IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DEMON MORGAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 70424

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST. ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
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ROUTING STATEMENT

John Morgan's appeal is not presumptively assigned to the Court of Appeals because his robbery conviction is a category B felony (NRS 200.380), arises from a jury verdict in a criminal trial, and challenges more than sentence imposed or sufficiency of evidence.[1] NRAP 17(b)(2).

Assignment in the Nevada Supreme Court is warranted under NRAP 17(a)(10) and NRAP 17(a)(11) because this case involves several issues of statewide importance and issues of constitutional first impression. John's *Batson* challenge appears to be of first impression because it addresses the removal of a prospective juror based on juror's sexual orientation. John further contests trial court's use of incorrect jury selection procedures that

[1] Jury also found John guilty of a misdemeanor battery rather than the original charge of felony battery with intent to comment a crime. I:223.

infringed on his right to use peremptory challenges in a meaningful manner, court's improper handling of his venire challenge, and court's statements to venire that diminished his constitutional rights. Court must also decide if an almost 3 month delay by State not transporting John to Lake's Crossing when court found him incompetent warrants dismissal of his convictions. These and other issues support reversal of John's convictions.

JURISDICTIONAL STATEMENT

NRS 177.015 gives Court jurisdiction to review this appeal from a jury verdict. District court sentenced John on 04/14/16 and filed final judgment on 04/19/16. IV:960;Minutes-II:257; I:224-25. John filed his notice of appeal on 05/17/16, within 30 day time limit established by NRAP 4(b). I:226-29.

ISSUES PRESENTED FOR REVIEW

I. COURT ERRED IN DENYING *BATSON* CHALLENGE WHEN STATE USED PEREMPTORY CHALLENGE IN DISCRIMINATORY MANNER BASED ON SEXUAL ORIENTATION.

II. FURTHER JURY SELECTION ERRORS MANDATE REVERSAL.

III. RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS DENIED WHEN COURT DIRECTED DEFENSE COUNSEL TO APOLOGIZE TO JURY DURING CLOSING ARGUMENT.

IV. VAGUE PLEADINGS ALLOWED STATE TO CHANGE ITS THEORY OF THE CASE IN REBUTTAL CLOSING.

V. PROSECUTORIAL MISCONDUCT IN CLOSING.

VI. COURT ERRED IN DENYING JOHN'S MOTIONS FOR A MISTRIAL.

VII. EVIDENCE INSUFFICIENT TO CONVICT.

VIII. JOHN'S SUBSTATIVE AND PROCEDURAL RIGHTS TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION WERE VIOLATED WHEN COURT FOUND HIM COMPETENT DURING AN INADEQUATE NRS 178.415 HEARING.

IX. JOHN'S CONSTITUTIONAL RIGHTS WERE VIOLATED DUE TO LENGTHLY DELAY IN TRANSPORTING HIM TO LAKES' CROSSING IN VIOLATION OF COURT'S ORDER AND DUE PROCESS.

X. CUMULATIVE ERROR.

STATEMENT OF THE CASE

State charged John by way of Criminal Complaint and Information with: *Count 1*, battery with intent to commit a crime (NRS 200.400) and Count 2, robbery (NRS 200.380), both occurring on 10/30/14 with the same alleged victim, Maria Verduzco, a manager at an AMPM convenience store.[2]

[2] State filed criminal complaint on 11/03/14 (I:001-2) and Information on 11/25/14 (I:036-38). State amended Information during second day of

After holding a preliminary hearing on 11/18/14, Justice Court bound case to District Court for arraignment on 02/12/15. II:297-305. *Minutes*-229-34. But District Court delayed John's arraignment for more than two months due to competency concerns.[3] II:258-305.

On 05/15/15, after a second round of competency evaluations proved John was incompetent, Competency Court ordered him to be taken care of at Lake's Crossing. II:311-13;*Min.*-I:237. When John remained in Clark County Detention Center with no firm transfer in sight, on 07/07/15, he filed a motion to dismiss. I:061-112. Court denied motion. II:313-25;*Min*-I:240. John was finally transported on 09/03/15. *Min*-I:241.

After receiving treatment, John returned to Las Vegas from Lake's Crossing on 12/18/15. II:349-50;*Min*-I:243.

John filed several other pre-trial motions: (1) Motion for discovery – court granted (I:041-55;146-49; II:360-372:M-I:246-47); (2) Motion for dismissal alternatively bill of particulars – court denied (I:177-79;II:374-80);

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trial by reversing counts, making Count 1 robbery and Count 2 battery with intent to commit a crime (I:184-85).

[3] Defense counsel voiced competency concerns and requested a referral when John was not present at his arraignment due to spitting. II:258-60;*Min.*-I:229. At the 12/01/14 hearing, court ordered a third evaluation. II:261-62;*Min.*-I:230. On 01/16/15, court set a competency challenge hearing. II:263-64;*Min.*-I:231. On 02/06/15, after hearing testimony from evaluating doctor, Dr. Slagel, who found John not competent, court reviewed reports from two other doctors who found John competent and decreed John competent. II:265-32;*Min*-I:232-3.

(3) Motion to compel Counts 1 and 2 as alternative counts– court denied (I:159-65; 180-83;II:374-80); and (4) Motion in Limini to preclude State from introducing overly prejudicial, non-relevant, information – granted with stipulation (I:166-172;173-76;II:374-80).

The three day trial began on 02/23/16.[4] Jury returned a guilty verdict on the robbery charge and found him guilty of the lessor crime, misdemeanor battery, on other count. I:223.

On 04/14/16, court sentenced John to 26 to 120 months for robbery and 6 for misdemeanor battery, running both concurrent. I:225.

STATEMENT OF THE FACTS

On 10/30/14, Maria Verduzco, manager of AMPM at Mountain Vista and Flamingo in Las Vegas, completed paperwork in her office while her employee Ruby Cruz managed the cash register. III:662-68. Watching the security monitors of the store while in the office, Maria observed a man, later identified as John, take a bag of Frito Lay nuts from a rack and place in his pocket. III:665-68.

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[4] 02/22/16 - DAY 1: *Trans.* II:384-500;III:501-653; *Min*-II:251-52.
02/23/16 - DAY 2: *Trans.* III:654-750;IV:751-96;*Min*-II:253-54.
02/24/16 - DAY 3: *Trans.* IV:796-859; *Min*-II:255-56.

Maria left the office and walked to the cash register where John was making a purchase with Cruz. III:668;685;703. During this time, Maria did not see what was happening at the cash register. III:703-707. Maria, did not know if John paid for any items, did not know what John sought to purchase, and did not know what Ruby Cruz rang up. III:703-707.

Once at the cash register, Maria told John to take the stuff out of his pocket. III:668;685.

According to Maria, John said, "Get the f--- out of my face," and punched her in her chest and she fell to the floor. III:668. When Maria got up, she grabbed a peanut stick, and hit John's backpack, ripping it open. III:668-69. Maria said soup fell out of his backpack. III:670;684. But, she did not see John steal any soup. III:685.

John immediately left the store without completing his purchase at the register and Maria called 911. III:703.

Around the time Maria confronted John, customer Mario Gonzales entered the AMPM. III:738-45. Mario noticed a struggle between a girl and a man. He left after the incident but then saw John three and a half blocks away. III:744. He called the police, advising them of John's location and waited for Officer Law to arrive. III:744;IV:751-52.

