IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANKIE ALAN WATTERS, Appellant, v. THE STATE OF NEVADA, Respondent.	No. 59703

FAST TRACK STATEMENT

1. **Name of party:** FRANKIE ALAN WATTERS.

2. **Name of attorney submitting this fast track statement:**

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3. **Name of appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C272483.

5. **Name of judge issuing order appealed from:** David Barker.

6. **Length of trial.** Two days.

7. **Conviction(s) appealed from:** Ct. 1: Possession of a Stolen Vehicle, value $2,500 or more; Ct. 2: Grand Larceny Auto, value $2,500 or more; Ct. 3: Stop Required on Signal of Police Officer.

8. **Sentence for each count:** $25 admin. fee; $250 Indigent Defense Civil Assessment fee; restitution of $4,870; Ct. 1: 24-120 months in prison; Ct. 2: 24-120 months in prison, consecutive to Ct. 1; Ct. 3: 13-60 months in prison, consecutive to Ct. 2; sentenced consecutive to Case C273350; 0 days CTS; genetic fees and testing waived.

9. **Date district court announced decision:** 10/10/11.

10. **Date of entry of written judgment:** 10/21/11.

11. **Habeas corpus:** N/A.

12. **Post-judgment motion:** N/A.

13. **Notice of appeal filed:** 11/15/11.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP 4(b).

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

16. **Disposition below:** Judgment upon verdict of guilt.

17. **Pending and prior proceedings in this court:** N/A.

18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Procedural history.** The State filed a Complaint on March 22, 2011, alleging Count I, Possession of a Stolen Vehicle; Count II, Grand Larceny Auto; and Count III, Stop Required on Signal of Police Officer. (Appellant's Appendix [AA], Vol. I 1). Watters waived his preliminary hearing on April 6, 2011. (I 3). On April 26, 2011, the State filed an Information alleging the same charges. (I 4). On May 25, 2011, Watters was arraigned and pled not guilty. (I 82-83). On July 13, 2011, the defense filed a motion for discovery. (I 21). The Court granted the motion. (I 70). On August 9, 2011, jurors returned guilty verdicts on all counts. (I 53). On October 21, 2011, the State filed the Judgment of Conviction. (I 55). On November 15, 2011, Watters filed a timely Notice of Appeal. (I 57). On January 6, 2012, the State filed an Amended Judgment of Conviction.

21. Statement of facts. On March 17, 2011, Heather Reed worked in Las Vegas at the Boulder Station Hotel as general manager of the theater. (II 285). She drove her 2006 Chrysler Sebring convertible to work that day and parked in the lower level of the public parking garage at about 2:30 p.m. (II 285). When Reed finished her shift at 11:30 p.m., her car was missing. She called the police. (II 287).

While driving in Las Vegas on March 18, 2011, Jamie Poyner was rear-ended by a Chrysler Sebring at about 3 p.m. near an intersection at Nellis and Sun Valley. The Hispanic male driver drove away when Poyner asked for his insurance information.

(III 438). The car drove up on the sidewalk and spun out in the middle of the road. (III 439).

At about 3:15 p.m., Metro Officer Baker was assigned to a call regarding a stolen Chrysler Sebring. She saw the car at the intersection of Tropicana and Boulder Highway. (II 294). The car turned eastbound on Tropicana. (II 296). Baker lost visual contact. (II 299). Officer Rowe was near Officer Baker and saw the Chrysler turn eastbound. (II 308). He also lost sight of the car on Tropicana. (II 310). Officer Baker drove to the Wal-Mart on Tropicana based on a call that officers were on a foot pursuit of the driver of a stolen vehicle. (II 300-301).

