IN THE SUPREME COURT OF THE STATE OF NEVADA

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

PETITION FOR EN BANC RECONSIDERATION

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
Nevada Bar No. 005248
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

PETITION FOR EN BANC RECONSIDERATION

COMES NOW Chief Deputy Public Defenders SHARON G. DICKINSON and NADIA HOJJAT, on behalf of appellant, JOHN DEMON MORGAN, and pursuant to NRAP 40A, petitions this Court for rehearing of the Opinion issued on 05/03/18 and the Order denying rehearing issued on 06/08/18. This petition is timely filed with 10 days of the filing of the Order

///

///

///

///

///

denying rehearing. NRAP 40A(b). It is based on the following memorandum of points and authorities and all papers and pleading on file herein.

Dated this 18 day of June, 2018.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
Sharon G. Dickinson, Bar #3710

By: */s/ Nadia Hojjat*
Nadia Hojjat Bar #12401
Deputy Public Defenders
309 South Third Street, #226
Las Vegas, Nevada 89155-2610

POINTS AND AUTHORITIES

I. JURISDICTION

Court may consider Petition for En Banc Reconsideration of panel decision when "proceeding involves a substantial precedential, constitutional or public policy issue" or "reconsideration is necessary to secure or maintain uniformity of decisions of the [Court]." NRAP 40A(a).

II. ARGUMENT

A. ISSUE II: Subsection C and D.

Peremptory challenge and voir dire procedures denied John meaningful use of peremptory challenges and unreasonable restricted voir dire.

The trial court is not at liberty to decide what process to use in conducting jury selection. Jury selection procedures are established by the Legislature and implemented by the courts. The trial court only controls the substance, length, and content of voir dire and rules on challenges to the venire, for cause, and peremptory challenges.

Allowing the Legislature to dictate the jury selection procedures is accepted by this Court. The *Whitlock* Court held that rather than being an encroachment on judicial power, the jury selection statute, NRS 16.030, "confers a substantive right." *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988). The substantive right discussed in *Whitlock* was "reasonable participation in

voir dire by counsel..." as provided for in NRS 16.030(6). *Id.* at 26; *also see Leone v. Goodman*, 105 Nev. 221, 222–23 (1989). In *Whitlock* this Court reversed the judgment because the trial court prohibited the attorneys from directly participating in voir dire. In finding error, the *Whitlock* Court said it would "not attempt to abridge or modify a substantive right" as provided in NRS 16.030. *Id.*; NRS 2.120 (court may not make rules inconsistent with the Nevada Revised Statutes and the Constitution).

Court also reversed a conviction when the trial court failed to follow jury selection procedures in NRS 16.030(5). The *Barral* Court found district court's failure to administer the jury oath to prospective jurors, as required by NRS 16.030(5), was structural error necessitating reversal because "a defendant in a criminal case is denied due process when the jury selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process." *Barral v. State*, 353 P.3d 1197, 1200 (2015), *reh'g denied* (Nev. 2015), *reconsideration en banc denied* (12/02/15), *cert. denied*, 15-931, 2016 WL 309779 (U.S. 06/28/16).

Whitlock and *Barral* provide that although the trial court controls the practice of jury selection in each courtroom, the Legislature defines the rules and describes the procedures; and, the jury selection statutes create substantive rights for the parties at trial. The following jury selection rules

enacted by the Legislature provide the parties with substantive rights: (1) oath required for prospective jurors before questioning;[1] (2) limited reasons are allowed for court excusing a juror from service;[2] (3) requirement of reasonable voir dire;[3] (4) use of peremptory challenge;[4] (5) challenge for cause procedures;[5] and (6) the required number of jurors and alternate jurors.[6]

This case addresses John Morgan's substantive rights under NRS 16.030(4), specifically whether voir dire and challenges for cause must be completed prior to the parties beginning exercising peremptory challenges. Here, as in *Whitlock* and *Barral*, John objected to the court not following NRS 16.030(4) thereby preserving review of a violation of his substantive rights.[7]

