IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES . . . . iv, v, vi, vii, viii

INCORRECT STATEMENT OF FACTS 1

FAILURE TO ADDRESS ARGUMENTS AND LAW 1

STATE'S ARGUMENTS IN FOOTNOTES 2

ARGUMENT. 2

I. *BATSON* CHALLENGE. 2

A. Discrimination based on sexual orientation. 2

B. Test. 3

1. Step 1: prima facie case of discrimination. 3

2. Step 2: reasons given and argument. 5

3. Step 3: court's decision. 9

II. FURTHER JURY SELECTION ERRORS. 12

A. Court said State and Defendant were at "same starting line," making hand motions to suggest trial was a car race. 12

B. Challenge to jury venire. 15

1. Court's actions showed judicial bias. 15

2. New venire needed. 18

(a) Step 1: African-Americans -"distinctive" group in community. 18

(b) Step 2: representation not fair and reasonable in relation to number of persons in community. 18

(c) Step 3: under representation/systematic exclusion. 19

C. Use or lose peremptory challenge procedure deprived John meaningful use of his peremptory challenges and unreasonably restricted voir dire. 21

D. Unreasonable restrictions on scope of voir dire. 25

1. *"Can you think of some reasons why he wouldn't want to testify?* 25

2. *"[D]oes anybody here think...sometimes in the criminal justice system... a person is overcharged or charged with--* 25

3. *"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..."* 26

III. SIXTH AMENDMENT RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS DENIED WHEN COURT DIRECTED DEFENSE COUNSEL TO APOLOGIZE DURING CLOSING ARGUMENT. 26

IV. VAGUE PLEADINGS ALLOWED STATE TO CHANGE ITS THEORY OF CASE IN REBUTTAL. 28

V. PROSECUTORIAL MISCONDUCT. 31

VI. THREE MISTRIAL MOTIONS. 31

VII. EVIDENCE INSUFFICIENT. 33

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. 33

IX. LENGTHY DELAY IN TRANSPORTING JOHN TO LAKES' CROSSING IN VIOLATION OF COURT'S ORDER AND DUE PROCESS. 36

X. CUMULATIVE ERROR. 37

CONCLUSION 37

CERTIFICATE OF COMPLIANCE 38

CERTIFICATE OF SERVICE 40

TABLE OF AUTHORITIES

PAGE NO.

Cases

Afzali v. State, 326 P.3d 1, 3 (Nev. 2014) 20

Batson v. Kentucky, 476 U.S. 79, 93 (1986) 2, 10

BedRoc Limited, LLC v. United States, 541 U.S. 176, 183 (1992) 23

Bell v. Wolfish, 441 U.S. 520, 535-37 (1979) 36

Bellon v. State, 121 Nev. 436, 444 (2005). 32

Big Pond v. State, 101 Nev. 1, 3 (1985) 37

Brass v. State, 291 P.3d 145, 149 (Nev. 2012). 11

Brown v. State, 678 So. 2d 910, 911 (Fla. Dist. Ct. App. 1996) 28

Buchanan v. State, 335 P.3d 207, 210 (Nev. 2014) 15

Calvin v. State, 122 Nev. 1178 (2006) 35

Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502 (1990) 23

Commonwealth v. Jose Aponte, 891 Mass. 494 (1984) 21

Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992) 23

Conner v. State, 327 P.3d 503, 510 (Nev. 2014) 5

Coombs v. Diguglielmo, 616 F.3d 255, 264 (3d Cir.2010) 10

Dechant v. State, 116 Nev. 918, 927-28 (2000); *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). 37

Edmond v. State, 126 Nev. 708 (2010). 14

Estelle v. Williams, 425 U.S. 501, 503 (1976)... 13

Ford v. State, 122 Nev. 398, 403 (2006). 5

Gonzales v. State, 2 S.W.3d 600,603 (Tex.App.1999)..................................26

Gyger v. Sunrise Hosp. & Med. Ctr., LLC, WL 7156028 (Nev. 2013)....... 22

Hightower v. State, 123 Nev. 55 (2007) 13

In re Parental Rights as to S.M.M.D., 272 P.3d 126, 132 (2012) 23

Jasper v. State, 61 S.W.3d 413, 421 (Tex.Crim.App. 2001)........................ 13

Jean v. State, 27 So.3d 784 (Ct. of App. Florida 2010).................................27

Johnson v. California, 545 U.S. 162, 170...(2005)... 10

Mangarella v. State, 117 Nev. 130, 133 (2001) 23

Manley v. State, 115 Nev. 114, 125 (1999) 28

Oade v. State, 114 Nev. 619, 623 (1998)...28

People v. Trujillo, 712 P.2d 1079, 1081 (Colo. App. 1985).......................... 25

Polk v. State, 233 P.3d 357, 359 (Nev. 2010)... 2

Purkett v. Elem, 514 U.S. 765, 767. (1995) 9

Scarbo v. Eighth Jud. Dist. Ct., 125 Nev. 118 (2009)...................................34

Scott v. State, 92 Nev. 552, 556 (1976) - 28

SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 474 (9th Cir. 2014)..3

SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006)..2

Snyder v. Louisiana, 552 U.S. 472, 478...(2008)..10

Starr v. United States, 153 U.S. 614, 626 (1894)..28

State v. Tinnes, 877 A.2d 313, 316 (Superior Ct. of N.J. 2005)..................25

State v. Williams, 123 Ore. App. 547, 551 (1993)..............................24, 25