Officer Maas was dispatched to the Cannery Hotel on Boulder Highway based on reports that a stolen Chrysler Sebring had been located in the parking lot. (II 324). No one was in the car. (II 324). Maas saw a man near the Chrysler who resembled the description of the Chrysler driver. The man was in a green Honda. (II 325). The Honda driver ignored commands to exit the car and drove off. (II 326). Maas followed the car as it crossed the median on Boulder Highway. (II 330). He saw the Honda make circles on Flamingo and I-95 and change direction multiple times. (II 332). Officer Rowe also received information that he should look for a green Honda, which he saw at the Flamingo and I-95 on-ramp. (II 313). The Honda made a number of U-turns and crossed the median three times. Rowe never saw the driver. (II 313). An air unit took over the pursuit. (II 313).

David Granger was driving a dark blue Tacoma westbound on Tropicana. (III 358). Granger collided with the Honda, which was heading eastbound in the westbound lanes. (III 359). Maas saw the Honda strike a dark truck on Tropicana. (II 337). The Tacoma was towed from the scene. (III 362). The Honda also struck a light pole on Harmon. (II 338).

Officer Harper received a radio call that a suspect was in a Honda wearing a dark hoodie. (III 429). Officer Harper saw the Honda traveling eastbound on Harmon. (III 401). Harper saw the Honda collide separately with a Ford Taurus, a landscaping truck, and another truck. (III 407, 416, 418). Officer Pro attempted to box in the Honda by blocking it from the rear. (III 386). Officer Harper tried to block the Honda from the front. (III 386). The Honda reversed and struck Pro's car. (III 387). Pro pinned the Honda to the curb to prevent further movement. (III 387). The driver jumped out of the car and jumped over a wall. (II 340).

Harper exited his car with his police dog and ordered the man to stop. The driver kept running toward Wal-Mart. (III 422). Harper took the dog into Wal-Mart and commenced a search for the suspect. Harper saw Watters, who was wearing a gray t-shirt, and believed that Watters fit the description of the suspect. Harper apprehended Watters by ordering the dog to bite him several times. (III 424, 432). Watters was taken into custody.

Yosvany Otano was eating lunch at the Cannery in the afternoon of March 18, 2011. (III 366). He had parked his 2000 Honda Civic in the north parking lot. (III 366). He found out that his car had been taken when officers approached him at the Cannery. (III 369). Otano admitted the Honda was not in the best condition. (III 370). He testified that the car had 150,000 to 155,000 miles on it. (III 366). He had been in an accident with the car and sustained bumper and hood damage. (III 371). He had paid $4,600 for the car in December, 2009. (III 371). He claimed that Kelley Blue Book valued the car at $4,100 to $4,200 for a car in good condition. (III 372). Reed's Chrysler Sebring was recovered by police in irreparable condition. (II 289). Reed purchased the car in November, 2007, for $19,700. (II 292). Her insurers valued the car at $8,000 in March, 2011. (II 292).

22. **Issues on appeal.** I. The Court violated Watters' federal and state Constitutional rights by permitting display of a prejudicial photo and undermining the presumption of innocence. II. The Court erred in providing misleading and prejudicial jury instructions. III. The Court erred by denying the defense motion to remand to Justice Court. IV. The State failed to present sufficient evidence to sustain these convictions.

23. Legal argument, including authorities: I. The Court violated Watters' federal and state Constitutional rights by permitting display of a prejudicial photo and undermining the presumption of innocence. The defense

objected to the State's use of a booking photo with the word "Guilty" displayed across Watters' face during the Opening Statement Power Point presentation. The Court overruled the objection. (II 113, 114; III 492). The Court erred in permitting jurors to view this inflammatory picture at the outset of trial. The First Circuit Court of Appeals noted the negative impact of mug shots on jury deliberations, even where the State attempts to mask the circumstances of the pictures: "The government's inartful masking of the other prejudicial features did little to dispel the message so vividly conveyed and could have heightened the jury's awareness of the picture's prejudicial nature." *United States v. Fosher*, 568 F.2d 207, 215 (1st Cir. 1978).

