IN THE SUPREME COURT OF THE STATE OF NEVADA

JAQUEZ DEJUAN BARBER,	)	NO. 62649
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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SUMMARY OF THE ARGUMENT

Jaquez challenges his convictions for the crimes of burglary and grand larceny arising out of a petition originally filed in juvenile court. Jaquez contends that the juvenile court lost jurisdiction of his case when it failed to render a final disposition with the one year time limit of NRS 62D.310. If the juvenile court did not have jurisdiction than the justice and district courts did not have jurisdiction when the case was certified. Even if the juvenile court had jurisdiction, the record shows that he did not make a knowing and intelligent waiver of his right to proceed to a certification hearing.

Jaquez also challenges the sufficiency of the evidence, points out that his right to a speedy trial was violated by a delay of more than 2 years, argues

that the court's failure to adequately inquire into his requests for a new attorney violated his constitutional rights, notes that the State admitted hearsay testimony in violation of his right to confrontation when allowing the latent print examiner to testify to the opinions of other examiners, and argues that the court erred in refusing a defense offered jury instruction. Additionally, at sentencing, the court ordered an amount or restitution not supported by the evidence at trial and failed to name a victim in the judgment.

JURISDICTIONAL STATEMENT

NRS 177.015 gives this Court jurisdiction to review this appeal from a jury verdict. The court filed the final judgment on 01/24/13 and Jaquez filed the notice of appeal on 02/15/13, within the 30 day time limit established by NRAP 4(b). I:112-17.

ISSUES PRESENTED FOR REVIEW

I. THE CONVICTIONS MUST BE REVERSED BECAUSE THE DISTRICT COURT WAS WITHOUT JURISDICTION TO PROSECUTE THE CASE.

II. JAQUEZ DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO THE CERTIFICATION HEARING.

III. DISMISSAL IS MANDATED BECAUSE THE COURT VIOLATED JAQUEZ'S RIGHT TO A SPEEDY TRIAL AND STATUTORY RIGHT TO A TRIAL IN 60 DAYS PURSUANT TO NRS 178.556.

IV. THE COURT ERRED BY NOT PROPERLY CONDUCTING AN EVIDENTIARY HEARING REGARDING JAQUEZ'S MOTIONS ASKING FOR A NEW ATTORNEY OR SEEKING OTHER REMEDIES.

V. THE EVIDENCE WAS INSUFFICIENT TO CONVICT JAQUEZ OF BURGLARY AND GRAND LARCENY.

VI. THE COURT ERRED IN DENYING THE MOTION FOR AN ADVISORY VERDICT JURY INSTRUCTION.

VII. THE COURT DENIED JAQUEZ THE RIGHT OF CONFRONTATION WHEN ALLOWING THE LATENT PRINT EXAMINER TO TESTIFY TO THE CONCLUSION OF OTHER PRINT EXAMINERS.

VIII. REVERSAL OF THE RESTITUTION ORDER IS WARRANTED BECAUSE THE AWARD IS NOT BASED ON THE VERDICT OR ON THE TESTIMONY OF THE ALLEGED VICTIMS; AND, THE COURT DID NOT INCLUDE THE NAME OR NAMES OF THE ALLEGED VICTIMS WITHIN THE JUDGMENT.

IX. EVEN IF THIS COURT DOES NOT FIND ANY ONE SINGLE ERROR ENOUGH TO WARRANT REVERSAL, JAQUEZ ASKS THIS COURT TO CONSIDER THE CUMULATIVE ERROR THAT OCCURRED AT HIS TRIAL.

STATEMENT OF THE CASE

On 01/21/09, Aldegunda Mendoza contacted METRO to report a burglary of her rental home. At the time of the call, there were no witnesses to the incident and no suspects. VI:672.

On 03/17/09, METRO identified Jaquez Barber, a juvenile, as a possible suspect after a METRO print examiner claimed his palm print

matched a latent print recovered from the outside of the home. IV:668. At the time of the identification, Jaquez was in custody for another crime in the adult system, Case C253779. IV:711-21.

METRO sought an arrest warrant for Jaquez on 04/03/09 which the juvenile court issued on 05/12/09. It appears that the arrest warrant was received by METRO on 05/12/09 and possibly served by METRO on 05/12/09. IV:668-09; 675; 679-80. Also, on 05/12/09, the State filed a juvenile petition charging Jaquez with grand larceny and the burglary of Mendoza and Sergio Martin's home. IV:652-3.

The State waited more than a year (08/16/10), to bring Jaquez to Juvenile Justice Services and to file a Petition for Certification. IV: 665-68; 668-09; 675; 679-80. At the certification hearing on 09/27/10, Jaquez waived his right to challenge certification. IV:681-95. Thereafter, the juvenile court granted the State's request for certification. IV:690-94.

On 09/30/10, the State filed a criminal complaint in justice court charging Jaquez with burglary and grand larceny. I:001. Jaquez waived his right to a preliminary hearing but later decided to reject any negotiations in district court. I:002-6. Thereafter, the court set the case for trial. I:168-171.

Jacquez invoked his right to a speedy trial on 11/18/10. I:168-71. But the trial did not begin until almost two years later, on 10/09/12, even though

Jaquez never waived his rights to a speedy trial. During the two years, Jaquez asked for a new attorney or to represent himself several times. I:59-54;55-63; 64-70;192-93; 201-7; 210-11;212-14;218-221; 223-26228-231.

The trial began on 10/09/12 and lasted 3 days, with the jury returning a guilty verdict on both counts on 10/11/12.[1]

On 01/10/13, the court sentenced Jaquez to a term of 12 to 30 months on both counts, running the time concurrent. But the court ran the entire sentence consecutive to the sentence Jaquez received in Case C253779. Additionally, the court ordered Jaquez to pay $7000 in restitution, a $25 Administration fee, and awarded him 90 days of credit for time served. III:644-51.

The Judgment of Conviction was filed on 01/24/13 and the Notice of Appeal was filed on 02/15/13. I:112-17.

STATEMENT OF THE FACTS

On 01/21/09, prior to 9:00 a.m., Aldegunda Mendoza left her home with her son to go to her daughter's school to attend a meeting. III:453-54; 477-70. No other family members remained in the home while she was gone that morning. III:454;474. Mendoza's husband, Sergio Martin, was at work

[1] Trial Day 1 (10/09/12) at II:246-412; Trial Day 2 (10/10/12) at III:413-581; Trial Day 3 (10/11/12) at III:582-640; Verdict at I:111.

and her daughter was already at school. III:454. She locked all the doors when she left. III:454.

