IN THE SUPREME COURT OF THE STATE OF NEVADA

JAQUEZ DEJUAN BARBER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 62649

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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INACCURACIES WITHIN THE STATE'S STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. State's misstatement of the case.

1. "Appellant requested a continuance on 12/14/10." RAB:3. Jaquez absent and when Defense Counsel requested a continuance, the court told her: "I'll need a written waiver from your client. . ." I:174.

2. Claim: Appellant agreed to continuance on 06/14/11. RAB:3. However, State's failure to provide complete discovery caused the continuance. I:195.

3. Claim: Jaquez filed a motion to fire his attorney on 06/02/11. RAB:3. However, defense counsel sought to withdraw ("Motion to Withdraw as Attorney of Record") which included Jaquez's motion. I:55-63.

4. Facts not in the record: State speculates that "due to difficulties transporting Appellant to court" from prison, more than a month passed before he appeared for his motion to withdraw counsel. RAB:4.

5. "Appellant again asked for a continuance" on 01/10/12. RAB:4. Jaquez objected and asked to represent himself. I:223-24. (See Section III for additional facts regarding continuances).

B. State's misstatement of the facts.

State incorrectly claims, at III:459-61, Mendoza testified that: (1)"[i]nside the bathroom, the floor was covered in dirt and water"; and (2) the screen was removed from the bathroom window. RAB:6.

Mendoza's testimony (III:460-61) describes State's Exhibit 16. IV:745. Exhibit 16 is a picture of a small portion of the inside bathroom window showing fingerprint dust and tape on several rows of tiles beneath the inside window. IV:744-45. Although she indicated dirt was on the tiles, the tiles mainly show fingerprint dust and tape. Exhibit 16 does not show the bathroom floor. There are no pictures of the bathroom floor. IV:722-47. There was no testimony that the bathroom floor was covered with dirt, mud, and water. Even though Shevlin and CSI Dahl testified to some dirt or mud at the edge of the bathtub, there are no pictures showing this and Dahl said the marks were not sufficient for a footprint comparison. III:480;531.

As to water damage or mud inside, Mendoza testified that all the water was outside the house. III:454; See IV:737.

Mendoza did not say a screen was removed from the bathroom window. There are no pictures showing a screen removed or on the ground. IV:736-45. No one testified a screen was removed from any windows. State misunderstands Mendoza testimony where she said the "back screen door" was open. RAB 6; See III:459.

State inaccurately describes Mendoza's testimony about the bucket found by the bathroom window as full of concrete rather than concrete paint. RAB:6; See III:459; IV:736-37.

State contends Officer Shevlin determined the point-of-entry was the bathroom window. RAB:6. Shevlin initially voiced this conclusion, but later admitted that there could have been another point-of-entry. III:487. Shevlin found the back slider door open when he arrived. III:480. Mendoza described three possible points-of-entry, finding: the front door ajar, the back door open, and the backyard window in the bathroom open a few inches. III:454;459;464; IV:739-45.

State fails to fully acknowledge relevant facts regarding the crime scene. In two footnotes, State notes CSI Dahl admitted that one of her three

ride-a-longs contaminated the crime scene by leaving fingerprints in the bathroom. III:519; RAB:7.

In discussing Dahl's testimony regarding the recovered latent prints and their unusual placement on the tiles near the window inside the bathroom, State fails to admit that the unusually placed fingerprints are not Jaquez's prints and belong to Palmer, the police ride-a-long who contaminated the scene, or to an unknown person. RAB:7; See III:570-571.

State misstates the testimony of the Mendozas,[1] claiming they said $6,000 was missing without acknowledging that they testified that only $4000 belonged to them. RAB:8; III:461;460. Another $2000 belonging to Mendoza's brother was missing. III:461.

The amount of missing Mexican pesos is in dispute, though irrelevant because Barber was not charged with taking Mexican pesos (10,000 or 3,000 of pesos missing). III:465; 467-69; RAB:8.

ARGUMENT

I. DISTRICT COURT WAS WITHOUT JURISDICTION TO PROSECUTE THIS CASE.

A. Standard of review.

State cites no standard of review. RAB:8-10. The Court examines jurisdictional issues and the interpretation of NRS 62D.310 by de novo

[1] There is no Mr. Mendoza. II:454.

review. *In re Aboud Inter Vivos Trust*, 413 P.3d 941, 945 (Nev. 2013); *In the Matter of George J. v. State*, 279 P.3d 187, 189 (Nev. 2012); *Landreth v. Malik*, 251 P.3d 163, 166 (Nev. 2011)(subject matter jurisdiction is a question of law reviewable when raised for the first time on appeal).

B. On or after 01/12/09, the district court did not have subject matter jurisdiction because the juvenile court had jurisdiction.

A court derives jurisdiction to hear and determine the outcome of a case through the state's constitution and statutes adopted pursuant to the constitution. *State v. Osborne*, 329 Mont. 95, 98 (2005). The Nevada Constitution gives the district court original jurisdiction over all criminal cases except for those excluded by law. *State v. Barren*, 279 P.3d 182, 184 (Nev. 2012); Nev. Const. art. 6 Sec. 6(1). By law, the district court did not have subject matter jurisdiction over this case. NRS 62B.370.

State does not challenge Jaquez's assertion that the juvenile court had original exclusive jurisdiction. See OB:10; RAB:9. Therefore, both parties agree that pursuant to NRS 62B.310(1), NRS 62B.330, and NRS 62B.335, the juvenile court obtained original exclusive jurisdiction over this case because: (1) at the time the alleged crimes occurred, Jaquez was a child living within the county who was alleged to have committed a delinquent act when under the age of 18 years, and (2) he was identified by law enforcement

and charged with the crimes prior to reaching the age of 20 years and 3 months.[2]

C. Juvenile court lost jurisdiction on 05/12/10.

Although the State claims the juvenile court never lost jurisdiction, it does not contest the following legal assertions and facts.

The juvenile court obtained subject matter jurisdiction on 05/12/09 upon the filing of the petition. *Barren* at 187 (jurisdiction begins when petition is filed). NRS 62D.310 limits the juvenile court's subject matter jurisdiction to one year. Between 05/12/09 and 05/12/10, the State did not proceed on the petition even though Jaquez remained in the custody of the State the entire time period.[3]

"[T]he juvenile court is limited by the provisions of NRS Title 5 when exercising its authority to carry out its duties in overseeing juvenile justice matters." *In re Steven Daniel P. v. State*, 309 P.3d 1041 (Nev. 2013) (NRS 62C.230 limits court's authority to dismiss a petition and place a child on informal probation); *Kell v. State*, 96 Nev. 791, 792-93 (1980) (juvenile court's jurisdiction is statutory).

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[2] Jaquez was born on 07/05/91. IV:700. The crimes occurred on 01/21/09. IV:700. Law enforcement identified Jaquez as a suspect on 03/17/09. IV:652;669. On 05/12/09, State filed the petition. IV:700.

[3] C253779 minutes show Jaquez in custody on 03/20/09, after his arrest on 03/03/09. He remained in CCDC custody until sentenced to prison on 07/21/09. IV:711-20.

The plain wording[4] of NRS 62D.310 limits the juvenile court's subject matter jurisdiction by mandating a final disposition in a juvenile case "no later than 60 days after the date on which the petition was filed" subject to several exceptions, none of which apply in this case. "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." NRS 62D.310 (3). The *In re Eric A.L.*, 123 Nev. 26, 34 (2007), Court recognized a juvenile's statutory right to a final disposition of a petition within the one year time limitation of NRS 62D.310.

