IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARD RAY WOODS, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 78816

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

DARIN F. IMLAY
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

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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Appellant,	)	
	)	
vs.	)	
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THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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AARON D. FORD
Attorney General
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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The appellant, Leonard Ray Woods ("Leonard"), appeals from his judgment of conviction pursuant to **NRAP 4(b)** and **NRS 177.015**. Leonard's judgment of conviction was filed on May 17, 2019. (Appellant's Appendix Vol. III:564-65).[1] This Court has jurisdiction over Leonard's appeal, which was filed on May 15, 2019. (III:563). See **NRS 177.015(1)(a).**

ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because Leonard went to trial and was convicted of first-degree murder with use of a deadly weapon, a Category A felony. See **NRAP 17(b)(2)**.

[1] Hereinafter, citations to the Appellant's Appendix will start with the volume number, followed by the specific page number. For example, (Appellant's Appendix Vol. III:564-65) will be shortened to (III:564-65).

ISSUES PRESENTED FOR REVIEW

I. **Structural error during jury selection requires reversal.**

II. **Leonard's Faretta canvas was invalid because the district court assured him of his right to personally voir dire jurors during the canvas and then denied Leonard that right at trial without recanvasing him.**

III. **The district court violated Leonard's Sixth Amendment rights by denying his repeated requests for substitution of counsel.**

IV. **Prosecutorial misconduct during initial guilt phase requires reversal.**

V. **Court erred by failing to suppress contents of Leonard's cellphone and dismiss related charges.**

VI. **Errors relating to weapons phase of trial.**

VII. **Cumulative error requires reversal.**

STATEMENT OF THE CASE

On October 6, 2015, the State filed an information in district court charging Leonard with one (1) count of murder with use of a deadly weapon, four (4) counts of peeping or spying through a window, door, or other opening of dwelling of another while in possession of a recording device, two (2) counts of capturing an image of the private area of another person, two (2) counts of possession of a firearm by a prohibited person, and one (1) count of open or gross lewdness. (I:61-65). The Clark County Public

Defender was appointed to represent Leonard in connection with these charges. (I:70).

On multiple occasions prior to trial, Leonard sought to have the Office of the Public Defender removed as counsel. On December 17, 2015, when Leonard advised the court of his concerns with defense counsel, the court held an *ex parte* **Young**[2] hearing and denied his request for alternate counsel. (III:652-68). On June 29, 2016, Leonard filed his first *pro per* motion to dismiss counsel and appoint alternate counsel. (I:238-43). On July 21, 2016, the court held a second *ex parte* **Young** hearing and denied Leonard's request for alternate counsel. (X:2139-40). On November 21, 2016, Leonard filed a *pro per* Petition for Writ of Mandamus seeking to compel the court to remove the Public Defender's Office from his case. (I:253-260). At a hearing on December 13, 2016, the court treated Leonard's Petition as a motion to dismiss counsel and appoint alternate counsel and denied the motion based on the pleadings, without holding a **Young** hearing. (III:581). When Leonard told the court that he would like to represent

[2] **Young v. State**, 120 Nev. 963, 102 P.3d 572 (2004) (governing motions for substitution of counsel).

himself "if that is what it takes to remove present counsel", the court scheduled a **Faretta**[3] canvas for December 20, 2016. (III:581).

On December 20, 2016, Leonard sought to avoid having to represent himself by requesting another **Young** hearing and moving to dismiss counsel. (III:582). The court denied Leonard's motion to dismiss counsel without holding a **Young** hearing. (III:582,702). On October 25, 2017, Leonard filed a third written motion to dismiss counsel and appoint alternate counsel. (I:261-69). On November 15, 2017, the court held a third *ex parte* **Young** hearing and denied Leonard's request to dismiss counsel and appoint alternate counsel. (III:592).

Unable to get the Clark County Public Defender's Office removed from his case, Leonard filed a written motion to proceed *pro se* on August 21, 2018. (I:283-285). After a **Faretta** canvas on August 29, 2018, the court permitted Leonard to proceed *pro se* with the Clark County Public Defender's Office as standby counsel. (III:602).