United States v. Baldwin, 607 F.2d 1295, 1298 (9th Cir. 1979)..................24

United States v. Lorenzo, 995 F.2d 1448, 1453-54 (9th Cir. 1993)................8

United States v. Sams, 470 F.2d 751, 754 (5th Cir. 1972)..........................24

Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001). 2

Valdez v. State, 124 Nev. 1172, 1195-98 (2008)...37

Watson v. State, 335 P.3d 157, 166-67 (Nev. 2014).......................................3

Whitlock v. Salmon, 104 Nev. 24, 27 (1988)...25

Williams v. State, 121 Nev. 934, 940 (2005)..15, 18

Misc. Citations

Nev. Const. Art. 1 § 8 14

Nev. Const. Art. 1 Sec. 3; Art. 1 Sec. 8 2

Nev. Const. Art. VI, Sec. 12 28

NRAP 28(a)(8) 1

U.S. Const. Amend. V 14

U.S. Const. Amend. VI 2

U.S. Const. Amend. XIV 2, 14

Statutes

NRS 13.030 22

NRS 16.030 .... 22, 23, 24

NRS 174.234 32

NRS 175.021 22

NRS 175.031 .... 23, 24

NRS 175.191 13

NRS 175.201 13

NRS 175.211 13

NRS 178.405 .... 33, 34

NRS 178.415 .... 33, 34

NRS 178.602 35

NRS 415 33

NRS 6.110 15

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INCORRECT STATEMENT OF FACTS

State's "Statement of Facts" section is summary of Maria Verdozco's preliminary hearing testimony in Justice Court. As such, section is contrary to NRAP 28(a)(8) requirements by not being relevant to issues on review. John asks Court to disregard State's "Statement of Facts," except for last sentence, the only reference to trial testimony.

FAILURE TO ADDRESS ARGUMENTS AND LAW

Respondent's Answering Brief is entitled as such because it is a response to Appellant's arguments. Here, State's index of cases cites approximately 13 of the almost 80 cases John cited and State does not address many of John's arguments. John asks Court to

consider State's negligence a concession that John's points are meritorious in each instance. *Polk v. State*, 233 P.3d 357, 359 (Nev. 2010).

STATE'S ARGUMENTS IN FOOTNOTES

Several of State's arguments challenging John's issues are in footnotes, single spaced: Page 32 contains one footnote almost an entire page in length. Also see RAB pages 11 and 17.

Arguments raised only in footnotes are not preserved for review for the appellate court. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001).

John asks Court to disregard footnote arguments not raised in body of State's brief.

ARGUMENT

I. *BATSON* CHALLENGE.

A. Discrimination based on sexual orientation.

State agrees equal protection is violated if prosecutor uses peremptory challenge based on juror's sexual orientation. *Batson v. Kentucky*, 476 U.S. 79 (1986); U.S. Const. Amend. VI, Amend. XIV; Nev. Const. Art. 1 Sec. 3; Art. 1 Sec. 8. RAB:7.

State further agrees this is an issue of first impression for this Court. State acknowledges *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014)(use of peremptory challenges based on juror's sexual orientation subjected to heighten scrutiny under *Batson*). RAB:7.

B. Test.

1. Step 1: prima facie case of discrimination.

State argues John failed to make a prima facie case of sexual orientation discrimination in State's use of a peremptory challenge because John only argued Juror #24 was gay. RAB:11; III:577; IV:878-882.

Not so.

John argued State specifically asked Juror #24 his sexual orientation during voir dire while not asking other jurors the same question. IV:879-82; III:570-71; OB:11. In focusing on the nature of the questions asked, John provided "something more" as required by *Watson v. State*, 335 P.3d 157, 166-67 (Nev. 2014).

State does not deny Juror #24 was the only juror prosecutor asked about sexual orientation. State compares it to asking other jurors if they were married, single, or divorced. RAB:11, n.1. However, asking jurors the gender of their spouse or partner is not the same.

State's claim trial court concluded John did not make a prima facie case is wrong. RAB:12.

Court's actions and pronouncement indicated John made a prima face case under the first step. After John made his challenge, prosecutor objected and asked court if she should go to the next step (Step 2). Court said: "Go ahead." IV:880. Court did not direct State to respond "out of an abundance of caution" as trial court did in *Watson*. *Id. at* 169. Thus, court found John made a prima facie case.

The quote State attributed to court concluding John did not make a prima facie case under the first step is actually court's overall ruling on John's challenge after State responded in Step 2. IV:880. Court never said John did not make a prima facie case. IV:880.

State also argued John failed to make a prima facie case under four factors discussed in *Watson*. RAB:11-12. As to four factors, John contends: (1) striking one of two means State struck 50%; (2) John identified the difference in prosecutor's questioning of Juror #24 and other jurors; (3) no other jurors were asked similar questions; and (4) case is not sensitive to bias.

However, State never argued these four factors at trial and trial court never addressed them. At trial, prosecutor only contend John failed to show a pattern.

State's four factor argument reeks with afterthought and does not instill confidence in a conclusion that prosecutor's use of a peremptory challenge against Juror #24 was neutral. *See Conner v. State*, 327 P.3d 503, 510 (Nev. 2014). Instead, State illuminates factors prosecutor did not discuss in trial court under Step 1.

Most importantly, on appellate review, the first step is moot if "State gave reasons for use of its peremptory challenges before district court determined whether the opponent of the challenge made a prima facie showing of discrimination." *Ford v. State*, 122 Nev. 398, 403 (2006).