John wanted a meaningful use of his peremptory challenges. To obtain a meaningful use of his peremptory challenges, John requested the

---

1 NRS 16.030(5).

2 NRS 6.010; NRS 6.020; NRS 6.030.

3 NRS 175.031.

4 NRS 16.030(4); NRS 16.040; NRS 175.051.

5 NRS 16.050; NRS 16.060; NRS 175.036.

6 NRS 16.030(3) and (4); NRS 175.011; NRS 175.021; NRS 175.061.

7 In *Moore v. State*, 112 Nev. 27, 36-37 (2006), Court reaffirmed that the trial court must follow the Legislature's dictates for jury selection. In *Moore*, the trial court violated NRS 175.061 by using a blind alternate procedure. However, because the trial attorneys did not object, Court used plain error analysis, concluding Moore's substantial rights were not affected.

court allow the parties to complete voir dire and pass 23 people for cause before he began using his peremptory challenges. His request was based on his substantive rights in NRS 16.030(4), due process, and on the unpublished Nevada case, Gyger v. Sunrise Hosp. & Med. Ctr., *LLC*, 58972, 2013 WL 7156028, at *2–3 (Nev. Dec. 18, 2013). II:392-94.

John explained:

> 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.

John contended the first 12 jurors left in the box would be his jury while the 13th would be the alternate. He cited Gyger.

Court disagreed.

Trial court asked the venire a few general questions, called 13 jurors to the box, and allowed the parties to question the 13 jurors collectively and specifically. II:389-93. After the parties passed the 13 jurors for cause, court used a "use or lose" peremptory challenges procedure. When one party excused a juror with a peremptory challenge, court replaced that juror, allowed voir dire of the new juror, and then required the next party to use or

lose a peremptory challenge. *See Morgan v. State*, 416 P.3d 212, 222–23 (Nev. 2018).

At oral argument, prosecutor admitted that the procedures used for jury selection in this case may create a problem she called: "Sorry Charlie you are out of luck." When the trial court does not first qualify all jurors who could be called, the parties do not know anything about the next person who may fill the vacant seat after a peremptory challenge is used. The prosecutor said that although you could ask the newer juror questions, unless you find a reason to remove the new juror for cause and you were out of peremptory challenges then "you are out of luck." Clearly, such procedures do not comport with seating a fair and impartial jury.

The *Morgan* Panel decided the trial court did not abuse its discretion by using this procedure because the trial court first asked general questions all 45 persons in the venire. *Id.* However, in reaching this conclusion, the *Morgan* Panel did not acknowledge that this procedure conflicts with NRS 16.030(4). NRS 16.030(4) specifically requires a number of names be called to the panel equal to the number of jurors, alternates, and peremptory challenges before the parties scratch off people on the list. NRS 16.030(4) gives John the substantive right to this procedure.

As to Gyger, the *Morgan* Panel distinguished the facts, contending the trial court in Gyger merely called 13 jurors to the box without first questioning the entire venire. *Id.* However, the Gyger order does not contain the facts the *Morgan* Panel relied on and the standard of review used in Gyger was plain error whereas here, John objected.

As previously stated, the procedures used by the trial court in this case and affirmed in *Morgan* contradict NRS 16.030(4) and deny all parties a meaningful use of peremptory challenges.

"Trial juries for criminal actions are formed in the same manner as trial juries in civil actions." NRS 175.021(1). NRS 16.030(4) explains the jury selection process, in pertinent part:

> The judge may require that the clerk draw 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.** The persons whose names are called **must** be examined as to their qualifications to serve as jurors. If any persons on the panel are excused for cause, they **must** be replaced by additional persons who **must** also be examined as to their qualifications...**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. After the peremptory challenges have been exercised, 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.** (Emphasis added).

