IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW YOUNG, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 83243

APPELLANT'S AMENDED OPENING BRIEF

(Appeal from Judgment of Conviction)

NANCY L. LEMCKE
Nancy Lemcke Law, LLC.
10161 Park Run Dr., Ste. 150
Las Vegas, Nevada 89145
(702) 902-6691

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST. ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 671-2700

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW YOUNG,	)	NO. 83243
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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(702) 671-2700

AARON D. FORD
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APPELLANT'S AMENDED OPENING BRIEF

JURISDICTIONAL STATEMENT

A. Statute which grants jurisdiction to review the judgment: NRS 177.015.

B. Judgment of Conviction filed June 29, 2021; Notice of Appeal filed July 15, 2021.

C. This appeal is from a final judgment entered pursuant to a jury verdict, the final judgment for which was entered June 29, 2021.

ROUTING STATEMENT

D. This case is not presumptively assigned to the Court of Appeals under NRAP 17(b)(2) because Appellant was adjudicated a habitual criminal under NRS 207.010(1)(b), for which the trial court sentenced him to life in prison (with parole eligibility after 10 years has been served). This amounts to a Category A felony disposition. See Doolin v. Department of Corrections, 123 Nev. 809 (Nev. Ct. App. 2018).

ISSUES PRESENTED FOR REVIEW

I. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY THAT AMOUNTED TO BAD ACT EVIDENCE.

II. THE TRIAL COURT ERRED BY ALLOWING MULTIPLE OFFICERS TO NARRATE SURVEILLANCE FOOTAGE AND IDENTIFY MR. YOUNG AS ONE OF THE PERPETRATORS DEPICTED THEREIN.

III. THE TRIAL COURT'S ADMISSION OF HEARSAY EVIDENCE VIOLATED MR. YOUNG'S CONSTITUTIONAL AND STATUTORY RIGHTS.

IV. THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL FOLLOWING A JUROR'S DISCLOSURE OF INFERENTIAL BIAS DURING TRIAL VIOLATED MR. YOUNG'S CONSTITUTIONAL RIGHTS.

V. THE TRIAL COURT ERRED BY ALLOWING DEFENSE COUNSEL TO CHALLENGE JUROR BILZERIAN'S PARTIALITY IN HIS PRESENCE AND BY FAILING TO EXCUSE JUROR BILZERIAN THEREAFTER.

VI. THE TRIAL COURT ERRED BY PROFFERING JURY INSTRUCTIONS THAT WERE MISLEADING AND/OR MISSTATED THE LAW.

VII. MR. YOUNG'S DUAL CONVICTIONS FOR GRAND LARCENY AND LARCENY FROM THE PERSON VIOLATE DOUBLE JEOPARDY PRINCIPLES.

VIII. THE TRIAL COURT VIOLATED MR. YOUNG'S CONSTITUTIONAL AND STATUTORY RIGHTS BY ADJUDICATING HIM A HABITUAL OFFENDER IN THE ABSENCE OF THE INQUIRY AND FINDINGS REQUIRED BY NEVADA LAW.

IX. THE TRIAL COURT'S FAILURE TO CONDUCT A JURY TRIAL ON THE HABITUAL OFFENDER ALLEGATION

VIOLATED MR. YOUNG'S JURY TRIAL AND DUE PROCESS RIGHTS.

X. MR. YOUNG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING, THEREBY DEPRIVING HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

XI. THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN MR. YOUNG'S CONVICTIONS.

XII. CUMULATIVE ERROR WARRANTS REVERSAL OF MR. YOUNG'S CONVICTIONS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ART. 1, SECT. 8 OF THE NEVADA CONSTITUTION.

STATEMENT OF THE CASE

On October 1, 2020, prosecutors charged Mr. Young via indictment with 22 felonies deriving from several wallet thefts and related fraudulent credit card transactions that occurred between June 29, 2020 and August 10, 2020. I App. 70-73; 76-84; II App. 384-89. Prosecutors brought the charges as part of a superseding indictment that included Attempt Murder With Use of a Deadly Weapon and Battery With Use of a Deadly Weapon charges. I App. 1-2.

On February 22, 2020, prosecutors filed a Notice of Intent to Seek Punishment as a Habitual Criminal. I App. 234-36. A few weeks later, prosecutors filed an Amended Notice of Intent to Seek Punishment as a Habitual Criminal (hereinafter "Habitual Criminal Notice") which provided:

[P]ursuant to NRS 207.010 and NRS 207.012, the STATE OF NEVADA will seek punishment of Defendant ANDERW YOUNG as a habitual criminal in the event of a felony conviction in the above-entitled action. That in the event of a felony conviction in the above-entitled action, the State of Nevada will ask the court to sentence Defendant ANDERW YOUNG as a habitual criminal based upon the following felony convictions, to-wit:

1. That on or about 1985, the Defendant was convicted in the State of Pennsylvania, for the crime of THEFT BY UNLAWFUL TAKING OR DISPOSITION (felony) in case CP-51-CR-1215921-1984.

2. That on or about 1989, the Defendant was convicted in the State of Pennsylvania, for the crime of ROBBERY (felony) in case CP-51-CR-0234751-1989.

3. That on or about 1993, the Defendant was convicted in the State of Pennyslvania, for the crime of KNOWINGLY/INTENTIONALLY POSSESS CONTROLLED SUBSTANCE (felony) in case CP-51-CR-1220341-1990.

4. That on or about 1993, the Defendant was convicted in the State of Pennsylvania, for the crime of ROBBERY (felony) in case CP-51-CR-1224501-1992.

5. That on or about 1993, the Defendant was convicted in the State of Nevada, for the crime of POSSESSION OF CREDIT CARD WITHOUT CARDHOLDER CONSENT (felony) in C150727.

6. That on or about 1996, the Defendant was convicted in the State of Nevada, for the crime of BURGLARY (felony) in C134592.

7. That on or about 1996, the Defendant was convicted in the State of Nevada, for the crime of POSSESSION OF CREDIT CARD WITHOUT CARDHOLDER CONSENT (felony) in C134592.

8. That on or about 1998, the Defendant was convicted in the State of Nevada, for the crime of THEFT (felony) in C153059.

9. That on or about 2002, the Defendant was convicted in the State of Nevada, for the crime of LARCENY

FROM THE PERSON, VICTIM OVER 65 YEARS OF AGE OR OLDER (felony) in C184447.

10. That on or about 2003, the Defendant was convicted in the State of Nevada, for the crime of BURGLARY (felony) in C186802.

11. That on or about 2006, the Defendant was convicted in the State of Nevada, for the crime of FRAUDULENT USE OF CREDIT OR DEBIT CARD (felony) in C213942.

12. That on or about 2006, the Defendant was convicted in the State of Nevada, for the crime of LARCENY FROM THE PERSON (felony) in C213930.

13. That on or about 2017, the Defendant was convicted in the State of Nevada, for the crime of BATTERY WITH SUBSTANTIAL BODILY HARM (felony) in C327000.

14. That on or about 2019, the Defendant was convicted I the State of Nevada, for the crime of BATTERY WITH SUBSTANTIAL BODILY HARM (felony) in C341474.

Defendant ANDREW YOUNG, hereinbefore named, is further placed on notice that, in accordance with the authorization of NRS 207.012, punishment imposed pursuant to the above-stated habitual criminal statute is *mandatory* if said Defendant is found guilty on the primary offense of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B felony – NRS 200.010, 200.030, 193.330, 193.165 – NOC 50031) and/or ATTEMPT MURDER, as Defendant ANDREW YOUNG, has previously been convicted of TWO (2) PRIOR offenses as stated in NRS 207.012, to wit:

1. That on or about 1989, the Defendant was convicted in the State of Pennsylvania for the crime of ROBBERY (felony) in case CP-51-CR-0234571-1989.

2. That on or about 1993, the Defendant was convicted in the State of Pennsylvania, for the crime of ROBBERY (felony) in case CP-51-1224501-1992.

I App. 254- 57.

On February 28, 2021, Mr. Young filed a Motion to Sever Counts requesting severance of the Attempt Murder/Battery charges from the theft-

related offenses. I App. 242-53. The trial court granted the motion (II App. 333-36), and the case proceeded to trial on a Second Superseding Indictment alleging only the theft-related offenses as follows:

> Count 1 - Burglary; Count 2 - Larceny From the Person/Victim Over 60; Count 3 - Grand Larceny; Count 4 - Burglary; Count 5 - Fraudulent Use of Credit or Debit Card; Count 6 - Burglary; Count 7 - Burglary; Count 8 - Larceny From the Person/Victim Over 60; Count 9 - Burglary; Count 10 - Larceny From the Person/Victim Over 60; Count 11 - Burglary; Count 12 - Fraudulent Use of Credit or Debit Card; Count 13 - Burglary; Count 14 - Fraudulent Use of Credit or Debit Card; Count 15 - Burglary; Count 16 - Larceny From the Person/Victim Over 60; Count 17 - Burglary; Count 18 - Fraudulent Use of Credit or Debit Card; Count 19 - Burglary; Count 20 - Fraudulent Use of Credit or Debit Card; Count 21 - Burglary; Count 22 - Burglary.

II App. 360-65.[1]

Jurors ultimately convicted Mr. Young of all but two of the charged crimes (Counts 14, 20). II App. 375-80. At sentencing, the trial court adjudicated Mr. Young as a habitual offender pursuant to NRS 207.010(b) and sentenced him to nine (9) consecutive terms of 10 years to life in prison on Counts 1, 6, 7, 9, 11, 15, 17, 21, and 22. VII App. 1343-47. The court ran the sentences on the remaining counts concurrent to the habitual criminal sentences. Id.

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[1] Notably, the conduct alleged in Counts 1-5 occurred on June 29, 2020. Id. The conduct alleged in the remaining counts occurred on or after July 8, 2020. Id.

The instant appeal follows.

STATEMENT OF THE FACTS

Prosecutors alleged that, between June 29, 2020 and August 10, 2020, Mr. Young committed as series of thefts followed by fraudulent credit card transactions.

Mary Campo

Mary Campo, 72, testified that, on June 29, 2020, she was sitting at the Rampart Casino playing a gaming machine when she was approached by two men. V App. 787-91. One of the men approached her from the right and asked her about something. Id. She could feel the other gentleman standing behind her. Id. After the men left, Ms. Campo reached inside her purse and noticed her wallet was missing. Id. Ms. Campo had approximately $1400 as well as various cards, including her debit card, inside her wallet. Id.

Ms. Campo then contacted Bank of America to report her debit card stolen. V App. 792-94. That debit card ended in 1020. V App. 792-94. Not long thereafter, Ms. Campo received word that someone had tried to use her debit card at a 7-Eleven on Maryland Parkway. V App. 795.

Ms. Campo did not get a good look at the individuals who approached her in the casino. V App. 799.

LVMPD Officer Ethan Grimes was assigned to investigate Ms. Campo's wallet theft. VI App. 1163-65. He impounded surveillance video provided by the Rampart Casino. VI App. 1165. Officer Grimes testified that, in the surveillance video, the individuals seen near Ms. Campo were carrying jackets and "pretending to gamble but mainly looking around." VI App. 1166. Officer Grimes described how one of the individuals talked to Ms. Campo while the other reached in her purse and grabbed something, after which both individuals walked away. VI App. 1167.

Officer Grimes also obtained receipts and surveillance footage from the 7-11 where Ms. Campo's card was used. VI App. 1174-75. Marcia Martinez, the manager of that 7-11, located a receipt for cigarette purchase with Ms. Campo's card. VI App. 1008-09. Ms. Martinez also produced video surveillance footage of the transaction. VI App. 1008-09. Although not the individual working the cash register the night of the transaction, Ms. Martinez reviewed the footage and testified that the person who purchased the cigarettes was wearing a brown shirt. VI App. 1008-13.

Officer Grimes testified that it takes approximately 20-25 minutes to drive from the Rampart Casino to the 7-11 on Maryland Parkway where Ms. Campo's card was used. VI App. 1175. According to Officer Grimes, this time frame was consistent with the time the alleged perpetrators were

observed to have left the Rampart and arrived at the Maryland Parkway 7-11. VI App. 1173-76.