After the school meeting concluded at 10:30 a.m., she returned home to find the front door ajar. III: 454. Mendoza explained:

> I tried to open the door, but the door was ajar. And then I entered and I noticed front door was open. It was full of water. And I noticed the drawers of my home, they were all ransacked. And then I ran outside. And I called law enforcement. III:454

Martin arrived home shortly thereafter. III:474.

The water Mendoza described during her testimony was in the backyard (not in the house) and caused by a broken water faucet. Mendoza saw a bucket underneath the back bathroom window and claimed "He stepped on [the faucet] in order to climb on the window." III:545 Mendoza said that when she left the house that morning, the bucket was not under the window, the window was not open, the back screen door was not open, and the water faucet was not broken. III:459.

Martin testified that he kept the bucket at the other corner of the yard. III:470. Martin speculated that someone used the bucket to step inside the home and broke the water fixture. III:470.

Mendoza examined the inside of the home and found cash missing. Mendoza and Martin said the $4000 they had hidden in a sock in a drawer (money that Martin planned to take to Mexico that same day) was stolen.

III:461;460. Another $2000 that belonged to Mendoza's brother was also missing from the same drawer. III:461. Additionally, 10,000 in Mexican pesos was gone. III:465. Martin and Mendoza had no documentation to support their claim they were missing cash and pesos. III:465-67;469. Nothing else was missing from the home. III:466-68.

Officer Chad Shevlin responded to the 911 call. III:477-487. Upon checking the home, Shevlin found the back slider door open, an open bathroom window in the backyard with a bucket underneath the window, and a broken water spigot. II:480. Shevlin opined that the small bathroom window may have been the point-of-entry and the back slider door the exit. II:480; 486-87. He thought that "Whoever came in through the window pushed off the wall with their foot, landing on the tub ring, and that's how they entered the residence." III:480. However, he also admitted that he had other crime scenes where the suspect went inside the home from the back door and left through the front door. III:486-87.

Shevlin noticed that someone moved property around inside the home. III:848. Although the bedroom drawers were rummaged through, only cash was reported missing. III:481;483.

CSI Robbie Dahl and three people on a CSI ride-a-long responded to the home to process the scene. III:487-92. Dahl dusted for fingerprints and

photographs were taken. III:493-499. Dahl found prints inside and outside the home and on the jewelry box. III: 497-99.

Dahl allowed the three ride-a-longs access to the scene only to find out later that one of them, Michael Palmer, balanced himself in the bathroom shower stall and left fingerprints in the area thought to be the point-of-entry. III:515-19. Thus, the crime scene was contaminated and possible prints destroyed. III:518-19.

Dahl admitted other errors in the investigation. For instance, not all areas were dusted for prints. III:523. Even though the front door was found open when Mendoza returned home, Dahl did not dust for prints on the door. III:523. Also, Dahl saw dirt around the edges of the bathtub but he did not develop a footprint comparison because she believed the area was not good enough analysis. III:531.

Latent print examiner Kathryn Aoyama testified that eight readable prints were recovered. III:570. Four of the eight prints inside the home were unidentified to any suspects. III:570. The four unmatched prints were not entered into AFIS. III:572. Three of the prints inside the home belonged to Michael Palmer. III:548; 570. None of the palm or fingerprints found inside the home belonged to Jaquez. III:590. However, Aoyama identified one

palm print found outside the home by the rear bathroom entry as belonging to Jaquez. III:544.

The identification of Jaquez as a suspect through AFIS was a reverse hit: an AFIS hit sometime after it was entered into the system. III:574. The reverse hit occurred on or about 03/17/09, after Jaquez was arrested on 03/03/09 and processed in the adult system in Case 09F0443B (C253779), a case arising out of an incident occurring on 02/24/09. IV:652; 668-69; 711-20. Thus, the prints the police took when Jaquez was arrested on 03/17/09 resulted in an AFIS hit for the prior 01/21/09 incident.

ARGUMENT

I. THE CONVICTIONS MUST BE REVERSED BECAUSE THE DISTRICT COURT WAS WITHOUT JURISDICTION TO PROSECUTE THE CASE.

A. The juvenile court's jurisdiction over Jaquez began when the State filed a petition alleging a delinquent act.

On 03/17/09, METRO identified Jaquez Barber as a suspect in a burglary occurring on 01/21/09 and sought an arrest warrant on 04/03/09. IV:652; 668-69. Because Jaquez was less than 18 years of age at the time of the burglary and at the time of the request for a warrant, METRO obtained the warrant through juvenile court. *See* NRS 62A.030(1)(a); IV: 652; 668-69.

The juvenile court issued an arrest warrant on 05/12/09, the same day the State filed the delinquency petition against Jaquez in juvenile court.[2] IV:652-3;679-80. METRO received the arrest warrant on 05/12/09 and possibly served it the same day while Jaquez was in custody on his other case, C253779. IV:668-69; 675; 679-80.

"[T]he juvenile court has exclusive original jurisdiction over a child living or found within the county who is alleged or adjudicated to have committed a delinquent act." NRS 62B.330(1); NRS 62A.030. The crimes of burglary and grand larceny fall within the definition of a delinquent act. NRS 62B.330(2)(c). Thus, because Jaquez was under the age of 18 years and the petition filed alleged a delinquent act, the juvenile court gained original exclusive jurisdiction over Jaquez and the crimes the State alleged when the petition was filed on 05/12/09.

B. The juvenile court lost jurisdiction over Jaquez and the petition after one year passed without the court making a final disposition.

Between 05/12/09 (the date the petition was filed) and 08/16/10 (the date the State requested certification proceedings), the State did nothing on

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[2] The actual petition indicates it was signed on 02/15/08 but filed on 05/12/09. IV:652-53. The date of the incident is 01/21/09. The words "Arrest Warrant" are typed on the Petition. IV: 652-3; 700-91.

Jaquez's case. Thus, more than 15 months passed before the State proceeded on the petition. During this entire time Jaquez remained in State custody.[3]

On 08/16/10, the juvenile court granted the State's request for a certification hearing and ordered the proceedings in Jaquez's case stayed to allow the Juvenile Probation Department time to prepare a report for a certification hearing. IV:677-788. Jaquez was brought to juvenile court on 09/13/19. VI:704. The juvenile court held the certification hearing on 09/27/10. IV:681-95.