2. Step 2: reasons given and argument.

On appeal, State argues prosecutor struck Juror #24 because he admitted he appreciated recent media attention about police officers because "the few that are abusing their authority are being…charged…" III:535; IV:880; RAB:12-13. State claims prosecutor feared Juror #24 would be biased against police officers. IV:880; RAB:13. However, prosecutor did not challenge Juror #24 for cause. Thus, prosecutor's belated reasoning for striking Juror #24 was implausible.

Juror #24's response came when panel was asked whether anyone had strong feelings about recent criticism of police officers in the media. Juror #24 responded:

> ...I feel that it's about time that the police officers – the few that are abusing their authority are being – you know, are being charged...I think it's gone on way too long that they've been able to abuse the public. II:534-35.

After Juror #24's comments, John immediately asked all jurors if anyone disagreed with him. No hands were raised in the panel. III:535. Thus, all jurors on the panel agreed with Juror #24.

Prosecutor did not seek to remove all jurors who did not raise their hands – only Juror #24.

State further claims Juror #27 and #31 did not make comments about police officers similar to those of Juror #24. RAB:13.

They did.

Juror #24, #27, and #31 all thought criticism of the police was warranted and dialogue very important. *Compare Juror #24* (III:535) *with* III:566- 68 *and* III:588. Juror #27 said dialogue and media criticism of police was important and should be judged on a case-by-case basis. III:566-67. Juror #31 did not have strong feelings about the media attention but added "I know that there [are] bad police officers out there and there's good

police officers and there's a reason everything happens." III:588. Prosecutor did not challenge or strike Juror #27 or #31.

State also contended Juror #24 had "strong" feelings about the media and police. RAB:13-14.

Not so.

When John asked the panel if anyone had "strong feelings about the criticism of cops…in the media," Juror #19 was only juror to respond. III:534-35. Juror #24 did not acknowledge strong feelings.

Juror #24 responded when John asked if anyone had "a problem with the idea of putting a cop on the stand and cross-examining them as to the work that they've done…" III:535.

State further argues Juror #24 "expressed an anti-police bias" and several witnesses were police officers. RAB:14.

Juror #24's comments were not "anti-police" but a reflection that police officers hold the public's trust in their hands every day while on the job and the public should investigate any alleged abuse of their power. Juror #24's comments indicated he would be a good juror for State because he believed police officers must follow the law. Juror #24 likely believed defendants must also follow the law and should be punished when they

break the law. Thus, Juror #24's comments showed he was a law and order person – just the type that would be favorable for the State.

As to why prosecutor asked Juror #24 his sexual orientation, in a footnote, State argues another juror, Juror #11, was also gay and clearly revealed this information. RAB:11, n.1;II:494-95. On appeal, State contends Juror #24 was less clear about his relationship status, provoking prosecutor to seek further clarification. RAB:11, n.1.

State offers no explanation as to why questioning Juror #24 about his intimate relationship with a person of the same sex in voir dire was relevant to determine bias in this alleged battery/robbery case of an AM/PM convenience store. To the contrary, State asserts "this case was not sensitive to bias." RAB:12.

When challenged at trial, prosecutor initially said: "There must be a pattern established first before I make up my sexual orientation which [indecipherable]." IV:880.

Watson holds it is not necessary to show a pattern. 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).

Prosecutor's use of the word "make up" is telling. It suggests she was going to make up a reason that may not be the real reason she struck Juror #24.

At trial, prosecutor also contended she did not ask Juror #24 about his sexual orientation but asked what his partner did. IV:879. When confronted with the fact that she asked him if his partner was a girlfriend or boyfriend, prosecutor responded: "Or whatever. He's a homosexual, it was out there..." IV:880.

Prosecutor's response that she knew Juror #24 was a homosexual suggests her state of mind during voir dire and when using peremptory challenges. If she knew Juror #24 was a homosexual then there was no need to ask him during voir dire if his partner was a boyfriend or girlfriend.

Under second *Batson* step, State contends prosecutor can make up any reason – even one that is implausible – and the reason will suffice, citing *Purkett v. Elem*, 514 U.S. 765, 767. (1995). RAB:7-8. While this is correct, in the third step "implausible or fantastic justification may and probably will) be found to be pretexts for purposeful discrimination." *Id.*

3. Step 3: court's decision.

State's failure to address John's argument under Step 3 regarding judicial bias and inadequate inquiry is concession of error. *Polk*.

Under third step, court:

> "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and "consider all relevant circumstances" before ruling on a *Batson* objection and dismissing the challenged juror. *Batson,* 476 U.S. at 93... (internal quotation marks omitted); *see also Snyder v. Louisiana,* 552 U.S. 472, 478...(2008). This sensitive inquiry certainly includes giving the defendant an opportunity to "traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual." *Hawkins,* 127 Nev. at —— –, 256 P.3d at 967; *Coombs v. Diguglielmo,* 616 F.3d 255, 264 (3d Cir.2010) ("*Batson* requires ... an opportunity for opposing counsel to argue that the proffered reasons are pretextual...."). A district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual. *See Coombs,* 616 F.3d at 263. The district court should sustain the *Batson* objection and deny the peremptory challenge if it is "more likely than not that the challenge was improperly motivated." *Johnson v. California,* 545 U.S. 162, 170...(2005)...
>
> ...

Conner at 509.