Officer Law responded to the 911 call at 7:45 a.m. III:714-16. Mario flagged Law, directing him to John's location. III:720. According to Law, John began running. III:721. When John tripped, Law and Mario fell on top of him. III:722-23. Law claimed a bag of nuts fell out of John's pocket. II:722-23. The alleged bag of peanuts was not documented in the police reports and not impounded as evidence for trial. III:727-28;IV:756-58.

Officer Ibarra interviewed Maria at the AMPM. III:745-58. Maria gave him a piece of paper that she claimed fell out of John's ripped backpack. III:750;IV:751. Ibarra noticed the name John Morgan on the paper and impounded it as evidence. IV:751;753.

D.A. Investigator Edward Dougherty testified that he subpoenaed Ruby Cruz for trial and explained to her the importance of attending court. IV:777-85. She said she would attend. He tried to contact her at her apartment the previous day but no one answered the door.

SUMMARY OF THE ARGUMENT

John's convictions should be reversed because State used a peremptory challenge in violation of *Batson* by removing a prospective juror based on juror's sexual orientation. John also challenged the jury venire because it lacked sufficient African-American jurors. Numerous other errors tainted the jury panel and infringed on John's right to effective assistance of

counsel: court limited the scope of John's voir dire in some instances, directed him to apologize to the jury in closing, and used an incorrect jury selection procedure that infringed on his right to use peremptory challenges in a meaningful manner. Court must also decide if competency issues involving a 3 month delay by State not transporting John to Lake's Crossing and incorrect competency procedures warrant dismissal. These and other issues support reversal of John's convictions.

ARGUMENT

I. COURT ERRED IN DENYING *BATSON* CHALLENGE WHEN STATE USED PEREMPTORY CHALLENGE IN DISCRIMINATORY MANNER BASED ON SEXUAL ORIENTATION.

A. Law.

"The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice." *Powers v. Ohio*, 111 S. Ct. 1364, 1370–71 (1991). Therefore, a criminal defendant may challenge a prosecutor's use of a peremptory challenge to excuse a juror from his jury by making a *Batson v. Kentucky*, 476 U.S. 79 (1986) challenge alleging an improper motive for juror's removal. *Id.*

A *Batson* challenge arises from the Equal Protection Clause of the United States and Nevada Constitution which prohibit the discriminatory use

of peremptory challenges based on race, ethnicity, or gender. U.S. Const. Amend. VI, Amend. XIV; Nev. Const. Art. 1 Sec. 3; Art. 1 Sec. 8; *State v. McClear*, 11 Nev. 39 (1876); *Batson* (race); *J.E.B. v. Alabama*, 511 U.S. 127 (2014)(gender); *Rivera v. Illinois*, 556 U.S. 148, 153 (2009)(ethnicity). Discrimination in the process for selecting jurors will result in the reversal of a conviction. *Synder v. Louisiana*, 522 U.S. 472 (2008) (race); *Batson*; *J.E.B.*; *Rivera*.

Discriminatory use of peremptory challenges is structural error not subject to harmless error analysis. *Diomampo v. State*, 124 Nev. 414, 423 (2008); *Conner v. State*, 327 P.3d 503, 507–11 (Nev. 2014) *reh'g denied* (12/16/14), *cert. denied,* 135 S. Ct. 2351 (2015). On appeal, the *Diomampo* and *Conner* Courts analyzed the entire record, finding several reasons given by the prosecutor were pre-textual and grounds for reversal. *Conner at* 509-511; *Diomampo at* 421-31.

An unbiased jury selection process is important because "[j]ury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all people." *Powers at* 407. "The anti-discrimination principle is thus not just a privilege of the criminal defendant; it constrains prosecutors, criminal defense lawyers, and civil litigants alike." *Winston v. Boatwright*, 649 F.3d 618, 622

(7th Cir. 2011). "Intentional discrimination by any participant in the justice system undermines the rule of law and, by so doing, harms the parties, the people called for jury duty, and the public as a whole." *Id.*

This Court and others have yet to specifically hold that the removal of a juror based on sexual orientation falls under the umbrella of *Batson*. But discrimination based on sexual orientation is a form of gender discrimination. Jessica Satinoff, *Coming Out of the Venire: Sexual Orientation Discrimination and the Peremptory Challenge*, 11 FIU L. Rev. 463, 465 (2016); *Libby v. State*, 115 Nev. 45, 50, 975 P.2d 833, 836 (1999)(gender discrimination).

Ninth Circuit held peremptory challenges used to strike a prospective juror based on the juror's sexual orientation are subject to heighten scrutiny under *Batson*. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014). And in *Slade v. Caesars Entm't Corp.*, 373 P.3d 74, 83 (Nev. 2016), Justice Cherry alluded to such finding in his dissent.

B. Test.

When a party raises a *Batson* challenge during jury selection, trial court uses a three part test to determine if the use of the peremptory challenge violated the constitution. The test is as follows:

> (1) the opponent of the peremptory challenge must make out a prima facie case of racial [or gender] discrimination; (2) the

> production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial must then decide whether the opponent of the challenge has proved purposeful discrimination.

Ford v. State, 122 Nev. 398, 403(2006).

The Constitution forbids the striking of even a single prospective juror for a discriminatory purpose. *United States v. Lorenzo*, 995 F.2d 1448, 1453-54 (9th Cir. 1993); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994).

1. Step 1: prima facie case of discrimination.

In this case, State used its second peremptory challenge to remove Juror #24, Olsen. III:577;IV:878-882.

John asserted a *Batson* challenge, noting State specifically asked Juror #24 his sexual orientation during voir dire. IV:879-80; III:570-71. Prosecutor asked almost every juror if they were married, single, or divorced. III:488, 487, 490, 492, 495, 499, 501, 504, 508, 511, 512, 514, 550, 562, 571. But for Juror #24, prosecutor asked: "You indicated you're in a relationship...did you say boyfriend, girlfriend or married?" III:505-06. Prior to this question, Juror #24 indicated he had a partner. III:505.

Because court required prosecutor to respond and give reasons for her use of the peremptory challenge, court found John made a prima facie case of discrimination based on sexual orientation. IV:880.

2. Step 2: reasons given and argument.

Prosecutor responded to the *Batson* challenge by arguing:

> **He's a homosexual, it was out there**. I stuck him based on his response to the [indecipherable]. There must be a pattern established before I make up my sexual orientation which [indecipherable]. There's been no pattern. So, would Your Honor like...for me to move on to other next step nonetheless. (emphasis added). IV:880.

Court told prosecutor, "Go ahead."

Prosecutor further argued:

> I struck him based on his – that the criticism released in the media is correct. It's been a long time overdue. There's [indecipherable] the prosecuting entity who is presenting the case who would be presenting police officers as witnesses. IV:880.

Without allowing John to respond, Court held: "[I] don't see a pattern and I think that the prosecution had a reason to strike him. In fact, I'm just surprised that you made this *Batson* challenge...denied." IV:880.

But John asked court to allow a response: "When the State makes their race neutral reason we actually have the right to respond and explain why that's – it's pre-textual. Would the Court allow me to...respond?" IV:880.

Court said: "Okay. By the way, we're spending an awful lot of time up here with these bench conferences, okay?" IV:880.