Lydia Hefner

Vianca Eskildsen, an asset protection officer at Walmart on Eastern and Serene Avenue, testified that, on July 8, 2020, she was monitoring activity at her store when she noticed a man engaging in suspicious behavior. VI App. 1069. Ms. Eskildsen observed the man maneuvering a jacket around and "hovering over a customer" in a way that suggested to her "something was going to happen." VI App. 1071. So she went into her office and "picked up surveillance via CCTV." VI App. 1072. While watching the CCTV, Ms. Eskildsen observed the man to have his eyes trained on a customer's purse as he concealed his hand with his jacket. VI App. 1074-75. Worried, Ms. Eskildsen called police. VI App. 1075.

While waiting for officers to arrive, Ms. Eskildsen watched as the man began looking at another woman and her purse. VI App. 1078-80. Shortly thereafter, LVMPD officers arrived and joined her in her office. VI 1080-81. Together, Ms. Eskildsen and responding officers watched on the CCTV as the man took a wallet out of the woman's purse. VI App. 1081. Ms. Eskildsen and the officers then headed to the front of the store, where

they apprehended him. VI App. 1083-85. The man identified himself as Mr. Young. VI App. 1083-85.

The woman to whom that wallet belonged was Lydia Hefner, 69. Ms. Hefner testified that she was shopping at the Walmart when Ms. Eskildsen stopped her as she approached the checkout line. VI App. 1131-35. When Ms. Eskildsen asked that she check to make sure her wallet was still in her purse, Ms. Hefner discovered that her wallet was missing. Id.

LVMPD Officer Jerry Wheeler was one of the officers who responded to the Walmart to assist Ms. Eskildsen. V App. 840-41. Officer Wheeler testified that, as soon as he arrived at the store, he accompanied Ms. Eskildsen to the store security office to view surveillance footage of "a male that they've had problems with before, that they're concerned about him trying to steal." V App. 843-44. Officer Wheeler watched while the male "reached into someone else's cart and grabbed something." V App. 846. Upon seeing this, Officer Wheeler, along with LVMPD Officers Scott and Cunningham stopped the male, eventually identified as Mr. Young, at the store exit. V App. 846-48.

According to Officer Wheeler, Mr. Young, when confronted and *Mirandized* by officers, explained that he found Ms. Hefner's wallet on the

floor in the milk aisle. V App. 851. Officer Wheeler issued Mr. Young a citation for petit larceny and released him. V App. 852; VI App. 1086.

Rhonda Hatcher

Rhonda Hatcher, 64, testified that, on July 8, 2020, she was staying at Caesar's Palace Hotel and Casino with her mother when, after an evening out, the women encountered two men in a hotel elevator. VI App. 989-93. One of the men indicated he was blind and asked Ms. Hatcher if he pushed the right button for his floor. VI App. 993. Once Ms. Hatcher and her mother reached their floor, they had to step around the men to exit the elevator. VI App. 993.

As she walked to her room, Ms. Hatcher felt like something was wrong. VI App. 994. She checked her purse and discovered her wallet, which contained approximately $180 as well as her debit and credit cards, was missing. VI App. 994-95. She then began utilizing the apps on her phone to shut down her cards and block further transactions on them. Id. Approximately 30 minutes later, Ms. Hatcher began receiving text messages notifying her of suspicious transactions on her cards. VI App. 996-97. One of the transactions was from a business referenced as "Speedway." VI App. 997-98. The transactions totaled around $1,000. Id.

Ms. Hatcher did not identify either man with her in the elevator. VI App. 988-1006.

Once she returned home, Ms. Hatcher filed a report with the LVMPD. VI App. 995. Her case was assigned to LVMPD officer Jeremy Jacobitz, who immediately requested surveillance video from Caesar's. V App. 892. Narrating the video, Officer Jacobitz identified Andrew Young as the individual who took Ms. Hatcher's wallet based upon his review of "substantial video surveillance from various incidents during the summer 2020 months." V App. 894-95. Officer Jacobitz described the wallet theft as a 'distract theft' in which Mr. Young took Ms. Hatcher's blue wallet while his partner blocked the elevator doorway. V App. 895-98.

Over defense objection, Officer Jacobitz opined that the theft was a joint effort as neither Mr. Young nor his acquaintance was registered to the hotel; and after completing the 'distract theft' both men returned to the ground floor and left the casino. V App. 898-99. Officer Jacobitz additionally opined that Mr. Young was "...smooth at this. He's been doing this for a long time. He's good."[2] V App. 897-98. However, Officer

[2] Defense counsel objected to Officer Jacobitz' opinion that Mr. Young was 'smooth' in his conduct but did so on the basis that Officer Jacobitz was unclear as to which of the two perpetrators he was referring to. V App. 897-98.

Jacobitz admitted that he had "no information" that Mr. Young had, indeed, "been doing this a long time." V App. 898.

Joanne Frank

Joanne Frank, 77, testified that, on July 22, 2020, she was shopping at Albertson's on Rainbow Boulevard when she was approached by two individuals as she perused frozen shrimp. V App. 811-13. She had a backpack-type purse with her, in which she had various personal items including her wallet. Id. Her wallet contained approximately $75 as well as her credit and other cards. V App. 811-13; 816. While one of the individuals asked her questions about the shrimp, the other individual stood nearby, appearing to do nothing. V App. 813-15. Ms. Frank eventually left the store without buying anything. V App. 816. Once in her car, she noticed her purse felt lighter. Id. She looked for her wallet and discovered it missing. Id. She eventually received a notice from Bank of America that someone had tried to use one of her credit/debit cards at a Smith's grocery store on Sahara. V App. 817.

Ms. Frank could not provide identifying details regarding the individuals who approached her other than very general descriptors. V App. 820-21.

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Barbara Bowen

Barbara Bowen, 81, testified that, on July 23, 2020, she was shopping with her daughter at Walmart on Boulder Highway when a man with a shopping cart approached her as she was getting fruit cups. VI App. 1049-52. Ms. Bowen testified she handed the man a fruit cup and then turned her back to him to get him another one. VI App. 1052. The man thanked her and went on his way. Id. Shortly thereafter, Ms. Bowen went to pay for some cosmetics and noticed her wallet, in which she had her credit/debit cards, her driver's license, and approximately $70, missing from her purse. VI App. 1053-54. She notified store security and then went to Bank of America to report her cards stolen. VI App. 1053-55. Despite this, someone tried to use two of her Visa cards (ending in 4527 and 5664) at a GameStop, a Walgreens, and the Flamingo gift shop. VI App. 1056-63.

Ms. Bowen could not identify the man who took her wallet. VI App. 1059-60.

Investigating officers obtained receipts and surveillance footage of the transactions involving Ms. Bowen's cards at the GameStop and Walgreens. Based upon the receipts and surveillance footage, Kristen Trock, a GameStop store leader, testified that, on July 23, 2020, a man attempted to purchase a Vanilla Visa card for $450 using (Ms. Bowen's) Visa credit card

ending in 4527.[3] V App. 960-68; 973-74; 968. Similarly, Janelle Phung, an assistant manager at Walgreens on Boulder Highway, testified that, on July 23, 2020 at approximately 2:19 p.m., a male customer tried to purchase a Vanilla Visa gift card with two different credit cards, both of which were declined.[4] VI App. 1098-99; 1106. The man then exited the store. VI App. 1098-99; 1106.

Neither Ms. Trock nor Ms. Phung identified Mr. Young as the individual who tried to use Ms. Bowen's cards.

Serry Mello

Serry Mello, 69, testified that, on July 29, 2020, he and his wife encountered two men in an elevator while they were on their way to their hotel room at the Flamingo Hotel and Casino. V App. 929-33. When Mr. Mello and his wife reached their floor, one of the men helped Mr. Mello, who was dragging two suitcases, exit the elevator. V App. 934. About fifteen (15) minutes later, Mr. Mello received a call from Wells Fargo indicating that there was suspicious activity on his debit card, including a charge for taxi fare as well as four attempted transactions at Target. V App.

[3] While Ms. Trock was the individual working the cash register, her testimony was based upon her review of the receipts and relevant surveillance video, much of which she narrated for jurors. V App. 961-69.

[4] Ms. Phung's testimony was based upon her review of the receipts and relevant surveillance video, much of which she narrated for jurors. VI App. 1096-99.

934-35. Mr. Mello checked his pocket and realized his wallet was gone. V App. 935. He had no idea it had been taken from him. V App. 939.

LVMPD Officer Dominick Cipriano responded to the Flamingo Hotel to investigate the Mr. Mello's wallet theft. V App. 940-41. He obtained surveillance video of Mr. Mello's encounter with the men in the elevator. V App. 942. Narrating the video, Officer Cipriano testified that the surveillance footage showed one of the men going through his belongings after the Mellos exited, after which both men took another elevator down to the casino. V App. 944. Officer Cipriano identified one of the men in the elevator as Mr. Young, despite admitting that he had no independent knowledge of Mr. Young and had only learned of him through his investigation, which included watching "a lot of video surveillance footage."[5] V App. 946; 958.

Montho Boone

Montho Boone, 81, testified that, on August 1, 2020, she was shopping with her daughter, Benji, at Walmart on Boulder Highway when

[5] Some of that footage purportedly related to Mr. Young's Attempt Murder case. V App. 949-58. Prosecutors informed the court during a bench conference that Officer Cipriano's identification of Mr. Young was based, at least in part, on surveillance footage he watched pertaining to Mr. Young's Attempt Murder charge(s). Id. Accordingly, prosecutors did not ask for specifics as to the surveillance footage Officer Cipriano saw that formed the basis for his identification of Mr. Young in the Mello footage. Id.

she discovered someone had opened her purse and removed her wallet. V App. 827-30. Ms. Boone's wallet contained approximately $230 as well as her credit and debit cards. V App. 830.

Ms. Boone could not identify the individual who took her wallet as she did not see the theft. V App. 833; VI App. 1159.

According to GameStop store leader Kristen Trock, a man tried to purchase a Vanilla Visa card using Ms. Boone's credit card (ending in 3609) that same day.[6] V App. 969-70. Approximately 15 minutes later, someone tried to use Ms. Boone's cards at a nearby Walgreens. VI App. 1142. Walgreen's assistant manager Janelle Phung testified that someone tried to purchase a Vanilla Visa gift card with Ms. Boone's Visa card (ending in 3609).[7] VI App. 1091. Ms. Phung indicated that, when the first transaction failed to process, the individual attempted to use a second card, this one ending in 7001. VI App. 1091-92. When that transaction also failed, the individual tried to run the transaction again with the first card ending in 3609. VI App. 1092. When transaction again failed to process, the individual used a card ending in 7669, which went through. VI App. 1092.

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[6] While Ms. Trock was present in the store at the time of the transactions, her testimony was based upon her review of the receipts and relevant surveillance video, much of which she narrated for jurors. V App. 969-74.

[7] Ms. Phung's testimony was based upon her review of the receipts and relevant surveillance video, much of which she narrated for jurors. VI App. 1087-95

Ms. Boone and her daughter reported the wallet theft, ultimately providing her credit/debit card information to LVMPD Officer Sandeep Liske (V App. 830-31), the detective assigned to her case. VI App. 1137-38. Officer Liske determined that the stores where Ms. Boone's cards were used were within walking distance from the Walmart where her wallet was stolen. He indicated that the GameStop store was a 5- to 10-minute walk from the Walmart; and the Walgreens was a 15- to 20- minute walk from the GameStop. VI App. 1139-40.

Coincidentally, Officer Liske's partner was investigating [the Bowen] wallet theft from July 23, 2020. VI App. 1144. Upon learning that Officer Liske was investigating the Boone case – which involved a wallet theft from the same Walmart as well as fraudulent transactions at the same GameStop and Walgreens -- the two officers compared the surveillance footage from all the GameStop and Walgreens transactions. VI App. 1145-46. According to Officer Liske, the surveillance footage depicted an individual wearing the same clothes during both the July 23, 2020 and August 1, 2020 GameStop/Walgreens transactions. VI App. 1146.