Here, court made up her mind without allowing John to provide counter argument regarding prosecutor's implausible explanation for removing Juror #24. IV:880. Thus, court violated procedures in place for a *Batson* challenge.

Additionally, court's decision requiring a pattern is clearly erroneous because *Watson* indicates proponent of a *Batson* challenge does not have to show a pattern. *Watson at* 166-67.

Furthermore, court's procedure showed judicial bias and a failure to conduct a sensitive inquiry much like occurred in *Brass v. State*, 291 P.3d 145, 149 (Nev. 2012). State did not address *Brass*. *Polk*.

State contends court did not prejudge John's *Batson* challenge as evidenced by her use of the word "surprised." RAB:12. But court made the "surprised" comment before allowing John to respond. Thus, court had already judged challenge before allowing rebuttal argument.

Conner Court required district court give party raising a *Batson* challenge opportunity to respond after opposing party recited reasons for using the peremptory challenge. Although district court belatedly allowed John to respond, court acted disinterested and said: "Okay. By the way, we're spending an awful lot of time up here with these bench conferences, okay?" IV:880.

Judicial bias is also shown by court making no comment regarding prosecutor's failure to remove another juror who made responses similar to those made by Juror #24. Court also did not factor in that State did not challenge Juror #24 for cause.

Prosecutor's reasoning was implausible as addressed in argument under Step 2. Prosecutor's questioning of Juror #24 was markedly different from other jurors. Jurors with similar answers regarding police and the

media remained on the jury but not Juror #24. Because all jurors admitted they felt the same say as Juror #24 when it came to police and the media, prosecutor's response could only be pre-textual. Accordingly, court's decision that "the prosecution had a reason to strike him" was clearly erroneous. IV:880.

II. FURTHER JURY SELECTION ERRORS.

A. Court said State and Defendant were at "same starting line," making hand motions to suggest trial was a car race.

State misunderstood John's argument regarding necessity for a new venire and incorrectly claimed it was a voir dire issue involving a possible biased juror. RAB:19-21. It is not.

John asked for a new venire because court inaccurately compared his trial to a car race, thereby wrongly explaining the burden of proof and the presumption of innocence. Court's analogy required John to prove his innocence because the first car to reach the checkered flag wins. The winner in a car race may win by an inch or a mile. Thus, by moving her hands back and forth, court allowed jurors to believe that whoever was ahead at end of the trial was the winner – an example of the preponderance of the evidence standard rather than beyond a reasonable doubt.

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). When trial judge's comments taint the presumption of innocence before jury venire, fundamental error of a constitutional dimension occurs because the impartiality of jury is destroyed. *Jasper v. State*, 61 S.W.3d 413, 421 (Tex.Crim.App. 2001).

State's does not address issue raised and *Jasper, Polk.*

Legislature defined presumption of innocence in NRS 175.191. "A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted." NRS 175.191; also see NRS 175.201.

Legislature defined the burden of proof needed to overcome the presumption of innocence as proof beyond a reasonable doubt in NRS 175.211(1). The NRS 175.211(1) definition of reasonable doubt is the only definition court may give jury. NRS 175.211(2). By telling jury venire trial was a car race, court violated NRS 175.191, NRS 175.201 and NRS 175.211, as well as *Hightower v. State*, 123 Nev. 55 (2007); U.S. Const.

Amend. V; Amend. XIV; Nev. Const. Art. 1 § 8. The presumption of innocence and burden of proof are not a car race.

Accordingly court abused its discretion when deciding the venire was not tainted. *Edmond v. State*, 126 Nev. 708 (2010).

State contends no error occurred because judge asked juror questions about bias (II:415) and later told entire panel John was presumed innocent and State had burden to prove him guilty beyond a reasonable doubt. (II:422).

However, court never instructed jury to disregard her car race analogy. Without a specific instruction directing jury to disregard her car race example, the bell was never un-rung no matter how many subsequent admonishments court gave jury.

During voir dire, three prospective jurors expressed confusion over the presumption of innocence and/or thought defendant should prove his case or testify: Juror #011 (II:495-95;III:534-33); Juror #16 (III:500-05; 530); Juror #26 (III:553). Thus, there was evidence that the car race analogy was prejudicial.

Belated pre-trial instructions (III:623) cannot wash away taint placed on jurors during selection process thereby making it difficult for John to weed out prejudice before jurors were impaneled.

B. Challenge to jury venire.

1. Court's actions showed judicial bias.

Just as court showed judicial bias when deciding John's *Batson* challenge, court showed judicial bias in not granting John's request for an evidentiary hearing before deciding his challenge to the venire.

State indirectly concedes error by ignoring John's judicial bias argument regarding timing of evidentiary hearing and only citing *Buchanan v. State*, 335 P.3d 207, 210 (Nev. 2014) in footnote. RAB:14-18. *Polk.*

State contends John was not entitled to a hearing because he did not make a prima facie case by showing NRS 6.110(1) procedures were not followed. RAB:14-18 and n.4.

However, at trial prosecutor said: "To get a hearing for this [challenge] you have to ask for one. There's no prima facie showing that needs to be met and satisfied to get a hearing…" III:651.

Accordingly, State's new argument on appeal - contrary to its assertion at trial - shows a misunderstanding of *Williams v. State*, 121 Nev. 934, 940 (2005).

Williams does not indicate John must first argue systematic exclusion occurred "before the burden shifts to the State to show the disparity is justified" or before hearing is held. RAB:17. *Williams* does not discuss

burden shifting. *Williams* does not require a showing that NRS 6.110(1) was not followed before a hearing may be held.