Here, on 08/10/10, the court granted the State's request to transport Jaquez from High Desert State Prison to juvenile court for a certification hearing based on the petition filed on 05/12/09. IV:654. On 09/27/10, the court rendered a final disposition by granting the State's motion for certification.

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[4] "When construing a statute, this court looks to the words in the statute to determine the plain meaning of the statute. . .". *In re Steven Daniel P.* at 1042 *citing Hernandez v. Bennett-Haron,* 287 P.3d 305, 315 (Nev. 2012). When interpreting a statute, the Court "'avoid[s] statutory interpretation that renders language meaningless or superfluous and '[i]f the statute's language is clear and unambiguous, [this court will] enforce the statute as written.'" *Id. citing George J. v. State,* 279 P.3d 187, 190 (Nev. 2012), (alterations in original) *quoting Hobbs v. State*, 251 P.3d 177, 179 (Nev. 2011).

State: (1) does not contest the above facts; (2) does not contest the one year time limit of NRS 62D.310 on the juvenile court's authority; (3) does not discuss the plain wording of NRS 62D.310; (4) does not contend NRS 62D.310 is ambiguous; (5) does not deny the legislature prohibited the juvenile court from extending the final disposition of a petition beyond one year; and (6) does not challenge the possibility of a violation of the one year rule of NRS 62D.310(3). State also does not discuss subject matter jurisdiction or cases cited within Issue I of the Opening Brief.[5] *Compare* RAB:8-12 with OB:9-15; *See* NRAP 31(d).

Instead, State argues: (1) the juvenile court never lost jurisdiction because "the reason for the delay does not offend NRS 62D.310 or suggest conscious indifference to procedure by the State" (RAB:11); (2) *In re Eric A.L.* allows a tolling of the one year time limit due to the arrest warrant (RAB:12); (3) Jaquez waived this issue by not appealing from the certification order (RAB:11); and (4) even if the juvenile court lost jurisdiction, the district court automatically acquired jurisdiction (RAB:11). Jaquez addresses these arguments.

D. District court did not obtain subject matter jurisdiction because the certification order was void.

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[5] State omits the filing date of the Petition, only acknowledging procedural dates and filings after 08/10/10. RAB:2-5.

State summarily argues the certification process and order gave the district court jurisdiction even if the juvenile court lost jurisdiction. RAB:9;11.

For the district court to obtain subject matter jurisdiction, the juvenile court must have jurisdiction to issue a valid order. *Ewing v. State*, 98 Nev. 81 (1982)(vacating an violation of probation order by finding an invalid exercise of jurisdiction by the juvenile court). A court acting without subject matter jurisdiction renders a void order. *Del Papa v. Steffan*, 112 Nev. 369, 375 (1996); *Landreth* at 166 (judgment void if court lacks subject matter jurisdiction). Thus, the juvenile court cannot waive jurisdiction to the criminal court if it does not have jurisdiction. *Ingram v. State*, 160 Ind. App. 188 (1974).

A juvenile court's discretionary authority to certify a child to the adult court "assumes procedural regularity sufficient . . .to satisfy the basic requirements of due process and fairness. . ." and compliance with statutory procedural requirements. *Lewis v. State*, 86 Nev. 889, 892 (1970). By failing to comply with the NRS 62D.310 requirements, the juvenile court lost jurisdiction because the juvenile court's power to act is statutory. *See Barren* at 184.

A district court does not obtain subject matter jurisdiction to criminally adjudicate a juvenile if the juvenile court erroneously certifies the case to the adult court. *State v. Sanders*, 76 P.3d 567, 572 (Hawai'i 2003). Thus, the district court could not obtain subject matter jurisdiction from the juvenile court in this case because an order cannot confer subject matter jurisdiction where there is none.

Moreover, the certification order appears facially invalid because it: (1) fails to cite the authority for the juvenile court's jurisdiction, and (2) shows NRS 62D.310 divested the juvenile court of jurisdiction because the order issued on 09/27/10 and the filing date of the attached petition is 05/13/09. IV:696-701.

Yet State argues that even if the juvenile court lost jurisdiction, "some court always has jurisdiction over a criminal defendant" citing *State v. Barren*, 279 P.3d 182, 184 (Nev. 2012) and NRS 171.010. RAB: 11;17. In *Barren,* the Court held the district court had jurisdiction, based on NRS 171.010, because the juvenile court did not have jurisdiction at the time the petition filed. Here, the juvenile court had jurisdiction but lost it. Thus, *Barren* and NRS 171.010 are inapplicable.

State further claims if the juvenile court does not reach a final disposition within one year of the filing of a petition then the district court

automatically obtains jurisdiction. However, this reasoning is inconsistent with NRS 62B.330 and NRS 62D.310 and leads to an absurd result because a child would suffer more serious consequences based solely on the State or the Court delaying the case. The statutes are harmonized by concluding NRS 62D.310 limits a juvenile court's jurisdiction over a petition. *Pellegrini v. State,* 117 Nev. 860, 874 (2001) (Court "construe[s] statutory language to avoid absurd or unreasonable results, and, if possible, we will avoid any interpretation that renders nugatory part of a statute").

E. Arrest warrants do not toll the one year time period.

While recognizing that an arrest warrant is not listed as an exception to the one year rule of NRS 62D.310, State argues that this Court's decision in *In re Eric A.L.* allows tolling. RAB:12. State does not deny: (1) Jaquez was in State custody the entire time after the arrest warrant issued; and (2) it could have avoided the one year time limitation by obtaining an arrest warrant and arresting him. See OB:14-15;14:21-23.

The *In re Eric A.L.* Court held "NRS 62D.310 speaks only to what the juvenile court is required to do and the time frame in which it must operate." *Id.* at 31. The Court found that when the State filed a notice of appeal from a certification order, as allowed by NRS 62D.500, the juvenile court was divested of jurisdiction and the one year time period of NRS 62D.310 tolled

to allow time for a resolution of the appeal in the Nevada Supreme Court. Thus, the juvenile court could not reach a final disposition because it lost jurisdiction during the appellate process.

In contrast to *In re Eric A.L.*, here, the juvenile court always had jurisdiction during the one year time frame of NRS 62D.310.

F. No global negotiations prohibited the court from complying with NRS 62D.310.

State argues that the reason for a more than one year delay does not offend NRS 62D.310 or show conscious indifference because during this time Jaquez and the State were pursuing global negotiations between his juvenile and adult case, C253779. RAB: 11-12. Not true.

1. No delays due to negotiations in C253779 record.

The district court record in C253779 shows there were no global negotiations delaying proceedings in district court. IV:748-750. In C253779, on 04/23/09 Jaquez pled guilty pursuant to a guilty plea agreement. IV:720. After Jaquez entered his guilty plea, the State filed the juvenile petition on 05/12/09. IV:652-3. The district court minutes in C253779 show no delays for possible re-negotiations before his sentencing on 07/21/09. IV:748-50.

Moreover, the district court sentenced Jaquez to prison more than a year before the State filed the certification petition on 08/13/10, thereby

making any delays with his juvenile case due to negotiations with C253779 impossible.

2. No delays due to negotiations in juvenile court record.

Likewise, the juvenile court record does not indicate any global negotiations between 05/12/09 and 08/13/10 when the certification petition filed.

