In the Supreme Court of the State of Nevada

Jemar Demon Matthews,

Appellant,

v.

The State of Nevada,

Respondent.

Supreme Court Case No.: 77751

Appeal from Judgment of Conviction of Eighth Judicial District Court, Clark County, in Case No.: 06C288460-2

Appellant Jemar Matthews's Opening Brief

/s/ Todd M. Leventhal

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NRAP 26.1 Disclosure

As required by NRAP 26.1, undersigned certifies that there are no persons or entities as described in 26.1(a) that must be disclosed.

Jurisdictional and Routing Statement

This direct appeal follows a judgment of conviction entered after a jury trial. This Court has jurisdiction over this appeal as a final judgment or verdict in a criminal case under NRS § 177.015.3. This appeal is presumptively retained by the Nevada Supreme Court because (1) this is an appeal from a judgment of conviction based on a guilty verdict that involves a conviction for a category A felony for which a sentence of life with the possibility of parole was imposed and (2) this appeal challenges the conviction (and not merely the sentence) and is not based solely on a sufficiency of the evidence challenge. NRAP 17(b)(2).

Statement of Issues

I. Did the district court err by summarily accepting the state's reasons for striking a minority juror and denying Matthews's *Batson* challenge?

II. Did the district court err by allowing a lay police officer witness to give scientific testimony?

III. Did the district court err by refusing to allow a newly discovered and belatedly noticed defense witness to testify when the defense did not act in bad faith and the state would not have been prejudiced?

IV. Did the state commit plain prosecutorial misconduct in closing argument and rebuttal by vouching for its lead witnesses?

V. Did the trial errors, taken cumulatively, prejudice Matthews and require a new trial?

Statement of the Case

A. Mersey Williams is murdered on September 30, 2006.

This is an appeal from a retrial in a first-degree murder case. Around 9:00 p.m. on September 30, 2006, Mersey Williams, Myniece Cook, and Michel-le Tolefree went to Maurice Hickman's home located at 1271 Balzar Avenue in Las Vegas. 1 AA 107. As the women and Hickman stood in Hickman's front yard, four to five males approached and opened fire on the group, ultimately killing Mersey Williams and wounding Myniece Cook. 1 AA 118.

Moments later, three to four black men carjacked two couples parking a Lincoln town car at 1284 Lawry Avenue, about one block from 1271 Balzar. 1 AA 159, 164–66. After ordering the passengers out of the car, the assailants drove the Lincoln down Lawry Avenue, turning left on Martin Luther King Drive. 3 AA 173.

Meanwhile, Las Vegas Metropolitan Police Department Officers Brian Walter and Bradley Cupp were patrolling the area and heard gunfire. 1 AA 303. The officers drove by 1271 Balzar, but observed no signs of trouble, so they continued on down Lawry, where they saw a "commotion," at 1284 Lawry (the carjacking). 1 AA 303. Their suspicions aroused, the officers followed the Lincoln, which rolled through a red light. 1 AA 306–08. The officers then

activated their patrol lights and sirens; the suspects accelerated through the next red light, and the officers gave chase. 1 AA 308–09.

The chase continued to a church parking lot near the corner of Eleanor Avenue and Lexington Street, where the Lincoln slowed down; the driver, who was holding a sawed-off shotgun, fell or jumped out of the car. 1 AA 311–12. The police car hit the driver, who rolled up onto the driver's side hood of the police car (Officer Cupp's side) for a "brief second" before rolling off on the passenger side (Officer Walter's side) and taking off on foot. 3 AA 637–39.

In addition to the driver, two other black men jumped out of the passenger side of the Lincoln, one from the front and one from the back. 3 AA 641. Officer Cupp elected to chase the front passenger, who was armed with a handgun, while Officer Walter chased the driver. 3 AA 641. The third suspect, who appeared to be unarmed, ran Westbound across the church parking lot with no officer in pursuit. 3 AA 641.

Officer Walter chased the driver north on Lexington Street and then East on Eleanor Avenue, where he lost sight of the driver after the driver jumped over a chain-link fence. 1 AA 319. Meanwhile, Officer Cupp watched the front passenger jump over a wall and pursued him into an apartment complex. There, police found him hiding in a dumpster, along with a pair of black baseball gloves

and a .45-caliber Glock. 2 AA 502–03; 3 AA 648–49. The passenger was identified as Pierre Joshlin.

Police recovered a jammed .45-caliber Colt pistol from the Lincoln, and a .22 caliber rifle from the grass between the Lincoln and the church. 2 AA 491–93, 495. Police also found a single red-knit glove about one block north of the church. 2 AA 497. Police set up a parameter around the neighborhood to search for the still-missing suspects.

About an hour to an hour and a half after the foot chase began, a K9 unit found Jemar Matthews hiding in the bushes behind a house at 1116 Jimmy Avenue. 1 AA 397. The dog attacked Matthews, biting him and drawing blood. 1 AA 398. Matthews was then transported in handcuffs and a police car to Officer Walter, who identified him as the suspect driver. 1 AA 329–30.

B. Jemar Matthews and Pierre Joshlin are jointly tried and convicted of the murder and related crimes.

In May of 2007, Matthews and Joshlin were tried for the murder of Mersey Williams and related crimes. At trial, a toolmark analyst testified that ten of the 39 cartridge cases recovered from 1271 Balzar were fired from the Glock found with Joshlin in the dumpster.[1] Eleven, including the bullet that killed Mersey Williams,

[1] This factual summary of the evidence at the first trial is offered for background purposes only and is derived from the federal district court's orders in *Joshlin v.*

were fired by the rifle found near the Lincoln. Officers Cupp and Walter identified Matthews and Joshlin as the suspects they had chased, while the surviving shooting and carjacking victims were unable to identify Matthews.[2] A forensic analyst also testified that gunshot residue was recovered from one of the black gloves in the dumpster with Joshlin and on the red glove found on the sidewalk near where the foot chase began. To explain his presence in the area and his hiding from police, Matthews offered a temporary protective order prohibiting his presence at Jimmy Avenue. The jury convicted both men on all counts, and each received a sentence of life in prison.