John said:

> Mr. Camuso who is in seat number one, badge number 027, is a similarly situated juror. Mr. Camuso specifically said he thinks it's a good thing that light is being shed on these incidents which is very similar to what Mr. Olsen, badge number 024, in seat number 12 said. They did not strike Mr. Camuso but they struck Mr. Olsen after specifically eliciting from him – they asked him – he said "my partner" and they said "boyfriend or girlfriend." And now two jurors, their answers are almost identical in terms of what they think about, an answer to my questions. The individual who is openly homosexual has been struck. Mr. Camuso has not been struck. IV:881.
>
> Court said: "...I didn't realize juror number 1 was homosexual..."
>
> John told the court:
>
> He's not, that's the point. The response that I get to give – when the State gives their neutral reason is if I can point out a similarly situated juror who is not of that class, the class being homosexuals in this case who gave similar responses. That is our response to State's pre-textual reason. So that is my response. IV:881-82.

After Juror #22 was removed, during a break in proceedings, prosecutor added another factor by pointing out Juror #22 was one of two openly homosexual males on the panel. III:579.

3. Step 3: trial court's decision.

There are two reasons trial court's decision was incorrect. First, court prejudged her decision prior to holding the hearing. Second, prosecutor did not remove other jurors who answered similarly to Juror #22.

In *Brass v. Nevada*, 291 P.3d 145 (Nev. 2012), Court found structural error when court refused to hold a *Batson* hearing prior to removing the

challenged juror from the venire. The *Brass* Court held: "when a defendant asserts a *Batson* violation, it is a structural error to dismiss the challenged juror prior to conducting the *Batson* hearing because it shows that the district court predetermined the challenge before actually hearing it." *Id.* at 149.

Although court held the hearing prior to removing the challenged juror in this case, court prejudged its decision before hearing argument.

Without allowing John to respond, Court held: "[I] don't see a pattern and I think that the prosecution had a reason to strike him. In fact, I'm just surprised that you made this *Batson* challenge...denied." IV:880. Then after argument court said: "...I don't see it...denied..."IV:881-2. Court conducted no analysis and gave no explanation.

On appeal and in district court, when deciding whether prosecutor's reasons for striking a minority juror are pre-textual or race neutral, Court's analysis requires careful consideration of:

> (1) the similarity of answers to voir dire questions given by veniremembers who were struck by the prosecutor and answers by those veniremembers of another race or ethnicity who remained in the venire, [and]
> (2) the disparate questioning by the prosecutors of struck veniremembers and those veniremembers of another race or ethnicity who remained in the venire,

Conner citing Hawkins v. State, 256 P.3d 965, 967 (Nev. 2011). "An implausible or fantastic justification by the State may, and probably will, be

found to be pretext for intentional discrimination." *Id citing Ford v. State,* 122 Nev. 398, 404(2006); *Miller-El v. Dretke,* 545 U.S. 231, 240-65 (2005); *Kaczmarek v. State,* 120 Nev.314, 334 (2004).

Here, prosecutor's reasoning was implausible.

Juror #24 was the only juror she asked a question suggesting the juror was homosexual. When explaining why she asked him if he had a boyfriend, the first words from her mouth were: "He's a homosexual, it was out there." IV:880. The disparate questioning of Juror #24 and other jurors who remained on the panel suggests a discriminatory purpose.

Prosecutor further argued that before she needed to "make up" a reason, John needed to show a pattern. IV:880. Court disagreed and then prosecutor claimed she removed him based on his comment about problems with police officers in the media: "that the criticism released in the media is correct...[and] long overdue." IV:880.

But, when asked about stories about police officers in the media, Juror #22 actually indicated that he felt it was time for the few police officers who abuse their authority to be charged because they have been allowed to abuse the public for too long. III: 535.

Juror #22 was not the only one with that feeling. Juror #27 said the dialogue on police criticism was important. III:566-67. Yet, prosecutor did not strike Juror #27, Camuso, and he ended up on the jury. I:186a and b.

Therefore, based on the similarity of answers in voir dire to similar questions, prosecutor should have also removed Juror #27 and chose not to – thereby suggesting a discriminatory purpose.

Later Juror #31 expressed concern about the police in the media, saying: "I know that there is bad police officers out there and there good police officers and there's a reason everything happens." III: 588. Prosecutor did not remove Juror #31.

II. FURTHER JURY SELECTION ERRORS MANDATE REVERSAL.

A. Challenge to jury venire.

1. Improper procedures.

At the start of jury selection, John challenged the venire.

> Looking at the panel there [are] 45 individuals, only 3 of them are African American. That is not a representative of our community, our community I believe [is] twelve percent African American, 3 out of 45 would be six percent. So...Defense is lodging challenge to the panel and we would ask for a hearing." IV:869.

Court responded, " I think that they were all chose at random, counsel, so I'm denying your request at this time..." IV:869.

Later, court agreed to hear testimony from the jury commissioner upon State's suggestion. III:519-22.

Court held a hearing with Jury Commissioner Maria Witt after completing jury selection, after swearing in the jury, after instructing the jury on preliminary matters, after reading the charges to the jury, and after directing the jury on the law. III:621-53.

The procedures used in this instance for a challenge to the venire are similar to those in *Buchanan v. State*, 335 P.3d 207, 210 (Nev. 2014) where Court found structural error occurred mandating reversal when trial court made a ruling prior to allowing a hearing testimony from the jury commissioner.

"By indicating that she would conduct an evidentiary hearing and consider testimony from the jury commissioner but then deciding the fair-cross-section challenge before doing so, and making that decision based on a record devoid of any factual information regarding the venire selection process, the district court judge predetermined the challenge and created the appearance of improper judicial bias." *Id.* Therefore, this Court may reverse

John's conviction based on the improper procedures used by trial court when facing a challenge to the venire.

2. John was entitled to a new venire.

To establish a prima facie violation of Sixth Amendment's fair cross-section requirement, defendant must show: (1) alleged excluded group is "distinctive" group in community; (2) representation of group in venires from which jurors are selected is not fair and reasonable in relation to number of persons in community; and, (3) under representation is due to systematic exclusion of group in jury-selection process. *Williams v. State*, 121 Nev. 934, 940 (2005); *Evans v. State*, 112 Nev. 1172, 1186-1187 (1996); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *Duren v. Missouri*, 439 U.S. 357 (1979). Unlike a challenge under the equal protection clause, a "fair cross-section claim does not require a showing the selection procedure is susceptible of abuse or not race-neutral." *Rodriguez-Lara* at 940.

a) African-Americans are a distinctive group.

Under the first part of the test, African-Americans are recognized as a distinctive group. U.S. Census Bureau estimates for 2015 list demographics of "distinctive" groups for Clark County with Black being included as a distinctive group accounting for 11.8% of the population. http://www.census.gov/quickfacts/table/PST045215/32003

b) African-Americans not fairly represented.

Under the second part of the test, African-American's were underrepresented in John's venire. There were only 3 African-American in the 45 person venire. IV:869. With 11.8% of the population in Clark County being African-American, there should have been at least 5 African-Americans in the venire.

With 3 African-Americans within a 45 person venire, there are a percentage of 6.66 % African-Americans in the venire. Since the 2015 Census figures indicate that 11.8% of Clark County's population is African-American, there is a 5.14 % absolute disparity and a comparative disparity of 56.4 %. See *Williams*, at 940, n 9.