Whether the juvenile court maintains jurisdiction of a juvenile petition after the one year time limit of NRS 62D.310 passes is an issue of first impression for this Court. Although the issue of jurisdiction was not challenged in juvenile court or district court, this Court can sua sponte consider jurisdictional issues. *Landreth v. Malik*, 127 Nev. Adv. Op. No. 16, 251 P.3d 163, 166 (2011) *citing Swan v. Swan*, 106 Nev. 464, 469 (1990) (holding "[W]hether a court lacks subject matter jurisdiction 'can be raised

---

[3] The judge issued the arrest warrant in juvenile court on 05/12/09. IV:679. The police officer who prepared the affidavit and requested the arrest warrant said Jaquez was arrested on 03/03/09 in another case (C253779); and, when his fingerprints were put into the AFIS system, METRO received a match indicating that he was a suspect in the case at bar. IV: 668. The minutes from C253779 show that Jaquez was in court, in custody, on 03/20/09, after his arrest on 03/03/09, and remained in custody the entire time the case was pending, until he was sentenced to prison on 07/21/09. VI:711-20.

by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties.'"); *Pershing Quicksilver Co. v. Thiers*, 62 Nev. 382, 387 (1944) ("[A] jurisdictional question may be raised for the first time on appeal.").

Because the jurisdiction of the juvenile court is statutory, the Court uses de novo review to interpret NRS 62D.310. *In the Matter of George J. v. State,* 128 Nev. Adv. Op. 32, 279 P.3d 187, 189 (2012). The Court begins by examining the plain language of the statute. *Id.*

NRS 62D.310 provides that:

> 1. Except as otherwise provided in this section, the juvenile court shall make its final disposition of a case not later than 60 days after the date on which the petition in the case was filed.
>
> 2. The juvenile court may extend the time for final disposition of a case if the juvenile court files an order setting forth specific reasons for the extension:
>
> (a) Not later than 60 days after the date on which the petition in the case was filed; or
>
> (b) Later than 60 days after the date on which the petition in the case was filed, if the juvenile court finds that the extension would serve the interests of justice. In determining whether an extension would serve the interests of justice, the juvenile court shall consider:
>
> (1) The gravity of the act alleged in the case;
>
> (2) The reasons for any delay in the disposition of the case; and

> (3) The potential consequences to the child, any victim and the public of not extending the time for final disposition of the case.
>
> 3. The juvenile court shall not extend the time for final disposition of a case beyond 1 year from the date on which the petition in the case was filed.

Thus, the plain language of NRS 62D.310 indicates that the legislature prohibited the juvenile court from extending the final disposition of a petition beyond one year.

The final disposition of the juvenile petition in this case occurred on 09/27/10, when the juvenile court certified the case to adult court. But the juvenile petition was filed on 05/13/09 thereby making the final disposition of the petition outside the one year limit of NRS 62D.310.

The juvenile court minutes do not reflect any extensions ordered during the one year time limit. IV:702-10. But the certification order signed by the judge on 08/16/10 says: "[T]he proceedings in this matter be arrest until the time of the submission of the report from the Juvenile Probation Department. . ." IV:678. This brief stay occurred long after the one year time period had passed. Thus, the juvenile court lost jurisdiction over this petition and was without power to certify the case to district court because it did not follow the mandates of NRS 62D.310.

NRS 62D.310 is akin to a statute of limitations requiring dismissal when a case is not filed within a determined period. If the juvenile court did not have jurisdiction over the petition because more than one year had passed then the juvenile court's order certifying Jaquez's case to district court is void. *Landreth* at 166. Thus, the district court did not have jurisdiction to go forward with the case either.

C. Arrest warrants do not toll the time period within NRS 62D.310.

The second issue of first impression is whether the arrest warrant tolled the one year limitation of NRS 62D.310. Because NRS 62D.310 does not list an arrest warrant as an exception to the one year rule, an arrest warrant does not toll the time period for final deposition after the filing of a petition. Moreover, the State could have obtained the arrest warrant without filing the petition and then avoided the one year time limit by filing the petition at a later date.

When the State fails to serve an arrest warrant or serves the warrant but does not bring a defendant to court (even though the defendant is in State custody) then the State cannot claim the time period is tolled because the State intentionally failed to proceed on the petition. Jaquez was in the custody of the State from the time the arrest warrant issued and the 08/16/10 date for the juvenile hearing on the petition.

D. Conscious indifference to rules of procedure.

The State's failure to bring Jaquez to juvenile court for more than one year not only violated NRS 62D.310, it violated his right to due process by showing that the prosecutor and the court had a conscious indifference to following the rules of procedure. This Court recognizes a policy of dismissing a cause of action in a criminal case due to a prosecutor's willful failure to comply with important procedural rules meant to protect a defendant's due process rights, such as delays a preliminary hearing or a contested hearing beyond the statutory time limit. *Maes v. Sheriff,* 86 Nev. 317, 319 (1970); *Joseph John H., a minor v. State*, 113 Nev. 621, 621-24 (1997); *Bustos v. Sheriff*, 87 Nev. 622, 623-24 (1071).

Here, the State made no attempt to comply with the one year rule of NRS 62D.310 thereby showing a conscious indifference to the rules of procedure and a violation of Jaquez's right to due process. U.S. Const. Amend. V, Amend IVX; Nev. Const. Art. 1 Sec. 8. Jaquez was prejudiced by the delay because the juvenile court factored in his conviction and sentence in C253779 at the certification hearing. IV:690-94.

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II. JAQUEZ DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO THE CERTIFICATION HEARING.

What procedures are required for a valid waiver of a certification hearing also appears to be a matter of first impression for this Court.

At the certification hearing on 09/27/10, the Defense attorney told the court that Jaquez waived his certification hearing. IV: 683. Thereafter, the court asked him a few questions as follows:

> D. ATTN: No, he was just going to waive. . .there's no negotiations. . .
>
> . . .
>
> COURT: You've seen a copy of Petition 4, haven't you?
>
> SUBJECT MINOR: Yeah.
>
> COURT: It says here that you committed a burglary. . .You understand that, right?
>
> SUBJECT MINOR: Yeah
>
> COURT: . . .[T]he second count . . .says that you actually removed some property from the home during the burglary. You understand that also, right?
>
> SUBJECT MINOR: Yeah.
>
> COURT: . . you're asking the Court to go ahead and transfer this case, essentially granting the State's petition to transfer this case to the adult system for it to be what we call adjudicated, or resolved, in the adult system whether by trial or by a plea of some sort. You understand that?
>
> SUBJECT MINOR: Yeah.
>
> COURT: . . .you talked to Ms. Maxey about the likelihood of me granting, or not granting, the State's request to transfer this case to the adult system, right?
>
> SUBJECT MINOR: Yeah.
>
> COURT: And given . . .your age, , the – your – actually I do have to factor in your current situation being at High Desert already with the charges and the sentence you have there. And the fact that this occurred – allegedly occurred in – less than a

year ago, that I would be more likely than not to grant the State's request under those circumstances. You understand that?