Under the plain meaning of NRS 16.030(4), the Legislature requires the court qualify a sufficient number of jurors *before* the parties use their peremptory challenges. The parties use their peremptory challenges by "striking names from the list of the persons on the panel" and they do this "out of the hearing of the panel." In order to do this, the number of prospective jurors on the list used must equal the sum of regular jurors, alternates, and peremptory challenges. Other language in NRS 16.030(4) further supports this procedure. The Legislature says the parties begin using their peremptory challenges "by alternately striking names from the list of jurors on the panel." Thus, the parties would not begin using peremptory challenges until the list is complete with the parties completing voir dire and the court deciding challenges for cause.

Based on NRS 16.030(4), in this case, the parties would begin using *all* peremptory challenges *after* all 23 prospective jurors were qualified and passed for cause rather than piecemeal as occurred here. This interpretation comports with the purpose of voir dire which is 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). Here, the trial court only passed 13 jurors.

The Legislature's intent is further confirmed by the last sentence of NRS 16.030(4) which indicates "the persons remaining on the panel who are needed to complete the panel shall, in the order in which their names were drawn, be regular or alternate jurors." Thus, the first 12 remaining on the list are the jury and the next would be the alternate. This means the trial court should have passed 23 jurors before requiring John to use his peremptory challenges.

The case at bar is the only published decision addressing NRS 16.030(4) jury selection procedures.[8] Therefore, en banc reconsideration is needed because the *Morgan* decision conflicts with the plain meaning of the words in NRS 16.030(4). Jury selection procedures that conflict with the rules the Legislature enacted involve "substantial precedential, constitutional [and] public policy" issues. NRAP 40A.

The unpublished Gyger order approved the procedure John requested. The Gyger order found the purpose behind voir dire and the use of peremptory challenges is to ensure parties are able to rank the ***comparative fairness*** of potential jurors who are not yet seated. The same jury selection

---

[8] *Canterino v. Mirage Casino-Hotel*, 118 Nev. 191 (2002), addresses NRS 16.030(4) but only discusses number of jurors needed during deliberations.

procedure was used in *Skilling v. United States*, 561 U.S. 358, 362 (2010).[9] This procedure ensures litigants have a full opportunity to make an intelligent decision when using peremptory challenges.

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): *United States v. Sams*, 470 F.2d 751, 754 (5th Cir. 1972)(struck-jury method is the fairest method for allowing a defendant an opportunity to make a full choice of the use of his peremptory challenges). The process used in John's case did not provide him with a meaningful chance of voir dire and a meaningful use of his peremptory challenges.

---

[9] In *Skilling*, the trial court required 400 jurors fill out lengthy pre-trial questionnaires and initially excused those with bias or tainted by pre-trial publicity. Of the remaining prospective jurors, 90 were selected for the venire. "[C]ourt [then] qualified 38 prospective jurors, a number sufficient, allowing for peremptory challenges, to empanel 12 jurors and 4 alternates." *Id.* 359.

Here, the trial court and the current opinion issued by the *Morgan* Panel abridge John's rights as conferred by the Legislature in NRS 16.030(4). This opinion affects the rights of all future litigants.

John was prejudiced by the procedures used because he was forced to use or lose his peremptory challenges before all potential jurors on his jury panel were questioned. The trial court's general questioning of the jurors was insufficient to weed out all bias and prejudice thereby leaving the more personal questions to the parties during their voir dire. This process will affect all future litigants. Future litigants will only be allowed to question the 13 selected jurors before beginning to exercise peremptory challenges.

The *Whitlock* Court recognized that Nevada historically accords parties "meaningful opportunities for involvement in the voir dire of prospective jurors. *Whitlock at* 211-12. The procedures used in this case do not allow for a meaningful use of peremptory challenges.

Furthermore, the court asking a 45 person venire a few general questions does not satisfy NRS 16.030(4) and Gyger. Although the trial court in this case asked general questions of the entire venire, only 3 of the prospective jurors who replaced the original 13 answered: Juror #28 was a defendant in a civil case (II:451); Juror #31 was a victim of a crime (II:461-62) and Juror #40 was a victim and previously on a jury. (II:443-44;463).