State's reference to a discussion in the 09/27/10 transcript regarding possible negotiations occurred: (1) after the one year time period of NRS 62D.310 lapsed; and (2) show the parties acknowledged Jaquez was already serving time at High Desert on C253779. IV:681-95; RAB:11-12. Thus, the discussion only involved the possibility of negotiating the juvenile case.

Additionally, the juvenile record shows the parties did not discuss negotiations before 09/13/10 because on 09/13/10 defense counsel notified the court that she needed time to discuss the certification petition with Jaquez.[6] IV:704.

3. Remand is unnecessary.

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[6] State did not transport Jaquez for the hearings on 09/13/10 and 09/20/10. IV:704;707. On 09/20/10, defense counsel informed the court that she met with Jaquez and he would waive the certification hearing. IV:707. At the 09/27/10 hearing, Jaquez was present and defense counsel said his waiver was without any negotiations. IV:690.

State's citation to *Ryan's Express v. Amador State Lines*, 279 P.3d 166, 172 (Nev. 2012) and request for a remand for further development of the record regarding an alleged "attempt to globally negotiate Appellant's juvenile and criminal charges" which benefited Jaquez is an unnecessary request.[7] RAB:12. *Ryan's Express* involved a question typically not found within a record. Here, the record is clear: there were no global negotiations. State's assertion that Jaquez caused delays by attempting to negotiate his juvenile and adult case is false and impossible.

G. Conscious indifference, undue delay, and failure to follow rules of procedure.

In *Maes v. Sheriff*, 86 Nev. 317, 319 (1970), *Joseph John H., a minor v. State*, 113 Nev. 621, 621-24 (1997), and *Bustos v. Sheriff*, 87 Nev. 622, 623-24 (1071), this Court recognized a policy of dismissing 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. State declined to address these cases, summarily contending no undue delay and no conscious indifference for procedural rules occurred because negotiations were being discussed between the two cases. RAB:11-12; See NRAP 31(d). Not true.

[7] State's assertion "[w]hen negotiations fell through, Appellant was sentenced on case C253779 and the State proceeded on the instant case" (RAB:12) is incorrect.

H. Failure to appeal from the certification order does not constitute a waiver of subject matter jurisdiction and does not preclude a challenge to the certification.

State claims Jaquez waived all jurisdictional claims by not appealing from the certification order. RAB:8-11.

Subject matter jurisdiction is not waivable and can be raised for the first time on appeal or by the court sua sponte: *Swan v. Swan*, 106 Nev. 464, 469 (1990); *Landreth; Pershing Quicksilver Co. v. Thiers*, 62 Nev. 382, 387 (1944). The words "subject matter jurisdiction" are not found anywhere in the State's argument because the State does not respond to Jaquez's arguments.

State cites several cases for the proposition that Jaquez waived jurisdiction; but, none discuss subject matter jurisdiction. RAB:9.

Castillo v. State, 106 Nev. 349 (1990), held: (1) the denial of a transfer back to juvenile court is not an appealable order, and (2) a certification order is appealable.

Turpin v. State, 89 Nev. 518, 520 (1973) did not extend the *Castillo* holding[8] and does not stand for the proposition that a "failure to timely appeal a certification order waives all challenges to the certification process," as the

[8] *Castillo* was decided after *Turpin*.

State claims.[9] RAB:9. *Turpin* involved a notice issue, a lack of specificity in the certification order raised on direct appeal from the criminal conviction. Despite noting that defendant should have been raised his complaint by appealing from the certification order, the *Turpin* Court reviewed the notice issue. The Court found that although the petition was not specific, it was broad enough to put the defendant on notice of the more serious charges he faced in adult court. Thus, challenges to the certification process may be raised on direct appeal of the judgment.

State argues that Jaquez is not entitled to a "home free" ticket after not litigating subject matter jurisdiction in juvenile court or by not appealing from the certification order, citing to *Castillo v. State*, 110 Nev. 535, 542 (1994), *disapproved of on other grounds, Woods v. State*, 111 Nev. 428 (1995). RAB:10. State does not identify the benefit it claims Jaquez received by not raising subject matter jurisdiction earlier. RAB:10.

State misconstrues the *Castillo* facts and "home free" argument. RAB:10. The *Castillo* defendant timely filed three notices of appeal seeking review from the Nevada Supreme Court, one of which was an appeal of the certification order. *Id.* at 537, fn. 1. Thus, the *Castillo* Court's reference to a

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[9] State cites no cases holding all challenges to certification are waived if the juvenile does not appeal from the certification order.

"home free" ticket had nothing to do with whether the defendant filed or did not file a notice of appeal from the certification order.

The *Castillo* Court used the words "home free" because the defendant sought to take advantage of a change in the certification statute enacted several years after his certification, during the time period he absconded from Nevada. The change in the law would have prohibited the juvenile court from certifying him. Because the legislature enacted the law after he absconded, the Court held that he could not benefit from his flight by obtaining a "home free" ticket and the new rule did not apply retroactively. *Id.* at 538-544.

Although *Castillo* does not support State's argument, it controls Jaquez's issue because *Castillo* illustrates that a defendant may raise a challenge to the certification process on direct appeal from a judgment of conviction. *Castillo* allows Jaquez to challenge the juvenile certification process and subject matter jurisdiction in this appeal even though he did not appeal from the certification order.

Here, State attempts to get a "home free" ticket by asking this Court to ignore NRS 62D.310 and the facts showing the State failed to bring Jaquez to court for more than one year while he was in State custody.

II. WAIVER OF THE CERTIFICATION HEARING.

A. State asks this Court to ignore the waiver issue and find the juvenile court made an independent determination of the certification factors.

State argues that the Court should uphold the certification order without any consideration of the waiver, claiming Jaquez's focus is misplaced because the juvenile court made an independent determination of certification.[10] RAB:12-13. The State does not address waiver or the cases Jaquez cited at OB:16-19 or the certification statute NRS62B.390(1).

In support of its argument that the juvenile court made an independent determination, State reviews case law for the certification process and argues the: (1) "court properly relied upon the pleadings and arguments of counsel when determining if there was prosecutorial merit;" (2) court made an adequate record under *In re Seven Minors,* 99 Nev. 427 (1983) *disapproved on other grounds In re William S.*, 122 Nev. 432, 422, n.23 (2006); (3) State met its burden;[11] and (4) court did not abuse its discretion. RAB:13-15; n.5.

B. Factors for a discretionary certification hearing.

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[10] State initially claims Jaquez only challenges his waiver; later, admits that Jaquez addressed the inadequate certification process. RAB:13;15.

[11] State argues the Defense attempts to place a higher burden on the State than is required but does not explain. RAB:14.

State cites to a prior motion, incorrectly claiming: "Appellant contends he is not challenging the order of certification." RAB:12. Jaquez's challenge and argument regarding the certification process and waiver is consistent in this brief and the prior motion. Subject matter jurisdiction and constitutional issues pertaining to the certification process may be raised for the first time on appeal. Thus, the certification order is being challenged in that sense.

At a discretionary certification hearing under NRS 62B.390(1), the juvenile court must: (1) decide whether the State established prosecutorial merit; and (2) consider a matrix of factors to determine if public safety and interest would be served by waiving the jurisdiction of the juvenile court and transferring the case to the adult criminal court. *In re William S.* 122 Nev. 432, 436 (2006).