SUBJECT MINOR: Yeah.

COURT: . . .so in order [to] get this matter dissolved sooner than later, you're asking the Court to go ahead. . .and make the findings and grant the State's request. Is that correct?

SUBJECT MINOR: Yeah.

COURT: . . .No one has forced you are threatened you to get you to do this, right?

SUBJECT MINOR: No.

COURT: . . .you thing it's in your best interest to get this resolved sooner than later?

SUBJECT MINOR: Yeah.

In waiving his certification hearing, Jaquez gained no benefit and showed no understanding of what he was waiving.

After questioning Jaquez, the juvenile court made findings:

> COURT: . . .Well based upon the – there's slight or marginal evidence to support prosecutorial merit. . .under Seven Minors. . .it is a burglary of the home. . .There are some prior services in the juvenile system. . .However, this case turns on the subjective factors which is the subject minor's age. . .there is nothing the Juvenile Court could offer in this case. . .other than an order of restitution. . .therefore the Court finds the matter of public safety, that the State's petition be granted. IV: 690-94.

A waiver "is the intentional relinquishment of a known right." *Mahbanah v. MGM Grand Hotel*, 100 Nev. 593, 596, (1984). When a juvenile waives the jurisdiction of the juvenile court during a certification hearing, the juvenile also waives the protections of the juvenile system geared to rehabilitation and enters an adult system focused on punishment. Thus, a waiver to adult court by a juvenile is a critical action that must not be taken

lightly. *State v. Saenz*, 175 Wash. 2d 167, 174-75 (2012). In Washington, a juvenile may not waive his or her right to juvenile court jurisdiction unless the court, the parties, and the attorneys agree to the waiver. RCW 13.40.110(2).

Because of the critical nature of the decision, a juvenile's waiver of juvenile court jurisdiction and a certification hearing must be an " 'express wavier intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.'" *Saenz* at 174-75 citing RCW 13.40.140(9). Additionally, the juvenile court must make findings in the record as to the reason to why the transfer is in the best interests of the juvenile and the public. *Saenz* at 175.

Here, the court's questioning of Jaquez did not show a knowing, intelligent waiver of his rights for several reasons. The court did not explain the difference between juvenile and adult court and did not tell him that the certification hearing would only be a brief delay in his case. This was important because it appeared that Jaquez's sole reason for his waiver was to speed up the process. The court never discussed the elements of the crimes or the punishments he could receive in adult court. The court asked no questions to confirm whether Jaquez understood the ramifications of his decision. Finally, the court announced that certification was likely during the

waiver thereby making Jaquez believe an objection to certification would not help him.

Additionally, the court made a less than adequate record on prosecutorial merit and the factors of *In re Seven Minors*, 99 Nev. 427 (1983). If the court had thoroughly reviewed the evidence then he would have realized that the identification of Jaquez as a suspect was from a palm print outside the home. None of his prints were found inside. Thus, prosecutorial merit was minimal. Additionally, public safety was not at risk because Jaquez was already sentenced to prison in the other case.

Although a court's decision to certify a case to adult court is an appealable order (NRS 62D.500), here, Jaquez did not challenge the order but waived the certification. Therefore, in cases like this, the only way this Court may review the certification, jurisdiction, and waiver of the certification for statutory and constitutional violations is on direct appeal of his adult case.

Because Jaquez did not object to the inadequate waiver, this Court may use plain error review. NRS 178.602. Jaquez had a protected liberty interest in having his case decided by the juvenile court because the juvenile court had exclusive original jurisdiction over him and the delinquent act. NRS 62B.330(1); NRS 62A.030; *see State v. Grigsby*, 818 N.W.2d 511, 517

(2012). Thus, the error is reviewable under plain error because his liberty interest is a substantial right.

The error was not harmless because if the juvenile court had decided to retain jurisdiction of the case then Jaquez would not be facing an additional 12 to 30 months in prison. Moreover, his attorney may have been able to convince the court to deny certification.

III. DISMISSAL IS MANDATED BECAUSE THE COURT VIOLATED JAQUEZ'S RIGHT TO A SPEEDY TRIAL AND STATUTORY RIGHT TO A TRIAL IN 60 DAYS PURSUANT TO NRS 178.556.

A. Days it took to go to trial: 686 or 1235.

Jaquez invoked his right to a speedy trial without ever making a waiver. During his certification hearing, he told the court that he wanted to resolve the matter sooner rather than later. IV:692. He waived his preliminary hearing but later rejected negotiations. I:2-2a;165-71. In district court he formally invoked his right to a speedy trial and right to a trial in 60 days at his arraignment. I:168-71.

Between the time of his initial arraignment in district court on 11/18/10 and the time his trial began on 10/04/12, the trial was continued 5 times for more than 686 days, with the last continuance being for 9 months. If you count the time from the request for an arrest warrant and the filing of the juvenile petition on 05/12/09 then 1235 days passed.

The initial delay occurred because the State did not bring Jaquez to court after the arrest warrant issued on 05/12/09. However, after Jaquez'a arraignment in district court, his attorney and the State requested several continuances.

At his arraignment on 11/18/10, the court set Jaquez's trial to begin on 01/18/11 with a calendar call date of 01/11/11. But, on 12/14/10, the court addressed a motion for a continuance filed by Jaquez's attorney. The State did not bring Jaquez to court for this motion. I:14-16;172-75. At this hearing, the Defense Attorney told the court that she talked to Jaquez and he was willing to waive the 60 day rule and that she needed a continuance because she had another trial scheduled on the same date that had a firm setting. I:173. She asked for a trial date in February or March of 2011. I:173. The court granted her request for a continuance and ordered her to obtain and file a written waiver from Jaquez. I:174. She never did.

On 03/15/11, the next calendar call, the State filed a motion requesting a continuance because the latent print examiner moved out-of-state and they needed to find another examiner to testify. I:176-82. The Defense Attorney objected, announced ready, and argued that although Jaquez waived his right to a speedy trial at the last calendar call, he originally invoked it. Id. The court granted the State's motion. However, a closer look at the reason the

State gave for the continuance seems unreasonable. At trial Aoyama testified that 4 different latent print examiners looked at the prints. Thus, all the State needed to do was to ask another latent print examiner who worked for METRO to review the prints and testify in court.

On 06/14/11, the next calendar call date, the Defense Attorney said she was missing discovery from the State. The court continued the trial again.