Four prospective juror replaced did not respond to any of the trial court's general questions: Jurors #27, #36, #37, and #40. The general questions[10] court asked did not include personal identifying information, such as information on jobs or retirement, family, length of time living in Clark County, and other experiences. The subsequent voir dire by the parties allowed for more in-depth discussions about topics addressed during court's general questioning and personal questions.

The Gyger Order placed special importance on the procedures used for voir dire.

> The purpose of voir dire is to ensure that a fair and impartial jury is seated, *Whitlock*, 104 Nev. at 27, 752 P.2d at 212, and the voir dire process used in this case worked directly against this purpose by forcing the parties' attorneys to guess about the comparative fairness of potential jurors who were not yet seated. We conclude that even though the parties were permitted to question potential jurors, the purpose and effectiveness of this questioning was unreasonably restricted by the district court's voir dire process.

---

[10] Asked juror if they: were convicted of a felony, not a U.S. citizen, acquainted with lawyers, defendant, court, anyone at D.A.'s office, know witnesses, know about the case, not able to follow instructions given, unable to be fair and impartial, understood the defendant was presumed innocent, engaged in law enforcement, relative engaged in law enforcement, served as a juror before, party to a lawsuit, accused of a crime, victim of a crime. Court further asked: "Is there anyone who has such a sympathy, prejudice or bias related to age, religion, race, gender or national origin that they feel would affect their ability to be open-minded, fair and impartial jurors?" II:412.

Gyger at *2. The focus in the Gyger Order was safeguarding the voir dire process along with the use of peremptory challenges procedures to ensure a fair and impartial jury was seated. By using a process that eliminated a party's chance to use a peremptory challenge against a juror they thought may not be fair to their client and further questioning may be fruitless, the system worked directly against the purpose of seating a fair and impartial jury.

The *Morgan* Panel decision allows for the seating of an unfair and partial jury as was discussed in Gyger and requires parties to exercise peremptory challenges in the blind without knowing the background of the replacement juror. This denies all parties a meaningful use of peremptory challenges and unreasonably restricts voir dire.

ISSUE II: Subsection B in Opening and A in Reply

The burden of proof is a constitutional issue. In footnote 8, the *Morgan* Panel decided Issue III by indirectly holding it was *not error* for the trial judge to repeatedly instruct the jury that the parties in this case were "At the same starting line." Opinion:2;10-11.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal

law." *Coffin v. United States,* 156 U.S. 432, 453 (1895). The defendant is entitled to a presumption of innocence and has no burden while the government bears the full burden of proof beyond a reasonable doubt in every case and enjoys no such presumption of guilt. Thus, the parties are *not* at the same starting line and to tell the jury so is error.

By holding that such a clearly inaccurate legal statement is not error in need of immediate correction, the *Morgan* Panel opened the floodgates for other parties to use the "at the same starting line" argument and this instruction will permeate the courthouse, tainting other criminal trials.

Even if the trial court correctly instructs the jury at the close of the case on the presumption of innocence, the record reveals that the Judge's erroneous instruction *did* affect the jurors and confused them as to the presumption and the burden. This is seen when Prospective Juror #026, in discussing whether the Defendant had to prove his innocence, said, "I thought it was **a back and forth**." III:553. Thus, there was confusion.

Furthermore, the trial court not only told the jurors the parties were at the same starting line, she specifically made hand motions indicating the parties were in a race to present evidence. Thus, the Judge emphasized the incorrect statement of law to the jury by making hand gestures which suggested a back and forth race car movement. John made a record of these

actions: "When talking to a couple of the jurors Your Honor started asking them about whether the defense and the State- I believe 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**." II:468.

Prospective Juror #026, when discussing her understanding of the law, did not disagree with the burden and the presumption, but instead thought that a back and forth accurately depicted the legal concept. This is because the Judge twice gave this instruction and visual demonstration to the jury. II:415-418. As Juror #026 was confused, other jurors may also have found it confusing.