Over the next several years, both men unsuccessfully appealed their convictions, ultimately filing post-conviction petitions in federal district court.[3] In August of 2016, a federal district court judge denied Joshlin's petition based on her finding that any trial errors were harmless in light of the "overwhelming" evidence against him.[4] In March of 2017, a different federal district court judge granted Matthews's petition. She found, as did this Court, that the state had committed

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Neven, 2016 WL 4491503 (D. Nev. Aug. 25, 2016) (Dorsey, J.), Case No. 2:13-cv-01014-JAD-NJK and *Matthews v. Neven*, 250 F.Supp.3d 751 (D. Nev. 2017), Case No. 2:14-cv-00472-GMN-PAL.

[2] Tolefree was able to identify Joshlin.

[3] *See* Nevada Supreme Court Case Nos. 49947, 58881, 62241, 50052; U.S. District Court Case Nos. 2:14-cv-00472-GMN-PAL (Matthews), 2:13-cv-01014-JAD-NJK (Joshlin).

[4] *Joshlin*, 2016 WL 4491503, *1.

prosecutorial misconduct in closing argument and rebuttal by telling the jurors to look at Matthews and Joshlin—both of whom are black men—and arguing that they did not "look" innocent.[5] The judge also found that the state committed misconduct by arguing that if the defendants weren't guilty, then they wouldn't be challenging the gunshot-residue evidence.

But the federal district court judge disagreed that these errors were harmless, distinguishing the state's case against Matthews from that against Joshlin:

> The evidence against Matthews—while sufficient to support his convictions, if viewed in the light most favorable to the State[]—had obvious weaknesses and was far from overwhelming. Unlike Joshlin, who was found in a dumpster with a handgun linked to the shooting, there was no evidence directly linking Matthews to either the shooting or the robbery. About an hour to an hour and a half after the foot chase ended, Matthews was found hiding in a backyard about a block from where the foot chase ended, and some four to five blocks from where the shooting and robbery occurred. The defense suggested, and it remains a possibility, that Matthews had reason to fear apprehension by police other than—and less egregious than—having participated in the shooting and robbery [, the TPO].[6]

The judge also reasoned that many of the victim-witnesses' descriptions did not match Matthews. Additionally, Officers Walter and Cupp had a limited opportunity to view the fleeing suspect that both would later identify as Matthews,

[5] *Matthews*, 250 F. Supp.3d at 763.
[6] *Id.* at 765.

and Walter's description of that suspect appeared to grow more detailed (and more consistent with Matthews) over time.[7]

C. The retrial

Matthews's second trial commenced in September of 2018—twelve years after the murder. The evidence at the second trial was largely the same as that presented during the first trial. Below is a brief summary as relevant to this appeal.

1. Jury selection

During jury selection, the state exercised its fifth peremptory strike to remove prospective Juror No. 342, a black woman. 1 AA 58. Matthews made a *Batson* challenge, arguing that the state had impermissibly struck No. 342 due to her race. Before the court ruled on whether Matthews had made a prima facie showing of discrimination, the state interjected and proffered a race-neutral reason: it claimed that No. 342 gave "tenuous" responses when asked about being fair and impartial and that she "kind of hesitated and rolled her eyes." 1 AA 59. Matthews disputed the state's assertions and argued that they were merely pretext. 1 AA 60. The district court made no specific findings and summarily overruled Matthews's objection. 1 AA 62.

[7] *Id.* at 766.

2. The state's case

The state's first witnesses were Myniece Cook and Michel-le Tolefree Myniece testified that she saw four to five silhouettes but could not identify their race or any clothing. 1 AA 118–19. Tolefree was able to identify Joshlin but not Matthews. 1 AA 139.

Two of the carjacking victims, Melvin Bolden and Geishe Bolden (Orduno) also testified. Melvin Bolden testified that there were three to four assailants, all black males between 17–18 years old, and all wearing black T-shirts and blue jeans or black pants. 1 AA 164–68. Two of the men had black and red gloves on. 1 AA 169. Melvin described the suspect who got into the driver's seat as 5'7" or shorter (Matthews is five feet eleven inches tall), and indicated that he would not be able to identify any of the assailants. 1 AA 178. Geishe testified that there were four assailants; one was wearing a white shirt while the rest were in black. 1 AA 194. One man was wearing red gloves and was 5'5" or possibly a little taller. 1 AA 199.

Forensic scientist Crystina Vachon testified about gunshot residue. She testified that gunshot residue (particles containing a fusion of lead, barium, and antimony) was present on the black gloves from the dumpster, the red glove, and Joshlin and Matthews's hands. 1 AA 259–268. As to Matthews, that included three partial particles on the right palm; one partial particle on the back of the left

hand; and one partial particle on the back of the left hand. 1 AA 260, 269 (when looking for gunshot residue, looking for a fusion of three elements: barium, led, and antimony). Matthews cross-examined Vachon about possible transfer of gunshot residue and possible issues with contamination and preservation, which she acknowledged. 1 AA 271–79.

The lynchpin of the state's case was the testimony of Officers Walter and Cupp. Officer Walter identified Matthews as the suspect driver, who he recalled was wearing blue jean shorts, a black t-shirt, and a red glove. 1 AA 319. He further testified that, on the night of the shooting, he recognized the driver based on previous interactions in the neighborhood, though he wasn't then-sure of his name. 1 AA 313–14.

On cross-examination, Walter admitted that he did not tell homicide detectives during his interview on the night of the shooting that he recognized the suspect driver from previous interactions. 1 AA 347. He also admitted that he had previously stated that he caught only a "glimpse" of the suspect whom he now claimed to have seen face to face. 1 AA 348. Finally, Walter acknowledged that his description of the suspect had grown more detailed over time and that on the night of the shooting, he communicated over the police radio that the suspect was wearing jeans, not shorts. 1 AA 353.