On 10/25/11, the next calendar call date, both parties announced ready with a scheduling caveat because the lead detective for the State would not return from his vacation until 11/01/10. The court again continued the trial. But when the court stated that the defendant had already waived his right to a speedy trial, Jaquez objected and told the court he never waived the 60 day rule. I:208-11. His attorney then contradicted him and told the court he waived the right to a speedy trial. I:208-11. However, she was incorrect.

On 01/10/12, the Defense Attorney announced ready but there were some issues. She then announced she had scheduling difficulties if the case was continued. I:222-26. She informed the court that she was going on leave and asked for a date in October for the trial. She indicated that she was the only attorney in her office that could handle this case. I:223. The court responded that everyone on her tract was pregnant. I:223. Jaquez again told

the court that he was upset about the continuance and suggested that he represent himself. I:223-26. The court continued the trial again.

At the next calendar call date of 10/02/12, the parties announced ready and the trial began on 10/04/12, more than 686 days from the district court arraignment and 1235 days since the request for an arrest warrant.

B. Violation of the sixty day rule.

NRS 178.556 states in pertinent part:

> ...If a defendant whose trial has not been postponed upon his application is not brought to trial ***within 60 days after the arraignment*** on the indictment or information, the district court may dismiss the indictment or information. (Emphasis added)

NRS 178.556(1). Dismissal is mandatory if the State fails to show good cause for a delay past the 60 day time limit. *Anderson v. State*, 86 Nev. 829 (1970).

Here, the first continuance was requested by his attorney. All of the remaining continuances were either requested by the State or caused by the State's failure to give discovery to the defense. The court also allowed a nine month continuance when Jaquez's attorney took a leave of absence without appointing another attorney. Thus, the court abused its discretion when granting the continuances without good cause and violated the 60 day rule.

C. Violation of the right to a speedy trial.

The Sixth Amendment right to a speedy trial attaches when a defendant is arrested or a criminal complaint or information is filed. *Dillingham v. United States*, 423 U.S. 64 (1975). The test for determining a violation centers on four factors:

> 1. Was the delay before trial uncommonly long?
> 2. Who was more to blame for the delay, the government or the defendant?
> 3. Did the defendant assert his right to a speedy trial in due course?
> 4. Was the defendant prejudiced as a result of the delay?

Doggett v. United States, 505 U.S. 647(1992).

In *Doggett,* an Indictment was filed within the time period allowed in the statute of limitations, but there was an eight and a half year delay before Doggett was arrested. The *Doggett* Court found a violation of the Sixth Amendment right to a speedy trial,[4] even though the government did not know Doggett's exact whereabouts during that time period and without Doggett showing affirmative proof of particularized prejudice. The test used

[4] "When the Government's negligence [caused a] delay six times as long as that generally sufficient to trigger judicial review, and when the presumption of prejudice is albeit unspecified, is neither extenuated, as by the defendant's acquiescence, (cite omitted) nor persuasively rebutted, the defendant is entitled to relief." *Doggett*, 505 U.S. at 658.

in *Doggett* is a modification of the four-prong balancing test used in *Barker v. Wingo*, 407 U.S. 514(1973).

1. Was the delay before trial uncommonly long?

How long is uncommonly long? Seven months, thirteen months or a sixteen month delay are enough to trigger a violation of the right to a speedy trial. *See State v. Erenyi*, 85 Nev. 285 (1969) (finding a violation of the right to a speedy trial when the prosecutor did not extradite a defendant for trial in Nevada until the defendant's out-of-state prison term was completed); *Wood v. Sheriff, Carson City,* 88 Nev. 547 (1972) (finding a violation when there was a sixteen month delay between the time the defendant requested a disposition of the charge against him, under the IAD, and the time he was returned to Nevada for trial); *State v. Lujan*, 112 N.M. 346 (1991) (where the New Mexico Appeals Court affirmed the dismissal of a charge with prejudice for a 13-month delay in bringing a defendant to trial when the defendant was in the custody of the state, in a New Mexico prison, during the same time period). Here, the delay was more than in any of the cited cases.

Dismissal of the charges is the remedy for a violation of the right to a speedy trial and due process. *Piland v. Clark County Juvenile Services*, 85 Nev. 489 (1969). Clearly, a delay of 686 days or 1235 days is uncommonly long, triggering a right to a speedy trial violation.

2. Who was more to blame for the delay, the government or the defendant?

The State is more to blame because: (1) Jaquez was not brought to juvenile court for more than a year after the arrest warrant issued; (2) the State requested 2 continuances when the Defense announced ready; (3) many of the other continuances were due to discovery issues caused by the State. The defense only asked for the first continuance and the 9 month continuance. Therefore, the government was more to blame for the delay.

3. Did the defendant assert his right to a speedy trial in due course?

Jaquez invoked his right to a speedy trial at his district court arraignment and never formally waived that right. He also notified the juvenile court that he wanted a speedy resolution of his case when he waived his certification hearing.

4. Was the defendant prejudiced as a result of the delay?

Even though this prong suggests that a defendant must show prejudice, this Court may grant relief, without a showing of particularized prejudice, if the delay is long or if the government negligently persisted in failing to prosecute the defendant. *Doggett,* 505 U.S. 656-658. "The presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett* at 652.

Here, the delay was long and the government negligently or intentionally did not bring Jaquez to juvenile court for 15 months after obtaining the arrest warrant and filing of the petition. The government also contributed to the delay by not providing discovery in a timely manner and not having another latent print examiner ready to testify when needed.

Nonetheless, Jaquez was prejudiced because he obtained little credit for time served on this case during the time it was pending and the original latent print examiner left. At trial, the State allowed the new latent print examiner to testify to the opinions of the one who left. Thus, a witness was lost during the delay and Jaquez's right of confrontation violated at trial.

IV. THE COURT ERRED BY NOT PROPERLY CONDUCTING AN EVIDENTIARY HEARING REGARDING JAQUEZ'S MOTIONS ASKING FOR A NEW ATTORNEY OR SEEKING OTHER REMEDIES.

Jaquez's relationship and communication with his attorneys was troubling as evidenced by the record.[5]

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[5] Before Jaquez filed a motion to dismiss his attorney, there was evidence of communication problems and a possible conflict. In juvenile court, Jaquez accepted no negotiations and waived a challenge to the certification process so as to speed things along. IV:681-95. Once in justice court, he waived his preliminary to accept negotiations under an *Alfrod* plea, only to reject them in district court. I:2-4; 163-67. In district court, Jaquez invoked his right to a speedy trial and trial within 60 days, only to see the trial date continued numerous times by the court. His attorney told the court Jaquez waived his right to a speedy trial even though she never filed the document the court requested.