In *Fosher*, the First Circuit identified three prerequisites to admission of a mug shot:

> 1. The Government must have a demonstrable need to introduce the photographs; and
> 2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
> 3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

Here, the State meets none of these requirements. First, multiple witnesses identified Watters in court, making the photo irrelevant and unnecessary. Second, the photograph is a frontal close-up shot of an unsmiling Watters in a fashion that unmistakably implies a booking photo and an accompanying criminal record. Finally, the presence of the word "GUILTY" in all capitals plastered across Watters' face is so prejudicial and inflammatory that this Court must find reversible error.

This Court has noted that "[t]he rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence." *Haywood v. State*, 107 Nev. 285, 288 (1991). This Court recognizes that forcing a defendant to appear in prison clothing undermines his credibility in a constitutionally impermissible fashion. "To prevent the dilution of the presumption of innocence, an accused should generally not be compelled to stand trial in the distinctive attire of a prisoner. The United States Supreme Court has explained in Estelle v. Williams that a criminal defendant is allowed to wear civilian clothing at trial because identifiable prison attire is a 'constant reminder of the accused's condition' that 'may affect a juror's judgment.'" *Hightower v. State*, 154 P.3d 639, 641 (Nev. 2007). The same logic applies here. Although this Court held in *Browning v. State* that a booking photo is not prejudicial in connection with the charges at hand, in this case jurors saw not only a booking photo but the word "GUILTY" emblazoned on the photo, distinguishing this Court's logic in *Browning* and warranting a finding of prejudice. *Browning v. State,* 120 Nev. 347, 358, 91 P.3d 39, 47 (2004).

II. The trial Court violated federal and state constitutional protections by refusing to provide proposed defense jury instructions and by providing inadequate and misleading jury instructions. The defense objected to Instruction 4 regarding possession of a stolen vehicle on the grounds that intent to permanently deprive is an appropriate definition of the word "stolen" and an element of the

possession offense. The defense offered two proposed instructions on these issues. (I III 450; III 493-494). The Court rejected the defense position that intent to permanently deprive should be considered an element of possession of stolen property, citing *Montes v. State*, 95 Nev. 891 (1979). Although *Montes* provides that the intent to permanently deprive the owner is not an element of possession of a stolen vehicle, the fact remains that the word "stolen" nevertheless implies that the property had been taken at some point with the intent to permanently deprive the owner. Thus, the Court erred in rejecting Instruction D-2 where the defense merely offered a definition of a word contained in the actual criminal statute. (III 493-494). Further, the defense noted that at common law, the connotation of the word "stolen" certainly contemplated the intent to permanently deprive the owner. (III 450). In contrast to *Montes,* other jurisdictions have recognized as much: "[t]he word 'steal' on a criminal statute ordinarily imports the common law offense of larceny." *Hite v. U.S.*, 168 F.2d 973, 975 (10th Cir. 1948). "Of course, a contrary intent not appearing, a . . . criminal statute using a word known to the common law borrows the common law sense of the term." *Boone v. U.S.*, 235 F.2d 939, 940 (4th Cir. 1956), *citing Hite*. Thus, notwithstanding *Montes*, the common law offers a basis for construing the crime of the possession of a stolen vehicle as a crime encompassing the intent to permanently deprive the owner of the vehicle:

> As did the Court of Appeals for the Sixth, we adopt the definition given by Judge Miller in United States v. Adcock, D.C.W.D.Ky., 1943, 49 F.Supp. 351,

> 353 'that the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in its well known and accepted meaning of taking the personal property of another for one's own use without right or law . . ., *contemplating, of course, an intent to deprive the owner of it permanently.*

Boone v. U.S., 235 F.2d at 940 (emphasis added). Thus, where the intent to permanently deprive the owner was part of the crime of possession at common law, this Court should revisit *Montes*.