A comparative disparity over 50 % indicates that the representation of African-Americans is not likely fair and reasonable in relationship to the number of African-Americans within the community. *Id.* This satisfies the first and second prong of the test.

c) Systematic exclusion.

Under the third part of the test, Court decides if the under representation of African-Americans in John's venire was due to a systematic exclusion in the jury selection process.

At the hearing, Maria Witt testified that jurors for the venire are chosen from a master list compiled from lists she received from Nevada DMV and Nevada Power. III:631. The master list is a computer system with millions of people listed. III:638-39.

Witt said jurors were selected randomly from all demographic areas. III:631. But she admitted she only knew this because IT personnel told her this - she had no expertize in confirming what she was told. III:641. No follow-up studies were initiated by the county to confirm what she was told or to prove the summons were being sent to the correct demographics. III:642;643;645-449.

She acknowledged certain zip code areas contained more minorities than others. III:643-44;645. She said the system distributed summons *equally* to all zip codes. III:644.

Although the system has a qualification questionnaire on race that jurors are asked to complete, she has no control over whether it is completed. III:633-35. Other than mailing out the summons to all demographic areas, no other steps are in place to ensure panels represent a fair cross-section of the community. III:636; 648-49. However, her department does have a race report though it is not conclusive. III:642-43.

The testimony given by Witt indicated that the Eighth Judicial Court does not keep any statistics or records which a defendant needs to challenge the systematic exclusion of minorities from the jury venire. The Jury Commissioner's failure to present or testify to any statistics amounted to a conscious indifference to a defendant's constitutional rights.

Witt said jury summons are equally sent to all zip codes but acknowledged she never checked her hypothesis against raw data. If summons are being sent equally to all zip codes rather than based on the census figures then it is likely minorities are systematically excluded. The problem with sending equal summons to all zip codes is that those zip codes with higher populations are receiving fewer per person and those in outlying areas are receiving a higher percentage. Because African-Americans tend to live in the larger populated areas, there is systematic exclusion if these areas receive the same percentage of summons as Mesquite.

Faced with a challenge to the grand jury process, a Massachusetts trial court held an evidentiary hearing to examine the procedures used and to determine the race of all those who received the jury questionnaires and those who were summoned for the grand jury during a 5 year period. *Commonwealth v. Jose Aponte*, 891 Mass. 494, 462 NE2d 284 (1984). Based on the documentation kept on all prospective grand jurors, although 7

prospective jurors could not be identified by race, the parties concluded no Hispanic prospective jurors received a summons.

Aponte stands for the importance of record keeping and checking on how and where summons are sent. If Henderson area codes received more summons per person than North Las Vegas zip codes then there is a problem. But systematic exclusion may also occur when summons are sent equally to all zip codes.

Historically there have been problems with the jury selection procedures utilized by the Eighth Judicial District Court. In 2005, the Las Vegas Sun published numerous articles questioning the process and selection procedures for jury service in Clark County, noting that the process failed to put together jury venires that replicated the diverse population of the area. *Williams* at 942. Eventually, on May 21, 2007, the legislature passed NRS 704.206 which allowed the Eighth Judicial District Courts to also receive utility lists for compilation of jury pools in Clark County. Despite the passage of this bill expanding the jury pool, minorities continue to be underrepresented on the panels.

When a defendant has a right to challenge a procedure, the courts must ensure that the defendant can litigate that right because the failure to afford Abron an adequate opportunity to litigate his fair cross-section claim

would in itself violate due process. See *Franks v. Delaware*, 438 U.S. 154, 171-172 (1978).

In light of the fact that the defendant has the burden to show systematic exclusion, the jury commissioner and the court have a duty to keep statistics for the defense to review to support or refute a fair cross-section objection. Here, Witt brought no statistics and acknowledged no checks and balances are conducted.

B. Court told jurors State and Defendant were at the "same starting line" and made a motion with her hands to suggest this was a race.

At the beginning of voir dire, when a juror announced she could not be fair, court said: "Both parties are right now at the start line…In your view is one ahead of the…other?" II:415.

Juror explained that in her mind the D.A. was ahead or another way to look at it was that defendant was behind. II:415-16.

Court made no attempt to explain to the juror that this was not a race.

During a break in the questioning, John asked for a new venire because:

> When talking to a couple of the jurors Your Honor …made some sort of reference to a race. And Your Honor had your hands next to each other and kind of indicating what – kind of like GoCars, one moving forward, one moving back. Our position is that's not an accurate statement of the presumption of innocence and the burden of proof. This is not a race. The

> defense does not have any burden. We don't have to do anything. It's not a GoCar that we have to move...[it]implies to the jurors that we have to prove something, they have to prove something, and it's kind of a who can get to the finish line first, or who can present more evidence, and that's not an accurate statement. II:468

Trial court disagreed, claiming Defense Counsel misunderstood what she meant. II:469. Court said she wanted to make sure the juror's viewed the parties at the same starting line so that one party was not ahead before the trial began. Court noted she had instructed the jury John was presumed innocent and the State had the burden of proof beyond a reasonable doubt. Court denied John's motion for a new venire. II:469.

But State reiterated a similar argument during voir dire when asking a juror if State already had a disadvantage in her mind because they were calling a police officer as a witness. III:549-550.

John objected to the advantage/disadvantage language but court overruled. IV:875-76.

Subsequently, another juror voiced concern about the burden of proof needed for a conviction, indicating she was surprised the defendant did not have to prove anything. "I thought it was a back and forth." III: 553. Juror thought someone would want "to prove their innocence." III:553.

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 § 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.

When a trial judge's comments taint the right to the presumption of innocence in front of the jury venire, fundamental error of a constitutional dimension occurs because the impartiality of the jury is destroyed. *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). Using examples, such as a race, to explain the presumption of innocence or reasonable doubt is improper.

C. Court required parties to use or lose peremptory challenges before qualifying 23 jurors thereby denying John meaningful use of his peremptory challenges.

John asked court to pass 23 people for cause prior to parties exercising peremptory challenges. II:392-94. John said:

> Because we're going to be exercising 5 [peremptory challenges] each...so that would be 10 [jurors] taken out, so 13 plus 10 [equals]...23. The reason we request that [court first qualify 23] is because...[if the court only qualifies 13 then] basically we're exercising our peremptory challenges blind as to who the next person would be coming into the seat...the point is we should be exercising them on the four worst jurors, plus one for the alternate. II:393.

As authority, John cited an unpublished Nevada case, *Gyger v. Sunrise Hosp. & Med. Ctr., LLC*, 58972, 2013 WL 7156028, at *2–3 (Nev. Dec. 18, 2013). II:393-94.

Court denied John's motion.

The method used for voir dire "rests within the sound distraction of the district court, whose discretion will be given considerable deference..." *Johnson v. State*, 122 Nev. 1344, 1354-55 (2006). But Court will reverse a conviction when trial judge arbitrarily places limits on voir dire. *Salazar v. State*, 107 Nev. 982 (1991).

NRS 175.031 states:

> The court **shall** conduct the **initial examination of prospective jurors**, and defendant or his attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. **Any supplemental examination must not be unreasonably restricted.** (Emphasis added).