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Tina Leigh

Officer Liske was also assigned to investigate a wallet theft reported by Tina Leigh from the same Walmart. VI App. 1149-50. Ms. Leigh, 61[8], testified that, on August 7, 2020, she went to the Walmart on Boulder Highway to buy cleaning supplies. V App. 867-68. While looking at the cleaning supplies, a tall gentleman approached her and asked questions about mixing various cleaning agents. V App. 869. While speaking with him, she noticed another man stick his hand in her purse and take something. V App. 869. She immediately determined that he had taken her wallet, which contained her debit and credit cards, amongst other things. V App. 869-72. Within an hour, Ms. Leigh received word that someone had tried to use her credit and/or bank cards. V App. 876.

Ms. Leigh described both individuals as black. V App. 870.

Officer Liske obtained the surveillance footage from the incident involving Ms. Leigh. VI App. 1149-50. He testified that the footage showed an individual distracting Ms. Leigh while another individual grabbed her wallet from her purse. VI App. 1150. Officer Liske identified that man as Mr. Young, explaining that officers were able to identify Mr. Young as the perpetrator of each Walmart wallet theft based on the citation

[8] Ms. Leigh testified that she was born on October 2, 1959. V App. 867.

Mr. Young received for the Lydia Hefner incident (and the information deriving therefrom – including surveillance and LVMPD body camera footage). VI App. 1151. Officer Liske further explained that the surveillance footage from each wallet theft revealed the perpetrator as wearing white shoes with a black stripe – the same shoes Mr. Young was wearing at the time of his arrest and citation for the theft of Ms. Hefner's wallet. VI App. 1151-52.

Barbara Angersbach

Barbara Angersbach, 83, testified that, on the late evening of August 9, 2020/early morning of August 10, 2020, she was at the Suncoast Casino gambling when two men approached her, ostensibly attempting to play the gaming machines to the right and left of her. V App. 904-10. After Ms. Angersbach reminded the man to her right that they could not stand within (6) feet of her due to Covid restrictions, the man to her left agreed they were too close, and they left. V App. 904-10.

Shortly thereafter, Ms. Angersbach noticed her wallet was not in her purse. V App. 911. She assumed she left it at home until she began receiving cell phone messages notifying her of suspicious transactions on her credit cards. V App. 912. Once she returned home and determined her wallet was not there, she reported it stolen. V App. 913. She then learned

that someone used her credit/debit cards at a "motor speed" place, a Taco Bell, and a gas station. V App. 914.

Ms. Angersbach could not identify either man who approached her at the Suncoast. V App. 920-21.

LVMPD Officer Grimes, already investigating Ms. Campo's wallet theft from the nearby Rampart Casino a month earlier, was assigned Ms. Angersbach's case. VI App. 1171-72. Officer Grimes testified that, when he obtained the surveillance footage of the Angersbach theft from the Suncoast, he recognized the two men seen on the video as the same two men involved in the theft of Ms. Campo's wallet. VI App. 1172. Officer Grimes noted, amongst other things, that the shoes worn by one of the men were the same in both thefts. VI App. 1172-74.

Officer Grimes explained that, between the first incident involving Ms. Campo and the later incident involving Ms. Angersbach, LVMPD officers began coordinating their investigations of the wallet thefts, including those occurring at the Walmart on Boulder Highway. VI App. 1176-77. Through that coordinated effort, officers noted that one of the suspects in the surveillance videos appeared to be the same individual wearing the same shoes. VI App. 1177. Officers identified that man as Mr. Young by reviewing the surveillance and body camera footage as well as the

citation issued in connection with the incident involving Ms. Hefner. VI App. 1177. Officer Grimes testified that he "did a records check on that name and date of birth and found a match in our system." VI App. 1177.

Officer Grimes then communicated Mr. Young's name to officers investigating similar wallet thefts, including LVMPD Officer Janacek, who was investigating Ms. Frank's wallet theft at Albertson's. VI App. 1178. Officer Grimes testified that reviewed the surveillance footage from Albertson's and "recognized both of the suspects in [that] video as being the same two suspects in [his] cases." VI App. 1178-79. Officer Grimes explained that he recognized one of the suspects as wearing the same shorts and shoes, having a bald head, and displaying the same mannerisms as one of the suspects in the cases he was investigating. VI App. 1179-80.

Detective Trent Byrd

LVMPD Detective Trent Byrd testified that he was called upon to assist with identifying the individual(s) involved in the wallet thefts. VII App. 1207. Det. Byrd explained that he identified Mr. Young as one of the perpetrators based on the incident involving Ms. Hefner. VII App. 1208. Det. Byrd compared certain of Mr. Young's characteristics depicted in the Hefner footage – such as race, height, approximate age, build, clothing, accessories, and mannerisms – to that of the suspects in the other wallet

thefts. VII App. 1208-20. Det. Byrd opined that Mr. Young was depicted in nearly all the surveillance videos obtained from the other wallet thefts and related credit/debit card transactions.[9] VII App. 1208-20. Det. Byrd identified Andrew Young as the man sitting at the defense counsel table in court. Id.

Juror Bilzerian makes a special request

Following the testimony of nearly all the victims, Juror 111, Mr. Bilzerian, sent out a note asking the judge: "Would you mind if I give each of the victims $2,000.00 in an envelope after they are excused?" VI App. 1039-42; 1115. The court responded by explaining she could not answer the question since the issue of gift-giving to witnesses/victims is "out of her control." Id. The court then canvassed Mr. Bilzerian on his ability to fairly adjudicate the case. Id. at 1115-16. Mr. Bilzerian assured the parties that his sympathy for the victims did not have anything to do with his perception of Mr. Young's guilt or innocence. Id. at 1115-20.

[9] Specifically, Det. Byrd opined that Mr. Young was one of the individuals depicted in the following videos: the June 29, 2020 theft of Ms. Campo's wallet (VII App. 1213); the July 8, 2020 theft of Ms. Hatcher's wallet (VII App. 1214); the July 29, 2020 theft of Mr. Mello's wallet (VII App. 1215-18); the use of credit/debit cards at GameStop (VII App. 1218-19); the July 22, 2020 theft of Ms. Frank's wallet (VII App. 1219-20); and the August 10, 2020 theft of Ms. Angersbach's wallet (VII App. 1219-20).

Defense counsel then moved for a mistrial, arguing, *inter alia*, that Mr. Bilzerian's expression of sympathy for the victims gave rise to an insurmountable inference of bias. Id. at 1120-26. Defense counsel contended that Mr. Bilzerian's request revealed he had formed an opinion about the case prior to the submission of all the evidence – in direct contravention of the court's repeated admonitions. Id. at 1125. Defense counsel added that Mr. Bilzerian's "status and his reputation" (as a famous YouTube personality) gave rise to the possibility that "he may have an extra ability to influence this case."[10] Id. at 1121.

Without canvassing the other jurors to ensure that Mr. Bilzerian's sympathies had not been the subject of discussion and/or influenced their perceptions of the case, the trial court denied the defense mistrial motion and allowed Mr. Bilzerian to remain on the jury. VI App. 1121-30. Jurors ultimately convicted Mr. Young of all but two of the offenses with which he was charged.

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[10] According to one of the prosecutors, Juror Bilzerian was a YouTube personality with a following of 3 to 4 million viewers. IV App. 631. The prosecutor was familiar with Mr. Bilzerian because Mr. Bilzerian was prosecuted by the Clark County District Attorney's Office for blowing up a vehicle in the desert. IV App. 631.

Sentencing

At sentencing, the trial court considered information submitted by prosecutors relating to their request for habitual criminal adjudication. VII App. 1323-1345. Following an elaborate and impassioned argument by the prosecutor and a statement by Mr. Young, the trial court turned to defense counsel for his sentencing argument. Id. In so doing, the trial court summarized Mr. Young's criminal history and then posed the question: "I mean, what is a Court to do in this type of situation when part of my duty is to keep this community safe?" VII App. 1342. The following colloquy between the court and defense counsel then occurred:

> MR. FISCHER: Well, a fair trial would have been a start, Judge. But that didn't happen. So we will be appealing this, as Your Honor's well aware. We will submit it on the misdemeanor petty larceny, which is our argument and our concession. And that's all I have to say, Your Honor. Thank you.
>
> THE COURT: Okey dokey. All right. And just so I understand, Mr. Fischer, because I'm a little caught off guard, what part of the trial was it that you felt wasn't fair? You're talking about the juror question, is that what you're talking about?
>
> MR. FISCHER: Judge, I'll be making all that known in my appeal. Thank you, your Honor.
>
> THE COURT: Are you refusing to answer the question?
>
> MR. FISCHER: My refusing – Your Honor, I'm going to make my issues known. I don't believe it's my duty to tell the Court what my appeal issues are.

THE COURT: Okay. So that answer is that you are refusing to answer the question in regards to – because I have no idea what you're referring to.

MR. FISCHER: Okay. Sure.

THE COURT: Great. Okay. In accordance with the laws of the State of Nevada, you are hereby adjudicated...

VII App. 1342-43.

The trial court then adjudicated Mr. Young a habitual criminal and sentenced him to an aggregate of 90 years to life in prison. VII App. 1343-45.

SUMMARY OF THE ARGUMENT

With no victim who could identify Mr. Young as a perpetrator, prosecutors turned to, *inter alia*, a host of surveillance footage – much of which was narrated by various LVMPD officers. The officers identified Mr. Young as the individual depicted in several of the videos, thereby communicating their opinion(s) of Mr. Young's guilt. Woven into this narrative was the suggestion that Mr. Young was an experienced criminal, on the radar of both Walmart store security and LVMPD. The improper video narrations and identifications of Mr. Young by LVMPD officers, together with the implication that he had engaged in other, unspecified prior bad acts, combined to ensure Mr. Young's conviction of all but two of the charged crimes.

At sentencing, Mr. Young's trial counsel offered no argument in mitigation of sentence; nor did he challenge the trial court's consideration of certain of Mr. Young's prior convictions or the habitual criminal adjudications that followed. Accordingly, Mr. Young now comes before this court laboring under multiple, consecutive life sentences.

ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY THAT AMOUNTED TO BAD ACT EVIDENCE.

At trial, prosecutors elicited testimony from several police officers that gave rise to the inference that Mr. Young committed prior, unspecified bad acts. Officer Wheeler, who responded to the Hefner incident, testified that he was summoned to the Walmart because of a "male that *they've had problems with before, that they're concerned about him trying to steal.*" V App. 843-44 (emphasis added). Officer Jacobitz, the LVMPD officer assigned to the Hatcher case, testified that he identified Mr. Young based upon watching "substantial video surveillance from various incidents during the summer 2020 months." V App. 894-95. Officer Jacobitz opined that Mr. Young was "smooth at this [stealing]. *He's been doing this for a long time. He's good.*" V App. 897-98 (emphasis added).

Officer Cipriano, the officer assigned to the Mello case, echoed this, opining that he was able to identify Mr. Young by watching "a lot of video

surveillance footage." V App. 846; 958. Officer Grimes, the officer assigned to the Campo and Angersbach cases, testified that, after identifying Mr. Young as one of the perpetrators, he "did a records check on that name and date of birth and found a match in our [LVMPD's] system." VI App. 1177. The admission of this *de facto* bad act evidence, singularly or in combination, amounted to error. [11]

Nevada Revised Statute 48.045(2) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absences of mistake or accident.

"A presumption of inadmissibility attaches to all prior bad act evidence." Ledbetter v. State, 129 P. 3d 671, 677 (Nev. 2006) (quoting Rosky v. State, 111 P.3d 690, 697 (2005)). "The principle concern with admitting this type of evidence is that the jury will be unduly influenced by it and convict a defendant simply because he is a bad person." Ledbetter, supra, at 677 (quoting Walker v. State, 116 Nev. 442, 445 (2000)). The presumption of inadmissibility may be overcome only after a finding by the

[11] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003).

trial court, outside the presence of the jury and prior to the admission of the evidence, that the bad act evidence is: (1) relevant; (2) clear and convincing; and (3) more probative than prejudicial. Ledbetter, at 677.