In fall 2018, Leonard filed multiple pretrial motions, including a motion to suppress the contents of his cellphone (II:326-63) and a motion to dismiss counts 2-7 (II:439-42), and in both motions he argued that the

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[3] **Faretta v. California**, 422 U.S. 806 (1975)(recognizing defendant's constitutional right of self-representation, where defendant has knowingly and voluntarily relinquished the right to counsel).

unreasonable delay between the impounding of his cellphone and the State's subsequent search of that phone rendered the contents inadmissible. The court denied both motions. (IV:947-950;V:984). The court denied Leonard's request for an evidentiary hearing regarding the unreasonable delay in searching his cellphone. (II:464-66;III:614;V:994).

Although the court denied virtually all of Leonard's other pretrial motions, it granted Leonard's motion to sever the weapons possession charges, so the jury would not learn of his status as a felon until after deliberating on the first eight charges. (IV:903).

Leonard's birfurcated jury trial commenced on March 18, 2019. (III:621-22). On March 25, 2019, after resting its case on the first eight charges, the State dismissed the four (4) counts of peeping or spying through a window, door, or other opening of dwelling of another while in possession of a recording device, because Leonard could not "peep" into his own home. (II:494-96;VIII:1879). The jury took less than an hour to deliberate on the remaining four counts, finding Leonard guilty of one (1) count of first-degree murder with use of a deadly weapon, two (2) counts of capturing an image of the private area of another person, and one (1) count of open or gross lewdness. (II:492-93;III:631).

On March 26, 2019, the weapons possession phase of the trial began, and the jury heard evidence related to the two counts of ownership or possession of a firearm by prohibited person. (III:633). After an hour of deliberations, the jury found Leonard guilty of both counts. (III:633). The penalty phase of the trial began that same afternoon and concluded on the morning of March 27, 2019. (III:633-34). After another hour of deliberation, the jury returned a verdict of life without the possibility of parole. (III:635).

At Leonard's sentencing on May 15, 2019, the court formally adjudicated him guilty and pronounced sentence as follows:

- Count 1 (first degree murder with use of a deadly weapon) – life without parole, plus a consecutive sentence of 96 to 240 months for the deadly weapon enhancement.
- Counts 2 & 3 (capturing an image of the private area of another person) – 364 days, concurrent with count 1.
- Count 4 (open or gross lewdness) – 364 days, concurrent with count 1.
- Counts 5 and 6 (possession of firearm by prohibited person) – 28 to 72 months, concurrent with count 1.

(III:636-37). The court gave Leonard 1,379 days credit for time served. (III:637). Leonard filed a notice of appeal in open court that same day. (III:563). Leonard's judgment of conviction was filed on May 17, 2019. (III:564). Leonard's notice of appeal was docketed in this Court on May 23, 2019.

STATEMENT OF FACTS

DL testified that in July 2015, she lived with her mom, Josie Jones, and her mom's on-again-off-again boyfriend, Leonard Woods, in a trailer home on Pinon Peak in Las Vegas. (VII:1482,1487).[4] DL was 15 years old at the time. (VII:1482). According to DL, on the morning of July 15, 2015, Leonard made her stay home with him when her mom went to work. (VII:1488). According to DL, Leonard told her he had seen her through her bedroom window looking at herself and threatened to tell her mom she was "sending pictures" if she did not show him her breasts. (VII:1489). Then, Leonard allegedly grabbed her breasts with both hands over her shirt, lifted her shirt, looked at her, and said, "Those are pretty titties. You have pretty titties." (VII:1490-91). DL testified that Leonard gave her $20 to bribe her to keep quiet. (VII:1491).