Jaquez expressed dissatisfaction with his attorneys on 06/02/11 when telling the court: "There's a conflict of interest between me and my lawyer. I'd like to fire her right now." I:192. Rather than taking Jaquez's request seriously, the court refused to accept an oral motion and recommended that Jaquez have a conversation with his attorney to solve the problem. I:192-93.

At this hearing, Jaquez's attorney then placed herself in conflict with Jaquez by responding: "The only thing I want to just have him be aware of is that if you write something down, the clerk's office won't take it, but if he sends it to me, we'll put a cover sheet on it and file on his behalf." II:193. Thereafter, the court directed Jaquez to send his complaints to the attorney he was complaining about. However, this is contrary to EDCR 3.70 which allows the clerk's office to file motions from a defendant who is represented by counsel if in the motion the defendant requests a new attorney or seeks to represent himself.

On 06/19/11 Jaquez sent his own motion seeking to dismiss all charges which was also a motion to dismiss his attorney to the clerk's office. I:50-54. Thereafter, his attorney filed another motion for him on 07/15/11: a motion to dismiss his attorney. I:55-63. The State did not bring Jaquez to court on 08/04/11 for the hearing on his motions. I:199.

On 08/25/11, more than 2 months after he filed the first motion, the court held a hearing. I:201-07. The hearing began with Jaquez's attorney asking to approach the bench and having a private conversation with the court that Jaquez was not privy too and was not transcribed.

After the bench conference, Jaquez told the court the reason that he wanted another attorney:

> It's like I have a conflict of interest with my counsel like we don't see eye-to-eye on anything. I want to go to trial. They're trying to force me to take a deal. Been on the case for about a year now, and I've been requesting a motion for discovery the whole time. I still haven't got it all. I can't – I don't have no contact with them at all, and they're telling my contact is in the courtroom right before I see your honor. It's just like – it's not going to work for me wanting to go to trial, and I don't. . .feel like I'll have a fair chance at all. . . I just want to go to trial with counsel with me – possibly get another one.. .I's rather you appoint somebody, just somebody different I:202-3.

The court responded: "Well, it doesn't really work that way. . .under the law you're entitled to the appointment of . . .counsel, who's competent. . .you're not necessarily entitled to a counsel of your choice at State expense. . . you don't get to pick and choose. . .you really don't set forth any real reasons for it [in your motion]." I: 203

The prosecutor opposed the motion. I:204. It is unclear what right the prosecutor had to have an opinion in the matter and by voicing her objection she interjected herself into the conflict between Jaquez and his attorney.

The court responded by adopting the prosecutor's argument. However, the court concluded that there was a lack of communication between Jaquez and his attorney and ordered his attorney to send him copies of any motions she had filed and to visit him to discuss his case. I:205-06. The court denied Jaquez's motion to dismiss his attorney without holding an evidentiary hearing, closed to the public and without the prosecutor, to discuss the reasons Jaquez wanted a new attorney.

The continuing conflict between Jaquez and his attorney evidenced itself on 10/12/11, when Jaquez's attorney disagreed with him when he told the court that he never waived his right to a speedy trial in 60 days. I:208-11.

Thereafter, on 11/28/11, Jaquez filed another motion to dismiss counsel. I:64-70. Again, Jaquez was not brought to court for the hearing on the motion on 12/08/11. I:212-214. Again, his attorney approached the bench for a private conversation off the record. Then, the court said the defendant's motion was improperly filed in proper person. The court also said: "based on some of the representations. . . at the bench, it appears that there has been some kind of breakdown in communication. . ." I:213. The court continued the hearing for the State to bring Jaquez to court.

At the hearing on 01/03/12 for the motion Jaquez filed in November, Jaquez's attorney began by approaching the bench to have a private

conversation with the court. I:219. The court then told Jaquez that he understood he was not accepting any calls from his attorney. I:219.

Jaquez denied the accusation. Jaquez said: "Just the exact opposite. . .I couldn't get hold of her at all. . .I've been trying to go to trial for about a year. . ." I:219. He complained about not receiving discovery and said: "I just feel that they don't got my best interests in what I want to do in this case at all." I:220.

The court denied his motion for a new attorney, stating that the problem was not irreconcilable because it was a communication problem. I:220. Thereafter, his attorney announced ready for trial.

On 01/10/12, Jaquez was back in court because all of a sudden his attorney was not ready for trial due to some issues the DA notified her about. I:223. At this point, the Defense attorney was getting ready to go on leave and requested a trial date in October. I:223. She noted that Jaquez was not happy about any of this. I:223.

At this point, Jaquez suggested that he should just represent himself. I:223. The court instructed his attorney to send him information on a *Faretta* canvass and to place the matter back on calendar if he wanted to represent himself. I:223-26.

On 9/20/12, nine months after Jaquez asked to represent himself, the case came on calendar for a *Faretta* hearing. I:228-31. Again, the hearing began with Jaquez's attorney asking for a bench conference to discuss the matter privately with the court. I:229.

When asked if he wanted to represent himself, Jaquez said: " No. . .I would like another counsel. . ." I:229.

The court acknowledged that he had a problem with his attorney but said he could not appoint another attorney because the case was assigned to the Public Defender's Office and they decided who would be assigned to assist him with his defense. I:229-31.

Jaquez has Due Process and Sixth Amendment Rights to effective assistance of counsel during all critical stages of the criminal proceedings. U.S. Const. Amend. VI, Amend XIV; Nev. Const. Art. 1, Sec. 8. In *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998), the Ninth Circuit explained that:

> A defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences results in the complete denial of counsel . . . [but where] the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [defendant's] Sixth Amendment right to effective assistance of counsel.

Id. at 1158. (citations omitted). A conviction will be reversed if the District Court abuses its discretion by failing to appoint a new attorney when there has been a significant break down in the relationship between the client and counsel. *Young v. State*, 120 Nev. 963 (2004).

When reviewing a district court's decision to not substitute counsel, this court conducts a three part test by looking at: "(1) the extent of the conflict, (2) the adequacy of the inquiry; and (3) the timeliness of the motion." Id., quoting *Moore* at 1158-59.

Under the three part test, Jaquez's claim of irreconcilable differences is not only evidenced by the motions he filed and his request for new counsel but also by the fact that he asked to represent himself. The motions and objections were timely and frequent. However, the court ignored or dismissed Jaquez's motions and never conducted a hearing to determine whether or not new counsel should be appointed. Thus, the record shows that Jaquez made an adequate record that his relationship with his defense attorney was so tainted that he had no confidence in receiving effective assistance of counsel if represented by her.