For his part, Cupp identified Matthews as the suspect driver. 3 AA 639. He also indicated that on the night of the shooting he recognized Matthews from previous interactions, but did not know his name. Like Walter, Cupp acknowledged that, on the night of the murder, he never indicated that he recognized or was familiar with Matthews. 3 AA 675. And although he now claimed to be driving only five to ten miles per hour when he hit the suspect he identified as Matthews, Cupp acknowledged that he previously testified that he was traveling almost twice as fast. 3 AA 687–88.

Now-Sergeant Chad Overson, the K9 handler who ultimately found Matthews hiding in the bushes at 1116 Jimmy Avenue, also testified. Overson testified about his dog, Lasco's, training. He explained that first the dogs are trained to find other humans, and then, "we get them out on the street and they start to find suspects that they learn to differentiate through time that suspects actually smell a little bit differently from humans" because they omit a chemical called "apocrine." 1 AA 401–402. When a dog smells apocrine as opposed to a "regular human," it will act more aggressively and may bite. 1 AA 401. Overson described how Lasco had detected and bitten Matthews.

The state read the previous trial testimony of toolmark analyst James Krylo into the record. The thrust of Krylo's testimony was that cartridge cases found at 1271 Balzar were consistent with being fired from the Glock found in the dumpster

with Joshlin, the .45 Colt recovered from the Lincoln, and the .22 shotgun abandoned by the suspect driver. 2 AA 583–60.

3. Matthews brings a newly discovered defense witness to the court and the state's attention.

Shortly before the close of the state's case, on Monday, October 1, 2018, Matthews notified the court that he had located a potential new witness. Defense counsel represented that, over the weekend, he had been able to make contact with Jomesha Gilchrist, Matthews's girlfriend at the time of the murder. 3 AA 619–20.

The defense team had previously been unable to locate Jomesha, but Matthews's sister had recently found her on Instagram, a social media website. 3 AA 619. Jomesha told defense counsel that she recalled Matthews telling her that he was going to visit his child's mother on the night of the murder. 3 AA 20. Matthews's child's mother's residence (1301 Jimmy Avenue) is the object of the temporary protective order that prohibited him from being at nearby 1116 Jimmy Avenue where he was found hiding from police. 3 AA 695–98; Defense Exhibits E, F.

Defense counsel candidly told the court that he had not since been able to get ahold of Jomesha, and that he was unsure if she could travel from California to Las Vegas because she had recently had a baby. 3 AA 620–21. However, he proffered that Jomesha's testimony about what Matthews told her on the night of

the murder would be admissible both as a then existing state of mind and a statement against interest (because Matthews would be subject to punishment for violating the TPO). 3 AA 621. The state objected to the testimony on hearsay grounds and because the defense had not noticed Jomesha as a witness. 3 AA 622. The court made no ruling as to the admissibility of her testimony at that time because it was unclear whether Jomesha was in fact available and willing to testify. 3 AA 22–23.

4. The defense's case

Matthews called two expert witnesses of his own: eyewitness-identification expert Dr. Mark Chambers and a firearms and ballistics expert, Ronald Scott.[8] Dr. Chambers testified that studies show that up to 80% of wrongful convictions are based on faulty eyewitness testimony. 2 AA 439–40. He explained that a witness's confidence does not equate with reliability; stress, fatigue, and the presence of weapons can negatively impact perception; and that cross-racial identifications are less reliable than intraracial ones. 2 AA 445–32. He also opined that the show-up method used in this case is less reliable than a double blind sequential lineup. 2 AA 454.

[8] Dr. Chambers testified out of order during the state's case due to scheduling issues.

Expert Scott—an independent forensic consultant with 25 years of law-enforcement experience—testified about gunshot-residue analysis. He explained that he disagreed with the state's expert's opinion as to the red glove because it did not meet FBI standards. 3 AA 705. He also testified about the many possible sources of transfer of gunshot residue in this case, including Matthews's placement in handcuffs and inside police vehicles. 3 AA 707–11. Because Matthews's hands were not "bagged" there was a heightened risk of contamination. 3 AA 715. Finally, he testified that use of gunshot residue in law-enforcement investigations is declining due to contamination, transfer, and reliability issues. 3 AA 710–14.

5. Matthews moves to allow his recently disclosed witness to testify.

Before closing arguments began, defense counsel notified the court that he had again spoken with Jomesha Gilchrist. 4 AA 763. Because she was unable to travel to Las Vegas due to recently giving birth, the defense requested that she be allowed to testify telephonically. 4 AA 763. The parties reiterated their respective hearsay and notice arguments. The state argued that the defense failed to notice Jomesha as a witness or to provide notice of intent to use audio/visual testimony. The state also argued that Jomesha would be a quasi-alibi witness for which no alibi notice was provided and that her testimony would open up a whole

"Pandora's box of doors." 4 AA 765. The court sustained the state's objection "based on the lack of notice," but did not explain under which theory. 4 AA 768.

6. Closing arguments

The state argued at length in closing about the testimony of Officers Cupp and Walter—the only witnesses who identified Matthews: "when you are considering the reliability or believability of the identification of Officer Cupp and Officer Walter, think how different they are to just the ordinary observer. 4 AA 797. They are "two police officers," who "have actual training and experience chasing bad guys." 4 AA 797. She continued: "It's their job to observe." I am not a "paid observer" but "police officers, when they clock in that's their job all the way until they clock out. So, yeah, they are trained observers." 4 AA 797. "A trained observer who is paid to run towards danger as opposed to the ordinary person, civilians like ourselves" is more reliable. 4 AA 687. She asked whether Cupp and Walter struck the jury as "a type of officers who want to put away the wrong person?" 4 AA 799.

In closing, defense counsel acknowledged the tragic death of Mersey Williams. He did not attempt to challenge that a murder had occurred, or that the carjackers Cupp and Walter chased were the murderers. 4 AA 807. The sole issue was whether Matthews was there at all. He pointed out that the eyewitness

descriptions given by the carjacking victims were inconsistent with Matthews's appearance. 4 AA 808. Also, that Officers Cupp and Walter had limited opportunity to view the suspect driver during the car chase and brief foot pursuit. 4 AA 809. Their later identifications of Matthews were tainted not only by this limited opportunity to view the true suspect, but also by the suggestive show-up technique. 4 AA 815.