Distraught, DL went to her room and texted/called her friend Devyn to pick her up because Leonard had "molested" her. (VII:1492). When Devyn and her grandmother, Dora Del Prado, arrived at DL's house to pick her up, Leonard allegedly stopped DL and told her she had to send him "a picture" before she could leave. (VII:1493). DL testified that she went back

[4] Woods disputes that he lived in the Pinon Peak home; he presented evidence at trial indicating that he lived at Montello Avenue. (VII:1441;IX:2013,2022,2031).

into her bedroom, lifted her shirt, took a picture of her breasts, and texted the picture to Leonard. (VII:1494).

DL went outside and got in the car with Devyn and Dora. (VII:1494). During the car ride, Devyn and Dora tried to persuade DL to tell her mom what had happened. (VII:1495). When they got to Dora's home, they called Josie who immediately left work. (VII:1497;VIII:1773).

According to Devyn, when Josie arrived at Dora's home, she was "very upset, crying" and seemed "really scared to call the police." (VIII:1757). According to Devyn, Josie said Leonard was "dangerous" and had made death threats. (VIII:1578). According to Dora, Josie was reluctant to call the police because of Leonard's prior "threats". (VIII:1773). DL testified that Leonard threatened to kill all of them (her mom, herself and her brother) if they ever left. (VII:1498-99). Despite this, Josie eventually called the police. (VII:1498)

When Officers Striegel and Reyes arrived at Dora's house around 4:00 p.m., DL, Devyn, Dora and Josie "all filled out police statements". (VII:1500;VIII:1657). DL told officers she had been "molested" by Leonard. (VIII:1660). DL also shared the text messages she had sent Devyn that morning. (VIII:1665).

Sometime after 4:00 p.m., Officers Blasko and Fulwiler arrived at the Pinon Peak home. (VIII:1704). They saw a man fitting Leonard's description exit the home and get into a black Chevrolet Suburban that was parked in the driveway. (VIII:1706-07). When the vehicle left the driveway and began driving southbound on Pinon Peak Drive, the officers conducted a vehicle stop. (VIII:1707). They identified the driver as Leonard Woods. (VIII:1708).

Officer Fulwiler testified that he placed Leonard in handcuffs, put him in the back of his patrol car, and read him his Miranda Rights. (VIII:1731-32). Officer Fulwiler testified that he informed Leonard that there were pictures potentially sent via cell phone. (VIII:1732-33). According to Officer Fulwiler, Leonard responded that he received a text message with a multimedia message or video from DL but he had not opened it and did not know what it was. (VIII:1733). Officer Fulwiler testified that he asked Woods whether there were any firearms in the home. (IX:1998). According to Officer Fulwiler, Leonard replied that "there may or may not be a shotgun in his closet". (IX:1998).

After Leonard had been placed in custody, Officers Striegel and Reyes arrived at the Pinon Peak home, as did Josie and DL. (VII:1500,VIII:1662). According to Officer Blasko, when Josie returned

home, she signed a "consent to search" card allowing officers to search the black Chevrolet suburban that Leonard had been driving. (VIII:1710,1729). Josie also told police that Leonard had firearms in the house. (IX:2024). As a result, Officer Reyes testified that he applied for and received an authorization to search the Pinon Peak home for firearms. (IX:2001-02).

During the vehicle search, Officer Blasko testified that he found a black cellphone inside Josie's vehicle, on top of the center console. (VIII:1709). Officer Blasko believed the cellphone had evidentiary value because Officer Reyes told him there may be a picture on that phone. (VIII:1710). After photographing the cellphone, they packaged and impounded it into evidence. (VIII:1711).

While searching the Pinon Peak home, Officer Reyes located a small black handgun inside the living room couch. (IX:2003-04). Officer Reyes also located a shotgun inside a blue pillowcase in the closet of a room that was identified to him as Leonard's bedroom. (IX:2004-05). Officer Reyes found ammunition for the handgun in the same pillowcase. (IX:2006-07).

DL and Josie moved out of the Pinon Peak home that evening. (VII:1500-01). They stayed with their extended family for a week, then got an apartment at Siegel Suites for a few days, and finally moved into a place across town, off Hacienda and Decatur. (VII:1502).