As to a haring with the jury commissioner, *Williams* states:

> "To fairly represent the community, there must be an awareness of the make-up of that community." (cite omitted). Therefore, jury commissioners should be cognizant of the makeup of their community, (cite omitted) should compare this with the makeup of the lists used in the jury selection process and the resulting jury pool,(cite omitted) and should strive to create lists of prospective jurors that represent an accurate cross section of the community.

Id. *Williams* acknowledges that fair cross-section component of the Sixth Amendment is not fulfilled by "blindly following statutes." *Id.* 942. Thus, a challenge to venire *requires* an evidentiary hearing to determine whether jury commissioner fulfilled these requirements.

State also misunderstands *Buchanan*.

State contends *Buchanan* does not apply here because court initially determined no hearing was needed and hearing only occurred because State wanted a hearing. RAB:17, n.4, 5. However, the rationale behind the *Buchanan* decision is court's actions created appearance of judicial bias. Here, as in *Buchanan*, court decided fair cross-section challenge "based on a record devoid of any factual information regarding the venire selection process" when denying John's first two challenges and requests for a hearing. *Id.* at 210.

State's last ditch attempt to save the record by asking for hearing does not change the appearance of judicial bias but re-enforces it because when John asked for a hearing court said "no" and when State – who had no burden of proof at this point– asked for a hearing court said "yes."

An evidentiary hearing with the jury commissioner would generally be required because defendant has no personal knowledge of how his jury venire was established. John would not be able to address Step 3 – systematic exclusion – without information from the jury commissioner or her designee who works in the jury system. Thus, State's argument that John must first show systematic exclusion before he is entitled to a hearing is wrong.

Here court made two rulings on John's challenge without any information on jury selection procedures, without a hearing. IV:869;III:518.

After agreeing to hold an evidentiary hearing, court completed jury selection, swore in jury, instructed jury on preliminary matters, and read charges and law to jury panel. III:652-53. Thus, as in *Buchanan*, court's actions and words show she made her decision based on a record devoid of factual information necessary for deciding a challenge to the venire before holding a hearing she agreed was needed.

The *Brass* Court found structural error when court removed a challenged juror from venire and held *Batson* hearing later. Here, as in *Brass*, court continued with jury selection and swore in jury before holding the challenge hearing. Thus, court made her decision to deny John's challenge to venire before hearing any testimony from Jury Commissioner thereby creating structural error.

2. New venire needed.

(a) Step 1: African-Americans -"distinctive" group in community.

State agrees. RAB:16

(b) Step 2: representation not fair and reasonable in relation to number of persons in community.

State claims it is not confident John fulfilled Step 2, arguing at most only one or two African-American's were missing. RAB:16-17.

Using the *William*'s test, John presented sufficient statistics showing 3 African-Americans resulted in 6.66 % in the 45 person venire, amounting to a 5.14 % absolute disparity and a comparative disparity of 56.4 %. *Williams at* 940, n.9;see OB:19.

A comparative disparity over 50% indicates representation of African-Americans was not likely fair and reasonable. *Id.* Thus, *Williams* shows a seemingly minor fluctuation in number of minorities on a jury panel is actually an underrepresentation subject to constitutional scrutiny.

(c) Step 3: under representation/systematic exclusion.

State contends John made no claim underrepresentation of African-Americans was due to systematic exclusion. RAB:16-18.

John's argument is twofold: (1) violation of due process by State not providing information needed to prove systematic exclusion; and (2) system in place allows for systematic exclusion in violation of equal protection and due process.

In Opening Brief John challenged procedures used by Eighth Judicial District Court for selecting jury as addressed by Jury Commissioner Maria Witt. Witt had no personally knowledge of how random selection process worked, only knew what IT person told her, conducted no follow-up studies to confirm summons were randomly sent to correct demographics, and she never checked her hypothesis against raw data. III:641-49;OB:20-23.

Williams directs jury commissioner to not "blindly" follow statutes, but to compare makeup of the community with makeup on jury lists and resulting jury pool. *Id.* 942. Witt is required to "strive to create lists of prospective jurors that represent an accurate cross section of the community. *Id.* Thus, when John told court Witt was required to do more to ensure minorities were not excluded, he was right. III:650-51.

On appeal, John noted problems with process Witt discussed. Witt said system distributed summons equally to all zip codes. III:644. Sending summons to all zip codes equally means zip codes with lower populations received more summons and zip codes with higher populations fewer. More minorities live in densely populated areas and may receive fewer summons. This leads to disparity and exclusion of minorities.

Witt testified system has a qualification questionnaire on race but claimed it was not conclusive – suggesting it had no value. III:642-43.

Witt admitted summons are simply mailed without any follow-up to ensure panels represent a fair cross-section of community.

State does not address these arguments.

John cannot present further information on how or why jury selection process leads to systematic exclusion of minorities because Eighth Judicial Court does not keep statistics or records for a defendant to use for a challenge. Witt's failure to present or testify to any statistics amounted to a conscious indifference to a defendant's constitutional rights in violation of due process.

Witt and court have a duty to keep statistics for defense to review to support or refute a fair cross-section objection. In *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014), Court held that when defendant challenges fair cross-section

requirement he is entitled to information relating to the racial composition of the grand jury. The same principle holds true when defendant challenges racial composition of his venire. The fair cross-section "requirement would be without meaning if a defendant were denied means of discovery in an effort to assert that right. *Id.* (cite omitted).