The defense reminded the jury about the fallibility of gunshot-residue evidence and the possibility of transfer and contamination. 4 AA 819–20. Also, the lack of any real forensic evidence tying Matthews to the murder and that Matthews had no visible physical injuries (aside from the dog bites) despite the suspect being hit by a police car at 10–15 miles per hour. 4 AA 821. Finally, the defense discussed the TPO. The TPO was brought by Matthews's child's mother, who lived on the corner of Jimmy and Lexington, just one block from where Matthews was found hiding. 4 AA 822. Because he was in violation of a TPO, it made sense that Matthews hid when police swarmed the neighborhood.

In rebuttal, the prosecutor admitted that "what it ultimately comes down to is those two officers who came in here and looked you all in the eye." 4 AA 827. He reassured the jurors that if Officers Cupp and Walter "had any doubt in their mind that is wasn't him, they'd be the first to say it. This was a big deal to them. They don't want the wrong guy going away. They want the right guy. I mean, if they

had any doubt, they would say it." 4 AA 827. He further reassured the jury that these officers "know the built-in problem with a one-on-one ID. They know that you can't be suggested by the fact that he's in custody, by the fact that he's sitting in cuffs." 4 AA 828–29. These are trained police officers who would not be influenced by other police officers to ID the wrong guy because "they know what's going on." 4 AA 829. As to why the officers did not mention recognizing Matthews on the night of the murder, the state promised: "If Mr. Matthews had gotten away and they were trying to find him then I can assure you Officer Cupp and Officer Walter would have said I know where he is." 4 AA 831.

7. Conviction and sentence

The jury convicted Matthews on all counts: conspiracy to commit murder; murder with use of a deadly weapon; attempt murder with use of a deadly weapon (three counts); possession of a short-barreled rifle; conspiracy to commit robbery; robbery with use of a deadly weapon (two counts); and assault with a deadly weapon (two counts). After waiving a penalty hearing on the first-degree murder count, the trial court sentenced Matthews to an aggregate sentence of life in prison with the possibility of parole after forty years. This appeal follows.

Summary of Argument

The district court erred by summarily accepting the state's reasons for striking a black juror and denying Matthews's *Batson* challenge. The district court failed to apply the well-established three-step *Batson* framework. The result is a hollow ruling entitled to no deference. Proper application of step three to this record shows that the state's proffered race-neutral reasons were pretextual. This is structural error requiring reversal.

Additionally, three trial errors warrant reversal. First, the district court plainly erred by permitting a lay police witness to give expert testimony about how K9 units smell suspects—namely, that suspects smell different than other humans. Second, the district court abused its discretion by precluding a newly discovered defense witness where the defense acted diligently and the state would not have been prejudiced as a result. Third, the state committed prosecutorial misconduct in closing argument and rebuttal by vouching for its lead witnesses. Finally, the cumulative effect of these trial errors require reversal because the issue of guilt and innocence was close, these errors are severe and numerous, and Matthews was sentenced to life in prison.

Argument

I. The district court erred by summarily accepting the state's reasons for striking a black juror and denying Matthews's *Batson* challenge.

A. The three-step *Batson* analysis

The state exercised its fifth peremptory strike to remove prospective Juror No. 342, a black woman. Matthews made a *Batson* challenge to the strike, claiming that Juror No. 342 was unconstitutionally removed due to her race. 1 AA 58. It is well-established that the use of a peremptory strike to remove a potential juror on the basis of race is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986). Once established, such discrimination constitutes structural error requiring reversal. *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008).

When analyzing a *Batson* challenge, a district court must engage in a three-step process. *Batson*, 476 U.S. at 93–100. First, the defendant "must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Snyder v. Louisiana*, 552 U.S. 472 (2008). Second, if that showing has been made, the state must present a race-neutral explanation for the strike. *Id.* at 477. If such an explanation is given, then the trial court decide (step three) whether the defendant has proven purposeful discrimination. *Kaczmarek v. State*, 120 Nev. 314, 332–35, 91 P.3d 16, 29 (2004). If made, this determination is reviewed for clear error. *Id.* at 333–34.

This Court has "repeatedly implored district courts to adhere to this three-step analysis and clearly spell out their reasoning and determinations." *Williams v. State*, 429 P.3d 301, 306 (2018) (collecting cases). "Yet district courts continue to shortchange *Batson* challenges and scrimp on the analysis and findings necessary to support their *Batson* determinations." *Id.* Here, the district court failed to adhere to this three-step analysis and failed to make any findings to support its outright denial of Matthews's *Batson* challenge.

1. Step one

Matthews argued that the state's strike of Juror No. 342 left only two African Americans remaining in the jury pool, only one of whom could potentially make it into the box at that point, and that there was no legitimate reason to strike her. 1 AA 58.

> [T]here was no justifiable reason to get rid of [Juror No. 342]. She said she could be fair. She could be impartial. She gave no indication that she couldn't be . . . and we are dealing with a limited number of African Americans [ ] that are still here. One of them is sitting next to her, and the other one may not even have a shot to get in because he's so far down.

1 AA 59.

Before the court had determined whether Matthews made a prima facie showing of purposeful discrimination, the state interjected, objecting that no prima facie showing had been made. 1 AA 59. Nonetheless, the state volunteered a

purportedly race-neutral reason for the juror's exclusion. "Where, as here, the [s]tate provides a race-neutral reason for the exclusion of a veniremember before a determination at step one, the step-one analysis becomes moot and we move to step two." *Williams*, 429 P.3d at 307.

2. Step two

At step two, the burden shifts to the state to provide a race-neutral reason for the strike. *Batson*, 476 U.S. at 97. "Under this step, the prosecutor's explanation only needs to be race neutral; it does not need to be persuasive or even plausible." *Williams*, 429 P.3d at 307 (internal citations and quotations omitted). "At this point, the district court should determine only whether the prosecutor has offered an ostensibly race-neutral explanation for the peremptory strike; it should not make an ultimate determination on the *Batson* challenge until conducting the sensitive inquiry required by step three." *Id.* at (internal citation omitted).