DL testified that, at some point, they received a call from Leonard at CCDC; but Josie decided she was no longer going to have contact with him. (VII:1504-05). DL testified that, on August 3, they learned that Leonard had been released from police custody. (VII:1505).

On August 5, 2015, DL had cheerleading practice at Desert Pines High School at 6:00 p.m. (VII:1505). Josie went to practice with DL and stayed the entire time, until around 8:00 p.m. (VII:1506). After practice they went to the Walgreens off Flamingo and Decatur, next to the Orleans Hotel. (VII:1506). They parked in front of the store and went inside for approximately 5 minutes. (VII:1507-08). Then, Josie walked out first with DL following behind her. (VII:1508). When Josie got to the front of the car, she saw a man run out and appear to shake Josie, who began screaming. (VII:1508). DL heard the man yell repeatedly, "I told you I would find you B-I-T-C-H". (VII:1508).

The man turned and DL glimpsed the side of his face. (VII:1508). DL testified that she knew it was Leonard because she saw his face when he looked at her and because it sounded like him. (VII:1510). DL ran into the Walgreens to get help. (VII:1510). When DL came back outside, her mom had collapsed on the sidewalk and the assailant was gone. (VII:1509).

There were two other eyewitnesses to Josie's murder: Garland Calhoun and Yesenia Rivas. (VIII:1844). Calhoun and Rivas were standing on the sidewalk outside of the Walgreens in front of Josie's SUV when she was attacked. (VIII:1844). At trial, Calhoun and Rivas both identified Leonard as the man who attacked Josie. (VII:1581;1602). However, in his statement to police, Garland was uncertain he could identify the assailant. (IX:1932). And, Rivas admitted that her vision was very bad and that she was not wearing glasses during the incident. (VII:1601,1604;IX:1933). Rivas also admitted that she and Calhoun had been "going over" their statements with one another before trial. (VII:1603).

A few hours after Josie's attack, Officers Travis Swartz and Vincent Haynes were downtown conducting a vehicle stop in the vicinity of 6th and Ogden. (VII:1454-55;VIII:1778-79). According to Officer Haynes, a man who identified himself as "Leonard Woods" approached, gave his ID, and said he had been involved in an incident in a Walgreens parking lot at Tropicana and Decatur and believed he might be wanted. (VII:1455-57). After running a records check, Officer Swartz found no evidence that Leonard was "wanted". (VIII:1780). However, Officer Swartz discovered that there was an active homicide scene at Tropicana and Decatur.

(VII:1456-57;VIII:1781). So, they put Leonard in handcuffs and transported him to Metro headquarters. (VIII:1782-83).[5]

At Metro headquarters, Detective Buddy Embrey informed Leonard that Josie had died. (VIII:1847-48). At trial, the State introduced evidence of a jail call allegedly placed by Leonard, using his jail PIN number, to Jennifer Woodson, whose name and number were found in Leonard's cell phone. (VIII:1854-55).[6] On the call, a man's voice says, "Hey I did something to Josie, but I don't think she's gonna make it." Then, the man says, "I didn't wanna go that far, I just like lost it. But now they tellin' me that she ain't gonna make it." (State's Exhibit 71).

On August 6, 2015, Detective Donald Shane obtained a search warrant for Leonard's cellphone that had been in police custody for 21 days, since July 17, 2015. (II:343-351). Detective Jason Darr testified that he examined the cellphone. (VIII:1811). In the phone, Detective Darr found an "expired" multimedia message sent by DL on July 17, 2015 that had never been opened. (VIII:1815-16). Detective Darr also found a photograph of a girl standing in a bathroom without a shirt, which was viewed on March 9,

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[5] Leonard told the jury he did not approach the officers; they approached him. (VII:1444).

[6] Leonard disputes that he was the person who placed this call, arguing that detectives had his PIN number and recorded voice since 2003 and manufactured the call. (IX:1930).