Thus, the Judge's actions and words created a misperception that believing the parties to be at the same starting line ***is*** exactly what presuming the defendant is innocent means. Although the court later instructed the jury on the correct legal definition, the jury could reasonably assume that the correct legal definition *included* the "same starting line" requirement. Accordingly, analysis should not center on whether the jury deliberately disregarded the subsequent instructions, but whether the jurors could believe the Judge's erroneous instructions and the subsequent instructions meant the

same; the later instruction being a rewording of the same concept as in the first – the "same starting line" concept.

"Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law. *Crawford v. State*, 121 Nev. 744, 754 (2005). Accordingly, the trial court should have advised the jurors that her "at the same starting line" statement was incorrect. However, the Judge never corrected the misconception she created. Even when Prospective Juror #026 clearly articulated the exact concerns the defendant voiced in his objection, the Judge did not then take the opportunity to instruct the jury that the *parties are not at the same starting line* and that there should not be an expectation of a "back and forth."

Where the jury was *never* expressly told that the parties are not at the same starting line, it cannot be presumed that they understood the subtle legal distinctions and that they completely disregarded the incorrect statement of law that was given to them on more than one occasion during the trial. *Hymon v. State*, 121 Nev. 200, 211 (2005)(we presume jury follows instructions).

ISSUE III

The *Morgan* Panel determined trial court properly sustained State's objection to John's argument that "Maria Verduzzco is still a manager at the

AM/PM," by concluding John misstated the facts. Opinion:24-25. Court decided "Maria never testified that she was still the manager of the convenience store at the time of trial." Opinion:25.

However, several questions asked of Maria inferred she still worked at the same AM/PM. Further, the Judge did not simply tell the jury that there was no evidence presented whether Maria currently worked there, she told them that "She is not." IV:87. This was a fact not in evidence.

Maria testified that on 10/30/14 she was working as the manager at AM/PM. III:662-64. Maria referred to her employment numerous times in the present-tense during her testimony.

> Q: So can you explain to the ladies and gentlemen of the jury some things that you would do as manager on a daily basis?
>
> A: I will do paperwork, scheduling and then we clean still and-
>
> Q: --make sure everything is okay.
>
> Q: Make sure everything in the store is okay?
>
> A: Is fine and clean and nice.
>
> Q: All right. Do you also still check out customers?
>
> A: Yes. III:664.
>
> ...
>
> Q: Can you describe for the—the jury where your office is in relation to like the front of the store?
>
> A: In the back. III:666.
>
> ...
>
> Q: All right. So is there a wall that separates you from the store when you're in your office?
>
> A: Yes.

Q: And do you sit at a desk when you do your paperwork?

A; Yes. III:666-667.

...

Q: As a manager you're familiar with how that video works?

A: Yes. III: 676.

Later, John asked Maria to identify some pictures of the store: "[T]his is a clear and accurate depiction of your store..." III:707. Maria responded "Yes."

Based on these questions and testimony, while it is true Maria never said "she was still the manager," she also did *not* say she was no longer a manager at the store. In fact, throughout her entire testimony, Maria referred to the incident in the past-tense, but described aspects relating to her employment in the present-tense, strongly implying she still worked at the store.

So when John argued "Maria Verduco is still the manager at the AM/PM" there *was* evidence to suggest this was true. In fact, there were whole sections of testimony suggesting it was true. And, it was never said in any document or in any testimony that Maria did not currently work at the AM/PM.

Accordingly, Defense Counsel correctly argued her recollection of the facts which, in the manner presented, suggested Maria was still a manager at

the AM/PM. As demonstrated at the bench conference, the State explained that they knew she did not work there due their own personal knowledge. IV:916. This was not evidence presented to the jury.