Here, the state said that it struck Juror No. 342 because "she gave very tenuous responses when asked about being fair and impartial. And I don't know if she verbally came across that way . . . . [but] on at least two occasions . . . she kind of hesitated and rolled her eyes . . ." 1 AA 59. The state also represented that other jurors had been more "forceful in their answers," while Juror No. 342 "hesitated" and "equivocated a lot." 1 AA 60. Although thin, each of these, if

true, is a race-neutral explanation for the strike, which is the end of the inquiry at step two. *Williams*, 429 P.3d at 307.

3. Step three

In the final step, the district court must determine whether the defendant has proven purposeful discrimination by a preponderance of the evidence. *Batson*, 476 U.S. at 98. "The district 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." *Williams*, 429 at 307 (internal citations and quotation marks omitted). Relevant considerations at step three might include:

> (1) the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained in the venire, (2) the disparate questioning by the prosecutors or struck jurors and those jurors of another race or ethnicity who remained in the venire, (3) the prosecutors' sue of the "jury shuffle," and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

"Generally, the district court's determination is akin to a finding of fact and is accorded great deference on appeal." *Id.*

The district court failed to follow these rules in deciding Matthews's *Batson* challenge. In fact, it never conducted the sensitive inquiry required by step three. After the state offered its race-neutral justifications and with no input from the

court, Matthews challenged the reasons proffered by the state. Matthews disputed that Juror No. 342 was equivocal, arguing "I heard unequivocal . . . as a matter of fact she's been on a jury before. They reached a verdict. While it was a civil jury, there's nothing that's impartial, that she's indicated that she couldn't be fair to both sides." 1 AA 60. He also disputed that Juror No. 342 moved her head or eyes more than other jurors who remained in the venire. 1 AA 61–62. The state responded that Juror No. 342 had "sighed" and answered "dot dot dot" on "numerous occasions." 1 AA 62. It concluded: "I just don't want her on the jury for that reason because there is some hesitation about fairness which is the only thing that matters at this point." 1 AA 62.

All the district court said was this: "So at this time, the objection's overruled." It also offered to make the juror questionnaire, where three potential jurors including Juror 342 identified as African American. 1 AA 62. This hollow ruling does not allow meaningful, much less deferential, review.

B. The record shows that the state's race-neutral reasons were pretextual.

The state's race-neutral explanations for striking Juror 342 were (1) her "tenuous" and "equivocal" responses when asked about being fair and impartial and that (2) she appeared hesitant and rolled her eyes. 1 AA 59–62. "Where only part of the basis for a peremptory strike involves the demeanor of the struck juror,

and the district court summarily denies the *Batson* challenge without making a factual finding as to the juror's demeanor," this Court "cannot assume" that the district court credited the state's demeanor argument. *Williams*, 429 P.3d at 308 (internal citations omitted). Where, as here, "the state offers two explanations for the strike, one of which appears implausible, and the other is a demeanor argument that is disputed by the defendant, there is no basis to assume that the district court based its denial on the [s]tate's demeanor argument." *Williams*, 429 P.3d at 309 (citing *Snyder*, 552 U.S. at 479).

The state's non-demeanor argument—that Juror 342 was equivocal when asked whether she could be fair and impartial—is belied by the record. When first questioned by the court, Juror 342 volunteered that she worked as a medical transcriptionist, had completed some college, was a widow, and that she had one grown child who worked in colon hydrotherapy. 1 AA 36. When asked if she knew of any reason why she could not be a fair and impartial juror, she answered no. 1 AA 37. Later, when the court asked if any of the potential jurors had previously served on a jury, Juror 342 responded that she had previously served on—but was not the foreperson of—a civil jury in Los Angeles, and that jury had reached a verdict. 1 AA 40. The court asked if there was anything about that experience that would affect her ability to be fair and impartial in this trial; Juror 342 said no. 1 AA 40.

The state later questioned Juror 342 after she revealed that her father was killed in Los Angeles in the 70s. 1 AA 46. The state asked if there was "anything that happened with your dad that causes you concern or should cause either side here concern," and she responded no. 1 AA 46. The following exchange then took place:

> State: Okay. What is your feeling, ma'am on the system in general? You've heard all of the questions I've asked.
>
> Juror 342: Well, yeah, somebody—a jury trial, I think it's fair.
>
> State: Okay.
>
> Juror 342: A jury trial.
>
> State: All right. What about the---the entire system? Uh-oh. Was that a loaded question?
>
> Juror 342: Yes.
>
> State: All right.
>
> Juror 342: I thought we were going to stick to the jury trial.
>
> State: Well, no. Because you gave that smirk when I did it, so now I knew I had to ask. So I have to know.
>
> Juror 342: No, I—I was just teasing. Yeah. I think it's pretty fair.
>
> State: Okay. Pretty fair, not perfect?
>
> Juror 342: Pretty fair.
>
> State: All right. Anything that—that should cause either side concern?

Juror 342: No.

State: You understand this case needs to be judged on what's coming from the witness—

Juror 342: That's right.

State: ---Stand and that's it?

Juror 342: Yes.

1 AA 46–48.

Defense counsel later asked Juror 342 what she meant when she said the system was "pretty fair," and the below exchange ensued.

Juror 342: I mean that I'm a little shaky about the system, you know, I just feel like there's—sometimes it's good sometimes it's bad some—you know, it's—it is what it is.

Defense counsel: It is what it is. But it's still the best, right?

Juror 342: Yes.

Defense counsel: Okay, I mean, thank goodness that Mr. Matthews has [defense counsel] fighting for him, it's good that the state has their attorneys fighting for them. We have a judge who's the referee that will give you the law and so that's what makes it fair; correct?

Juror 342: Correct.

Defense counsel: Okay. And you can keep an open mind, right?

Juror 342: Correct.

Defense counsel: Okay. And what experiences do you bring that—into this that you—that you think would make you a good juror?