2015 at 8:59 p.m. (VIII:1819-20). Detective Darr also found a photograph of a girl in the bathroom with her buttocks exposed, which was viewed on March 23, 2015 at 6:57 p.m. (VIII:1820-21). Finally, Detective Darr found a photograph of a girl standing with her back to the camera, which was viewed on April 21, 2015 at 9:14 p.m. (VIII:1820-21). At trial, DL testified that she was the person depicted in the three photographs. (VII:1511-12). Detective Darr could not say how these images came to be on Leonard's phone, or who had looked at them; all he could say was when they were viewed. (VIII:1823-25).

SUMMARY OF THE ARGUMENT

Leonard's state and federal constitutional rights to self-representation and due process were violated when the court prevented him from personally participating in voir dire, after assuring him he could do so during his **Faretta** canvas. Leonard's Sixth Amendment rights were violated when the court denied his repeated requests for substitution of counsel, forcing him to defend himself *pro se* at trial. Reversal is also required as a result of rampant prosecutorial misconduct and errors during the weapons-phase of the trial. Whether considered alone or together, these errors require reversal. In addition, because the district court should have suppressed evidence obtained from Leonard's cellular phone, counts 2 and 3 must be vacated.

ARGUMENT

I. Structural error during jury selection requires reversal.

The district court violated Leonard's state and federal constitutional rights to self-representation and due process by interfering with his right to personally question prospective jurors during voir dire, requiring reversal. **Nev. Const. art. I, § 8; U. S. Const. amend. VI, XIV.**

A. Relevant factual background.

At calendar call on March 7, 2019, the district court advised the parties that it would ask all the voir dire questions during jury selection and directed them to submit any proposed questions to the court prior to trial. (V:1033). On the first day of trial, March 18, 2019, the court addressed the parties' proposed voir dire questions and made them court exhibits. (V:1043;X:2160-61).

Leonard wanted the court to ask following eleven questions:

1) Are you capable of being fair and impartial to someone accused of murder?
2) Do you believe that you have the ability to follow the letter of the law as it pertains to all aspects of murder?
3) Do you personally know of someone who has been killed or murdered? What are your views?
4) What are your views on race and interracial relationships?
5) Do you believe someone is automatically guilty because they have been arrested or accused?
6) What are your views on the state having to prove beyond a reasonable doubt?

7) What are your views on the defense having no burden of proof?
8) What are your views on the state having no physical evidence for conviction?
9) Do you believe someone who falsely accuses another should also be punished?
10) Do you believe officers who tamper with evidence or lie in trial should be punished?
11) Do you believe police officers are always right?

(V:1043;X:2160). After reviewing this list, the court stated that it would not ask question 8 because "[a]sking the jury what their views is (sic) on the State's evidence right now is not an appropriate question." (V:1045). The court stated that it would "revise" questions 9 and 10 to omit references to punishment, but acknowledged that Leonard was "entitled to have the jury answer questions about, Do they believe that police officers could lie about things? Do you believe they're always right? Do you believe a police officer could tamper with evidence? Anything like that." (V:1045-46). The court promised Leonard it would "ask the questions about, Are you always going to believe a police officer? Or do you believe that a police officer could be wrong about things? They could lie about things? I'll certainly ask those." (V:1046).

During jury selection, the court initially questioned the entire panel regarding their qualifications to serve. (V:1079-25). The court asked the entire panel a modified version of Leonard's question 2, regarding their

ability to follow the law. (V:1022). Then, the court informed the prospective jurors that after a break, it would individually question the first 32 jurors. (V:1125).

First 32 Jurors

When questioning the first 32 jurors, the court modified Leonard's question 1, asking "is there anybody that feels . . . that you could not be a fair and impartial juror in this particular case?" (V:1193-1202). The court modified Leonard's question 3, asking if anyone "kn[ew] of someone that was close to you that had been killed in any kind of criminal activity?" (V:1218). The court modified Leonard's question 4, asking if jurors had "any kind of opinion . . . on any kind of interracial relationships?" (V:1218). The court asked Leonard's question 5, whether anyone thought "just because somebody's arrested they automatically must be guilty?" (V:1218). The court modified Leonard's question 6, regarding proof beyond a reasonable doubt. (V:1220,VI:1221). The court also modified Leonard's questions 10 and 11, asking whether jurors "would have a tendency to give more weight or credence . . . to the testimony of police officers just because they're a police officer?" and whether jurors believed police officers "are automatically always right" or that "police officers could lie"? (V:1207).