First, the trial court failed to hold the required pre-trial hearing regarding the admissibility of the bad act evidence described above. This is because prosecutors failed to file the necessary pre-trial motion requesting admission of this evidence at trial.[12] Accordingly, the trial court erred by admitting the bad act evidence in the absence of the required pre-trial motion and hearing.

Second, had the trial court held the required hearing, the court would have rejected the above-referenced bad act evidence as irrelevant and prejudicial. Evidence that Walmart security had pegged Mr. Young as someone with whom they had 'had problems' in the past; evidence that Mr. Young was a purportedly experienced and capable thief; evidence that Mr. Young had a record of some unspecified misconduct maintained in the LVMPD database; and evidence that Mr. Young was the subject of various

[12] While prosecutors filed a Motion in Limine to Admit Certain Evidence Under the Doctrine of Res Gestae or, in the Alternative, State's motion to Admit Evidence Related to Other Crimes (II App. 311-32), that Motion did not seek admission of the testimony challenged here. With that Motion, prosecutors asked the trial court to admit, in a sanitized form, testimony that the surveillance footage obtained in the theft cases led to the identification of Mr. Young as the perpetrator in the Attempt Murder case. Id.

surveillance videos did little other than portray Mr. Young as a person of poor character more likely than not to have committed the charged crimes. This is precisely what NRS 48.045 was designed to prohibit.

The trial court further erred by failing to proffer an instruction limiting the jury's consideration of the above-referenced bad act evidence, either upon admission of the evidence or in the jury instructions. Trial courts must instruct the jury immediately prior to the admission of bad act evidence so the limiting instruction "can take effect before the jury has been accustomed to thinking of it in terms of the inadmissible purpose." Tavares v. State, 117 Nev. 725, 733 (2001). "The State *must request* a limiting instruction prior to the admission of bad acts evidence." Rhymes v. State, 107 P.3d 1278, 1281-82 (Nev. 2005) (emphasis added). This Court views this instruction as so significant that even the prosecutor's failure to request the instruction does not alleviate the court's duty to provide it. Id.

The instant trial failed to give the required limiting instruction. Thus, jurors were free to speculate about the possibility that Mr. Young possessed a dangerous and/or criminal character and, accordingly, was more likely to have committed the charged crimes.

This warrants reversal. The *de facto* bad act evidence cast Mr. Young in a "negative light, prejudicially suggesting that he has a dangerous and

criminal character." Walker v. State, 116 Nev. 442, 447 (2000) (holding inadmissible prior threat evidence). This is particularly true here – where prosecutors already had the benefit of trying numerous offenses deriving from multiple thefts in a single indictment. Thus, the prejudice occasioned by the *de facto* bad act evidence admitted in the instant case warrants reversal.

II. THE TRIAL COURT ERRED BY ALLOWING MULTIPLE OFFICERS TO NARRATE SURVEILLANCE FOOTAGE AND IDENTIFY MR. YOUNG AS ONE OF THE PERPETRATORS DEPICTED THEREIN.

The trial court repeatedly allowed officers to narrate surveillance video, often opining as to what was depicted in the videos and, on occasion, identifying Mr. Young as one of the perpetrators.[13] The trial court allowed the narrations and identifications even though the officers did not have any independent knowledge of Mr. Young beyond the surveillance footage, itself.

Officer Grimes opined that the men seen in the Campo surveillance footage were 'pretending to gamble but mainly looking around,' and that one of the men talked to Ms. Campo while the other took something from

[13] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003).

her purse. VI App. 1166. Officer Grimes further opined that the men depicted in the Campo footage were the same as those seen in the Angersbach and Frank videos. VI App. 1171-80. Officer Grimes identified Mr. Young as one of those perpetrators based on his review of the Hefner incident. VI App. 1177. He explained that officers connected Mr. Young to the most, if not all, of the other wallet thefts as he displayed the same bald head, exhibited the same mannerisms, and was wearing the same shoes in much of the footage. VI App. 1177-80.

Similarly, Officer Jacobitz identified Mr. Young as one of the perpetrators in the Hatcher video, even though Officer Jacobitz' identification was based on his review of other surveillance footage rather than an independent familiarity with Mr. Young. VI App. 894-95. Officer Jacobitz further opined that Ms. Hatcher's wallet theft was a joint effort between Mr. Young and his partner. VI App. 898-99.

Officer Cipriano offered similar testimony, narrating the Mello surveillance video and explaining how the actions of the perpetrators supported the conclusion that they were working in concert. V App. 944-58. Like Officer Jacobitz, Officer Cipriano identified Mr. Young as one of the perpetrators based on his review of other surveillance footage rather than an independent familiarity with Mr. Young. V App. 944-58.

Officer Liske also identified Mr. Young as one of the perpetrators in the Walmart wallet thefts (involving Ms. Boone, Ms. Bowen, and Ms. Leigh) based upon his review of the video from those thefts as well as that obtained in connection with the Hefner incident. Officer Liske explained that the perpetrator in all the surveillance footage appeared to be wearing the same shoes as Mr. Young was wearing at the time of his arrest. VI App. 1151-52. Additionally, Officer Liske narrated footage of the Leigh theft, explaining that the video showed one individual distracting Ms. Leigh while another removed her wallet from her purse. VI App. 1149-50.

Finally, Detective Byrd identified Mr. Young as the perpetrator of the wallet thefts based upon his review of the surveillance footage from the thefts, including the Hefner incident in which Mr. Young was cited and released. VII Ap. 1107-20.

The admission of this evidence amounted to error. This Court has held that police officers may narrate surveillance videos if the narration assists the jury in making sense of the images depicted in the videos. Burnside v. State, 131 Nev. 371, 388-89 (2015). However, officers may not identify individuals depicted in surveillance footage unless "previously admitted evidence already established [their] identity" or the officers have "some prior knowledge or familiarity with" the individuals seen in the video.

Burnside, supra, (citing Edwards v. State, 583 So.2d 740, 741 (Fla. Dist. Ct. App. 1991) (concluding that police officer's testimony that he recognized defendant in videotape of drug sale was inadmissible because there was no showing that officer had prior knowledge or familiarity with defendant or was qualified as an expert in videotape identification); State v. Belk, 201 N.C. App. 412, 689 S.E.2d 439, 443 (2009) (concluding that officer's lay opinion that defendant was depicted in video surveillance was inadmissible because officer was in no better position than jury to identify defendant as person in video)).

Here, the narrations did not *assist* jurors in making sense of the video images but, rather, *told* jurors how to interpret them – i.e., that they depicted Mr. Young participating in coordinated thefts. Nothing in the videos required explanation and interpretation by law enforcement, as would the unique features of a narcotics or other specialized criminal enterprise. Here, jurors could watch the videos and determine for themselves whether the images disclosed the alleged wallet thefts and fraudulent credit card transactions -- and whether Mr. Young was responsible therefor. Jurors should have been able to make these determinations unencumbered by law enforcement's repeated suggestions that the videos depicted Mr. Young

"smoothly" committing a series of coordinated thefts and fraudulent transactions.

This is especially true with respect to the officers' repeated identification of Mr. Young as one of the individuals depicted in the videos. None of the officers who identified Mr. Young did so based upon an independent knowledge of (or familiarity with) him beyond the investigations at issue. Consequently, the officers were in no better position than jurors to determine whether Mr. Young was one of the men seen in the surveillance footage. As such, the officers' identification testimony served only to invade the jury's sacred province by improperly suggesting Mr. Young's identity as one of the men seen in the surveillance videos. Thus, the trial court erred by allowing the improper narration and identification testimony.

This error was exceedingly prejudicial. Jurors heard over and over that the videos depicted Mr. Young collaborating with another individual in the wallet thefts. This left little, if anything, for jurors to decide. In essence, jurors were told when, where, and how the wallet thefts occurred; and then they were told who committed them. These are facts that the jury, alone, should have decided. Accordingly, the prejudice occasioned by the trial

court's admission of the narration and identification testimony warrants reversal.

III. THE TRIAL COURT'S ADMISSION OF HEARSAY EVIDENCE VIOLATED MR. YOUNG'S CONSTITUTIONAL AND STATUTORY RIGHTS.

Over defense objection, Officer Jacobitz testified that the theft of Ms. Hatcher's wallet was the product of a collaborative effort between Mr. Young and the other man depicted on the Caesar's Palace surveillance footage – a conclusion he reached based upon the fact that neither Mr. Young nor his acquaintance was registered to the hotel; and that after completing the 'distract theft' both men returned to the ground floor and left the casino. V App. 898-99. This amounted to *de facto* hearsay testimony, the admission of which amounted to error.

The Sixth Amendment to the U.S. Constitution states that: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..." U.S.C.A. VI; XIV. The Sixth Amendment right to cross-examine witnesses is fundamental to a fair trial and was made applicable to the states via the Fourteenth Amendment. City of Las Vegas v. Walsh, 124 P.3d 203, 207 (Nev. 2005) (quoting Pointer v. Texas, 380 U.S. 400, 401 (1965); Drummond v. State, 86 Nev. 4, 6 (1970)). Codifying the above, NRS 51.035 (the hearsay rule) excludes from evidence

hearsay testimony. "Hearsay" is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035.

Officer Jacobitz' testimony that neither Mr. Young nor his partner were registered guests of Caesar's Hotel amounted to inadmissible hearsay. The contention that neither man was a guest of the hotel was based upon information Officer Jacobitz learned from some outside source, most likely a hotel employee. That means Officer Jacobitz' testimony was based upon an out of court statement offered to prove the truth of the matter asserted therein -- that neither Mr. Young nor his acquaintance was a registered guest of the hotel. Accordingly, his testimony amounted to hearsay, the admission of which violated Mr. Young's constitutional and statutory confrontation guarantees.

The admission of Officer Jacobitz' hearsay testimony warrants reversal. The hearsay information provided the basis for Officer Jacobitz' opinion that Mr. Young and his associate collaborated in the theft of Ms. Hatcher's wallet and had no other business in the hotel. This not only bolstered the theft-related charge involving Ms. Hatcher's wallet, but the related Burglary charge, as well. And it not only affected the Hatcher charges – it added credence to the prosecution's claim that Mr. Young was responsible for collaborating on the other wallet thefts. This infected the

entire case. Accordingly, the error occasioned by the unlawful admission of Officer Jacobitz' hearsay testimony warrants reversal of all the wallet-theft convictions as well as the associated Burglary convictions (Counts 1, 2, 3, 6, 7, 8, 9, 10, 15, 16, 21, 22).

IV. THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL FOLLOWING A JUROR'S DISCLOSURE OF INFERENTIAL BIAS DURING TRIAL VIOLATED MR. YOUNG'S CONSTITUTIONAL RIGHTS.

Following the testimony of several victims, Juror Bilzerian submitted a note requesting to give each victim $2,000.00. The defense sought a mistrial, arguing the request showed irreparable bias against Mr. Young. The court canvassed Mr. Bilzerian and determined that, despite the display of sympathy for the victims, Mr. Bilzerian did not harbor bias against Mr. Young. Despite Mr. Bilzerian's assurances that his generous offer was not a reflection of his perception of the case or Mr. Young, the trial court should have granted a mistrial or, at a minimum, excused Mr. Bilzerian from further participation in the case. The failure to do so violated Mr. Young's federal and state constitutional rights.

The United States and Nevada Constitution guarantee a defendant the right to due process and the right to a trial before a fair and impartial jury. U.S.C.A. VI, XIV; Nev. Const. Art 1, Sec. 3, 8. The Sixth Amendment guarantees criminal defendants a fair trial by "a jury capable and willing to

decide the case solely on the evidence before it." Fields v. Woodford, 309 F.3d 1095, (9th Cir. 2002) (quoting McDonough Power Equipment v. Greenwood, 464 U.S. 548 (1984)). "A defendant is denied the right to an impartial jury if only one juror is biased or prejudiced." Fields, supra, at 1103 (citing Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir. 1990)).