The plain meaning of NRS 175.031 indicates court initially examines and qualifies **prospective jurors** – in this case all 23 – before supplemental questioning.[5] Also see NRS 16.030(6).

Because NRS 175.031 mandates court first "conduct the **initial examination of prospective jurors**" (not juror), court arbitrarily and

[5] Each party received 4 peremptory challenges for jury and one for alternate. NRS 175.051; NRS 175.061.

unreasonably limited John's supplemental voir dire to 13 jurors rather than all 23 prospective jurors needed to seat a 12 person jury with alternates. Court's arbitrary method denied John the ability to make an intelligent and meaningful decision when exercising his peremptory challenges because he did not know the background on all 23 potential jurors.

Due process requires trial court follow procedures codified in the state's statutes for the selection of the jury. See *Ross v. Oklahoma*, 487 U.S. 81 (1988). But due process requires more. Due process requires a *meaningful* chance to question jurors for bias and it requires a *meaningful* use of peremptory challenges. *See United States v. Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979)(lack of valuable information on bias reduced the number of challenges for cause or the meaningful use of peremptory challenges).

In conducting voir dire in this manner court denied John the meaningful use of his peremptory challenges.

D. Unreasonable restrictions on scope of voir dire.

NRS 175.031 allows for supplemental examination of the jurors. But in several instance, upon State's objections, court prohibited John from asking questions thereby denying him his right to effective assistance of counsel and due process. III:580-81.

John asked jurors if anyone would have a negative assumption if he did not testify. III:524-25. He also asked: "Can you think of some reasons why he wouldn't want to testify? " III:525.

Before anyone could answer, State objected to inquiry as to John may decide to not testify because court already instructed jury. IV:869. Court agreed and shut down further questioning on this issue.

But trial court erred because "It is proper in *voir dire* to query prospective jurors regarding their opinion of the effect of a defendant's failure to testify. *People v. Trujillo*, 712 P.2d 1079, 1081 (Colo. App. 1985). When asking jurors about the reasons why he may not testify, John was exploring possible bias against him for not testifying.

In another instance, court shut down his questions when, in response to Juror #16 discussion about John admitted one crime but not another, John asked: "Just general, does anybody here think that ...sometimes... a person is overcharged or charged with..." III:533.

When State objected, court posed another way for John to ask the question. III:871. When prosecutor would not agree, court told John to move on. III:871.

Because John's theory of his case was that he was guilty of one crime and not another, court impaired his ability to question jurors on whether they would be prejudiced against him if he admitted one crime and not the other.

In another instance, John asked juror who already said that she would likely expect him to present evidence: "I guess the question that I was asking was because of your experiences does that affect who you would give the burden to:...make you feel like we have to prove he's not guilty..." III:557.

State objected, claiming it's touching on the potential verdict and court agreed.

The right to due process and the right to counsel allows an attorney to ask questions on voir dire that focus on the burden of proof and the defense theory of the case. *See Gonzales v. State*, 2 S.W.3d 600, 603 (Tex. App. 1999). Thus, court erred in limiting the scope of voir dire.

III. RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS DENIED WHEN COURT DIRECTED DEFENSE COUNSEL TO APOLOGIZE TO JURY DURING CLOSING ARGUMENT.

During closing argument, John commented that Ruby Cruz could testify to what items John put on the counter and what he paid for. IV:836. Moreover, the D.A. investigator said Ruby still worked at the AM/PM.

IV:836. And, "Maria Verduzco is still a manager at the AM/PM. Ruby Cruz, her employee…she is the direct supervisor of Ruby Cruz." IV:837.

State objected, arguing that Maria never testified she still worked at AM/PM. IV:915. John indicated he thought Maria testified that she was the manager. IV:917.

Court directed John to tell the jury that he misspoke and that she is not currently the manager. IV:917. But John contended in doing so court required him to inject new facts into the case that State claimed were never introduced into evidence. IV:918. Court said: "Now you can correct it or I can correct it for you." IV:918.

Thereafter, John told the jury: "And I'm sorry…the evidence was Maria Verduzco was a manager at AM/PM, I misspoke." IV:837.

Court then directed the jury: "there's no evidence that she is currently the manager." IV:837

The Sixth Amendment right to counsel and the right to Due Process include the right of a criminal defense attorney to make a closing argument without restrictions which infringe on the adversarial fact-finding process. *Herringv. New York,* 422 U.S. 853, 858 (1975)(denial of the right to make a closing argument is denial of the right to present a defense).

According to State, Maria did not testify that she currently was the manager at AM/PM but testified she was the manager on the date of the incident. Because she never said she no longer worked there, John's argument in closing was reasonable based on the testimony. Court's improper limitation of argument warrants several. *See Jean v. State*, 27 So.3d 784 (Ct. of App. Florida 2010).

"The limitation of the scope of closing affects the 'trial process itself' and is subject to a constitutional harmless error analysis."*State v. Osman*, 366 P.3d 956, 968 (2016)(internal cite omitted). Here, the error was not harmless because court interjected facts never introduced into evidence. Moreover, by ordering Defense Counsel to apologize to the jury, court undermined her integrity thereby undercutting her credibility in closing argument.

Before State gave rebuttal argument, court took a break and John made a motion for a mistrial based on court requiring John to correct his statement. *See Issue V.*

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IV. VAGUE PLEADINGS ALLOWED STATE TO CHANGE ITS THEORY OF THE CASE IN REBUTTAL CLOSING.

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation." A criminal defendant has a "substantial and fundamental right to be informed of the charges against him so that he can prepare an adequate defense." *Viray v. State*, 121 Nev. 159, 162 (21005); *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). "Due process requires that an information be: ... a plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075(1); also see, Art. 1, Sec. 8, Nev. Const.; and *Simpson v Eighth Jud. Dist. Ct.*, 88 Nev. 654 (1973).

Prior to trial, John filed a motion asking for a bill or particulars or dismissal based on the unspecific pleading. I:150-58. John also filed a motion asking that count 1 and count 2 be considered pled in the alternative. I:159-64.

The basis for both motions focused on facts alleged in both counts. For the battery with intent to commit a crime count, State alleged John "with intent to commit robbery by punching said: Maria Verdozco in the chest and/or neck, throwing her to the ground." I:036. In the robbery count, State

alleged no factual basis, only using the words required for a robbery conviction. *See jury instruction 3 at I:202.*

Because State alleged no facts to support the use of force element in the robbery charge, John argued State must be alluding to the facts in the other count. Therefore, the counts were pled in the alternative. John further argued that to allow the case to go to trial without a factual basis for the force used in the robbery, would allow State to change its theory of the case unless court ordered the pleading be more specific.

At a hearing on John's motion and in pleadings, State never contended different facts would be used for each crime. I:177-93;II:375;377. Court denied John's motions, finding the pleadings sufficient. II:379.

At trial, Maria testified that when she confronted John he came toward her and punched her and she fell on the ground. III:668-9. No other use of force was used. In closing, State argued the same use of force for both crimes. IV:824-85.

But in rebuttal, State argued that John's conduct induced fear in Maria when he told her to get out of his face. IV:847. "That's taking property from her person or in her presence by means of producing fear." IV:847-48. Prosecutor argued: "I submit to you, before he even knocks the heck out of

her, the robbery's complete." IV:848. Thus, in rebuttal, State changed its theory of the case.