> Juror 342: Well, I know I'll be fair. I'll be fair to all the information I receive.

1 AA 55–56.

Juror 342 repeatedly and unequivocally stated that she could be fair and impartial. She also agreed that jury trials are "fair," that the criminal-justice system as a whole is "pretty fair," and the "best," although not without its problems—a fair statement.

Several other jurors expressed views that, although fair, our criminal justice system is not perfect. For example, Juror 266 qualified that she believed the system is fair "for the most part." 1 AA 43. Juror 271 also acknowledged that the system is not "perfect," but that "[i]f it's proven, it's fair." 1 AA 44. Juror 354 answered: "The system, I think, is---is about as good as it can get, you know. It's not 100 percent, of course." 1 AA 45.

Jurors 381 and 455 expressed more pointed concerns about the fairness of the criminal justice system than Juror 342. For example, Juror 455 described the criminal justice system as "kind of fair," explaining that "[i]t just depends on the situation." 1 AA 52. He continued: "I don't want to sound like that person, but I feel like minorities have it a lot worse than white people." 1 AA 52. For his part, Juror 455 indicated that he could understand why some people may not want to engage with police officers and that people are treated differently in different

communities. 1 AA 54. And Juror 401 had her own misgivings about the criminal justice system: she described being ticketed by a police officer simply for trying to explain herself. 1 AA 52–53.

That the record contradicts the state's assertion that No. 342 expressed doubt about her own ability to be fair and impartial is strong evidence of pretext. *Conner v. State*, 130 Nev. 457, 466, 327 P.3d 503, 510 (2014) "A race-neutral explanation that is belied by the record is evidence of purposeful discrimination"). And even giving the state the benefit of the doubt and assuming that the prosecutors meant to refer to Juror 342's concerns about the fairness of the criminal-justice system in general, the record shows that this, too, was pretextual.

As explained above, the state failed to strike other jurors who expressed similar, and sometimes stronger concerns, about the overall fairness of the criminal-justice system. This shows pretext. *See Williams*, 429 P.3d at 309 (striking juror who acknowledged fallibility of science, a "reasonable concession," was pretextual where other jurors expressed similar, and sometimes stronger, concerns); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

Without a finding by the district court, the record by itself does not support the state's demeanor argument. In fact, to the extent the cold record provides any insight into Juror 342's demeanor, it contradicts the state's assertions. In the prosecutor's own words, he followed up on his fairness question because Juror 342 "smirked" at him, not because she rolled her eyes. 1 AA 47. And although he represented that he "bantered with her and tried to get more out of her," but was unable to get "more explanation as to why she sighed so much," this also lacks record support. 1 AA 46–49. The record instead reflects that Juror 342 answered every question that was put to her and repeatedly and unequivocally stated that she could be fair and impartial.

Finally, even if there was some hesitation in Juror 342's answers that is not captured in the transcript, this reason, too, appears pretextual. The court explicitly noted that Juror 330 "hesitated" in response to questioning about whether she had been treated fairly in her prior experience with law enforcement. 1 AA 41–42. Yet, the state did not strike Juror 330. The record does not support a finding that Juror 342 hesitated any more than any other juror who the state allowed to participate.

This Court has recognized that the "human, social, and economic costs of a reversal and retrial are substantial." *Williams*, 429 P.3d at 310. "But *Batson* has been the law for more than 30 years," and the "Constitution forbids striking even a

single prospective juror for a discriminatory purpose." *Id.* (internal citation and quotation marks omitted). Given the district court's mishandling of Matthews's *Batson* challenge and the pretextual nature of the state's race-neutral explanations for striking Juror No. 342, the district court clearly erred in denying Matthews's *Batson* challenge. This constitutes structural error requiring reversal and remand for new trial.

II. The district court improperly allowed a lay police witness to offer unnoticed and unreliable expert testimony.

A. Lay witness v. expert witness testimony

When a witness has personal knowledge of an offense but does not qualify as an expert, the witness may be allowed to express an opinion if the opinion is: (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue. N.R.S. §50.265. Only an expert witness may give an opinion based on "scientific, technical or other specialized knowledge." N.R.S. § 50.275.

This Court reviews a district court's decision whether to allow an unendorsed witness to testify for an abuse of discretion. *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Because Matthews did not object to the nondisclosure of Overson's expert testimony at trial, this Court reviews for plain error and will reverse only if Matthews's substantial rights were prejudiced. *Id.*

B. Overson's testimony constituted unnoticed and improper expert testimony.

Here, the state did not notice Overson as an expert witness. 1 AA 30. Yet Overson testified as an expert witness based on his training and experience handling K9 dogs, including scientific testimony about why dogs may alert aggressively. For example, he explained that the dogs are first trained simply to find other humans, and then "we get them out on the street and they start to find suspects that they learn to differentiate through time that suspects actually smell a little bit differently from humans" because they omit a chemical called "apocrine." 1 AA 401–402. When a dog smells apocrine as opposed to a "regular human," it will act more aggressively and may bite. 1 AA 402. Overson then described how Lasco had detected and aggressively bitten Matthews. The thrust of this portion of Overson's testimony was that Lasco attacked Matthews because Matthews smelled like a suspect instead of a "regular human."

This testimony deprived Matthews of a fair trial. Had it been properly noticed, Matthews could have formally challenged Overson's qualifications to give the opinion he gave and the reliability of the science behind it. Matthews also could have hired his own expert to help him prepare for Overson's cross-examination and to testify in the defense case in chief to refute Overson's seemingly incredible testimony. Not only that, but the state invited the error.

Overson initially testified in only general terms about his experience as a K9 handler and Lasco's alerting in the backyard. 1 AA 395. Several pages later, the state circled back to ask whether the dog was trained "to alert on just any person," which called for the improper testimony. 1 AA 401.

Additionally, Overson's testimony was, in substance, improper opinion testimony on the ultimate issue of guilt or innocence: his dog bit Matthews because he smelled like a criminal. This Court has repeatedly recognized that it is improper for a law enforcement officer to give an opinion on the ultimate issue of guilt or innocence because "jurors may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator." *Cordova v. State,* 116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (internal citation and quotation marks omitted).