Juror bias may be actual, implied, or inferred. Sayedzada v. State, 134 Nev. 283, 289-91 (Nev. Ct. App. 2018). Actual bias exists when a juror "demonstrates a state of mind that prevents the juror from being impartial." Id. (citing U.S. v. Torres, 128 F.3d 38, 45-48 (2nd Cir. 1997)). Implied bias, or "bias as a matter of law," exists when a juror's background or relationship to the case (such as where the juror is related to a party or has some interest in the outcome of the litigation) is sufficient to undermine any claim of impartiality. Id. Inferred bias arises when a "juror discloses a fact that 'bespeaks a risk of partiality sufficiently significant'" to warrant discretionary removal of the juror. Id. (quoting Torres, supra, 128 F.3d at 47)).

While inferred bias derives from facts elicited from the juror, it exists independently of the juror's assertion of impartiality. Id. Once facts are elicited that give rise to inferential bias, "the juror's statements as to his or her ability to be impartial become irrelevant." Id. (quoting Torres, supra,

128 F.3d at 47). Accordingly, a judge may exercise her discretion to infer bias "when the facts elicited in voir dire... show an average person in the juror's situation would be unable to decide the matter objectively." Id.

The trial court erred by refusing to grant a mistrial following juror Bilzerian's disclosure of inferential bias against Mr. Young. Mr. Bilzerian's expression sympathy for the victims in the case – to the extent that he wanted to spend thousands of dollars gifting each $2,000.00 – gave rise to an inference of bias so profound as to undermine his assurances of impartiality. This is especially true given that Mr. Young was the individual alleged to have occasioned the losses each of the victims suffered – a critical fact that distinguishes Mr. Young's case from Hernandez v. State, 118 Nev. 513 (2002), the case relied upon by the trial court in denying Mr. Young's mistrial motion.

In Hernandez, three jurors bought a gift for a murder victim's daughter between the guilt and penalty phases of trial. Id. at 521-22. The trial court canvassed the jurors about the purchase, after which the defense moved for a mistrial. Id. The trial court denied the mistrial motion. Id. This Court held that the trial court's decision did not amount to an abuse of discretion, concluding that "the facts do not establish prejudice but merely

demonstrate that the jury was sympathetic to an innocent child, *who was a collateral victim of the murder.*" Id. (emphasis added).

Here, the intended recipients of the Mr. Bilzerian's putative gifts were the victims themselves. This display of sympathy gives rise to the inference that Mr. Bilzerian had concluded, prior to the submission of all the evidence, that the victims had suffered losses at the hands of Mr. Young. As defense counsel noted, this was particularly concerning given the potential for Mr. Bilzerian, a YouTube celebrity, to influence other jurors. The trial court took no action to ensure that other jurors were free of improper influence or taint from Mr. Bilzerian's expression of sympathy. The trial court also failed to remind Mr. Bilzerian of his obligation to refrain from forming an opinion about the case until the close of evidence; and the court failed to admonish him about open displays of sympathy moving forward.

The trial court's refusal to grant a mistrial or, at a minimum, excuse Mr. Bilzerian amounts to reversible error. Since the trial court failed to inquire of the other jurors to determine the reach of Mr. Bilzerian's influence, if any, on them, there exists no way to fully quantify the impact of Mr. Bilzerian's presence on the jury in the post-trial setting. Regardless, his presence on the jury, alone, warrants reversal. Sanders v. Sears-Page, 131 Nev. 500, 511-12 (Nev. Ct. App. 2015) (despite assurances of partiality, trial

court's failure to excuse juror who disclosed information during trial giving rise to inference of bias resulted in unfair jury, thereby requiring reversal) (citing Jitnan v. Oliver, 127 Nev. 424 (2011)); See also Fields, supra; Smith v. Phillips, 455 U.S. 209, 222-23 (1982) (discussing concern that, in certain instances, a post-conviction hearing may be inadequate to uncover juror biases) (O'Connor, J. concurring). Accordingly, this Court must reverse Mr. Young's convictions entered below.

V. THE TRIAL COURT ERRED BY ALLOWING DEFENSE COUNSEL TO CHALLENGE JUROR BILZERIAN'S PARTIALITY IN HIS PRESENCE AND BY FAILING TO EXCUSE JUROR BILZERIAN THEREAFTER.

Near the end of Mr. Bilzerian's questioning, the court asked defense counsel if he had additional questions of Mr. Bilzerian, to which defense counsel stated: "Judge, I think it's blatantly obvious that he's not fair and impartial." VI App. 1119. The prosecutor began to respond, at which point the court interjected, stating: "Wait, no, not argument..." VI App. 1120. The court then queried Mr. Bilzerian further, after which the court excused him from the courtroom. VI App. 1121. The court then heard argument regarding the defense mistrial motion. VI App. 1121-30.

The trial court's failure to ensure that the parties did not challenge Mr. Bilzerian's partiality in his presence and the court's failure to, at a minimum,

excuse Mr. Bilzerian once this occurred, amounted to error.[14] "Although Nevada law does not mandate judges entertain challenges for cause outside of the prospective juror's presence, a critical difference exists between the challenge of a prospective juror during voir dire and a challenge for cause in front of an empaneled juror, particularly where the challenge occurs immediately after the empaneled juror admits facts establishing an inference of bias against the party making the challenge." Sanders v. Sears-Page, supra, 131 Nev. at 513 (Nev. Ct. App. 2015). While a challenge for cause in a prospective juror's presence during voir dire may be innocuous, a similar challenge in the trial setting may result in prejudice to the party making the challenge. Id (citing Oade v. State, 114 Nev. 619, 621-22 (1998)).

Here, defense counsel's challenge to Mr. Bilzerian in Mr. Bilzerian's presence prejudiced Mr. Young. Defense counsel asserted, in front of Mr. Bilzerian, that it was "blatantly obvious that he's not fair and impartial," despite Mr. Bilzerian's assurances to the contrary. After the court finished questioning Mr. Bilzerian, the court asked defense counsel if he had additional questions, to which defense counsel responded: "Judge, the questions that I've asked I think cover what my position is..." VI App.

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[14] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003).

1120. With this, defense counsel made clear that he did not believe Mr. Bilzerian's assurances of partiality, and that counsel further believed Mr. Bilzerian could not fairly adjudicate Mr. Young's case.

These assertions put defense counsel in an antagonistic position with Mr. Bilzerian, the result of which likely prejudiced Mr. Bilzerian against Mr. Young. See Sanders v. Sears-Page, supra, at 514 (citing Brooks v. Commonwealth, 484 S.E. 2d 127, 130 (Va. App. 1997) (cause challenge to sitting juror likely prejudiced juror against asserting party). The trial court took no steps to remediate this, instead leaving Mr. Bilzerian on the jury. This amounts to plain error warranting reversal. Sanders v. Sears-Page, supra, at 514 (likely prejudice resulting from party's cause challenge to trial juror amounts to plain error) (citing Gaxiola v. State 121 Nev. 638, 654 (2005)). Accordingly, this Court must reverse Mr. Young's convictions entered below.

VI. THE TRIAL COURT ERRED BY PROFFERING JURY INSTRUCTIONS THAT WERE MISLEADING AND/OR MISSTATED THE LAW.

Instruction No. 10

The trial court instructed jurors that, with respect to the crime of Larceny From the Person, "Property is deemed taken 'from the person' of the victim if the property was within the victim's reach, inspection,

observation, disposition or control." II App. 396. This instruction misstates Nevada law.[15]

In Terral v. State, 84 Nev. 412, 413-14, (1968), this Court held that the crime of Larceny From the Person "is *not* committed if the property is taken from the immediate presence, or constructive control or possession of the owner." (emphasis added). This Court recently recognized the Terral Court's holding, noting that Terral remains the "seminal Nevada case interpreting the 'takes property from the person of another' requirement." Ibarra v. State, 134 Nev. 582, 588-91 (2018). Thus, the trial court's instruction directly contravened Nevada law.

The error occasioned by this instruction warrants reversal of all but one of the Larceny From the Person convictions[16] (Counts 2, 8, 10) and the Burglary charges with which they are associated (Counts 1, 7, 9). The victims of those offenses – Ms. Campo, Ms. Hatcher, and Ms. Frank – all testified that their wallets were stolen from their purses, which were on/near

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[15] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003).

[16] Since the charge involving Mr. Mello alleged a taking from his pocket, the errant instruction likely did not impact the disposition of offenses relating to his wallet theft.

their bodies.[17] But for the errant instruction, jurors may have concluded that the theft of the wallets, located inside of their respective purses, was too attenuated to amount to Larceny From the Person.

And to the extent that jurors did not find proof of the Larceny From the Person offenses, they may not have found proof of the associated Burglaries, given that the Larceny From the Person allegation(s) provided the predicate felonies for those Burglaries -- as well as the Burglaries charged in Counts 6, 21, and 22.[18] Thus, this Court must reverse Mr. Young's Larceny From the Person convictions deriving from the wallet-purse thefts (Counts 2, 8, and 10) as well as the associated Burglary convictions (Counts 1, 7, and 9) and the other Burglary convictions for which jurors may have apprehended Larceny From the Person to be a predicate felony (Counts 6, 21, and 22).

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[17] Ms. Campo had her purse with her at a gaming machine (V App. 790); Ms. Hatcher was carrying her purse (VI App. 990-96); and Ms. Frank had her purse on her back (V App. 812).

[18] While the Burglary charges in Counts 6, 21, and 22 did not have associated, *charged* Larceny From the Person offenses, jurors likely apprehended the Larceny From the Person felonies as the predicates for the Burglaries, given that each Burglary derived from a wallet theft and alleged entry (into Walmart, Walmart and the Suncoast, respectively) "with the intent to commit grand or petit larceny, *and/or a felony*." II App. 384-89) (emphasis added).

Instruction number 13 and 14

Pursuant to defense counsel's request that jurors be allowed to consider lesser theft offenses, the trial court proffered two 'transition' instructions guiding the jury's consideration of lesser offenses for Grand Larceny/Petit Larceny (Instruction 13) and Larceny from the Person/Larceny (Instruction 14). The Grand Larceny/Petit Larceny transition instruction read:

> When a person is accused of committing a particular crime and at the same time and by the same conduct may have committed another offense of a lesser grade or degree, the latter is with respect to the former, a lesser offense.
>
> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, he may, however, be found guilty of any lesser offense if the evidence is sufficient to establish his guilt of such lesser offense beyond a reasonable doubt.
>
> The offense of Grand Larceny necessarily included the lesser offense of Petit Larceny.
>
> If you find the defendant guilty of Grand Larceny, you shall select Grand Larceny as your verdict. The crime of Grand Larceny may include the crime of Petit Larceny. You shall find the defendant guilty of the crime of Petit Larceny if (1) some of you are not convinced beyond a reasonable doubt that the defendant is guilty of Grand Larceny; and (2) all twelve of you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of Petit Larceny.

II App. 399. The Larceny From the Person/Larceny transition instruction utilized the same language. II App. 400. Because this language suggested that all twelve jurors need reject the greater offenses before considering the

lesser ones, the transition instructions violated Mr. Young's Due Process rights.[19] U.S.C.A. V, XIV.

Any jury instruction that relieves the government's proof burden violates Due Process. Francis v. Franklin, 471 U.S. 307 (1985) (jury instructions relieving government of proof burden violate due process); Sandstrom v. Montana, 442 U.S. 510 (1979); see also In re Winship, 387 U.S. 358, 364 (1970) (Due Process Clause prohibits states from depriving an accused of liberty absent proof beyond a reasonable doubt of all elements of charged offense). The instant transition instructions did precisely that. They indicated that, until jurors agreed on the prosecution's failure to prove the charged crimes beyond a reasonable doubt, they could not consider the lesser offenses. Thus, the instructions minimized the prosecution's burden of proof in violation Mr. Young's Due Process rights. Brackeen v. State,

[19] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003). Additionally, this claim implicates issues of constitutional magnitude, which may be raised "...for the first time on appeal." Phipps v. State, 111 Nev. 1276, 1280 (Nev. 1995). It is of no consequence that the instructions derive from the lesser offenses sought by the defense -- the trial court is obligated to ensure proper wording of all instructions, even those proposed by the defense. See Carter v. State, 121 P.3d 592 Nev. 592 (Nev. 2005) (recognizing trial court's duty to protect integrity of trial and act sua sponte to correct jury instructions offered by the defense). Thus, the fact that defense counsel sought inclusion of the lesser offenses for the jury's consideration does not obviate the trial court's obligation to ensure proper wording of the instructions pertaining thereto.

