IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC SCHACHTER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	Case No. 67673

FAST TRACK RESPONSE REPLY

The remaining issues on appeal[1] are (1) whether Mr. Schachter was denied the due process right of an adequate defense where the Justice and District Courts delayed in granting self-representation and reasonable investigative services, and (2) whether the District Court erred in finding that the State's failure to collect the allegedly stolen backpack was mere negligence.

The State argues that, despite the Justice and District Court delays in granting Mr. Schachter his right of self-representation and the failures to timely provide access to investigative services, Mr. Schachter cannot show prejudice. It further argues that the record does not demonstrate that the courts prejudicially delayed Mr. Schachter's ability to represent himself and prepare a defense.

[1] The State conceded original issue number one: whether the district court erred by imposing a second, separate sentence for the finding of habitual criminality. *Fast Track Response* at 3.

Finally, the State argues that the NRS 202.295 does not impart a duty to the police to use reasonable diligence in collecting stolen property for use at later proceedings. The State further asserts that Mr. Schachter did not demonstrate that the backpack was material, despite the District Court's contrary finding.

Argument in Reply

I. A harmless error analysis is inapplicable to a deprivation of the right of self-representation because the deprivation is structural error.

The question of whether the court system's delay resulted in prejudice – or, phrased another way, was harmless – is inapplicable to the issue. "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177, n.8 (1984); *see also United States v. Gonzales-Lopez*, 548 U.S. 140, 148-49 (2006) (finding that the denial of the right of self-representation is a structural defect which "def[ies] analysis by harmless-error standards because they affect the framework within which the trial proceeds and are not simply an error in the trial process itself"). Mr. Schachter need not demonstrate prejudice to prevail on a claim that the state hindered his ability to prepare his own defense by delaying his ability to direct that defense and seek evidence helpful to his cause.

Moreover, the State's claim that the Justice and District Courts expeditiously granted his request to represent himself and provide defense services is belied by the record. While the chronology of the proceedings is fully explained in Mr. Schachter's Fast Track Statement, two circumstances bear repetition in reply to the State's argument: First, the video Mr. Schachter sought was fifteen days from being destroyed pursuant to Wal-Mart policy when he was arraigned at his *second* appearance in district court, still without the court-sanctioned ability to represent himself. Mr. Schachter's first arraignment was continued, or delayed, for seven days so that the assigned department could conduct its own *Faretta* canvass. AA 47-53.

And while review of the record does demonstrate that standby counsel ultimately allowed Mr. Schachter the use of its investigators, the record does not demonstrate that standby counsel was expeditious in so doing. At the July 31, 2014, hearing – seven days before the video Mr. Schachter sought was destroyed pursuant to Wal-Mart policy – standby counsel accepted Mr. Schachter's investigation request but qualified that its determination as to whether it was appropriate to use its resources for self-represented defendants was unanswered. AA 88-89. Almost one month later, and approximately two weeks after the video Mr. Schachter sought was destroyed pursuant to Wal-Mart policy, subpoenas were issued. AA 187-201.

"[T]he state may not unreasonably hinder [a] defendant's efforts to prepare his own defense." *Milton v. Morris*, 767 F.2d 1443, 1446-47 (9th Cir. 1985). Despite Mr. Schachter's timely requests to represent himself and procure investigative services, the state's delays in meeting those requests operated to deny Mr. Schachter the ability to prepare his defense. The conviction must be reversed.

II. The backpack itself is material evidence as its condition could have refuted testimony as to whether it belonged to Wal-Mart; furthermore, the plain language of NRS 205.295 imposes a duty to use reasonable efforts to collect alleged stolen property for use at trial.

The State also argues that Mr. Schachter failed to demonstrate that the backpack itself was material. This too is belied by the record. First, the district court found that the back pack was material:

> Schacter argues the backpack itself would prove the backpack was customized and as a result it could not have been stolen on the day in question. Unlike the blood evidence in *Daniels*, the nondisclosure of this evidence undermines the confidence in the outcome of the trial because there is a reasonable probability that these items may change the result of the trial. The Court finds that Schachter has met his burden of proving these items of evidence are material."

AA 366.

Common sense demonstrates that the district court's finding is correct – had the backpack been modified in a manner consistent with Mr. Schachter's descriptions, it would have directly contradicted testimony that the backpack was new and appeared as if "it hadn't had any use." AA 134, 154, 592. Proof that the backpack was modified by or belonged to Mr. Schachter would have factually

eliminated any claim that he attempted to take the backpack from Wal-Mart by force. *See* NRS 200.380 (robbery is the unlawful taking of personal property from the person of another . . . by means of force or violence. . . .); NRS 193.330 (defining an attempt). The evidence was material.