In the second prong, the juvenile court considers: "(1) the nature and seriousness of the offense; (2) the seriousness and persistency of past admitted or adjudicated criminal offenses; and (3) personal considerations such as age, maturity, character, personality, and family relationships." *Id.; In re Seven Minors.* "[I]n close cases, when neither of the first two factors clearly compels certification, the juvenile court may consider personal factors, including the minor's amenability to treatment in the juvenile court, and may decline certification based on the totality of all of the factors." *In re William S.* at 441.

C. Information provided to the juvenile court for certification.

Within the certification petition filed on 08/13/10, State claimed: (1) Jaquez committed the offenses when he was 17 years old; (2) he currently was 19 years; (3) he committed two prior juvenile offenses in 2008; and (4) the charges listed would be felonious if he were charged as an adult. IV:655-

57. The juvenile court ordered: "any and all evidence which might mitigate the decision to certify the subject minor, including but not limited to evidence of substance abuse, emotional or behavioral problems be submitted to the assigned Probation Officer..." IV:677.

Prior to the certification hearing, State provided the juvenile court with a Memorandum in Support of Certification. IV:658-76. Within the Memorandum, State: (1) provided no factual information for the subjective factors needed for review in step two; (2) did not directly address the nature and seriousness of the crime or past offenses; and (3) recited the law for Step 2 without applying facts. IV:658-76. The court received no mitigating information as requested in the 08/16/10 Order.

At the certification hearing on 09/27/10, State and the defense presented no arguments regarding certification. IV:681-95. Instead, the court briefly quizzed Jaquez as to the waiver and made the two required findings with scant explanation. IV:691-94.

The juvenile court record indicates information on the subjective factors was available but not included in the certification packet. Jaquez's mother interrupted the certification hearing, telling the court that for almost two years the prison had not given Jaquez the medicine he needed for his depression and his mania. IV:688-90. Thus, mitigating information that

Jaquez suffered from some emotional and/or physical disabilities was not factored into the certification decision-making process.

D. Certification decision.

The certification hearing lasted approximately 11 minutes. IV: 681; 683;695. The court claimed "this case turns on the subjective factors which is the subject minor's age." IV:690-94. By announcing a decision based solely on Jaquez's age, the court admitted that the other two factors within step 2 were insufficient for certification (nature and seriousness of the offense and the seriousness and persistency of past admitted or adjudicated criminal offenses). The court's conclusion that certification was necessary for public safety is belied by the fact that Jaquez was in custody for several years.

Four hours later, the court filed a six page certification order. IV:696-701. In the order, the court stated it reached its decision by: "the court having heard argument in open court and being fully advised. . .". But the transcript shows there was no argument, the court was not fully advised, and that Jaquez waived the hearing. IV:681-95. The court did not find that Jaquez made a knowing and intelligent waiver of his right to a certification hearing.

E. Inadequate certification investigation and hearing.

When Jaquez waived the hearing, the hearing became nonadversarial. But this Court supports an adversarial certification hearing, stating:

"[F]airness requires that probable cause not be based entirely on unsworn hearsay evidence. Likewise, the determination cannot be based solely on the opinion of prosecutorial officials." *In re Three Minors*, 100 Nev. 414, 419 (1984) *disapproved on other grounds In re William S.*, at 422, n. 23. The Court also said: **"[a] minor has the right to an adversarial hearing on the substantive issues relating to the transfer decision**, this is not true of non-dispositive, non-dispositional issues. . .a juvenile does not have a *right* to an adversary probable cause hearing." [12] *Id* at 418 (emphasis added).

Here, the juvenile court's decision was based on the: (1) opinion of the prosecutor as expressed in the pleadings without any argument or mitigating evidence from Jaquez or his attorney, and (2) the waiver. Thus, the juvenile court's decision is suspect and not an independent inquiry because the fairness factor and adversarial nature of a certification hearing as addressed in *In re Three Minors* did not occur.

In *Kent v. United States*, 383 U.S. 541, 553 (1966), the Court held that a valid waiver of jurisdiction by the juvenile court "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic

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[12] In footnote 5, State incorrectly claims *In re Three Minors* stands for the principal that "Due Process does not require an adversarial juvenile certification hearing" and that certification hearings are "generally dispositive and not adversarial." This is an incorrect and incomplete quote. RAB:15.

requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.' *Id.* at 553.

> Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made.

Kent at 561. Here, the juvenile court did not do a meaningful review because it: (1) lacked information from a full and complete investigation; (2) relied on the waiver, and (3) used one fact: Jaquez's age.

The certification process is a critical stage in the proceedings against a juvenile. *See Powell v. Sheriff, Clark County*, 85 Nev. 684, 690 (1969). When a certification hearing is not a complete independent inquiry then an unconstitutional waiver is not superfluous as the State suggests.

F. Invalid waiver.

"A child may waive the right to a certification hearing if the waiver is made knowingly, voluntarily, and intelligently after the child is fully and effectively informed of that right." *Vang v. State*, 788 N.W. 2d 111, 115 (Minn. 2010). But a child's waiver only extends to the hearing by making the process nonadversarial and does not stop the certification process because the juvenile court, not the child, waives the juvenile court's jurisdiction. *Id.* at 115-118. A child's waiver of a certification hearing does not terminate the

juvenile court's original, exclusive jurisdiction. *Id.* at 117 n. 3 *citing Matter of Welfare of K.A.A.*, 10 N.W. 2d 836, 842 (Minn. 1987).

A review of the waiver shows that it was deficient because the court made no findings and did not address: (1) the type of sentence and amount of time Jaquez could receive in adult court; (2) the possibility of consecutive time; (3) the elements of the crime and burden of proof in adult court; (4) any defense Jaquez may have to the certification hearing, such as a violation of NRS 62D.310 or a violation of his right to a speedy trial; and (5) he waived his right to an attorney at the certification hearing and basically proceeded pro se without providing mitigation. The court did not ask the types of questions courts address in a *Faretta* canvass or those asked for a guilty plea waiver. The wavier was not knowingly and voluntarily made.

State does not address the waiver. As a matter of first impression, this Court must decide: (1) whether a child may waive a discretionary certification hearing; (2) what is required for the waiver to be knowing, voluntary, and intelligent; and (3) what type of findings the court must make.

G. Constitutional issues are not waived.

Jaquez contends the validity of his waiver and the process presented at the certification hearing involve constitutional issue under the Due Process

Clause which may be raised for the first time on appeal in the criminal case.[13] *Murray v. State*, 113 Nev. 11, 17 (1997) (double jeopardy addressed for the first time on appeal); *Phipps v. State*, 111 Nev. 1276, 1280 (1995)(due process raised for the first time on appeal); *See NRS 178.602*.

III. RIGHT TO A SPEEDY TRIAL AND STATUTORY RIGHT TO A TRIAL IN 60 DAYS.[14]

A. No waiver and a delay of 686 or 1235 days.

State claims Jaquez waived his right to a speedy trial when his attorney filed a motion requesting a continuance and included her affidavit attesting to his agreement to the continuance. I:14-16;173. However, there are no documents showing a waiver of the right to a speedy trial signed by Jaquez in the district court record as the court requested.[15]

State contends Jaquez impliedly waived his right to a speedy trial by agreeing to continuances and "continuously asking for continuances,"

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[13] State does not contend the waiver issue must be raised by appeal from certification order. See RAB:15.

[14] Within this section, State infers that all actions taken by Jaquez's attorney were his actions, claiming "Appellant waived" or "Appellant agreed" or "Appellant requested." Because State also talks about defense counsel separately, State confuses the actions of each and makes it look like Jaquez asked for or agreed to continuances when he voiced objections.