Finally, the jury instructions further exacerbated the problem. The expert-witness instruction (No. 38) did not specify which witnesses testified as experts, allowing the jury to conclude that Overson had in fact done so. And no jury instruction on dual-role testimony was given. "If a witness testifies to both facts and opinions, a cautionary instruction on the dual role of such a witness must be given." *See* commentary to Ninth Circuit Model Criminal Jury Instruction No. 4.15. The Ninth Circuit has held that omitting such an instruction in a criminal case is plain error, even if no party requests such an instruction or affirmatively

opposes it. *United States v. Vera*, 770 F.3d 1232, 1246 (9th Cir. 2014) (holding that court's failure to instruct jury on how to evaluate agent's dual role testimony prejudiced defendant when agent testified as both expert witness and lay, or fact, witness); *see also United States v. Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015) (noting holding in *Vera* and finding error in district court's omission of dual role instruction differentiating between lay and expert testimony). Indeed, in *Torralba-Mendia*, the government proposed such an instruction, the defendant objected, and the court declined to give the instruction; the Ninth Circuit found plain error. *Id.* This Court should find the Ninth Circuit's reasoning persuasive.

In sum, Overson's unnoticed, unqualified, unreliable, and substantively improper expert testimony deprived Matthews of a fair trial. No curative instruction was given, and the jury instructions further exacerbated the problem. Reversal is therefore required.

III. The district court erred by precluding the newly discovered defense witness where the defense did not act in bad faith and the state would not have been prejudiced.

The state moved to preclude defense witness Jomesha's testimony based on lack of notice under three theories: failure to notice her as a lay witness in advance of trial, failure to provide alibi notice, and failure to provide notice of intent to testify telephonically. The trial court precluded the testimony "based on lack of

notice," but did not specify under which theory. 4 AA 768. As explained below, the district court improperly precluded Jomesha's testimony under any notice theory.

A. The trial court abused its discretion by precluding Jomesha's testimony under N.R.S. § 174.234 because Matthews did not act in bad faith and the state would not have been unfairly prejudiced.

Nevada Revised Statute 174.234.1(a) provides that "not less than five judicial days before trial or at such other time as the court directs" the parties must disclose the names and last-known addresses of any lay witnesses it intends to call during its case in chief. Subsection 3 provides that, after complying with the above provisions, each party has a continuing duty to notice a witness "as soon as practicable after the party determines that the party intends to call the additional witness" during its case in chief. It also provides: "The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1." N.R.S. § 174.234.2.3(a). This Court reviews for abuse of discretion. *Mitchell*, 124 Nev. at 819, 192 P.3d at 729.

The record does not support a finding that Matthews acted in bad faith in noticing Jomesha as a potential witness during trial, nor did the trial court find that he did. On the Monday following the weekend break, defense counsel notified the

court and the state that he had spoken with Jomesha for the first time over the weekend. 3 AA 619–20. He explained that the defense had previously been unable to locate her, but that Matthews's sister recently found Jomesha on social media. 3 AA 619. Notably, twelve years had passed between the murder and Matthews's retrial, a considerable amount of time making it more difficult for the defense to locate potential witnesses. The defense also disclosed the substance of Jomesha's testimony and the basis for its admission under N.R.S. § 51.105 as a then existing state of mind, which the trial court appeared to agree with. 3 AA 619; 4 AA 763–66.

Not only did Matthews not act in bad faith, but the state failed to show that it would be prejudiced by the belated disclosure. Matthews previewed the substance of Jomesha's testimony for the state, and it was not a surprise. The parties stipulated to admit the TPO restricting Matthews from being at his child's mother's home on Jimmy Avenue. The state was always aware that the defense theory was that this was why Matthews was found hiding in the bushes on Jimmy Avenue several blocks away from, and an hour and a half after, the shooting.

The state argued that it would be prejudiced because Jomesha's testimony would open up a whole "Pandora's box" of issues, including Matthews and Joshlin's purported gang membership and the gang-related murder the night before Mersey Williams's murder. 4 AA 765. But nothing about Jomesha's proffered

testimony would open the door to these already precluded issues. Even if it did, this would prejudice Matthews and not the state. And any prejudice to the state could have been remedied through cross-examination or in its rebuttal case. For example, the state could have highlighted the lapse in time between the murder and Jomesha coming forward. The state did not explain, and the court did not find, why this would be insufficient.

B. The trial court improperly precluded Jomesha's testimony under N.R.S. §174.233(4).

The state also attempted to characterize Jomesha as an alibi witness and moved to preclude her testimony on that additional basis. For one thing, Jomesha was not an alibi witness because she would not have testified where Matthews "claim[ed] to have been at the time of the alleged offense." N.R.S. §174.233. Her proposed testimony was merely to help explain why Matthews was found at a different location some one and a half hours later. Even if Jomesha were an alibi witness, §174.233(4) gives the district court the discretion to preclude or allow untimely disclosed alibi evidence.

If a defendant demonstrates good cause for non-compliance, a trial court should exercise its discretion to allow the presentation of the alibi evidence. *Williams v. State*, 97 Nev. 1, 3, 620 P.2d 1263, 1265 (1981). This Court has held that good cause exists where prejudice to the state could be cured and where the

alibi "ha[s] such substance as to have probative value to the defense." *Id.* (internal citations and quotation marks omitted). Where good cause is shown and the state fails to show prejudice, exclusion amounts to an abuse of discretion. *Id.* at 5, 1266.

For the reasons discussed above, Matthews did demonstrate good cause for Jomesha's belated disclosure. Matthews brought Jomesha—and the substance of her anticipated testimony—to the court's attention as soon as possible and candidly explained how he had contacted her. 3 AA 619–20. The state failed to show that it would suffer any incurable prejudice from the nondisclosure. And Jomesha's testimony did have probative value to the defense.