State's change in its theory was intentional. During the settling of jury instructions, State presented an instruction informing the jury that State did not need to prove violence for the robbery conviction, only fear. IV:802-3. State camouflaged its intent by telling court "robbery is where he struck her...we do not need to show violence." IV:803.

Just as the pleading in *Barren v. State*, 99 Nev. 661 (1983), was insufficient for notice under the aiding and abetting liability, the pleading here was inadequate and allowed State to change the theory of its case in closing rebuttal – at a time when John had no chance to further argue.

An indictment or information, standing alone, must contain: (1) each and every element of the crime charged and (2) the facts showing how the defendant allegedly committed each element of the crime charged. *U.S. v. Hooker*, 841 F.2d 1225 (4th Cir. 1988). An indictment or information which fails to allege facts as to how a crime was committed must be dismissed. *Sheriff v. Blasko*, 98 Nev. 327 (1982). The charging document must be definite enough to prevent the prosecutor from changing the theory of the case. *Simpson*.

Here, court erred in refusing to dismiss the robbery count or ordering State to plead specific facts. John was prejudiced by this error because State changed the theory of its robbery charge during trial, after John conceded a misdemeanor battery and after he had completed his closing argument.

V. PROSECUTORIAL MISCONDUCT IN CLOSING.

John objected to State informing jury that: "the law applies to everyone and equally everyday should be protect under the law, including Maria Verduzco...She doesn't sell anything of high value there. But she is still protected under the law." IV:827.

John objected because "It's improper for the State to be instructing the jury on the value of the law around the idea of legislative intent...they're basically implying now that if the jury doesn't convict John Morgan they're not protecting Maria Verduzco, that they need to protect Maria." IV:912.

Arguments asking the jury members to place themselves in the shoes of the victim are improper. *Howard v. State,* 106 Nev. 713 (1990). Statements of personal opinion as to the justness of a cause or credibility of a witness are also improper. *Lioce v. State*, 122 Nev. 115 (2006).

"Improper argument is presumed to be injurious." *Pacheco v. State,* 82 Nev. 172, 179 (1966). Prosecutorial misconduct is grounds for reversal unless the error is harmless beyond a reasonable doubt. *Brown v. United*

States, 951 F.2d 1011, 1014 (9th Cir. 1991) *citing Chapman v. California*, 386 U.S. 18, 24 (1967).

VI. COURT ERRED IN DENYING JOHN'S MOTIONS FOR A MISTRIAL.

John made three motions for a mistrial.

First request for a mistrial came after Officer Law's testimony that John resisted arrest. John cited *Bellon v. State*, 121 Nev. 136 (2005) as basis for error.

Law testified that:

> I turned on my lights and went up behind him and started giving him commands...He continued to walk away...he started to run from me...I started to give chase...He tripped and was able to get on top of him and took him into custody with some assistance. III:721-3.

Although John agreed State could present evidence of flight, he argued Lay's testimony suggested John committed the crime of resisting arrest -a bad act for which State never requested a *Petrocelli* hearing. III:732-34.

In *Bellon*, Court reversed a conviction when State introduced threats defendant made to the police officer after his arrest, finding they did not fit in the res gestae statute. Likewise, here, John resisting arrest was not part of the res gestae.

Court denied the motion but agreed to give a curative instruction. III:733.

The second motion for a mistrial John made was when court allowed State's investigator to testify to the efforts he made in subpoenaing Ruby Cruz in order to explain to the jury why she did not come to court to testiy. III:787- 93. John further noted State withheld her address from the Defense in violation of discovery order. III:787-8. Court denied John's motion.

The third motion for a mistrial occurred in closing. *See Issue IV.* John argued that by requiring him to apologize to the jury during his closing and tell them he misstated evidence, mistrial was warranted. IV:842-43.

When there was a discrepancy about the facts at the bench, John asked court to direct the jury to go off their own recollection but court instead required him to correct his statement. This was not the same procedure court used with the State. IV:846.

Trial court should declare a mistrial when the prejudicial impact of improper argument or evidence may affect the jury's verdict. *Glover v. Eight Jud. Dist. Ct.*, 25 Nev. 691, 693 (2009). Trial court must consider whether error will hamper the jury from reaching an impartial verdict when deciding to grant a mistrial. *Beck v. Seventh Jud. Dist. Ct.*, 113 Nev. 624, 627 (1997) *citing Illinois v. Somerville*, 410 U.S. 458, 46 (1973). Testimony

that the defendant committed inadmissible bad acts may warrant a mistrial. *Ledbetter v. State*, 22 Nev. 252 (2006).

In each instance, John suffered prejudicial impact because bad acts were admitted, State violated discovery violation, and court unfairly ordered to Defense Counsel to apologize to jury and correct a factual statement.

VII. EVIDENCE INSUFFICIENT TO CONVICT.

The right to a fair trial includes the presumption of innocence. *Hightower*; 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). And 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).

John was charged with robbery, as follows:

> Did then and there willfully, unlawfully, and feloniously take personal property, to wit: miscellaneous food items, from the person of Maria Verduzco, or in her presence, by means of force or violence, or fear of injury to, and with the consent and against the will of Maria Verduzco, Defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property and/or to facilitate escape. I:202.

State present no evidence to show John left the store with any merchandise belonging to Maria Verduzco or AM/PM. State presented no inventory information showing any items were missing. Although Lay said he saw some peanuts when he stopped him, there was no evidence what he saw belonged to AM/PM or Maria. No merchandise was recovered or impounded.

VIII. JOHN'S SUBSTATIVE AND PROCEDURAL RIGHTS TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO CROSS-EXAMINATION WERE VIOLATED WHEN COURT FOUND HIM COMPETENT DURING AN INADEQUATE NRS 178.415 HEARING.

The United States Constitution "provides criminal defendants with the right to be competent during trial." *United States v. Duncan*, 643 F.3d 1242, 1248 (9th Cir. 2011) citing *Indiana v. Edwards,* 554 U.S. 164, 170 (2008) (citing *Dusky v. United States,* 362 U.S. 402 (1960) (per curiam), and *Drope v. Missouri,* 420 U.S. 162 (1975)).

Under state law and under the Fourteenth Amendment Due Process Clause, a defendant has a substantive right requiring competency; and, a procedural right to "have the State provide adequate procedures for determining competency" when competency is questioned. *David W. Beaudreau, Due Process or "Some Process"? Restoring Pate v. Robinson's Guarantee of Adequate Competency Procedures*, 47 Cal. W.L. Rev. 369, 370-71 (2011); NRS 178.400(1); *Pate v. Robinson*, 383 U.S. 375, 386-387 (1966)(The conviction of a defendant who is legally incompetent "[v]iolates due process, and . . .state procedures must be adequate to protect that right"); *Medina v. California*, 505 U.S. 437, 446 (1992).

Because competency is of upmost importance, "any time after the arrest of a defendant, including, without limitation, proceedings before trial, during trial, when upon conviction the defendant is brought up for judgment. . .if doubt arises as to the competence of the defendant, the court shall suspend the proceedings...until the question of competence is determined." NRS 178.405(1); NRS 178.415 (appointment of psychiatrist, psychologist, or social worker for evaluations; hearing; findings).