Checks and balances may reveal problems even though jury selection rules are followed as discussed in *Commonwealth v. Jose Aponte*, 891 Mass. 494 (1984). *Aponte* showed an investigation uncovered incorrect mailings and improper issuance of summons. *Aponte* stands for the importance of record keeping and checking on how and where summons are sent. State does not address. *Polk.*

The problem with venires lacking minorities is not unusual in Eighth Judicial District Court. Problems continue today. This was the second time that day the jury commissioner testified. III:651.

C. Use or lose peremptory challenge procedure deprived John meaningful use of his peremptory challenges and unreasonably restricted voir dire.

State contends John was allowed to question all jurors before using peremptory challenges by submitting questions to court. RAB:6; II:394-95.

Not so.

In discussions at II:394-95, court merely familiarized parties with questions court would ask entire venire. Court did not request parties submit questions.

Prior to this, court said she would ask venire a few general questions and then allow parties to question 13 jurors called to the panel, collectively and specifically. II:389-93.

John asked court pass 23 people for cause prior to parties exercising peremptory challenges but court declined. II:392-94. II:393-94.

State does not address Gyger v. Sunrise Hosp. & Med. Ctr., LLC, WL 7156028 (Nev. 2013), peremptory challenges, or method and process court used for selecting jury, instead limiting analysis to scope of voir dire, claiming voir dire was not unreasonable restricted. RAB:6-9.

"Trial juries for criminal actions are formed in the same manner as trial juries in civil actions." NRS 175.021(1). Judge uses venire list to call "a number of names to form a panel of prospective jurors equal to the sum of the number of regular jurors and alternate jurors to be selected and the number of peremptory challenges to be exercised." NRS 13.030(4).

This means all 23 prospective jurors are examined as to their qualifications to serve. Those excused are replaced and all are examined for cause. NRS 16.030(4). "When a sufficient number of prospective jurors has

been qualified to complete the panel, each side shall exercise its peremptory challenges out of the hearing of the panel by alternately striking names from the list of persons on the panel." *Id.* When the exercise of peremptory challenges is completed, "the persons remaining on the panel who are needed to complete the jury shall, in the order in which their names were drawn, be regular jurors or alternate jurors." *Id.*

By not following the guidelines of NRS 16.030, court denied John effective use of his peremptory challenges and unreasonably restricted voir dire.

NRS 175.031 states:

> The court shall conduct the initial examination of prospective jurors....Any supplemental examination must not be unreasonably restricted.

Court begins analysis of NRS 175.031 by "'presum[ing] that [the] legislature says in a statute what it means and means in a statute what it says there.'" *In re Parental Rights as to S.M.M.D.*, 272 P.3d 126, 132 (2012) *citing BedRoc Limited, LLC v. United States,* 541 U.S. 176, 183 (alteration in original) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–54 (1992); *Mangarella v. State*, 117 Nev. 130, 133 (2001) *quoting Charlie Brown Constr. Co. v. Boulder City,* 106 Nev. 497, 502 (1990)(Court gives words in a statute their plain meaning and construes

statute as a whole so "not be read in a way that would render words or phrases superfluous or make a provision nugatory").

Plain meaning of words in NRS 175.031 and NRS 16.030 indicate trial court must first qualify total number of jurors needed and then allow supplemental voir dire of all jurors before parties use peremptory challenges.

This interpretation of NRS 175.031 comports with purpose of voir dire to "enable litigants to obtain enough information to make an intelligent decision whether to exercise a peremptory challenge." *State v. Williams*, 123 Ore. App. 547, 551 (1993). 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).

The struck-jury method required by NRS 175.031 and NRS 16.030 is the fairest method for allowing a defendant an opportunity to make a full choice of the use of his peremptory challenges. *United States v. Sams*, 470 F.2d 751, 754 (5th Cir. 1972). It allows parties full knowledge of all possible jurors who could hear the case and gives the ability to make informed intelligent decisions on peremptory challenges.

John does not need to show his jury was not fair and impartial as part of analysis. RAB:7.

Judge is gatekeeper during jury selection process, vested with high responsibility to take "all appropriate measures to ensure the fair and proper administration of a criminal trial. *State v. Tinnes*, 877 A.2d 313, 316 (Superior Ct. of N.J. 2005)(other cite omitted). Here, by not following the rules in place for jury selection, court failed to conduct a thorough voir dire of all 23 jurors thereby denying John effective use of peremptory challenges and effective use of voir dire.

D. Unreasonable restrictions on scope of voir dire.

State ignored cases/statutes John cited: *Polk.*

State claims questions were improper. RAB:21.

1. "Can you think of some reasons why he wouldn't want to testify? III:535.

At trial, prosecutor argued court already asked this question but State points to no part of record where court asked same questions. IV:869;II:408-77. "[I]t 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).

2. "[D]oes anybody here think…sometimes in the criminal justice system… a person is overcharged or charged with-- III:533.

Prosecutor's objection at trial was unclear. IV:870-71. On appeal, State claims it is a hypothetical.

John's question was relevant query to determine if jurors would consider a conviction for a lessor crime not charged in Information. Due process and right to counsel allow an attorney to ask questions on voir dire focusing on burden of proof and defense theory. *See Gonzales v. State*, 2 S.W.3d 600,603 (Tex.App.1999).

3. "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.

No discussing by State.