104 Nev. 547, 552 (1988) (the State must prove each element beyond a reasonable doubt); Apprendi v. New Jersey, 530 U.S. 466 (2000).

Admittedly, this Court has approved the use of 'conviction first' transitions instructions. See Green v. State, 119 Nev. 542 (2003). However, this Court has not expressly approved language that erroneously conveys a requirement that *multiple jurors need agree* on the prosecution's failure to prove the charged crime beyond a reasonable doubt prior to consideration of any lesser offense. In truth, the failure of *only one juror* to find proof of the charged crime beyond a reasonable doubt is enough to compel consideration of a lesser offense or acquittal. But the instant instruction suggested to the contrary.

The constitutional violation occasioned by the improperly worded transition instructions warrants reversal of the Grand Larceny conviction (Count 3) and the Larceny From the Person convictions (Counts 2, 8, 10, 16). Jurors may not have considered the lesser offenses due to a misapprehension that they could consider the lesser crimes only if multiple jurors determined that proof of the greater offenses was lacking. Had jurors understood that they could consider the lesser offenses if *even one* juror failed to find adequate proof of greater offenses, the verdicts on counts to which the transition instructions applied may have been very different.

Thus, the trial court's improper 'transition' instructions warrant reversal of Counts 2, 3, 8, 10 and 16.

Instruction 22

The trial court instructed the jury that: "The defendant is presumed innocent *until* the contrary is proved. This presumption places on the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense..." II App. 408 (emphasis added). The use of the word 'until' improperly lessened the prosecution's proof burden in violation of Mr. Young's federal and state constitutional rights.[20] U.S.C.A. VI, XIV; Nev. Const. Art. 1, Sect. 8.

The presence of the word "until" regarding the presumption of innocence improperly suggested a lower prosecutorial proof burden by intimating that proof of guilt is a foregone conclusion. The U.S. Supreme Court has recognized the significance of the presumption of innocence instruction:

> While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically

[20] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003). Additionally, this claim implicates issues of constitutional magnitude, which may be raised "...for the first time on appeal." Phipps v. State, 111 Nev. 1276, 1280 (Nev. 1995).

> similar, the ordinary citizen may well draw significant additional guidance from an instruction on the presumption of innocence. Wigmore described this effect as follows: 'In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i.e.*, no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases.' Wigmore 407.

Taylor v. Kentucky, 436 U.S. 478, 485 (1978). The use of the word "until" connotes an inevitability to a guilty verdict by suggesting that the prosecution would ultimately satisfy the burden of overcoming the presumption of innocence.

Other states have rejected use of the word 'until' in favor of something less suggestive, such as 'unless,' in similar instructions. In State v. Wilkerson, 91 P.3d 1181, 1190 (Kan. 2004), the Kansas Supreme Court agreed that "unless" would improve upon "until" in a jury instruction on the presumption of innocence, although the Court refused to reverse on the facts of the case.[21]

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[21] Additionally, the Kansas burden-of-proof instruction generally includes the phrase "unless *you are convinced.*" Id (emphasis added). The inclusion of those last four words, which Nevada's instruction lacks, clarifies that the government's burden is not a foregone conclusion. This distinguishes the Kansas cases which have refused to reject the entire Kansas instruction

A subtle distinction exists between the words 'until' and 'unless,' given the natural usage of the words in common language. State v. Beck, 32 Kan. App. 2d 784, 787, 88 P.3d 1233 (2004). Webster's Third New International Dictionary 2513 (1968) defines "until" as "used as a function word to indicate movement to and arrival at a destination...limit or stopping point" and, "used as a function word to indicate continuance (as of an action, condition, or state) up to a particular time." Webster's defines "unless," on the other hand, as "under any other circumstance than that; except on the condition that; if...not." Id. at 2503.

In Riggs v. District of Colombia, 581 A.2d 1229 (D.C. Ct. App. 1990), a civil court evaluated the connotation of "unless" in the context of the burden of proof. The Riggs court explained "[t]he primary meaning of the word 'unless' is 'under any other circumstance than that: *except on the condition that*.' The words that follow "unless" therefore constitute an exception to the general rule..." Id. at 1249. (citation omitted) (emphasis in original).

Deletion of the word 'until' or utilization of a more conclusion-neutral word such as 'unless' would have resulted in an instruction that more fairly

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despite the Kansas high-Court's preference for the word 'unless.' State v. McConnell, 106 P.3d 1148, 1150 (Kan. Ct. App. 2005).

and accurately described the prosecution's proof burden: "The defendant is presumed innocent *except on the condition that* the contrary is proved." Such a wording more accurately describes this important constitutional concept and comports with Due Process. This Court should not sanction jury instructions that diminish this presumption by conveying to jurors that a person is only innocent *until* the government has presented its case. Thus, the trial court's use of the word "until," which connoted certainty and inevitability, thereby minimizing the prosecution's burden, in an unfair and unconstitutional fashion, amounted to error.

The erroneous instruction warrants reversal as it cannot be deemed harmless beyond a reasonable doubt. Cortinas v. State, 195 P.3d 513 (Nev. 2008). Given the fact that none of the victims identified Mr. Young as one of the individuals involved in the wallet thefts; given that none of the store employees where the victims' credit/debit cards were used identified Mr. Young as one of the individuals involved in the fraudulent transactions; and given that the alleged Burglaries occurred in commercial establishments for which patrons may have a multitude of intentions upon entry, the jury could have found proof of one or more of the charged crimes lacking. Thus, but for the trial court's instruction conveying a sense of inevitability regarding

Mr. Young's guilt, the verdicts may have been very different. Accordingly, this Court must reverse.

Instruction 23

The trial court instructed jurors that:

> You are here to determine the guilt or innocence of the Defendant from the evidence in this case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the defendant, you should so find, even though you may believe one or more persons are also guilty.

II App. 409 (Instruction 23). The use of the 'guilt or innocence' language to convey jurors' *true* task – adjudicating whether the government met its proof burden – abrogated Mr. Young's constitutional rights. [22] U.S.C.A. V, VI, XIV.

The 'guilt or innocence' language improperly undercut the presumption of innocence and the prosecution's proof burden by misleading jurors to believe that they could convict where the evidence, though inadequate to prove guilt beyond a reasonable doubt, nonetheless indicated that the defendant may not have been 'innocent.' U.S. v. Deluca, 137 F.3d

[22] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003). Additionally, this claim implicates issues of constitutional magnitude, which may be raised "...for the first time on appeal." Phipps v. State, 111 Nev. 1276, 1280 (Nev. 1995).

24, 34-35 (1st Cir. 1998); U.S. v. Mendoza-Acevedo, 950 F.2d 1, 4-5 (1st Cir. 1991). The difference between 'not guilty' and 'innocent' is more than semantics. U.S. v. Mocciola, 891 F.2d 13, 16 (1st Cir. 1989) (quoting U.S. v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) ("A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence..."). Trial courts must "...be wary of the risks of misunderstanding in the 'guilt or innocence' comparison." Mendoza-Acevedo, supra, at 4-5. Accordingly, the instant instruction, which misarticulated the jury's function in a way that infringed upon other constitutional mandates, was improper. U.S. v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995).

The error occasioned by the 'guilt or innocence' language warrants reversal. Again, given the fact that none of the victims identified Mr. Young as one of the individuals involved in the wallet thefts; given that none of the store employees where the victims' credit/debit cards were used identified Mr. Young as one of the individuals involved in the fraudulent transactions; and given that the alleged Burglaries occurred in commercial establishments for which patrons may have a multitude of intentions upon entry, the jury could have found proof of one or more of the charged crimes lacking. As such, any misapprehension of the jury's function – especially a

misapprehension that minimized the government's proof burden – could have easily tipped the scales in favor of conviction. Thus, the trial court's use of the 'guilt or innocence' language amounts to reversible error.

VII. MR. YOUNG'S DUAL CONVICTIONS FOR GRAND LARCENY AND LARCENY FROM THE PERSON VIOLATE DOUBLE JEOPARDY PRINCIPLES.

Jurors convicted Mr. Young of two offenses arising from the theft of Ms. Campo's wallet -- Larceny From the Person/Victim Over 60 and Grand Larceny. These dual convictions arising from a single purported course of conduct violated double jeopardy principles.[23]

The Double Jeopardy Clause of the United States Constitution provides no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S.C.A. V, XIV.[24] Accordingly, double jeopardy principles prohibit multiple punishments for the same offense. Whalen v. U.S, 445 U.S. 684, 688 (1980); Williams v. State, 118 Nev. 536, 50 P.3d 1116, 1124 (2002), cert. denied, 537 U.S. 1031 (2002). However, the

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[23] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003). Additionally, this claim implicates issues of constitutional magnitude, which may be raised "...for the first time on appeal." Phipps v. State, 111 Nev. 1276, 1280 (Nev. 1995).

[24] This protection applies to the states through the Fourteenth Amendment and Article 1, Section 8, of the Nevada State Constitution. Benton v. Maryland, 395 U.S. 784, 794 (1969) *overruled on other grounds,* Payne v. Tennessee, 501 U.S. 808 (1991)), State v. Combs, 116 Nev. 1178, 1179, 14 P.3d 520 (2000).

Double Jeopardy Clause does not bar multiple punishments if the legislature clearly authorizes them. Missouri v. Hunter, 459 U.S. 359, 366 (1983).

In the absence of clear legislative intent, Nevada uses the test set forth in Blockburger v. U.S., 284 U.S. 299 (1932), to determine the propriety of multiple convictions arising from the same offense. LaChance v. State, 130 Nev. 263, 273 (2014). The *Blockburger* test requires a determination as to whether each charged statutory provision requires proof of a fact which the other does not. Blockburger, supra, at 304. "The *Blockburger* test asks 'whether the offense in question cannot be committed without committing the lesser offense.'" LaChance, supra, 130 Nev. at 273 (citing Estes v. State, 122 Nev. 1123, 1143 (2006)).

Under *Blockburger*, Mr. Young's dual convictions for Larceny From the Person and Grand Larceny as charged in Counts 2 and 3 violate the Double Jeopardy Clause. Mosby v. State, 128 Nev. 920 (2012) (unpublished opinion). In Mosby, this Court adjudicated the constitutional propriety of Grand Larceny and Larceny From the Person convictions deriving from a single camera theft. Id. The Mosby Court concluded that the dual convictions were not permissible under the Legislature's intended statutory scheme as they are "merely variations of the same offense." Id. (citing

Terral v. State, 84 Nev. 412, 413-14 (1968)). Accordingly, the Mosby Court held that the convictions violated double jeopardy principles. Id.

The same is true here. Like the camera theft alleged in Mosby, Mr. Young's dual convictions for Grand Larceny and Larceny From the Person/Victim Over 60 derive from the same incident – the theft of Ms. Campo's wallet. As such, they punish the same conduct. Thus, Mr. Young's dual Grand Larceny and Larceny From the Person convictions violate double jeopardy principles. Mosby, supra.

This Court must reverse Mr. Young's Larceny From the Person/Victim Over 60 conviction (Count 2). Of the two offenses, the evidence adduced below more "aptly reflects" Grand Larceny. See Mosby, supra. This is because, as set forth above (See VI, *Instruction 10*, supra), the taking from Ms. Campo's purse did not amount to a Larceny From the Person. Thus, of the two duplicitous convictions, this Court must reverse Count 2, Larceny From the Person/Victim Over 60.

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VIII. THE TRIAL COURT VIOLATED MR. YOUNG'S CONSTITUTIONAL AND STATUTORY RIGHTS BY ADJUDICATING HIM A HABITUAL OFFENDER IN THE ABSENCE OF THE INQUIRY AND FINDINGS REQUIRED BY NEVADA LAW.

A. The prosecution's Habitual Criminal Notice and Nevada's habitual offender statutory scheme

The prosecution's Notice of Intent to Seek Punishment as a Habitual Criminal asserted that prosecutors intended to seek treatment of Mr. Young as a habitual offender under NRS 207.010 and NRS 207.012. I App. 234-36. These statutes carry a range of punishment from 5-20 years in prison to life without parole.