The defense also sought to include unlawful taking of a vehicle as a lesser included offense of possession of a stolen vehicle. (III 450-51). The Court rejected the defense position. (III 451). Although this Court has yet to find that unlawful taking is a lesser included offense of possessing a stolen vehicle, the former is certainly a lesser related offense of the latter. NRS 205.2715 provides:

> 1. Every person who takes and carries away or drives away the vehicle of another without the intent to permanently deprive the owner thereof but without the consent of the owner of such vehicle is guilty of a gross misdemeanor. 2. Every person who is in possession of a vehicle without the consent of the owner of such vehicle may reasonably be inferred to have taken and carried away or driven away the vehicle.

Because Watters was found in possession of the Chrysler, but was not accused of stealing the car with the intent to permanently deprive the owner, the Court should have instructed on unlawful taking as a lesser related offense of possession. "[I]n some circumstances, fairness to the defendant requires the district court to instruct the jury on lesser-related offenses .... The rationale for requiring an instruction on a lesser-related offense is to give the trier of fact an option 'other than conviction or

acquittal when the evidence shows that the defendant is guilty of some crime but not necessarily the one charged....' " *Johnson v. State*, 111 Nev. 1210, 1213, 902 P.2d 48, 50 (1995) (internal citations omitted). Because the Court erred in rejecting this instruction as a lesser related offense, this Court should reverse. "A criminal defendant is entitled to jury instructions on the theory of his case. If the defense theory is supported by at least some evidence which, if reasonably believed, would support an alternate jury verdict, the failure to instruct on that theory constitutes reversible error." *Honeycutt v. State*, 118 Nev. 660, 56 P.3d 362, 368 (2002), *overruled in part on other grounds*, *Carter v. State*, 121 P.3d 592 (2005).

The defense also objected to the flight instruction on the grounds that it shifts the burden of proof on the facts of this case. (III 449; I 36). Because flight is an element of the charge of Stop Required, the instruction on flight relieved the State of the burden of proving that element of the charge. The Court overruled the objection. (III 450). The flight instruction improperly permitted jurors to deem any flight equivalent to the elements of failing to stop for a police officer. Jury instructions relieving the government of this burden violate a defendant's due process rights. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). To the extent the instant instruction suggested that the prosecution had a "lesser degree" of proof required to show that Watters "fled" or refused to stop for officers, the instruction violated appellant's due process rights. *Brackeen v. State*, 104 Nev. 547,

552 (1988) (the State must prove each element beyond a reasonable doubt); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). "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." *Carl v. State*, 100 Nev. 164, 165, 678 P.2d 669 (1984). Based on the facts of this case, the provision of the flight instruction was confusing, vague, and prejudicial.

This Court has cautioned that flight "'signifies something more than a mere going away. It embodies the idea of going away with a consciousness of guilt, for the purpose of avoiding arrest.' Because of the possibility of undue influence by such an instruction, this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." *Weber v. State*, 119 P.3d 107, 126 (Nev. 2005). Further, the flight instruction also improperly suggests that jurors must determine Watters' "guilt or innocence" instead of whether the State proved guilt beyond all reasonable doubt. (I 36). Thus, Instruction 7 improperly suggested to jurors that while the State must prove guilt, the natural inference for jurors is that the defense must prove innocence, a fact implicitly recognized by the defense's burden-shifting argument (III 449). "[W]hether a jury instruction [is] an accurate statement of the law is a legal question subject to de novo review." *Berry v. State*, 125 Nev. ---, 212 P.3d 1085, 1097 (2009). "It is for the jury to determine the degree of weight, credibility and

credence to give to testimony and other trial evidence . . ." *Hutchins v. State,* 110 Nev. 103, 109; 867 P.2d 1136, 1140 (1994) (*over'd on other grounds by Mendoza v. State*, 130 P.3d 176 (2006)). Because this instruction shifted the burden of proof to the defense, the Court erred in overruling the defense objection.