Defense Counsel tried numerous times at the bench conference to explain this to the court:

> COURT: Now, I would rather you correct it as opposed it coming from the Court, okay?
>
> MS. HOJJAT: What would the Court like me to say at this point?
>
> THE COURT: Just say that-I'll sustain the objection and just tell them that I misspoke, she is not currently the manager but she was the manager.
>
> MS. HOJJAT: And, Your Honor, that's just not what the testimony was.
>
> MS. GRAHAM: Yes, it was.
>
> MS. HOJJAT: She never said I'm not-
>
> THE COURT: Okay. Then I'm gonna go ahead and tell them, okay?
>
> MS HOJJAT: Your Honor, I am happy to say I'm sorry, I misspoke. Maria Verduzco was the manager of the AM/PM. I'm happy to-
>
> THE COURT: She is-
>
> MS. HOJJAT—that
>
> THE COURT—not-there is no evidence that she is the manager now.

MS. HOJJAT: The Court is injecting evidence into this-

THE COURT: There is-

MS. HOJJAT: --trial that did not-

THE COURT: --you did it. Now I'm gonna allow you to correct it. Now you can correct it or I can correct it for you. You pick.

IV:917-918.

After being told at the bench to correct the statement said to the jury, Defense Counsel said: "And I'm sorry ladies and gentlemen, the evidence was Maria Verduzco was a manager at AM/PM. I misspoke." IV:837. The court then said, "And the rest" and interjected, advising the jury, "And she is not—there's no evidence that she is currently the manager." IV:837.

This interjection was not made in a manner to suggest that there had been confusion, but rather suggesting that counsel was deliberately being dishonest with the jury. When counsel moved for a mistrial and again tried to explain to the trial court that there was no testimony that Maria no longer worked at the AM/PM, court said: "I'm going to suggest that you take a memory course then..." IV:843.

In reality, the record shows Defense Counsel's memory was correct. There was never any testimony that Maria no longer worked at the AM/PM. The testimony was, at best, ambiguous, and the court should have instructed

the jury to rely on their own recollections of the evidence presented because the jury is the judge of the facts. Instead, the Court interjected facts that were not in evidence into the case into defense counsel's closing.

Prejudicial error occurred because court's interjection of facts not in evidence undermined defense counsel's credibility by making it appear that counsel was deliberately deceiving or misleading the jury as to the testimony. Trial court admonished counsel in front of the jury as if forcing her to admit a lie. This disparaged the defense in the eyes of the jury and unfairly prejudiced the defendant. *See Butler v. State.* 120 Nev. 879 (2004).

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. *Herring v. 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). The 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).

This Court has held that "It is one thing to argue 'fair inferences from the record' and quite another to argue 'the existence of facts *not* in the record.'" *Glover v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 125 Nev. 691, 705–06 (2009). In light of multiple present-tense statements by Maria about her employment at AM/PM, it was a fair inference from the record that she was still employed there. As noted, there was absolutely ***no*** testimony that she did not work at the AM/PM any longer. This was after vehement objections from the defense at the bench urging the Judge that this evidence was never presented and asking the Court to instruct the jury to rely on their own recollections of what the evidence was. The Judge simultaneously discredited the defense and violated *Glover* by interjecting facts not in evidence into the case.

CONCLUSION

Based on the foregoing, this Court should grant en banc reconsideration.

Respectfully submitted,
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
Sharon G. Dickinson, Bar #3710

By: */s/ Nadia Hojjat*
Nadia Hojjat Bar #12401
Deputy Public Defenders

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for en banc reconsideration complies with the formatting requirements of NRAP32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

It has been prepared proportionally spaced typeface using Times New Roman in 14 font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 4,621 words which does not exceed 4,667.

DATED this 18 day of June, 2018.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
Sharon G. Dickinson, Bar #3710

By: */s/ Nadia Hojjat*
Nadia Hojjat Bar #12401
Deputy Public Defenders
309 South Third Street, #226
Las Vegas, Nevada 89155-2610

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18 day of June, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

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 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