A person is not competent to participate in criminal proceedings if he or she does not have the present ability to:

> (a) Understand the nature of the criminal charges against the person;

(b) Understand the nature and purpose of the court proceedings; or
(c) Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

NRS 178.400(2); *Dusky*.

When doubts arise as to a defendant's lack of competency, court must hold a formal competency hearing. *Olivares v. State*, 124 Nev. 1142 (2008). The failure to hold a formal competency hearing is not only an abuse of the district court's discretion but also a violation of due process. *Melchor-Gloria v. State*, 99 Nev. 174, 180 (1983).

Questions about John's competency began when he was removed from the courtroom for spitting and Defense Counsel voiced competency concerns. II:259. At the first hearing in competency court, on 12/26/14, after receiving a split in decisions from evaluators who examined John for competency, court ordered a third evaluation. II:261-62. On 01/16/15, after the third evaluator found John competent, John asked for a challenge hearing. II:264.

A defendant is entitled to challenge findings in competency reports in a formal hearing based on protections under the due process clause of the United States and Nevada Constitutions. *Scarbo v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 125 Nev. 118, 124, (2009). Nevada's

statutory scheme recognizes that "competency proceedings must afford the defendant with proper notice and a meaningful opportunity to be heard." *Id.*

NRS 178.415(3) outlines procedures for a competency challenge.

> The court that receives the report of the examination shall permit counsel for both sides to examine the person or persons appointed to examine the defendant. The prosecuting attorney and the defendant may:
> (a) Introduce other evidence including, without limitation, evidence related to treatment to competency and the possibility of ordering the involuntary administration of medication; and
> (b) Cross-examine one another's witnesses.

Legislature's use of word "shall" indicates formal evidentiary procedures enumerated in NRS 178.415(3) are mandatory rather than optional. NRS 0.025 (1)(d). However, the parties may stipulate to forgo a formal hearing and cross-examination. But, there was no such stipulation in this instance.

At the 02/06/15 competency hearing, State was unprepared and without any witnesses. II:267-32. State requested a continuance but later agreed to proceed without witnesses and without introducing any documents into evidence. II:268-69. Dr. Slagle testified for John. II:267-32.

Dr. Slagle said John had "some significant thought, disorganization that was interfering with some of his answers..." II:271. John told Dr. Slagle "something had contaminated him...he had some kind of toxin in his body...he would spit in his hand and then sort of fling it...he said he just had this toxic something inside of him that he just had to get out..." II:271.

His spitting was similar to a compulsion that he could not even control when in a courtroom. II:274-5.

Dr. Slagle also said John had trouble answering questions, sometimes changing his answers later upon reflection. II:271-3. John struggled with conveying facts. II:276. John exhibited an unwillingness to plead not guilty. II:276-78. Dr. Slagle believed John's thought disorganization made it difficult for him to work with his attorney during the court process. II:290.

Dr. Slagle found John not competent but believed he could be restored to competency with treatment. II:277-78.

State did not admit any doctor's reports and called no witnesses. But State argued John failed to meet the threshold of having two doctor's confirming he was not competent under NRS 178.425. But NRS 178.425 does not require two separate findings from two different doctors.

State asked court to refer to Dr. Kapel's conclusion that John was simply disagreeable with his attorney – a document never entered into evidence at the hearing. II:294-5. But State admitted John could be sent to Lake's Crossing under NRS 178.415. II:294.

John asked to be found incompetent or to be sent to Lake's Crossing for observation. II:292. John noted that two or three doctors who examined him found evidence of a psychotic disorder. II:295. John's attorney noted

that when the clerk sought to swear Dr. Slagle for testimony, John raised his own right hand, thinking he was the witness – showing his confusion as to what was going on in the courtroom. II:295.

Court found John competent by relying on the reports from Dr. Colosimo and Dr. Kapel - reports not introduced as evidence in this evidentiary hearing. II:296.

NRS 178.400, NRS 178.415, and *Dusky* outline the test and procedures for determining competency and require a formal hearing with cross-examination. Court erred by not following the mandates required.

But even the rules under NRS 178.400 and NRS 178.415 are inadequate because they are missing standards or burdens for the court to use when reaching a decision. In Massachusetts, the government has the burden of establishing competency by a preponderance of the evidence if competency is challenged at trial. *Com. v. Chatman*, 473 Mass. 840, 847 (2016). But in post-verdict challenges, the defendant must establish "by a preponderance of the evidence that the Commonwealth would not have prevailed had the issue been raised at trial." *Id.*

In California and Iowa, the defendant has the burden of proving he is incompetent by a preponderance of the evidence. *People v. Kaplan*, 57 Cal.

Rptr. 3d 143, 150 (2007), *as modified on denial of reh'g* (Apr. 17, 2007); *Forsyth v. State*, 686 N.W.2d 236 (Iowa Ct. App. 2004)

In Washington and Kansas, the party challenging competency has the burden of proof by a preponderance of the evidence. *State v. Coley*, 180 Wash. 2d 543, 555 (2014); *State v. Woods*, 301 Kan. 852, 853 (2015). But in Kansas, "[w]hen the court itself raises the competency issue, the court is not a party and cannot be responsible for coming forward with evidence but can assign that burden to the State because both the court and the State have a duty to provide due process and to provide a fair trial to the defendant." *Id.*

In Nevada, there are no burdens of proof on anyone. Instead, the court simply orders competency evaluations and then says "yeah" or "nay." There also are not evidentiary standards requiring the introduction of reports or other evidence. Yet, NRS 178.415 suggests an adversarial formal hearing is required with someone carrying the burden to produce, persuade, and introduce evidence.

Here, by the court using reports introduced from non-testifying doctors, court acted arbitrary and capricious and denied John his substantive and procedural rights under the Due Process Clause, as well as his right to cross-examination under NRS 178.415.

As to court's reliance on reports not introduced into evidence, John was denied the opportunity to cross-examine Dr. Colosimo and Dr. Kapel on these hearsay reports because they did not testify.

A court's determination of competency is a question of fact entitled to deference on review. *Calvin* at 1182. However, because the procedures used here were arbitrary, this Court should use de novo review because it is a violation of due process to have no standards, no burdens, and a failure to follow the rules that are in place.

Here, the errors were prejudicial and harmful because John continued to deteriorate as shown at the following hearings. Because of his continued lack of competency, Defense Counsel was unable to aid and assist him in his defense for months.[6] Moreover, we know the court's decision was wrong because a second batch of mental health professionals interviewed John between 04/16/15 and 05/15/15, resulting in court finding John not competent to proceed. II:311-13. John was not transported to Lake's

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[6] At this arraignment hearing on 02/12/15, Defense Counsel noted she continued to believe John was not competent and not able to assist her in his defense. II:299. John told the court he refused to enter a plea because: "I did not go against the peace in the state…I wasn't agreeing with the charges." II:300. At another point he suggested he should represent himself. II:304.

At calendar call on 04/16/15, Defense Counsel again filed out a form requesting a competency evaluation and John continued to ask to represent himself. II:307-10.

Crossing until September 2015. He returned on or about 12/18/15. II:347-50.

The delay may also have been harmful to his trial because Ruby Cruz did not testify. Ruby may have acknowledged what items John placed on the counter for purchase and disputed that he tried to take nuts. Also, if the trial had proceeded earlier, Maria may have been working at the AM/PM - an issue of contention in closing arguments.