III. The Court erred by denying the defense motion to remand to Justice Court.

Watters waived his preliminary hearing with the understanding that the State's offer would remain open for an indeterminate period of time. (I 77, 4). During the waiver hearing, Watters' previous defense attorney noted that if the offer were withdrawn at some point, the defense would request a remand to Justice Court for the preliminary hearing (I 77, 4). At that time, the District Attorney represented that the offer would be left open for an indeterminate time and that she would speak to the previous defense attorney about the offer. (I 77, 5). On the first day of trial, the defense moved to remand the case to Justice Court for the preliminary hearing. The defense noted that Watters had actually intended to enter into a conditional waiver of the preliminary hearing, and not an unconditional waiver. (II 115, 116). The State responded that the waiver had been unconditional, that the offer had been left open for four to six weeks, and that the offer was rejected. (II 117). Based on the fact that the offer was rejected, the Court denied the defense request to remand the case to Justice Court. (II 117).

The Court erred in evaluating only whether the offer was accepted or rejected. There was a manifest question in the record regarding whether Watters intended his preliminary hearing waiver to be conditional or unconditional. The defense attorney specifically noted at the waiver, "We just want to reserve the right [to remand] if something happens." (I 77, 5). The Court should have analyzed whether the waiver was actually unconditional, and whether good cause existed for the remand: "[i]f a preliminary examination has not been had and the defendant has not unconditionally waived the examination, the district court may for good cause shown at any time before a plea has been entered or an indictment found remand the defendant for preliminary examination to the appropriate justice of the peace or other magistrate . . . " N.R.S. 171.208. The Justice Court noted the evident confusion on Watters' part at the waiver hearing: "So we're conditionally unconditionally waiving the right to a preliminary hearing?" (I 77, 4). The defense noted that Watters never intended to enter into an unconditional waiver. (II 116). The State admitted that the offer was revoked at some point. (II 117). Thus, where the evidence was inconsistent regarding the true intent of Watters' waiver and the contemplated time frame for the offer remaining open, the District Court should have remanded the case for a preliminary hearing.

IV. The evidence introduced at trial failed to prove the crimes charged beyond a reasonable doubt. Although several officers claimed they could identify Watters as the driver of the cars, the evidence reveals that many of these identifications were

unreliable and that Watters may simply have become a victim of mistaken identity. Officer Baker admitted she is not a good judge of distance, and that the Chrysler driver was driving at a high rate of speed in a 45-mile per hour zone and at least one lane across the opposite side of the road when she allegedly saw the driver. (II 304-05). Officer Rowe admitted he never saw the driver. (II 313). Officer Rowe also admitted that East Las Vegas contains a high Latino population, and that many Latino men wear their heads shaved. (II 321). Significantly, although Watters has several visible tattoos, no one testified that the suspect had tattoos, including Poyner. Further, Officer Pro could not remember whether the driver was wearing a blue sweatshirt when he exited the Honda. (III 393). When he was arrested, officers found no car keys on Watters. (II 318). Further, officers chose not to order any fingerprint testing on the vehicles involved.

In sum, this car chase took place at high rates of speed in an area where multiple men might have met the suspect's description. Watters was the victim of multiple police dog bites and the officers involved had limited opportunities to see the cars' drivers. Thus, these officers had every motivation to blame Watters for the incident. For these reasons, the State failed to prove these charges beyond all reasonable doubt.

24. **Preservation of issues:** I: Preserved. (II 113, 114). II: Preserved. (I III 450; III 493-494); (III 449; I 36); (III 450-51). III: Preserved. (III: 464-471).

25. **Issues of first impression or of public interest:** None of which counsel is presently aware.

Respectfully submitted,

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By E-File

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VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 4,161 words.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the

information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 17th day of February, 2012.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By E-file
AUDREY M. CONWAY, #5611
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of February, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS

AUDREY M. CONWAY
HOWARD S. BROOKS

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

FRANKIE ALAN WATTERS
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BY _____
Employee, Clark County Public Defender's Office