal from a prejudgment order granting a motion for a new trial and the *Lewis* rationale does not apply to a State's appeal in the criminal context from an order granting a motion for a new trial, we overrule *Lewis* to the extent that it prohibits the State from pursuing its

statutory right to appeal a prejudgment order granting a motion for a new trial. Therefore, we hold that this court has jurisdiction to hear the State's appeal of the district court's order granting Harris's motion for a new trial.

_____, J.
Saitta

We concur:

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

has repeatedly indicated that a prosecutor may not attempt to mislead the jury. *See Thomas v. State*, 120 Nev. 37, 48, 83 P.3d 818, 825 (2004) ("This court has held that prosecutors may not argue facts *or inferences* not supported by the evidence." (emphasis added) (internal quotation marks omitted)); *McGuire v. State*, 100 Nev. 153, 159, 677 P.2d 1060, 1064 (1984) (holding that a prosecutor's remarks constituted "improper attempts to mislead the jury").

Although the district court phrased the prosecutorial misconduct in terms of comments regarding Harris' silence, it is clear from the record that the district court was concerned with the prosecution's attempts at misleading the jury on the reasons for Harris' absence from the second interview and the child custody hearing. In its order granting a new trial, the district court stated:

> *Throughout the entire trial*, [the] State *disingenuously, and in clear contradiction to the Court's repeated directives* . . . continued, *over and over again*, to use a "compare and contrast method" in an effort to paint Armani Foster as cooperative and caring for his children, while portraying the Defendant as failing to cooperate with police and/or failing to show up for her own children's CPS hearing. *This portrayal was false*, as the evidence clearly showed that the Defendant had met with counsel, was acting on advice of

---

. . . *continued*

(1988); *Maresca*, 103 Nev. 669, 671-72, 748 P.2d 3, 5-6 (1987). As found by the district court, there is no evidence that Harris attempted to elude law enforcement. Without any additional evidence of evasion or flight, I do not believe that a failure to appear for a police interview, on its own, is evidence of consciousness of guilt.

> counsel when she chose to remain silent, and when she did not appear at the CPS hearing for her own children.

(Emphases added.)

When viewed more broadly, as part of the State's compare and contrast method, the State improperly portrayed Harris to the jury in a manner that was not in accord with the evidence. Further, the district court, who observed the proceedings in their entirety, was in the best position to determine the prejudicial effect of this misconduct. *See Browning*, 124 Nev. at 531, 188 P.3d at 69-70 (noting that great deference is afforded to the district court's factual findings because it is able to observe the proceedings below); *see also Rowland v. State*, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002) (stating that prosecutorial misconduct is likely prejudicial where the issue of guilt is close).

Given these facts, I would conclude that the district court did not abuse, much less "palpabl[y] abuse" its discretion in granting a new trial. Therefore, I dissent.

_____, J.
Stiglich

_____, C.J.
Cherry

_____, J.
Gibbons