However, the court did not ask the first group of 32 jurors questions 8 or 9, to determine what they thought about a lack of physical evidence or false allegations. (V:1193-VI:1225). Nor did the court ask any of these jurors whether they believed officers might *tamper with* evidence. *Id.* The following day, Leonard objected to the court's failure to ask the first 32 jurors questions about false allegations. (VI:1240-41). However, the court disagreed that it had failed to ask that question. (VI:1240).

Next 8 Jurors

The court then began questioning the next "row of 8" jurors. (VI:1239-75). During this round of questioning, the court asked modified versions of the following questions:

- question 1, about jurors' ability to be fair and impartial given the murder charge. (VI:1268).
- question 3, whether "any members of your family or close friends who have been killed by the criminal conduct of somebody else". (VI:1268).
- question 4, whether "anybody that has any concerns about interracial relationships?" (VI:1270).
- question 5, whether "any of you believe that just because somebody is arrested and charged with a crime that they must automatically be guilty?" (VI:1270).
- question 6, regarding the reasonable doubt standard. (VI:1270).

- question 7, whether jurors had a "problem with the fact that in the criminal justice system the defendant has no burden of proof?" (VI:1270).

- question 9, whether "[a]nybody disagree[s] with the statement that witnesses can falsely accuse people of things?" (VI:1273-74).

- question 10, whether "anybody disagree[s] with the statement that police officers could be dishonest about things" and whether "police officers could, you know, be inappropriate with evidence potentially in a case?" (VI:1274). *However, the court never specifically asked these jurors if they believed police could tamper with evidence.*

- question 11, whether "any of you believe that you'd have a tendency to give more weight or credence or less weight or credence to the testimony of police officers just because they're police officers" (VI:1254), and if jurors disagree that "witnesses and police officers" are "human and everybody making mistakes", minimizing Leonard's concerns. (VI:1273).

Next 5 Jurors

Then the court filled the 5 seats that were vacated due to cause challenges and questioned those jurors. (VI:1275-1304). The court asked modified versions of the following questions:

- question 1, regarding "bias or prejudice related to the fact that one of the charges … involves an alleged murder?" (VI:1302)

- question 3, whether jurors "know anybody . . . who has been killed by the criminal conduct of somebody else?" (VI:1302)

- question 4, regarding "bias or prejudice against the issue of interracial relationships?" (VI:1302)

- question 5, whether jurors "believe that someone is automatically guilty just because they've been arrested and charged with a crime?" (VI:1303)

- questions 6 & 7, regarding "views on the defense having no burden in the case, meaning that the State has the burden of proving beyond a reasonable doubt the elements of each of the crimes charged and the defense has no burden of proof." (VI:1303).

- question 9, regarding "any disagreement with the statement that witnesses sometimes could lie or not be honest or falsely accuse people of things?" (VI:1304)

- question 10, regarding "any disagreement with the statement that police officers could potentially do inappropriate things with evidence in a case?" (VI:1303). *Again, however, the court never specifically asked these jurors if they believed police could tamper with evidence.*

- question 11, whether jurors "disagree with the statement that police officers, like any other witnesses, are human and they can make mistakes" (VI:1303), and whether jurors "would treat a police officer differently just because they were a police officer", again minimizing Leonard's concerns. (VI:1291).

After the court questioned the third group of jurors, Leonard expressed concern that the court had not adequately asked about false allegations, as he had requested in proposed question 9. (VI:1317-18). Leonard also objected that the court had asked multiple elaborate questions about sexual crimes, while minimizing his proposed questions. (VI:1320). Leonard asked, "So can my question be multiply asked? Like have you ever been falsely accused? Or do you know of anyone else who has ever been

falsely accused of a crime?" (VI:1320). The court agreed to do so. (VI:1321).