Quite troubling is the fact that the court held private off the record conversations at the bench with Jaquez's attorney at her request prior to deciding the motions. Also, the prosecutor had no right to object to Jaquez's

motions because it is an issue between an attorney and the client. Thus, Jaquez was left with having to represent himself when arguing his motions or voicing his concerns.

Since the court failed to conduct a meaningful three-part inquiry as stated in *Moore* and adopted by *Young*, Jaquez's constitutional rights under state and federal law were violated, and his conviction should be vacated.

Additionally, on 01/10/12, the court did not take Jaquez's request to represent himself seriously. The United States and Nevada Constitutions protect a person's right to counsel and the right to represent oneself at trial. U.S. Const. Amend. VI; Amend. XIV; *Faretta v. California*, 422 U.S. 806 (1975); Nev. Const. Art. 1, Sec. 8. Prior to allowing a person to represent himself, the court is required to conduct a *Faretta* canvass to make sure that the person makes an intelligent and voluntary waiver of the constitutional right to be represented by an attorney. *See* Nev. Sup. Ct. R. 253. Here, the court merely told his attorney to place it back on calendar if he wanted to represent himself rather than setting a date for him to waive his right to counsel.

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V. THE EVIDENCE WAS INSUFFICIENT TO CONVICT JAQUEZ OF BURGLARY AND GRAND LARCENY.

A. Standard of Review.

A criminal defendant's fundamental right to a fair trial includes the presumption of innocence. *Hightower v. State*, 123 Nev. 55 (2007); U.S. Const. Amend. V; Amend. XIV; Nev. Const. Art. 1 Sec. 8. Consequently, "[e]very person charged with the commission of a crime shall be presumed innocent until the contrary is proved by **competent evidence** beyond a reasonable doubt..." NRS 175.201. (emphasis added). At trial, the State is required to prove each and "every element of a crime," as well as "every fact necessary to prove the crime" beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *In re Winship*, 397 U.S. 358, 364 (1970); NRS 175.191; NRS 175.201.

On appeal, when determining the sufficiency of the evidence, the Court considers the evidence in the light most favorable to the prosecution and determines if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Oriegel-Candido v. State*, 114 Nev. 378, 381, (1998). When making this decision, NRS 175.201 asks the Court to tally up all competent evidence rather than also considering incompetent evidence. However, in *Stephans v. State*, 262 P.3d 727 (Nevada 2011), this Court found

the opposite by relying in part on *McDaniel v. Brown*, 558 U.S. -, -, 130 S.Ct. 665 (2010) rather than NRS 175.201. But the *Brown* case was a federal habeas claim rather than a direct appeal and involved additional DNA evidence being introduced during the habeas proceedings through a report contradicting the evidence introduced at trial (newly discovered evidence that was prepared 11 years after the trial). Thus, the holding of *Brown* does not apply in light of NRS 175.201 and because this is a direct appeal rather than a habeas case.

B. Burglary and grand larceny.

The State presented no evidence that Jaquez entered Mendoza and Martin's home. The only print identified to Jaquez was found on the outside of the home. Although the court allowed the witnesses to speculate that Jaquez entered the home through the back window (over the objection of the defense), the witnesses had no personal knowledge of this fact and should have been prohibited from testifying that it occurred. See NRS 50.12; I:455; 462' 471-73. Because this is not competent evidence, NRS 175.201 requires the Court disregard it when deciding a sufficiency of the evidence issue.

In *Geiger v. State*, 113 Nev. 938 (1996) and *Mathews v. State*, 94 Nev. 179 (1978), the Nevada Supreme Court seemed to require the State to prove something more when fingerprint evidence was used to prove a burglary. In

Geiger, the Court concluded that when the State relies on fingerprint evidence in a burglary, the State must show that the circumstances rule out the possibility that the prints may have been left at the scene at a different time.

Additionally, in *Reed v. State*, 95 Nev. 190, 194 (1970) the Court said:

> Convictions based upon fingerprint evidence have been upheld when other substantial evidence tended to link the defendant with the crime charged. (cites omitted) In *Mathews v. State*, 94 Nev. 179, 576 P.2d 1125 (1978), this court followed the general rule, and upheld the conviction of a burglar upon evidence establishing that he fit the general description of a man seen running from the scene of the crime and was apprehended near the scene, when his fingerprints were found on several items in the store which had been burglarized.

Thus, something more than fingerprint evidence is required for the State to prove the identity of the suspect to a burglary when there are no witnesses. *See People v. Ray*, 626 P.2d 167 (1981).

Although Mendoza and Martin testified that they did not know Jaquez and they knew of no reason for him to be touching the outside of their home, this is insufficient because there is no evidence he was inside.

Also, Jaquez could not be found guilty of the grand larceny because the cash was inside the home and there was no proof that he was inside the home.

VI. THE COURT ERRED IN DENYING THE MOTION FOR AN ADVISORY VERDICT JURY INSTRUCITON.

At the conclusion of the trial, the defense asked for an advisory verdict jury instruction which the court denied. III:598-600; 605-06. The instruction offered stated:

> You are instructed that the Court deems the evidence insufficient to warrant a conviction as to the crimes of Burglary and Grand Larceny. However, you are not bound by this advice. I:94

The defense attorney requested the instruction pursuant to NRS 175.381 because there was no proof that Jaquez entered the home with the intent to commit larceny. III:599. She also noted that finger print evidence has been called into question by the National Academy of Sciences and in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Also, in *Geiger v. State*, 112 Nev. 938 (1996) and *Mathews v. State*, 94 Nev. 179 (1978), the Nevada Supreme Court seem to question fingerprint evidence by requiring the State to prove that there was no other explanation or possible reason for the suspects prints to have been found in the location. III:599-600. She argued that there was nothing more, pointing to the case of *People v. Ray*, 626 P.2d 167 (1981).

The court abused its discretion in not giving the advisory verdict because the palm print alone was insufficient to show entry with specific intent to steal.

VII. THE COURT DENIED JAQUEZ THE RIGHT OF CONFRONTATION WHEN ALLOWING THE LATENT PRINT EXAMINER TO TESTIFY TO THE CONCLUSION OF OTHER PRINT EXAMINERS.

On direct examination, latent print examiner, Kathryn Aoyama testified about the comparison and examination conducted by other latent print experts. She told the jury:

- Latent print examiner Marnie Carter reviewed her work last. III:538
- Exhibit 19F was originally identified as Jaquez's palm print by Vicki Farnham who was doing AFIS at the time and did the side-by-side comparisons. Farnahm made a reported on her identifications. III:544-45.
- "This particular print has been looked at by four different scientists, and we all came up with the same conclusion." III:547-48.