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

State misunderstands facts in John's brief and trial record. RAB:22. State incorrectly claims in closing and/or appeal John argued: "a witness for the State stated that victim Maria Verdoza was still a manager at the store..." RAB:22.

On appeal, John said D.A. investigator said Ruby – not Maria - still worked at the AM/PM. IV:836;OB:29-30. At trial, John said: "Maria

Verduzco is still a manager at the AM/PM. Ruby Cruz her employee, her – she is the direct superior of Ruby Cruz." IV:837. Accordingly, John did not argue DA investigator said Maria still worked there.

When prosecutor objected to John's statement in closing, prosecutor argued there was no evidence produced at trial that Maria *still* worked at AM/PM. IV:837;915-19. Prosecutor emphasized her personal knowledge that Maria no longer worked there. IV:916.

There is no testimony indicating Maria *no longer* worked at AM/PM at the time of trial.

However, at trial, prosecutor inferred Maria was still working at AM/PM. She asked Maria about her managerial duties. III:662-65. Prosecutor asked: "when you work as manager, let me ask you, since working at this store since 2008..." III:678. Prosecutor never corrected the question to clarify Maria no longer worked at AM/PM.

Because Maria never said she no longer worked there, John's argument in closing was reasonably based on testimony. *See Jean v. State*, 27 So.3d 784 (Ct. of App. Florida 2010).

By requiring John to apologize and directing jury "there's no evidence that she is currently the manager" (IV:837), court commented on and added new facts never introduced at trial.

"Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Nev. Const. Art. VI, Sec. 12. It is error for court to volunteer his opinion on the evidence. *Oade v. State*, 114 Nev. 619, 623 (1998); *Brown v. State*, 678 So. 2d 910, 911 (Fla. Dist. Ct. App. 1996)(reversible error for court to comment on statement Defense Counsel made in closing about the testimony of witnesses by telling jury "There is no evidence that anybody is a liar").

"[T]he influence of the trial judge on the jury is necessarily and properly of great weight, and [] his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). Court's demand Defense Counsel apologize diminished counsel's effectiveness and credibility in front of jury during John's last chance to talk to jury.

Cases State cited are irrelevant: (1) *Manley v. State*, 115 Nev. 114, 125 (1999) - court limited closing argument to two hours; and (2) *Scott v. State*, 92 Nev. 552, 556 (1976) - defense counsel voluntarily apologized to jury when misstating the law.

State does not address cases John cited. *Polk*.

IV. VAGUE PLEADINGS ALLOWED STATE TO CHANGE THEORY IN REBUTTAL.

State ignored cases and many arguments John referenced. *Polk.* RAB:22-25;OB:32-35.

State incorrectly relies on criminal complaint rather than Amended Information in argument. I:184-85; Instruction #3 I:202. Prosecutor changed order of counts prior to trial.

State incorrectly claims John was charged with battery to commit robbery rather than with intent to commit a crime. RAB:23-24; I:202.

State claims notice in pleadings was reasonable.

In battery with intent to commit a crime count, State pled elements of "force or violence" and alleged John punched Maria "in the chest and/or neck, knocking her to the ground" with intent to commit robbery. I:202. In robbery count, State pled no facts indicating how it would prove John used "force or fear." II:202. By not acknowledging robbery count was missing facts, State did not address issue at hand. RAB:23 *Polk.*

John filed a motion to dismiss alternatively seeking a bill of particulars and asked if the counts were pled in the alternative. I:150-58; 159-64; 177-93;II:375-79. Thus, John needed further information in order to defend against the charges and requested such.

State insincerely claims prosecutor made same argument in closing and in rebuttal. RAB:25. When settling jury instructions, prosecutor told court "robbery is where he struck her…we do not need to show violence." IV:803.

In closing, prosecutor said when John approached Maria and cursed, he used the fear of violence to retain property. III:824. Then he hit Maria and she fell – "this is use of force or violence to retain the property." III:825. In each instance, prosecutor was talking about robbery.

When prosecutor argued about the battery count in closing, she said: "we've already discussed the use of force or violence." III: 825. Thus, in closing State used same acts of fear or violence for both counts.

However, in rebuttal, prosecutor argued 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.

Accordingly, State argued the same acts for both crimes in closing but not in rebuttal thereby changing the theory of its case. Vague pleadings allowed prosecutor to change of theory of the case in closing. See OB:33-35.

John would not have seen the changed theory coming due to the vague pleadings and Maria's testimony.

Maria never testified she felt fearful. When she confronted John, he came toward her, cursed, punched her, and she fell on the ground. III:668-9. She felt nervous when John cursed but did not think he would hit her. III:683.

State argues in footnote that because John stipulate to misdemeanor battery John may not complain his convictions for robbery and battery were based on same act. RAB:25.

John never stipulated – he argued he was guilty of a simple battery but not robbery. II:659-61;III:841.

V. PROSECUTORIAL MISCONDUCT.

State limits argument to small portion - not entire section - of prosecutor's statement, thereby deceptively minimizing its effect. *Compare* OB:35 to RAB:25.

Prosecutor's argument was not innocuous. RAB:26. Prosecutor implied jury needed to convict John to protect Maria, it asked jurors to sympathize with her, and indirectly suggested jurors should stand in shoes of the victim. State does not address cases John cited. OB:35-36. *Polk*

Evidence was not close as State contends as evidenced by jury finding John not guilty of the felony battery. RAB:26-See Issue VII.