[15] In footnote 8, State accuses Jaquez of using the silence of the record to suggest that he never waived. If there is nothing in the record then nothing is there. Also, in this footnote, the State confuses argument in Issue IV on p.32 with Issue III. In Issue III, Jaquez did not address ineffective assistance of counsel, as the State claims, nor did he waive it.

specifically asking for a 9 month continuance on 01/10/12 and a continuance on 03/14/11. RAB:17;19; 20, n. 9. Not true. At the 01/10/12 hearing, when Jaquez's attorney asked for a 9 month continuance, he asked for a new attorney and objected to the continuance but was told he would not get another attorney. I:222-226. On 03/14/11 his attorney specifically objected to the State's request for a continuance. I:178: Compare RAB:19. The court made no effort to give Jaquez a speedy trial.

Unlike the defendant in *Leonard v. State,* 117 Nev. 53, 83 (2001), who never complained about a violation of his right to a speedy trial in district court, Jaquez argued he never waived. I:174. At the 10/25/11 hearing, Jaquez specifically informed the court that he never waived and his attorney and the court disagreed. I:208-11. State's assertion that Jaquez was simply incorrect does not cure the record because the waiver is not there. This disagreement illustrates the extent of the conflict between Jaquez and his attorney, as addressed in the next issue.

Also, unlike *Middelton v. State*, 114 Nev. 1089, 1110 (1998), where delay occurred due to pre-trial litigation, Jaquez's attorney only filed a motion for discovery, motion to continue, and an alibi notice.

B. Violation of the 60 day rule.

State argues defense counsel may waive a defendant's statutory right to a speedy trial under NRS 178.556 based on *Furbay v. State*, 116 Nev. 481, 484 (2000). RAB:16. *Furbay* is not dispositive because the *Furbay* defendant never invoked at his arraignment as did Jaquez.

State further argues that an attorney may waive the 60 day rule at any time, even if the defendant is not present.RAB:16. But in *Schulta v. State*, 91 Nev. 290, 292 (1975), the Court found no "factual support" that the defendant did not agree. *Id.* Here, Jaquez notified the court that he did not waive and there is no signed waiver in the file.

C. Violation of the right to a speedy trial.

State misconstrues the speedy trial test under the *Sixth Amendment* by claiming the first two prongs of the four part test are examined together, the test only begins at arraignment in district court, and a defendant cannot show prejudice if in custody on another case. RAB:21-22. The test for determining a violation centers on four separate factors, examined individually. *Doggett v. United States*, 505 U.S. 647(1992); See factors listed at OB: 24.

1. Was the delay before trial uncommonly long?

State says the delay was not uncommonly long by blaming Jaquez for the delay and subtracting any time from the total that it believes was caused by Jaquez. RAB:22-23. The State misapplies the *Doggett* test. The first part

of the test only addresses the length of time it took from indictment or arrest to trial (or in this case, from petition in juvenile court or arrest to trial). The second part of the test looks at who is to blame for the delay.

The State does not acknowledge that the delay in this case began in juvenile court when the State waited more than one year to bring Jaquez to court after the filing of the petition, resulting in a delay of 1235 days before he went to trial. *See Dillingham v. United States*, 423 U.S. 64 (1975) (right to a speedy trial attaches when a defendant is arrested or complaint filed). The delay is long even if counting from his district court arraignment, resulting in 686 days of delay, with the last continuance being for 9 months. A delay of 1235 days or 686 days is uncommonly long. *See State v. Erenyi*, 85 Nev. 285 (1969); *Wood v. Sheriff, Carson City,* 88 Nev. 547 (1972); *State v. Lujan*, 112 N.M. 346 (1991).

2. Who was more to blame for the delay?

State blames the court for 63 days, State for 29 days, and claims Jaquez and his attorney caused 599 days of delay by being more concerned about scheduling a trial date at the convenience of his attorney. RAB:19-22. But Jaquez manifested objection to the continuances by repeatedly asking for a new attorney and by telling the court on 01/03/12, "I have been trying to go to trial for about a year." I:219.

State arrives at Jaquez causing 599 days of delay by: (1) claiming that if his attorney agreed then Jaquez agreed, even though Jaquez voiced objections; (2) ignoring continuances due to a lack of discovery from the State or State missing witnesses; and (3) only attributing a portion of a continuance requested by State to the State. For instance, State claims that if the defense announced ready and State sought a brief two week continuance, then the State is only responsible for a two week delay if the defense or court is unable to proceed in two weeks. But there are no cases to support State's manner of calculations because State is responsible for all the time stemming from its request for a continuance.

As discussed in the Opening Brief, defense attorney requested the first continuance and State is to blame for the next three continuances from 03/15/11 to 10/25/11 to 01/10/12 to 10/04/12. See OB:20-23. Although both parties announced ready on 01/03/12, on 01/10/12, Defense Counsel indicated the State contacted her regarding issues that would prohibited them from proceeding; the court rescheduled the trial for 10/04/12. I:222-26. Jaquez objected to the continuance and wanted to proceed to trial sooner. Thus, State is to blame for the continuance, though the length of the continuance was because of defense counsel's leave.

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

State argues that Jaquez impliedly waived his right, does not admit that the record shows he never waived, and ignores his repeated requests to go to trial. Jaquez's actions show he did not impliedly waive.

4. Was defendant prejudiced?

State claims Jaquez suffered no prejudice because he was already serving time in prison on another case and because he caused the delay. Jaquez gained nothing from the delay and State lost one witness. State's conclusion that only a person out-of-custody can be prejudiced defeats the constitutional protection under the Sixth Amendment by allowing the State to delay; the *Lujan* case shows otherwise. As to loss of credit, State misdirects this court to NRS 176.055(2) and *Griffin v. State* 122 Nev. 737 (2006) which holds a defendant may not receive credit on subsequent crimes. Because this case occurred prior to C253779, NRS 176.055(1) allows credit.

IV. COURT ERRED BY NOT HOLIDNG AN EVIDENTIARY HEARING TO REVIEW CONFLICT.

A. Extent of the Conflict.

State minimizes the attorney-client conflict and communication problems by not addressing all hearings and facts Jaquez presented in his Opening Brief to show the conflict and by claiming Jaquez withdrew his complaints. RAB:28-31. State claims Jaquez only wanted new counsel when he thought he was not getting his way and the problems he complained of

involved communications, all of which were reconcilable. RAB:28. State's inference that communication problems developed because the prison does not allow telephone calls is incorrect because calls are allowed.[16]

State only addresses the two motions and accompanying hearings on the motions when accessing the extent of the conflict. Thus, State ignores other factors, which were: (1) problems between Jaquez and his attorney in juvenile court; (2) 06/02/11 hearing where Jaquez asked to fire his attorney; (3) a two month delay before the court addressed and decided the first motion Jaquez prepared; (4) 08/25/11 private discussions at bench between defense counsel and the court; (5) the prosecutor's objection and comments on 08/25/11; (6) 10/12/11 conflict between Jaquez and his attorney regarding his waiver; (7) 12/08/11 court discussed defense counsel's conversation at the bench; (8) court's unusually long delay in deciding motions; (9) 01/03/12 Defense Counsel's private bench conference regarding Jaquez's motion; (10) the reason Jaquez asked to represent himself was because his attorney asked for a 9 month continuance; (11) 01/03/12 court refused to hold a *Faretta* canvas unless he first spoke to the attorney; (12) 09/20/12

[16] See RAB: 29, n 13. When defense counsel asserted she could not call High Desert Prison the case was in juvenile court and juvenile court deputies are unfamiliar with procedures involving adult prisons. Attorneys working in the adult system know how to contacted clients in prison and accept their calls, as is evidence by Jaquez telling the court that his telephone calls to his attorney were an unsuccessfully attempt to talk to her. I:218-22.

counsel approached the bench and held a private conversation with the court; and (13) 09/20/12 Jaquez did not want to represent himself, asked for a new attorney, court refused. Therefore, by not addressing the totality of the circumstances, State presents a false analysis.