NRS 207.010

Prior to July 1, 2020, NRS 207.010(1)(a) provided for a sentence of 5-20 years in prison for a person convicted of any fraud crime, petit larceny, or any felony who has previously been convicted of two felonies, three petit larcenies, or three fraud crimes. NRS 207.010(1)(b) provided for sentences of 10-25 years, 10 years to life, or life without parole for any person convicted of a felony who has previously been convicted of three felonies, five petit larcenies, or five fraud crimes.

Effective July 1, 2020, the requirements for habitual offender adjudications under NRS 207.010 changed. NRS 207.010(1)(a) now provides for a sentence of 5-20 years in prison for a person convicted of a

felony who has five (5) prior felony convictions. NRS 207.010(1)(b) provides for a sentence of 10-25 years, 10 years to life, or life without the possibility of parole for anyone convicted of a felony who has seven prior felony convictions. Both the pre- and post-July 1, 2020 iterations of NRS 207.010 are discretionary: both allow prosecutors the discretion to seek habitual treatment and both vest judges with the discretion to sentence eligible offenders under the statute.

NRS 207.012

NRS 207.012 provides for *mandatory* punishment of life without parole; life with parole eligibility beginning after 10 years has been served; or 10-25 years in prison for a person convicted of a felony enumerated within the statute who has previously been convicted of two enumerated felonies. Most of the enumerated felonies involve the use or threatened use of violence. Like NRS 207.010, an amended version of NRS 207.012 took effect July 1, 2020. Since neither version of NRS 207.012 applied to the convictions Mr. Young sustained here, a detailed accounting of the offenses enumerated within both versions of the statute is unnecessary.[25]

[25] It appears as though prosecutors included NRS 207.012 in the Habitual Criminal Notice because, at the time the Notice was filed, the Attempt Murder and Battery With Substantial Bodily Harm counts – the counts to which NRS 207.012 arguably may have applied -- had not yet been severed from the theft-related offenses.

NRS 207.016 and the procedure for habitual criminal adjudications

NRS 207.016 sets forth the procedure for habitual criminal adjudications. It requires that a trial court "...determine the issue of the previous conviction after hearing all relevant evidence presented on the issue by the prosecution and the defendant." NRS 207.016(3). Only upon a "finding that the defendant has suffered previous convictions sufficient to support an adjudication" under one of the habitual criminal statutes may the court adjudicate a defendant, accordingly. Id.

B. The trial court's deficient habitual offender inquiry and findings

The trial court sentenced Mr. Young in the absence of the hearing and findings required by Nevada law.[26] Prior to sentencing, prosecutors filed a sentencing memorandum to which they appended several judgments of convictions purportedly representing Mr. Young's prior felony convictions. But the trial court never conducted a hearing upon, and/or made findings regarding, the number and nature of Mr. Young's prior offenses that qualified for habitual criminal consideration under NRS 207.010. While

[26] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003). Additionally, this claim implicates issues of constitutional magnitude, which may be raised "...for the first time on appeal." Phipps v. State, 111 Nev. 1276, 1280 (Nev. 1995).

prosecutor's sentencing argument referenced Mr. Young's priors, the court did not conduct further inquiry, nor did the court make any findings, regarding the convictions the court considered in habitualizing Mr. Young.

The out of state convictions

The documentation prosecutors submitted in support of Mr. Young's purported out-of-state convictions looked more like court minutes rather than judgments of conviction(s). I App. 477-500. Much of the information delineating the charges, dispositions, and sentences was handwritten. Id. The documents poorly distinguished between the charged offenses and the convictions, thereby making it nearly impossible to ascertain the nature and severity of the convictions. I App. 477-500.

For example, the first felony listed in the prosecution's Habitual Criminal Notice alleged that Mr. Young sustained a theft conviction in Pennsylvania in 1985. I App. 234-36. However, the documentation supporting that purported conviction identified the charged offense as: "*Attempt* 50002 - Theft By Unlawful Taking or Disposition 3921." III App. 477 (emphasis added). The notations indicate that the defendant, Troy Brockington, plead guilty to the *attempt* charge. Id. The notes fail to indicate whether this amounted to a felony adjudication. The sentence structure does not help clarify this critical issue: the court imposed a six (6)

to twenty-three and a half (23 ½) *month* sentence in the "*Philadelphia County Prison.*" I App. 477 (emphasis added).

A similar issue plagued Mr. Young's purported 1989 Pennsylvania robbery conviction, the second felony listed in the prosecution's Habitual Criminal Notice. Like the 1985 attempt theft offense, the documentation for 1989 robbery includes a significant number of handwritten notations. III App. 480. Those notes resemble court minutes more than a judgment of conviction. Id. They indicate that the defendant in that case, again identified as Troy Brockington, plead guilty to "Robbery F-3," for which the court imposed a six (6) to twenty-three (23) month sentence – with the six (6) month minimum to be served under house arrest. Id.

The documentation for the third felony listed in the prosecution's Habitual Criminal Notice, the 1993 drug possession conviction, suffered from even more vagaries and infirmities. The documentation for that offense – also in the form of handwritten notations – indicated that the defendant, Troy Brockington, was found guilty of "M1 Possession" for which the court imposed a 1 year probationary sentence. III App. 488. Whether this offense amounted to a felony is, at best, unclear.

The documentation for the fourth felony listed in the Habitual Criminal Notice, a 1993 Pennsylvania robbery conviction, discloses

problems similar to that described above. The handwritten notes indicate that the defendant, Troy Brockington, was charged with robbery; and that he "plead guilty" to an unspecified offense (possibly the charged crime), for which he was sentenced to eleven and a half (11 1/2) months to twenty-three (23) months in the "Philadelphia County Prison." III App. 493. The notes fail to indicate whether the offense amounted to a felony or misdemeanor; the nature of the sentence – both under and over a year in the 'county prison' – failed to help clarify this.

The Nevada convictions

The Nevada documentation, while more complete, contained its own set of problems. The 1996 Burglary and Possession of Credit Card Without Cardholder's Consent convictions (listed as numbers 6 and 7, respectively, in the Habitual Criminal Notice) appear to have arisen from the same case. III App. 505. And the identification number listed for the defendant in that case differs from the other identification numbers listed for Mr. Young in the other judgments of conviction. See generally III App. 501-518. Additionally, the 2002 Larceny From the Person/Victim over 65 and the 2003 Burglary convictions (listed as convictions 9 and 10 in the Habitual Criminal Notice) may have contained the same offense dates, as well. See

III App. 433-35 (defense counsel in one of Mr. Young's prior cases suggesting these offenses arose from the same transaction/occurrence).

By failing to conduct the habitual criminal inquiry required by NRS 207.016, the trial court failed to determine which of Mr. Young's purported convictions qualified for habitual criminal consideration. Instead, the court relied on old, out-of-state documentation that included difficult-to-decipher handwritten notes describing criminal case dispositions. And of the more reliable local documentation, the court failed to make the appropriate inquiry to ensure that certain of the offenses did not overlap and count as a single conviction for habitual criminal purposes.[27] This particularly confounding given that prosecutors submitted a transcript from one of Mr. Young's prior cases in which his attorney challenged the number of convictions that could be used to habitualize him.

Compounding this, the court never indicated which offenses the court considered for purposes of habitual criminal enhancement. Did the court consider any of the out of state convictions? If so, which ones? Of the out-of-state convictions the court considered, what offenses did the court believe were felonies and which were misdemeanors? With respect to the Nevada

[27] Multiple convictions arising out of same transaction amount to only one prior conviction for habitual criminal purposes. McAnulty v. State, 108 Nev. 179, 180 (1992).

convictions, which offenses, if any, did the court regard as deriving from a singular incident? Because the trial court never rendered any findings in this regard, Mr. Young cannot address the applicability of the priors used as the basis for the court's sentencing enhancement. This amounts to a Due Process violation as well as a violation of NRS 207.016. U.S.C.A. V, XIV; Nev. Const. Art. 1, Sec. 8.

But the Due Process violations do not end there. NRS 207.016, which confers upon a defendant the right to a proper hearing and findings prior to a habitual criminal adjudication, gives rise to a state-created liberty interest in such an inquiry and determination. Walker v. Deeds, 50 F.3d 670, 673 (9th Cir. 1995). The arbitrary deprivation of this state-created liberty interest amounts to a Due Process violation. Id; See also Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (arbitrary deprivation of state-created liberty interest amounts to Due Process violation). While this Court has clarified that Nevada law does not require the degree of particularity compelled by Walker, (See Hughes v. State, 116 Nev. 327, 333-34 (2000)), a trial court must nonetheless articulate some basis for the exercise of discretion in a adjudicating a defendant a habitual criminal. The instant trial court's failing in this regard arbitrarily denied Mr. Young the statutory protections to which he was entitled under NRS 207.016. This violated his Due Process rights.

The trial court's error in failing to conduct the inquiry required by NRS 207.016 was harmful. Some of the prior convictions alleged in the prosecution's Habitual Criminal Notice may not have qualified for habitual criminal consideration. To the extent that the trial court considered any such convictions (i.e., non-felony convictions and/or convictions deriving from the same incident/case), Mr. Young's habitual criminal adjudication cannot stand. Thus, the trial court's constitutionally deficient habitual criminal inquiry and findings warrants reversal of Mr. Young's life sentences imposed pursuant to NRS 207.010 (Counts 1, 6, 7, 9, 11, 15, 17, 21, 22).

IX. THE TRIAL COURT'S FAILURE TO CONDUCT A JURY TRIAL ON THE HABITUAL OFFENDER ALLEGATION VIOLATED MR. YOUNG'S JURY TRIAL AND DUE PROCESS RIGHTS.

The trial court violated Mr. Young's Jury Trial and Due Process rights by failing to conduct a jury trial on the habitual criminal allegations.[28] The Sixth Amendment Jury Trial and Fourteenth Amendment Due Process guarantees require a jury determination and proof beyond a reasonable doubt for every fact used to increase the maximum penalty of a crime. Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S.296

[28] While defense counsel did not object to this impropriety, this Court can still review the matter for plain error. Green v. State, 119 Nev. 542, 545 (2003). Additionally, this claim implicates issues of constitutional magnitude, which may be raised "...for the first time on appeal." Phipps v. State, 111 Nev. 1276, 1280 (Nev. 1995).

(2004); U.S. v. Booker, 543 U.S. 220 (2005); Shepard v. U.S., 544 U.S. 13 (2005).[29] However, in Almendarez-Torres v. U.S., 523 U.S. 224 (1998), *a pre-Apprendi* decision, the U.S. Supreme Court articulated [what now amounts to] a limited exception to this rule, holding that the Sixth Amendment jury guarantees do not apply to prior convictions used to enhance a criminal penalty.

While Almendarez-Torres constitutes prevailing law regarding prior convictions and the Sixth Amendment jury trial guarantees, the U.S. Supreme Court has signaled its intent to abandon this holding in the post-Apprendi era. Calling Almendarez-Torres unique"[30] and a "narrow exception," the Apprendi Court stated:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and

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[29] But see Parkerson v. State, 100 Nev. 222 (1984) (holding, pre-Apprendi, that jury trial right does not attach to a habitual criminal adjudication because "...it is only an adjudication of status, not of guilt..."); Also see White v. State, 83 Nev. 292, 429 P.2d 55 (1967); Howard v. State, 83 Nev. 53, 422 P.2d 548 (1967) (holding, pre-Apprendi, that sentencing enhancement, such as habitual offender adjudication, not subject to jury trial protections).

[30] Almendarez-Torres may be described an "unique" because the defendant not only pled guilty to the crime listed in the Indictment, at his arraignment, he also admitted three prior aggravated felony convictions that were not pled in the Indictment. The court then used these admissions to increase the penalty from twenty-four months to eighty-five months.

> we need not revisit it for the purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique set of facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of jurisprudence.

Apprendi, supra, 530 U.S. at 2362.