C. The district court improperly precluded Jomesha's testimony under Rule 4.

Rule 4 of the Nevada Supreme Court Rules regarding Telephonic Equipment imposes a 14-day notice requirement for any party wishing to appear (or to call a witness to appear) telephonically. The personal appearance of a party's witness at trial is required unless: (1) the parties stipulate to allow the party of the party's witness to appear telephonically, the defendant expressly consents, and the court approves the stipulation, or (2) the court makes an individualized determination, based on clear and convincing evidence, that permitting the witness to testify telephonically is necessary and that all of the other elements of the right of confrontation are preserved.

Here, Matthews gave a compelling reason why it was necessary for Jomesha to testify telephonically as opposed to in person: she had just given birth and was still breastfeeding, making it impossible for her to travel from California to Las Vegas. Additionally, allowing her to testify telephonically would have reduced any delay to the trial that would have been caused by making travel arrangements. 4 AA 763. Because Jomesha was a defense witness, there would have been no confrontation clause concerns. And the state would have been permitted to cross-examine Jomesha and could have requested a brief continuance to the extent it desired additional time to investigate before doing so. Notably, the defense's theory for Matthews's presence on Jimmy Avenue was not new. The district court therefore abused its discretion to the extent it precluded Jomesha's testimony based on Matthews's failure to technically comply with the notice requirements of Rule 4.

* * *

The trial court erred by precluding Jomesha's testimony because Matthews did not act in bad faith in, and showed good cause for, his failure to comply with the time-notice requirements. The state would not have been unfairly prejudiced by Jomesha's testimony. Any prejudice to the state could have been cured through a brief continuance, the opportunity for cross-examination, or permitting it to recall any necessary rebuttal witnesses. This error is particularly egregious because the

state *was* permitted to call an unnoticed expert witness, Jomesha's testimony supported Matthews's defense, and the issue of guilt or innocence was close. This Court should therefore find that the district court abused its discretion by precluding Jomesha's testimony under any notice theory and remand for a new trial on that basis.

IV. The state's comments during closing argument and rebuttal constitute prosecutorial misconduct requiring reversal.

A. Prosecutorial misconduct claims

This Court employs a two-step inquiry to prosecutorial-misconduct claims. First, the Court must determine whether the prosecutors' conduct was improper. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Second, if the conduct was improper, the Court must determine whether the improper conduct warrants reversal. "To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutors' statements so infected the proceedings with unfairness as to make the results a denial of due process." *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). This Court has cautioned that, "[i]f the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." *Garner v. State*, 78 Nev. 366, 373, 374 P.2d 525, 530 (1962). Because Matthews did not

object to the prosecutors' improper comments at trial, this Court reviews for plain error.

B. The state improperly vouched for its lead witnesses.

This Court has long recognized that prosecutors should not inject his personal opinion or beliefs into the proceedings and may not vouch for the credibility of a witness. *Collier v. State*, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985), *modified on other grounds by* 106 Nev. 713, 800 P.2d 175; *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Prosecutors may not vouch for their own witnesses because jurors "may be inclined to give weight to the prosecutors' opinion in assessing the credibility of a witness, instead of making the independent judgment of credibility to which the defendant is entitled." *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985); *Lisle v. State*, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997), *clarified on other grounds by* 114 Nev. 221, 954 P.2d 744 (1998).

In closing argument and rebuttal, the state repeatedly vouched of its lead witnesses, Officers Cupp and Walter, and encouraged the jury to believe their testimony simply because they are police officers. The prosecutors told the jury to believe these witnesses because they are "police officers" with "actual training and experience chasing bad guys." 4 AA 797. The prosecution further vouched that

they were not the "type of officers" who would want to put away the wrong person. 4 AA 799. In rebuttal, the prosecutor personally assured the jurors that if Officers Cupp and Walter "had any doubt in their mind that is wasn't him, they'd be the first to say it. This was a big deal to them. They don't want the wrong guy going away. They want the right guy. I mean, if they had any doubt, they would say it." 4 AA 827. The prosecutor also personally assured the jury that "[i]f Mr. Matthews had gotten away and they were trying to find him then I can assure you Officer Cupp and Officer Walter would have said I know where he is." 4 AA 831.

These comments so infected the proceedings with unfairness so as to make its result a denial of due process. The issue of guilt was close, and to convict Matthews required the jury to believe Cupp and Walter's testimony that he was the person driving the suspect vehicle. The state's comments improperly invited the jury to do so merely because they were police officers and personally assured the jury that they were telling the truth. These comments were made during closing argument and rebuttal—immediately before the jury retired to deliberate—and no curative instruction was given. These comments, particularly when combined with Officer Overson's improper expert testimony and the preclusion of Jomesha's testimony, require reversal.

V. The cumulative error was prejudicial in light of the weight of the evidence, the severity of the errors, and the gravity of the crimes.

A. Cumulative error

If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. *DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113–14 (2000). "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* (internal citation and quotation marks omitted).

B. The cumulative trial errors warrant reversal.

This case ultimately came down to whether the jury believed that Officers Cupp and Walter's identifications of Matthews as the suspect driver were reliable. This very much remains a case where the evidence of guilt is "far from overwhelming." *Matthews*, 250 F.Supp.3d at 765. First-degree murder is the gravest of crimes for which Matthews was sentenced to—and may well remain in—prison for the rest of his life. Each of the trial errors goes to the heart of Matthews's complete defense: that he was not present during the murder (as opposed to, say, that he lacked the requisite intent or was guilty of only the lesser crimes). Thus, even if this Court concludes that these errors do not, standing alone, require reversal, their cumulative effect denied Matthews a fair trial.

Conclusion

The trial court's failure to apply the well-established three-part *Batson* framework and its resultant summary acceptance of the state's pretextual reasons for striking an African American juror constitute structural error requiring automatic reversal. Alternatively, the trial errors taken separately and cumulatively deprived Matthews of a fair trial and require reversal and remand.

Dated: July 29, 2019

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2. **I certify** that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has typeface of 14 points or more, and contains less than 14,000 words.

3. **I certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 29, 2019

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