. State deceitful cites a small portion of the conversation between Jaquez and the court on 09/20/12 to make it look like Jaquez no longer had a complaint about his attorney and wanted to go to trial with her. Compare I:228-31 with RAB:29-30. When Jaquez asked for a new attorney on 09/20/12 the court said: "Do you want to go to trial with her or do you want to represent yourself?" I:231. The court refused to give him a new attorney. I:229-31. With limited options, Jaquez agreed to go to trial with defense counsel because he did not want to represent himself. I:228-31

The only time Jaquez agreed to trial despite communication problems was on 01/03/12 when his attorney announced ready and his prior attempts to obtain different counsel were denied. But on 01/10/12, the attorney indicated the trial could not proceed and Jaquez asked to represent himself. I:223-26. The court did not set a time for a *Faretta* canvas, instead directing Jaquez to first talk to his attorney.[17] On 09/20/12 when the court held the *Faretta*

[17] State mischaracterizes Jaquez request to leave the courtroom at the 01/10/12 hearing as being disruptive and a refusal to allow the court to

hearing, after his attorney returned from her leave of absence, Jaquez wanted a new attorney rather than represent himself, and the court refused to appoint a new attorney (as addressed above). I:229.

Therefore, Jaquez never withdrew a motion or objection as the State suggests but consistently asked for a new attorney and merely gave up when the court did not grant his motion, did not set an evidentiary hearing, and seemed to side with his attorney. I:192-93;201-07; 208-11; 219-220; 223-26.

State addresses the confidential bench conferences in a footnote, speculating defense counsel was getting the court up to speed and asks this Court to remand this case for an evidentiary hearing on the many sidebars. RAB:n.14.

Remand is unnecessary because the record shows defense counsel discussed her concerns about Jaquez at the bench conferences and the court noted some of her comments in the record.[18]

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conduct a *Faretta* canvas. Not true. He wanted to leave because he objected to the continuance. I:223-26.

[18] On 12/08/12, after a confidential bench conference, the court noted Jaquez's absence from the courtroom and announced preliminary findings on Jaquez' motion seeking to fire his attorney, stating ". . based on the representations that have been made at the bench. . ." there is a breakdown in communication. I:213. 01/03/12, after defense counsel conversed privately with the court at the bench, the court told Jaquez he understood that Jaquez stopped accepting his attorney's telephone calls. I:219. Obviously, his counsel relayed this information to the court at the bench. Thereafter, Jaquez disagreed and was left to defended himself. I:219.

The record shows a collapse of the attorney-client relationship. Jaquez's complaints were numerous and consistent. Jaquez's attorney disagreed with him in open court, asked for bench conferences, allowed the prosecutor to object to Jaquez's request for a new attorney, and told him he could not file a motion seeking a new attorney. See OB:28-32.

The attorney-client problems here are similar to those in *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998), and *Young v. State*, 120 Nev. 962 (2004) where the *Moore* and *Young* courts found irreconcilable differences when the defendant presented repeated claims of a lack of communication, lack of preparing the case, and failure to file motions or investigate the case. The *Moore* and *Young* Courts focused on the conflict between the defendant and his attorney during hearings (oral conflicts) as well as reviewing the defendant's written motions.

B. Adequacy of the inquiry.

State finds the courts' inquiry into Jaquez's complaints adequate by alleging: (1) the court attempted to remedy the communications issues, and (2) Jaquez stopped the court's inquiry or changed his mind and made clear statements that he wanted to proceed with counsel. RAB:31. These assertions address the extent of the conflict not the adequacy of the inquiry.

Rather than conducting inquiry or an evidentiary hearing, the court held off-the-record bench conferences with defense counsel, suggested that his attorney only needed to communicate better, claimed policies in the Clark County Public Defender's Officer prohibited him from receiving a new attorney, hindered his ability to file motions, did not conduct a *Faretta* canvass when asked, and acknowledged that Jaquez had a problem with his attorney. But the court never held an evidentiary hearing as required.[19]

C. Timeliness of motion.

The State concedes Jaquez's repeated requests for a new attorney were timely but says they were subsequently withdrawn. RAB:30. Not true. State simply mischaracterizes the facts.

V. INSUFFICIENT EVIDENCE TO CONVICT.

If the Court finds State did not prove the burglary beyond a reasonable doubt then the grand larceny count automatically falls, as the trial court acknowledged when deciding Jaquez's motion for an advisory verdict. III:598-606. Thus, Jaquez focuses on the insufficiency of the evidence presented for burglary.

State argues *Geiger v. State*, 112 Nev. 938 (1996), *Mathews v. State*, 94 Nev. 179 (1978), and *Reed v. State*, 95 Nev. 190, 194 (1970) are not on

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[19] Jaquez addresses issues under *Young* and *Moore* in this section (contrary to the State's contention otherwise in footnote 12 RAB: 27).

point. RAB:34-35. State does not discuss *People v. Ray*, 626 P.2d 167 (1981). See NRAP 31(d).

Geiger is not adverse. RAB:34. State misconstrues *Geiger*. *Geiger* held further corroborating evidence was not required in a sufficiency analysis if: (1) the defendant's fingerprints are identified on a screen; (2) the screen had been removed from a window at the point-of-entry, and (3) circumstances rule out the fingerprints being left there at another time. Here, no fingerprints were found on screens removed from any windows and no screens were removed. When a defendant removes and moves a screen, this act shows intent to enter and possible entry. However, a palm print on the outside of the window does not support the same inference. Moreover, here, there were three possible points-of-entry: the bathroom window, the front door, and the back door. Thus, under *Geiger*, State needed to prove more than fingerprints on an outside window to show that Jaquez entered with the intent to steal and committed larceny.

The *Reed* Court did not reject the contention that something more than fingerprint evidence is needed to establish identity but recognized this as the general rule. *Reed* at 277. *Reed* merely declined to hold that as a matter of law fingerprint evidence needed corroboration. In *Reed*, as in *Mathews*, there was additional evidence establishing the defendant's guilt. The Court did not

conclude that fingerprint evidence was strong, as State argues, but recognized other courts described it as strong evidence. *Reed* at 94.

State incorrectly claims other courts uphold burglary convictions based solely on fingerprint evidence. In each case State cites, there were two or more facts the court relied on: (1) a window, screen, or door was removed or broken at the point-of-entry and (2) the defendant's fingerprints were found on the broken, removed screen, window, or door. *See In People v. Riddick*, 516 N.Y.S. 2d 71 (1987) (fingerprint found on broken exterior doors); *State v. Gray*, 504 S.W.2d 825 (Mo. App. 1974)(prints found on broken windows and doors); *People v. Figueroa*, 2 Cal App.4th 1584 (1992) (defendant's prints found on broken window, defendant familiar with home, no evidence the defendant could have left his print on the broken window earlier). Here, there were no broken doors or screens and the palm print was found on the outside of the window.