VI. THREE MISTRIAL MOTIONS.

State argues court correctly denied mistrial when Law testified John resisted arrest because John's flight and subsequent arrest the same day of the robbery were relevant. RAB:27.

However, even if flight was relevant for consciousness of guilt, resisting arrest was not "so closely related to the act in controversy that the witness [couldn't] describe the act without referring to the other uncharged act or crime. *Bellon v. State*, 121 Nev. 436, 444 (2005).

As to John's second mistrial motion, State does not dispute it withheld discovery from John, only arguing John cited no authority cited.

NRS 174.234(1) requires prosecutor to reveal of all witnesses State intends to call. Even though State violated discovery, court allowed State's investigator to testify to efforts made in subpoenaing Ruby Cruz and prohibited John from introducing testimony D.A. without discovery. III:787-93.

John argued if court allowed State to present evidence as to why they did not call Ruby then he should be allowed to present evidence as to why he was unable to call Ruby – he was not given her address. IV:902-3.

John requested a third mistrial in closing – State does not respond to John's arguments and legal authorities as to third mistrial cited here. *Polk*; *see Issue IV*; IV:842-43.

VII. EVIDENCE INSUFFICIENT.

John did not stipulated to battery as State contends, and surveillance tape is limited - it does not show if John left with any items. RAB:28. Maria never testified she saw John take nuts *from* the store – she said while *inside* store. III:665-67.

State present no evidence to show alleged nuts Law testified to but never impounded came from AM/PM's inventory.

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

State's argument illustrates general misunderstanding of competency challenge hearings, evidentiary rules, and dicta. RAB:30-32;OB:39-47.

Competency proceeding involve several hearings, beginning with court appointing examiners to provide reports and opinion on defendant's competency. NRS 178.405; NRS 415(1) and (2). Another hearing occurs after submittal of competency reports to judge and parties. Defendant may

allow court to decide competency based on reports, without any cross-examination of evaluators, at this hearing.

However, as in this instance, Defendant may challenge reports and seek a hearing to "examine the person or persons appointed to examine the defendant." NRS 178.405(3).

State argues evaluators are not required to be at hearings unless subpoenaed and Defendant loses his right to cross-examine them if they are absent even though NRS 178.405(3) mandates cross-examination. RAB:31-32. State bases argument on footnote 5 in *Scarbo v. Eighth Jud. Dist. Ct.*, 125 Nev. 118 (2009).

In *Scarbo*, district court refused to give Defendant a copy of evaluator's reports. As such, whether or not evaluators were summons was not at issue thereby making footnote 5 dicta. Footnote 5 addresses an instance when Defendant stipulates to decision being made by court solely on evaluation reports.

Challenge hearings require cross-examination – that is why they are challenge hearings. A challenge hearing requires State or court to subpoena evaluators. NRS 178.415(3). Prosecutor in district court understood this procedure and asked for a continuance because he forgot to subpoena the other evaluators. II:268. John did not object to a continuance. II:267-69.

State argues no error because John did not object to other evaluators not being present. RAB:31. However, John objected to court using reports by asking for a challenge hearing on 01/06/15. John never said he only wanted to call one doctor, he said he had one witness ready to testify. II:267-69.

It was court who did not want a bifurcated hearing and wanted to use reports. II:268-69. Thus, John could not object further.

But if Court concludes John did not object enough, it was plain error for court to proceed at challenge hearing without allowing John to cross-examine all evaluators because NRS 178.418(3) mandates court allow cross-examination. NRS 178.602.

John objected to court deciding competency based on the written reports on 01/16/15 when he asked for a hearing. II:264. Thus, plain error is inapplicable.

State did not address John's argument regarding the plain meaning of words in NRS 178.415(3), notice, and meaningful opportunity to be heard. *Polk.* OB:41-46.

Calvin v. State, 122 Nev. 1178 (2006) discusses standards evaluators use for competency and indicates evidentiary rules apply in competency hearings. *Id. at* 1183. *Calvin* does not discuss burdens of proof and

standards at hearing. *Calvin* equates term "other evidence" in NRS 178.415(3) to be evidence other than competency reports prepared by court's evaluators. *Id.*

Here, by using reports from non-testifying doctors without cross-examination, court acted arbitrary and capricious. *See reports in volume V.*

IX. LENGTHLY DELAY IN TRANSPORTING JOHN TO LAKES' CROSSING VIOLATED COURT'S ORDER AND DUE PROCESS.

By only addressing issue in footnote and ignoring all criminal authority in John's analysis, Court may disregard State's footnote argument. *Polk.* RAB:32, n.8;OB:47-53.

State contends civil cases cited by John are not dispositive legal authority for dismissing criminal case when State knowingly disobeys court order requiring a mentally deficient criminal defendant to be placed in a treatment center rather than a jail cell. However, John cited criminal cases which State ignored, to include *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979) discussing punitive pretrial conditions. OB:47-53.

State argues John received remedy he was entitled to: new order to transport. However, court noted it was an "empty order." II:333.

State's systematic neglect in transporting criminal defendant's to Lake's Crossing for mental health treatment was well documented. I:061-

112. Therefore, under these circumstances, district court should have dismissed charges and released John or fashioned another remedy.

X. CUMULATIVE ERROR.

If no singular error is sufficient for reversal, Court analyzes collective effect of errors. *Valdez v. State*, 124 Nev. 1172 (2008).

CONCLUSION

Reversal and dismissal warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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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 3rd day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 3rd day of May, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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