"For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other 'rights deemed essential to a fair trial.'" *Cooper v. Oklahoma*, supra, 517 U.S. 348, 365 (quoting *Riggins v. Nevada,* 504 U.S. 127, 139 (1992)).

IX. JOHN'S CONSTITUTIONAL RIGHTS WERE VIOLATED DUE TO LENGTHLY DELAY IN TRANSPORTING HIM TO LAKES' CROSSING IN VIOLATION OF COURT'S ORDER AND DUE PROCESS.

On 05/15/15, upon reviewing new competency evaluations from Dr. Chambers and Dr. Lenkeit, court found John "incompetent, and...dangerous to himself and to society and that commitment [was] required for a determination of his ability to receive treatment to competency...". I:058-60; II:311-12.

Two months later, on 07/07/15 when John was not transported to Lake's Crossing as required by court order, John filed a motion to dismiss, noting he was not scheduled for transportation until 09/17/15 – a 118 day delay in him receiving treatment. I:061-112. I:063.

John argued State's systematic neglect in transporting criminal defendant's to Lake's Crossing for mental health treatment was well documented. I:061-112. On 06/24/13, State was a defendant in a civil action for injunctive and declaratory relief when pretrial detainees housed in the Clark County Detention Center waited approximately three months for transportation to Lake's Crossing Center for the Mentally Disordered. In the federal case, on 01/19/14, State entered into a consent decree agreeing to "prompt restorative treatment" to incompetent pretrial detainees within 7 days of a court order. I:064. But when State failed to meet the consent decree requirements, the agreement was changed to require transportation within 14 days. I:064: II:328.

Here, John was another victim of State's continued failure to provide adequate treatment to the mentally disabled and further proof of State's continued neglect in abiding by court requirements outlined in the 2013 civil action. John argued that in acting in this manner, State violated his rights to

due process under the United States and Nevada Constitutions thereby requiring dismissal. II:328-29.

At the 08/16/15 hearing on John's motion, State agreed it violated the consent decree and the court order but contended the only available remedy was another order directing State to transport John in 7 days. II:336-45;M-I:240. State contended John only presented authority for injunctive relief and the federal consent decree was not applicable in John's case. II:333-34.

Court decided that although State violated the court order to transport John within a few days, a balancing of the community's interest and John's interest did not fall in John's favor. "I think the remedy is [for the State] to comply with the order..." II:343. However, court noted it was an "empty order." II:333. Thus, all knew State had no intention of transporting John in 7 days even if ordered to do so.

In *Oregon Advocacy Center v. Mink,* 322 F.3d 1101, 1120 (9th Cir.2003), the Ninth Circuit Court said: "[p]retrial detainees, whether or not they have been declared unfit to proceed, have not been convicted of any crime. Therefore, constitutional questions regarding the ... circumstances of their confinement are properly addressed under the due process clause of the Fourteenth Amendment...."); *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d

1470, 1474 (9th Cir. 1992)(pre-trial detainee's freedom from incarceration is a fundamental liberty interest).

The United States Supreme Court recognizes constitutional limits on pretrial detention under the due process clause: *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951)(excessive bail); *City of Riverside v. McLaughlin*, 500 U.S. 44, 56 (probable cause determination within 48 hours); *Jackson v. Indiana*, 92 S. Ct. 1845, 1858 (1972) ("[p]erson charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future"); *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979)(punitive pretrial conditions).

The *Bell* Court used a two-prong test to determine if a pre-trial detainee's restrictions on freedom from restraint were excessive in relation to State's legitimate regulatory purpose. The comparative analysis in *Bell* is similar to district court's balancing test in this case.

But district court erred in its conclusion. Although State had a legitimate interest in sending John for medical treatment and perhaps protecting the public, the restrictions placed on John's freedom were excessive in relation to the regulatory scheme because he was required to

wait for 118 days for mental health treatment. The delay is akin to diagnosing a person with cancer and telling them they need to wait 3 months to see a doctor and obtain medicine and radiation therapy. Keeping a mental health patient from drugs and the treatment he needs for 118 days amounts to impermissible government action that may not be constitutionally inflicted on pre-trial detainees.

The district court further erred because it offered no remedy, only saying it would not dismiss the case. But a court may use its supervisory power to implement a remedy for the violation of a constitutional right. *United States v. Chapman,* 524 F.3d 1073, 1085 (9th Cir.2008)(other cite omitted). While dismissing a case with prejudice encroaches on the prosecutor's charging authority, "[a] court may dismiss an indictment under its supervisory powers...when the defendant suffers substantial prejudice" and no lesser remedial remedy is available. *Id.* at 1087 (internal quotation marks omitted).

Here, no lesser remedy was available and John suffered substantial prejudice because he lost valuable time in preparing for his defense.

But even if this Court believes dismissal too harsh, the district court erred by not crafting its own remedy, such as ordering State to provide additional medical/mental health treatment for John in the jail. Also, court

could have ordered John be given additional credit for time served for each day he was detained by the State in violation of his right to due process. Court could have ordered State to transport John in 7 days and if State failed to do so then court would award him 10 days of credit for each day past the 7 days. Instead, court did nothing.

In the unpublished decision of *Trueblood v. Washington State Dep't of Soc. & Health Services*, C14-1178-MJP, 2016 WL 4268933, at *11 (W.D. Wash. Aug. 15, 2016), *reconsideration denied,* C14-1178-MJP, 2016 WL 4418180 (W.D. Wash. Aug. 19, 2016), the Washington Court noted:

> Jails are inherently punitive institutions, and are not designed or administered so as to provide for the needs of the mentally ill. A correctional environment, calibrated to provide safety and order, is incongruous with the particular needs of the mentally ill, and results in people with confirmed or suspected mental illness spending more time in solitary confinement, where their mental health further deteriorates. This deterioration is in direct conflict with the State's interest in prompt evaluation and treatment so that the individual may be brought to trial, especially for individuals whose illnesses become more habitual and harder to treat while they wait in isolation.

State may not incarcerate people for failing to pay a fine if they are in poverty and State should not incarcerate people indefinitely who are mentally incompetent due to State's failure to provide services – inside and outside the criminal justice system. Lack of funding or facilities cannot

justify State's failure in accepting pre-trial detainees and providing the medical treatment they need. *Mink at* 1121.

If this Court is unwilling to dismiss John's conviction based on the unreasonable delay, John asks Court award him 10 days of credit for each day over 7 that he remained in confinement.

X. CUMULATIVE ERROR.

If Court finds no singular issue sufficient for reversal then Court analyzes collective effect of other errors. *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). Reversal is warranted because the robbery conviction is grave, the issue of guilt was not over overwhelming, and the quality and character of errors substantial. *See Valdez citing Hernandez v. State*, 118 Nev. 513, 535 (2002).

CONCLUSION

In view of the above, John asks Court to reverse his convictions or reverse and dismiss the case.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
SHARON G. DICKINSON, #3710
Deputy Public Defender

CERTIFICATE OF COMPLIANCE

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

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

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

DATED this 7th day of February, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *_/s/ Sharon G. Dickinson_*
SHARON G. DICKINSON, #3710
Deputy Public Defender
309 South Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of February, 2017. 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:

JOHN DEMON MORGAN
NDOC No. 1158013
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

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