In claiming a rational jury could find Jaquez entered the home and took property, State relies on false facts: the muddy, messy bathroom that became muddy and messy when the person who entered first broke the water faucet and then got mud on themselves and then brought the mud inside when they entered through the window. RAB:36-7. As explained on page 2-3 of this brief, there was no testimony and no pictures that there was mud or water all

over the bathroom floor or the wall. Crime scene photographs show fingerprint dust on the tiles below the bathroom window but no mud inside or outside. IV: 722-.47; See previous section, p. 2-3.

State also fails to acknowledge that it did not present conclusive evidence of the point-of-entry because: (1) Mendoza testified to three possible points-of-entry (III:454;459;464); (2) Shevlin initially said the bathroom window was the point-of-entry but later admitted it may not have been (III:487); (3) the reason Dahl thought the bathroom window was the point-of-entry was because of the unusual placement of fingerprints below the window; but Aoyama identified Palmer's prints (not Jaquez) as the unusually placed fingerprints below the window (III:515;529;548-70); and (4) Dahl did not photograph or document a footmark on the wall or tub as she and Shevlin believed they saw because the marking was not good enough for a comparison (III:480;497;531). Moreover, the marking likely came from Dahl's ride-a-long Palmer because Dahl said he contaminated the wall and balanced himself in the bathroom shower stall. III:515.

State's reliance on evidence found outside the home on concrete tiles (broken water faucet, water outside, and a bucket near the bathroom window) does not allow a rational jury to conclude Jaquez entered. RAB: 35-46.

VI. COURT ERRED IN DENYING ADVISORY VERDICT.

State does not discuss cases Jaquez referenced, summarily placing them in a footnote. RAB:40, n.17. State cites *Milton v. State*, 111 Nev. 1487, 1493-94 (1995) where this Court upheld a trial court's refusal to give an advisory verdict, finding it a discretionary decision and finding evidence linking the defendant to the crime.[20]

Milton supports Jaquez's reason for an advisory verdict because one palm print on an outside window is insufficient evidence linking Jaquez to the crime. To show entry or specific intent to steal, fingerprint evidence alone is insufficient for a guilty verdict. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Geiger; Mathews;* and *Ray*. OB:38-39.

State claims the court did not abuse its discretion because the court viewed the evidence in the light most favorable to the prosecution and concluded a reasonable and rational jury could conclude Jaquez committed the crimes. III:605; RAB:39-30. The test for an advisory verdict under NRS 175.381(1) is: "If. . .the court deems the evidence insufficient to warrant a conviction. . ." *See Milton* at 1492-94. Thus, the court used the wrong test.

State does not address *Ray*. In *Ray*, the Colorado Supreme Court upheld a trial court's decision to grant a defendant's motion for judgment of acquittal when a jury did not return a verdict and the only evidence linking

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[20] State claims the decision is simply discretionary without addressing the second factor. RAB:39.

the defendant to the theft and burglary was a fingerprint found on the outside surface of what was thought to be the point-of-entry, a milk chute door to the home. Based on *Ray*, here, the court abused its discretion by not giving the advisory verdict because State needed more than a palm print on the outside of a window.

VII. VIOLATION OF RIGHT OF CONFRONTATION.

A. State changes issue.

State entitled this section: "[A]oyama's Independent Expert Opinion Did Not Violate the Confrontation Clause." RAB:40. Jaquez did not object to her independent opinion, he objected to her testifying to the opinions of others. OB:39.

B. Aoyama testified she came to the same opinion as that of four different scientists.

Aoyama explained the single most important piece of evidence in the case: the results from the examination of the latent prints. During her testimony she said she was confident in her conclusion that the palm print belonged to Jaquez Barber because: (1) four other technicians came to the same opinion (III:547-48); (2) Vicki Farham originally developed Jaquez as a match (III:544-45) and (3) Marnie Carter reviewed her work (III:538).

State claims no violation occurred because Aoyama merely explained the basis of her own opinion, the validation process, and chain-of-

custody. [21] RAB:40-45. State concludes: "Although [Aoyama] referred to the work of her colleagues, [her] testimony was confined to explaining her own finger print analysis." RAB;42-44.

Aoyama's testimony shows the State is incorrect.

> Q. [I]s it possible that you were mistaken and it was not a match to that – that palm print was not a match of Jaquez Barber?
> A. No.
> Q. Why?
> A. This particular print has been looked at by four different scientists, and we all came up with the same conclusion. III:547-48.
> . . .
> Q. [H]ow did you develop the name Jaquez Barber as the match on this print?
> A. It was originally another forensic scientist who was working in our – who was doing our AFIS at the time and that was Vicki Farnham. She originally got a hit in our AFIS system, did the side-by-side comparison, on and reported it out. III:544.
> . . .
> Q. [Y]ou said that someone else previously before you had the chance to enter this into the system. Did you have a chance to check on that too?
> A. Someone else had previously identified it through the AFIS system. They had a potential match come up with- -
> III:545
> . . .
> Q. Do you know who [sealed the envelope]?
> A. The person who technically reviewed my work last, which was Marnie Carter. III:538.

[21] Aoyama never mentioned peer review as State contends. RAB:44. Early in her testimony, she said Marnie Carter reviewed her work. III:538. Later, she mentioned four other scientists. III:547-48.

In each instance, Aoyama directly or indirectly introduced evidence that other experts came to the same opinion as she and bolstered her opinion. She did not explain chain-of-custody, the validation process, or her own analysis.

Yet State asserts Aoyama's reference to Carter established the chain-of-custody. RAB: 50. Aoyama discussed Carter when the prosecutor asked her if she sealed the envelope containing the latent print cards. Thereafter, when the prosecutor asked her if she reviewed the latent print cards, Aoyama said her name was on the chain-of-custody. III:538-39. Thus, Aoyama volunteered information that Carter reviewed her work last without being asked, rather than to establish chain-of-custody.

State indirectly admits Aoyama testified to Farnham's opinion but claims the limited reference did not violate the Confrontation Clause because Farnham's report was not entered into evidence. RAB:25-26.

C. Testimonial.

State argues opinions of other experts are not testimonial.

In Nevada, expert testimony regarding the content of a non-testifying expert's report is the equivalent of a testimonial statement. *Vega v. State, 236 P.3d, 632,* 638 (Nev. 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. Thus, Aoyama's testimony regarding the conclusions and opinions of nontestifying experts is testimonial under *Vega*.

But State claims *Williams v. Illinois*, _ U.S. _, 132 S. Ct. 2221 (2012) controls and confirms no violations of the Confrontation Clause occurred because an expert may form an opinion based on inadmissible evidence. RAB:43-46.

Jaquez objects to Aoyama's testimony regarding opinions of nontestifying experts, not her independent opinion. The four *Williams* dissents and Justice Thomas would conclude that Aoyama's testimony to the opinions of nontestifying experts amounts to out-of-court statements offered for the truth of the matter asserted.[22] Moreover, State seems to agree.[23]

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[22] In *Williams*, a fractured United States Supreme Court held the Confrontation Clause was not violated when an expert testified to information within a Cellmark DNA report prepared by a non-testifying expert because the DNA report (that was not introduced into evidence) was not testimonial. In *Williams*, five Justices rejected the plurality's analysis, no line of reasoning garnered a five vote majority, and five Justices expressly rejected the "not for the truth" of the matter rational used by the North Carolina Court to validate the use of the substitute analyst. Smith, Jessica, *A Guide to Crawford and the Confrontation Clause*, UNC School of Government, (Sept. 2012); *Williams* at 2268, Kagan dissenting, joined by Scalia, Ginsburg, and Sotomayer; Opinion of Thomas, J. at 2256-59.