The State further claims that Mr. Schachter's "assertion that the backpack would have been favorable is simply a 'hoped-for conclusion'" that he has not factually demonstrated. Because the backpack is a tangible item, Mr. Schachter's assertion that it was modified can only be accessed by actually viewing the item – an impossibility given that the backpack was not collected by state agents. By arguing that Mr. Schachter cannot demonstrate the backpack's materiality, the State seeks to benefit from a Catch-22 situation of its own making.

Without citation to authority, the State further argues that NRS 205.295 only requires police to collect allegedly stolen property for the benefit of the property owner. "When interpreting a statute, legislative intent is the controlling factor." *State v. Lucero*, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011). "The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *Id.* The plain language of NRS 205.295 imposes a duty on the arresting officer to use reasonable steps to secure allegedly stolen property. The

State has not cited any authority evidencing legislative intent that allegedly stolen property only be collected for the benefit of the property owner.

NRS 205.295 provides

> The officer arresting any person charged as a principle . . . in any robbery .or larceny *shall use reasonable diligence to secure the property alleged to have been stolen*, and after seizure shall be answerable therefor while it remains in the officer's hands, and shall annex a schedule thereof to the return of the warrant. Whenever the district attorney shall require such property for use as evidence upon the examination or trial, such officer, upon the demand of the district attorney, shall deliver it to the district attorney and take receipt therefor, after which such district attorney shall be answerable for the same.

(emphasis added). The statute neither provides that allegedly stolen property is collected solely for the benefit of the property owner nor that police have a duty to secure only that property which is actually recovered. Using mandatory language, the statute imposes a duty upon the arresting officer to use "reasonable diligence to secure property alleged to have been stolen" in robbery or larceny arrests. *Id.* Contrary to the State's position, the statutory language says nothing about retaining only that property which police, rather than another, actually recovers. Additionally, the statute contemplates that allegedly stolen property may be held for reasons other than the benefit of the owner, for example, use at a later court proceeding or trial, where its ownership or condition is at issue.[2] *Id.*

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[2] Consider the Practice Commentary of New York's disposition of stolen property statute, NY PENAL § 450.10:

Here, Officer West did not use reasonable diligence to secure the allegedly stolen property. Despite handling the property during his investigation, the officer made no effort to collect the backpack and left it in Wal-Mart's custody. AA 596-97. The statute imposes a duty for arresting officers to take reasonable steps to secure property, in part, for use at a later trial. Such diligence was not exercised in this case. Because the officer acted contrary to a statutory duty, he was grossly negligent in failing to preserve evidence. The district court erred in finding that the officer was merely negligent and the conviction should be reversed accordingly.

> The current "disposal of stolen property" statute is the product of a major revision of the statute in 1984. The difficulty in evolving a just procedure for the return of stolen property to its rightful owner stems from the need to balance the diverse and competing interests of the owner of the property, the prosecution, and the defense. The owner generally seeks the speedy, if not instantaneous, return of the property. The prosecutor may need to inspect the property, to have some test performed with respect to it, or to show the property to the jury at trial. The defense may similarly desire to inspect and test the property and have it available for trial.

VERIFICATION

1. I hereby certify that this fast track reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This fast track response reply is prepared in a proportionally spaced typeface using Microsoft Word 2003 version in 14 point Times New Roman.

2. I further certify that this fast track response reply complies with the page or type-volume limitations of NRAP 3C(h)(2) as it contains 1,608 words.

3. Finally, I recognize that, pursuant to NRAP 3C, I am responsible for filing a timely fast track response reply and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response reply, or failing to raise material issues or arguments in the fast track response reply, or failing to cooperate fully with appellate counsel during the course of an appeal. I, therefore, certify that the information provided in this fast track response reply is true and complete to the best of my knowledge, information and belief.

DATED this 10th day of August, 2015.

JENNIFER LUNT
ALTERNATE PUBLIC DEFENDER

By:/s/ JARROD T. HICKMAN
JARROD T. HICKMAN
Deputy Alternate Public Defender
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Alternate Public Defender's Office and that on this date I served a copy of the **FAST TRACK RESPONSE REPLY** to the following:

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DATED this 10th day of August, 2015.

/s/Randi Jensen
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