Prior to testifying, Aoyama reviewed Farnham's report but also did her own examination of the latent prints. III:545.

The Confrontation Clause guarantees a defendant the right to confront and cross-examine the witnesses against him. U.S. Const. Amend. VI; Amend. XIV. Unless the declarant is unavailable and the defendant had a

prior opportunity to cross-examine the declarant, the testimonial hearsay statements will not be admitted at trial. *Crawford v. Washington*, 541 U.S. 36 (2004); *Flores v. State*, 121 Nev. 706, 714 (2005).

Jaquez objected to Aoyama's testimony regarding 3 other latent print examiner's opinions. III:545. But the court said it was not allowing the testimony for the truth of the matter asserted but to explain how Aoyama obtained the print. III:545. The admission of Carter, Fornham, and another unidentified examiner's analysis and opinion through Aoyama violated Jaquez's right of confrontation because it was used for the truth of the matter asserted in that it was used to bolster Aoyama's opinion.

Forensic reports are testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. -, 121 S. Ct. 2705 (2011). Forensic or written reports are testimonial if "an objective witness [would] reasonably believe that the statement would be available for use at a later trial." *Vega v. State*, 126 Nev. -, -, 236 P.3d 632, 637 (2010). Here, the reports prepared by three other latent prints who opined that the palm print belonged to Jaquez were testimonial because they were prepared in anticipation of trial. Thus, the State needed to call the other latent print examiners to testify to their own opinions rather than using Aoyama. The *Melendez-Diaz* Court affirmed the position that the Constitution requires

analysts to testify in court before their analysis is introduced into evidence. *Melendez-Diaz* at 351.

This Court holds that expert testimony regarding the content of a testimonial statement in a written report is the equivalent of a testimonial statement. *Vega*. at 638; *Polk v. State*, 126 Nev. -, -, 233 P.3d 357, 359 (2010). A defendant's constitutional right to confrontation is violated "when the district court erroneously admit[s] the testimonial statements from an unavailable expert witness without the witness previously being subjected to cross-examination." *Vega* at 634.

The State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Polk* at 359, n.2. The error is not harmless because the opinion of the latent print examiners that the latent palm print found outside the home belonged to Jaquez was the only evidence the State had tying Jaquez to the home that was burglarized. In closing argument, the prosecutor referred to the palm print as the evidence demonstrating Jaquez committed the crime and sufficient evidence for the jury to return a guilty verdict. III:612-13;615;620.

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VIII. REVERSAL OF THE RESTITUTION ORDER IS WARRANTED BECAUSE THE AWARD IS NOT BASED ON THE VERDICT OR ON THE TESTIMONY OF THE ALLEGED VICTIMS; AND, THE COURT DID NOT INCLUDE THE NAME OR NAMES OF THE ALLEGED VICTIMS WITHIN THE JUDGMENT.

Under the Second Amended Information and jury instruction #3, the jury convicted Jaquez of taking $6,000 from Aldequndo Mendoza and/or Sergio Martin. I:89-90;97. At trial, Mendoza testified that $6000 was missing from her home but only $4000 of that amount belonged to her and her husband Sergio Martin. III:461. Mendoza said that $2000 of the money in a drawer belonged to her brother. III:461. Thus, at best, the State proved that $4000 was taken from the named victims because the brother was never named and never testified.

At sentencing, the Court noted he was missing an amount for restitution because the Probation and Parole Department had no contact with the victims. III:645. The State claimed restitution was $7000. III:645. The district court followed the State's representation and ordered Jaquez to pay $7,000 without naming the victims who were to obtain the money on the record or in the judgment. III:644-51.

The defense did not object to Jaquez paying $7000 in restitution; thus, the Court may review the restitution amount under the plain error standard. NRS 178.602. The error was plain and affected Jaquez' substantial rights

because the State presented no evidence that $7000 was stolen from the Mendoza and/or Martin and the unnamed brother was not pled as a victim.

The District Court derives authority to impose restitution from NRS 176.033 which states, in pertinent part:

> If restitution is appropriate, [the court shall] set an amount of restitution for each victim of the offense...

NRS 176.033(1)(c). The court must include "the amount and terms of any. . .restitution. . ." within the judgment of conviction. NRS 176.105(c).

A court may order restitution for an offense admitted by the defendant, restitution agreed upon or following a conviction. *Erickson v. State*, 107 Nev. 864, 866 (1991). Upon trial and conviction, the scope and amount of restitution the court may order is limited by the verdict. *Greenwood v. State*, 112 Nev. 408 (1996). The sentencing court, however, must base the amount of restitution ordered on reliable and accurate information. *See Martinez v. State*, 115 Nev. 9, 13 (1999).

Here, Mendoza and Martin were the only named victims and both testified that only $4000 of their money was missing. Thus, the court based the award of $7000 on unreliable, inaccurate information. Moreover, the court abused its discretion by not identifying any victims entitled to restitution at the sentencing hearing or within the judgment.

IX. EVEN IF THIS COURT DOES NOT FIND ANY ONE SINGLE ERROR ENOUGH TO WARRANT REVERSAL, JAQUEZ ASKS THIS COURT TO CONSIDER THE CUMULATIVE ERROR THAT OCCURRED AT HIS TRIAL.

Even if this Court believes that an individual error is not enough to reverse, the cumulative effect of error may warrant reversal. *Big Pond v. State*, 101 Nev. 1, 3 (1985); *Dechant v. State*, 116 Nev. 918, 927-28 (2000); *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). When deciding cumulative error, this Court evaluates: "(1) whether the issue of guilt is close, (2) the quantity and character of the error[s], and (3) the gravity of the crime charged." *Valdez citing Hernandez v. State*, 118 Nev. 513, 535 (2002).

Although the crimes of burglary and grand larceny are not as serious as murder, here, the evidence is not overwhelming as noted within Issue V and the sentence was serious because the court ran the sentence in this case consecutive to the sentence in case C253779. The court forced him to go to trial with an attorney he was in conflict with without holding an evidentiary hearing on the conflict, refused an advisory jury instruction requested by the defense, and allowed the State to present evidence in violation of Jaquez's right of confrontation. Thus, the quality and character of the errors are substantial and significant.

CONCLUSION

In view of the above, Jaquez asks this court to reverse and dismiss his convictions because the court lacked jurisdiction over his case and he did not make a knowing and intelligent waiver at the certification hearing. Additionally, he seeks dismissal based on the right to a speedy trial violation and the violation of NRS 178.556. Jaquez also asks for reversal or dismissal based on all the other reasons addressed in this brief.

Respectfully submitted,

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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.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 9, 952 words and 992 lines of text.

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 11th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 11th day of September, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office