[23] When discussing the *Williams* plurality, the State says: "[b]ecause the testifying expert confined her testimony to her own expert analysis and opinions, as the Confrontation Clause requires, the [*Williams*] Court did not find a Sixth Amendment violation." RAB:44 *citing Williams* at 2240.

As to Farnham, State claims there was no confrontation violation because her report was the same type of report as the Cellmark DNA report used by the expert in *Williams* and Aoyama used the report in the same manner. RAB:45. Not correct.

The expert in *Williams* gave her own opinion and conclusion after conducting independent testing partially based on the Cellmark DNA report. In contrast, Aoyama conducted the same test, used the same latent prints, used the same prints, offered the same analysis, and came to the same conclusion as the nontestifying latent print experts. Additionally, while the Cellmark DNA report was not prepared for trial, forensic reports comparing latent prints left at a crime scene with known prints of a suspect are testimonial because they are prepared for trial and offered to prove an essential element of the crime. *People v. Rawlins*, 10 N.Y.3d 136, 157 (2008).

Although State did not introduce forensic reports from the latent print examiners, by introducing their opinions, the State introduced the substance of their reports. Thus, the following cases are not entirely distinguishable: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 121 S. Ct. 2705 (2011).

State claims that Jaquez's opportunity to cross-examine Aoyama cured any loss in not being able to cross-examine the nontestifying experts as recognized in *State v. Manion*, 173 Wash. App. 610 (2013) and *State v. Lui*, 153 Wash. App. 304 (2009). RAB:46-8. But the issue here is different because the experts in *Manion* and *Lui* testified to their own independent analysis and opinions.

D. Standard of review.

State claims Jaquez only objected to Aoyama's testimony about Farnham and the other two alleged Confrontation Clause violations do not rise to the level of plain error. RAB:49.

When Aoyama testified that: "Someone else had previously identified [Jaquez's palm print] through the AFIS system. . .," Defense objected to hearsay but the court overruled the objection, saying it was for the limited purpose of showing how she obtained the print. III:545. Defense did not make any other specific objections to her testimony when she discussed the opinions of other experts. Harmless error analysis applies unless the Court does not find Jaquez's objection covers all statements regarding the opinions of other experts, then the Court may use the plain error standard of NRS 178.602 because an issue of constitutional magnitude may be raised for the first time on appeal. *Murray v. State*, 113 Nev. 11, 17 (1997).

E. Prejudicial error.

State finds no plain error in two of Aoyama's statements. RAB:49-52. But as previously discussed in this section, there is plain, harmful, prejudicial error. *See previous argument about Carter, other scientists, and Farnham.*

State compares Aoyama's testimony that "[t]his particular print has been looked at by four scientists and we all came up with the same conclusion" to the testimony in *Vega* and argues the testimony is duplicative and inconsequential. RAB:51-52.

The State is incorrect. The *Vega* Court found no prejudice because the testimony was duplicative of the victim's trial testimony and consistent with the doctor's opinion. Here, Aoyama was the only witness testifying to the latent print comparisons. The latent prints were the single most important piece of evidence, the crime scene were contaminated, and the palm print outside the home was the only link the State claimed to Jaquez. Thus, her testimony regarding the opinions of Carter, Farnham, and four other unidentified examiners was introduced for the truth of the matter asserted, it was not duplicative and not inconsequential but was prejudicial.

VIII. REVERSAL OF THE RESTITUTION ORDER.

State argues Jaquez failed to show plain error because the discrepancy in the amount of restitution is minor and any error in requiring him to pay an

incorrect amount is not prejudicial. RAB:52-53. The State cites *Mendoza-Lobos v. State*, 125 Nev. 634, 644 (2009) and *Patterson v. State*, 111 Nev. 1525 (1995), cases having nothing to do with restitution and only referencing plain error.

State does not address the cases Jaquez cited: *Erickson v. State*, 107 Nev. 864, 866 (1991) and *Greenwood v. State*, 112 Nev. 408 (1996). *Erickson,* the controlling case on the court's authority to order restitution at sentencing, states: "[A] defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution." *Id* at 866.

Here, the record plainly shows that the jury only convicted Jaquez of what the State charged: taking property belonging to Mendoza and/or Martin, U.S. currency. They testified they lost $4000 in U.S. currency. Thus, the error in the court awarding $7000 in restitution to Mendoza and/or Martin is plain because there is no testimony that they lost $7000. See *Saletta v. State*, 254 P.3d 111, 114 (Nev. 2011)(an error is plain if the complained–of error is unmistakable from a casual inspection of the record).

State ignores the facts pled within the charging document and the conviction and comes up with a total amount near $7000 by adding the money from Mendoza's brother's plus the Mexican pesos and speculates to

possible damage to a water faucet or the home. RAB:53. State admits the PSI is silent as to an amount of restitution. State asks for a remand for an evidentiary hearing. RAB:52-53.

The remedy here, as in *Erickson,* is reversal of the restitution order with a reduction to $4000, not a remand, because under the pleadings and verdict, Jaquez's conviction does not allow the additional amounts. Also, because Jaquez was convicted of burglary rather than home invasion or destruction to property, recovery for any alleged damage to the house is not allowed and is pure speculation. I:97;III:461.

Jaquez was prejudiced and his substantial right of due process violated when the court based the amount of restitution on unreliable and inaccurate information. *See Martinez v. State*, 115 Nev. 9, 13 (1999). See U.S. Const. Amend. XIV.

IX. CUMULATIVE ERROR.

State argues no cumulative error occurred because: (1) evidence of guilt was overwhelming because Jaquez's palm print was found on an outside window of the home; (2) there were no errors or only minor errors; and (3) the gravity of the crime is high because it was a residential burglary when no

one was home.[24] RAB:54. Because State concedes the gravity of the crime, this Court only needs to review the first two parts of the test. Under part one, as addressed within Issue V, the evidence was insufficient to convict. Under part two, the errors were numerous and serious, as addressed in the Reply and the Opening Brief.

X.

State ends the Answering Brief by adding a new issue entitled: Any Error Was Harmless. RAB: 55. Jaquez asks this Court to disregard Issue X in the Answering Brief because State's argument is not cogently presented, not supported with citations to the record as required by NRAP 28(a)(9)(A), and does not identify any specific harmful or prejudicial errors. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38 (2006). The five sentence summary alleged to be a discussion of harmless error under NRS 178.598 with a brief reference to constitutional error, contains no reference to issues, evidence, arguments, or facts raised in the Opening Brief or addressed in the Answering Brief. Jaquez is unable to respond.

CONCLUSION

In all instances where Jaquez noted State ignored arguments presented in Opening Brief, Jaquez asks this Court to find a concession of error. *See*

[24] No evidence exists showing Mendoza and Martin are harmed for life, possibly suffering psychological damage, as the State claims.

Polk v. State, 233 P.3d 357, 359 (Nev. 2010). Jaquez asks this Court to reverse and dismiss his convictions.

Respectfully submitted,

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By: 
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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 does not comply 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 10,887 words and 1,050 lines of text. The appropriate motion for leave has been filed with the Reply Brief.

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 25th day of February, 2014.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 
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Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25th day of February, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

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BY */s/ Carrie M. Connolly*
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