The U.S. Supreme Court continued to depart from Almendarez-Torres in several post-Apprendi decisions: See Ring v. Arizona, 536 U.S. 584 (2002)[31], Booker[32], supra; Shepard, supra; and Blakely, supra. In Shepard v. U.S., supra, 544 U.S. at 26-27 (Thomas, J. concurring) Justice Thomas indicated his clear intent to overrule Almendarez-Torrez, stating:

> . . .this Court has not yet reconsidered *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which draws an exception to the *Apprendi* line of cases for judicial fact finding that concerns a defendant's prior convictions. *See Apprendi* supra, at 487-490. *Almendarez-Torres*, like Taylor[1], has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. See 523 U.S., at 248-249 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, supra., at 520-521 (Thomas, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres'* continuing viability.

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[31] In Ring, the Supreme Court held that, under the Sixth Amendment, factors aggravating murder to a capital crime must be found beyond a reasonable doubt by a jury. Since none of the aggravating factors at issue in Ring involved recidivism, the Court did not revisit Almendarez-Torres.

[32] In Booker, the Court held that the Sixth Amendment right to a jury applies to a mandatory sentencing enhancement involving a determination of a fact other than a prior conviction. Again, the Booker Court did not have a recidivism issue before it.

> Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirement." *Harris v. United States*, 536 U.S. 545, 581-582 (2002)(Thomas, J., dissenting.)

This Court would be remiss to ignore the warning shots sounded by Justice Thomas, as well as Apprendi and its progeny, as they amount to a *de facto* repudiation of Almendarez-Torres. Recognizing this, the Ninth Circuit held that Hawaii's multiple offender statute fell within the protective auspices of the Sixth Amendment. See Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006). The Kaua Court held that the Sixth Amendment requires a jury determination of at least the second facet of Hawaii's habitual offender statute, "whether an extended sentence [is] necessary for the protection of the public." Id. at 1054.

Quoting Apprendi, supra, the Ninth Circuit recognized that the Sixth Amendment does not discriminate against penalties described as 'enhancements':

> *Apprendi* made irrelevant any distinction between facts based on their "intrinsic" or "elemental" quality for purposes of ascertaining whether the Sixth Amendment requires a jury to find them. *Apprendi* announced a new rule that focused on the effect of a court's finding of fact, not on the label the statute or the court applied to that fact. The United States Supreme Court plainly set forth this new rule, stating that "the relevant inquiry is one not of form, but of effect - - does the required finding

> expose the defendant to a greater punishment than that authorized by the jury's guilty verdict? *Apprendi* exempted only one finding - - the fact of a prior conviction – from this "general rule."

Id. at 1061-0162. Thus, the fact that Nevada jurisprudence commonly refers to the habitual offender statutes as penalty 'enhancers' does not vitiate Sixth Amendment applicability.

Admittedly, this Court has distinguished Kaua based upon the fact that Hawaii's habitual criminal statute contains a fact-finding obligation that Nevada's does not. See O'Neill v. State, 123 Nev. 9 (2007). The O'Neill Court held that, because Nevada does not require fact-finding beyond the determination of the prior felony convictions, nothing in NRS 207.010 offends Apprendi or the jury trial and due process guarantees from which Apprendi derives. Id. The Ninth Circuit endorsed this view, agreeing that the fact-finding obligation mandated by Hawaii law distinguishes the habitual criminal statutes at issue in Kaua from Nevada's and that, accordingly, NRS 207.010 does not violate Apprendi. Tilcock v. Budge, 538 F.3d 1138, 1145 (9th Cir. 2008).

However, this ignores Apprendi's suggestion that the prior felony conviction exception carved out by Almendarez-Torres may not withstand constitutional scrutiny. At least one Nevada federal court seems to have recognized this, rejecting the argument advanced here but observing: "The

Ninth Circuit has repeatedly held that Almendarez-Torres remains binding law until explicitly overruled by the Supreme Court." Knox v. McDaniels, et. al., 2014 WL 2960365 (D. Nev. 2014) (citing, *inter alia*, U.S. v. Martinez-Rodriguez, 472 F.3d 1087, 1092-93 (9th Cir. 2007)).

Mr. Young urges this Court to revisit the issue raised here and find, based upon authority cited above, that jury trial and due process guarantees apply to sentence enhancements based on prior convictions. Other states have wisely decided to require jury determinations of habitual criminal allegations. See Lockyer v. California, 538 U.S. 63, 68 (2003) (noting that California law requires jury determination of qualifying offenses under 'three strikes' regime). The inadequacies in the documentation upon which the instant court relied, discussed above, highlight the need for a jury inquiry into recidivism allegations. This necessarily would eliminate the guesswork, supposition, and vagaries that formed the basis of Mr. Young's habitual criminal adjudication. Thus, the trial court's failure to conduct a jury trial on the validity, nature, and fact of Mr. Young's prior convictions amounted to harmful error in violation of his Fourteenth and Sixth Amendment rights.

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X. MR. YOUNG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING, THEREBY DEPRIVING HIM OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The United States and Nevada constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S.C.A. V, VI, XIV; Nev. Cons. Art. 1, Sect. 8. A conviction cannot stand when defense counsel fails to provide effective assistance during a critical stage of criminal proceedings. Id. A defendant receives ineffective assistance of counsel when (1) counsel's errors are so serious that a defendant fails to receive the 'counsel' guaranteed by the Sixth Amendment, and (2) when that deficiency prejudices the defendant to such an extent that proceedings from which a conviction derives are rendered unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The question of whether a defendant has received ineffective assistance is a mixed question of law and fact and is subject to independent review. State v. Love, 109 Nev. 1136, 1138 (1993).

Performance of counsel will be judged against the objective standard for reasonableness and is deficient when it falls below that standard. State v. Powell, 122 Nev. 751, 759 (2006); Means v. State, 120 Nev. 1001 (2004). Where counsel might claim that an action was a strategic one, the reviewing court must satisfy itself that the decisions were, indeed, reasonable. Strickland, 466 U.S. at 691. Prejudice to the defendant occurs where there is

a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996). A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id.

Under the authority cited above, Mr. Young received ineffective assistance of counsel at his sentencing. Mr. Young's counsel failed to proffer any argument regarding the nature and number of Mr. Young's priors, nor did he proffer any argument to mitigate Mr. Young's sentence. The absence of any argument regarding Mr. Young's prior convictions is particularly stunning given that prosecutors submitted a sentencing memorandum to which they attached a transcript of Mr. Young's prior counsel challenging the number and nature of Mr. Young's prior convictions III App. 433-36.

Trial counsel further offered no argument to mitigate Mr. Young's sentence. While Mr. Young tried to explain that he suffered from a drug addiction for which he was in dire in need of treatment, trial counsel presented no additional information or argument regarding this. Indeed, trial counsel presented no information regarding Mr. Young's background, character, or other aspects of his life that would have helped mitigate his sentence. Instead, trial counsel did nothing other than complain about an

unspecified impropriety in the trial proceedings – an argument that did nothing to help Mr. Young. Accordingly, Mr. Young received ineffective assistance of counsel as a result of trial counsel's deficient performance at sentencing.

While ineffective assistance of counsel claims are typically reserved for post-conviction habeas petitions, they may be considered on direct appeal if "the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless." Archanian v. State, 122 Nev. 1019, 1036 (2006). Here, given the nature and magnitude of trial counsel's ineffectiveness at sentencing, a hearing on the issues relating thereto would be needless. There is no strategic explanation that could justify trial counsel's failure to advance a single sentencing argument on Mr. Young's behalf.

Trial counsel's ineffectiveness undermines the reliability of Mr. Young's sentencing outcome, thereby warranting reversal. Had trial counsel presented *some* information and argument to mitigate Mr. Young's sentence, the trial court may not have imposed a sentencing structure that, in essence, ensures that Mr. Young will spend the rest of his life in prison. Thus, but for trial counsel's ineffectiveness, the sentences imposed below may have been

very different. Accordingly, the prejudice occasioned by trial counsel's ineffectiveness warrants reversal of Mr. Young's sentences.

XI. THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN MR. YOUNG'S CONVICTIONS.

"The Due Process Clause of the United States Constitution 'protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'"[33] Bryant v. State, 114 Nev. 626, 629 (1998) (quoting Carl v. State, 100 Nev. 164, 165 (1984) (further internal citations omitted)). The relevant inquiry in reviewing the evidence supporting a jury's verdict is "'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.'" Bolden v. State, 124 P.3d 191, 194 (Nev. 2005) (internal citations omitted).

The prosecution failed to present sufficient evidence to sustain Mr. Young's convictions. None of the victims identified Mr. Young as one of the men involved in the wallet thefts. Similarly, none of the store employees where the victims' credit/debit cards were used identified Mr. Young as one

[33] The requirement of proof beyond a reasonable doubt serves "to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." Batin v. State, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002) (citing In re Winship 397 U.S. 358, 363 1970)).

of the men who tried to use them. Thus, prosecutors failed to present sufficient evidence to sustain the theft-related offenses (Counts 2, 3, 5, 8, 10, 12, 16, 18).[34]

The same is true of the Burglary convictions. All the charged Burglaries occurred in commercial establishments. An individual patronizing these establishments may have a multitude of intentions upon entry, despite ultimately engaging in criminal activity. Given this, the evidence adduced at trial failed to establish Mr. Young's guilt of the commercial Burglaries beyond a reasonable doubt.

Additionally, jurors acquitted Mr. Young of two Fraudulent Use of Credit Card charges (Counts 14 and 20) which formed the basis for two, associated Burglary charges (Counts 13 and 19). This means that jurors rejected the predicate felonies associated with those Burglary charges. Accordingly, in addition to the proof issues deriving from the commercial nature of the Burglary charges in general, prosecutors failed to present sufficient evidence to sustain Counts 13 and 19, the Burglary convictions for which jurors rejected the predicate felonies.

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[34] Mr. Young also incorporates by reference the sufficiency of the evidence claims set forth in Section VI (Instruction 10), supra.

XII. CUMULATIVE ERROR WARRANTS REVERSAL OF MR. YOUNG'S CONVICTIONS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ART. 1, SECT. 8 OF THE NEVADA CONSTITUTION.

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. Big Pond v. State, 101 Nev. 1, 3 (1985). In evaluating cumulative error, this Court must consider whether "the issue of innocence or guilt is close, the quantity and character of the error and the gravity of the crime charged." Id. Even where the State may have presented enough evidence to convict in an otherwise fair trial, where one cannot say without reservation that the verdict would have been the same in the absence of cumulative error, then this Court must grant a new trial. Witherow v. State, 104 Nev. 721, 725 (1988).

Viewed as a whole, the combination of errors in this case warrants reversal of Mr. Young's convictions. This case was extremely close on the contested charges/allegations. "It is a proud tradition of our system that every man, no matter who he may be, is guaranteed a fair trial." People v. Cahan, 282 P.2d 905, 912 (Cal. 1955). "[N]o matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated." Walker v. Fogliani, 83 Nev. 154, 157 (1967). Accordingly,

the nature and magnitude of the error in this case compels a cumulative error reversal.

CONCLUSION

For the reasons set forth herein, Mr. Young respectfully requests that this Honorable Court reverse his convictions and sentences entered below.

Respectfully submitted,

Nancy Lemcke Law, LLC

By */s/ Nancy L. Lemcke*

NANCY L. LEMCKE, #5416
Nancy Lemcke Law, LLC
10161 Park Run Drive, Ste. 150
Las Vegas, NV 89145
(702) 902-6691
Nancy.Lemcke@LemckeLawLV.com
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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Proportionately spaced, has a typeface of 14 points or more and contains 17,574 words which exceeds the 14,000 word limit and the appropriate motion for leave has been filed.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of March, 2022.

Nancy Lemcke Law, LLC

By */s/ Nancy L. Lemcke*

NANCY L. LEMCKE, #5416
Nancy Lemcke Law, LLC
10161 Park Run Drive, Ste. 150
Las Vegas, NV 89145
(702) 902-6691
Nancy.Lemcke@LemckeLawLV.com
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 8th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nancy Lemcke Law, LLC

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

ANDREW YOUNG
NDOC No: 92511
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

BY */s/ Nancy L. Lemcke*
Employee, Nancy Lemcke Law, LLC