Final 5 Jurors

Because five people had been excused, the court questioned the next five jurors. (VI:1324-48). The court asked modified versions of the following questions:

- question 1, whether jurors were "biased or prejudiced because one of the charges here involves a murder charge?" (VI:1343).
- question 3, whether jurors "know anybody who has ever been killed by criminal conduct of another person?" (VI:1343).
- question 4, whether jurors have "any issue with people who are involved in interracial relationships?" (VI:1366)
- question 5, whether jurors "believe that someone is automatically guilty simply because they've been arrested or charged with a crime?" (VI:1343)
- questions 6 & 7, whether jurors have "negative opinions or anything that would cause you to be biased or prejudiced, based on the fact that the defense has no burden of proof" and "the State has the burden to prove someone's guilty beyond a reasonable doubt." (VI:1344).
- question 9, whether "witnesses could lie about things or falsely accuse people of things?" (VI:1344)
- question 10, whether "police officers could be incorrect about things or could lie about things" and whether police officers could do "inappropriate things with evidence in a case?" (VI:1344). *Again, however, the court never specifically asked these jurors if they believed police could tamper with evidence.*

- Question 11, regarding whether "police officers are like any other human beings and that they can make mistakes", again minimizing Leonard's concerns (VI:1344, also at 1339).

Although the Court had failed to ask the first 24 jurors any questions that resembled Leonard's proposed question 9, the Court made the following inaccurate record before asking the remaining jurors Leonard's proposed follow-up question:

> But the other thing that I wanted to follow up on is I asked everybody the question -- whether it was when I was talking to the first 24 of you, the second 8 of you, the second group of 5, or this last group of 5 -- about whether you disagree with the statement that somebody could falsely accuse somebody else of something.
>
> But I didn't ask if any of you -- and this applies to all 32 of you that are seated in our panel right now -- anybody ever been falsely accused of any kind of crime by anybody? Any – either yourselves or somebody that you're close with that talked to you about any kind of situation like that?

(VI:1346). As set forth herein, the court committed structural error in this case when it prevented Leonard from questioning jurors directly during voir dire, refused to ask whether jurors would require physical evidence for a conviction, failed to ask the first 32 jurors what they thought about about false allegations, and modified and minimized Leonard's remaining questions without justification, failing to ask anyone about the possibility that police might tamper with evidence.

B. District court violated Leonard's statutory right to participate directly in voir dire.

Under Nevada law, Leonard had a right to directly participate in voir dire by asking supplemental questions after the court conducted an initial examination of jurors. Nevada's statute governing the "examination of trial jurors" in civil and criminal trials states:

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

NRS 175.031 (emphasis added). By specifically permitting a "defendant or his attorney" to ask voir dire questions, **NRS 175.031** confers "a substantive right to reasonable participation in voir dire" which may not be abridged or modified. **Whitlock v. Salmon**, 104 Nev. 24, 26, 752 P.2d 210, 211(1988).

In **Whitlock**, 104 Nev. at 28, 752 P.2d at 213, this Court held that "[a] complete denial of attorney-conducted voir dire cannot be construed as a reasonable restriction" on the statutory right of supplemental voir dire. As a result, it is reversible error for a judge to prohibit the parties, through counsel, from directly participating in the voir dire of prospective jurors. **Id.**; accord **Leone v. Goodman**, 105 Nev. 221, 773 P.2d 342 (1989).

In **Whitlock**, this Court recognized the "importance of a truly impartial jury, whether the action is criminal or civil", and explained that the

purpose of voir dire is to ensure that a "fair and impartial jury" is ultimately empaneled. 104 Nev. at 27, 752 P.2d at 212. This Court understood that a judge might "seriously impede that objective" by denying attorneys' direct participation in voir dire. **Id**. at 27-28, 752 P.2d at 212. The Court explained that trial counsel is more familiar with the facts and nuances of a case than the judge, and that "jurors may be less candid when responding with personal disclosures to a presiding judicial officer." **Id.** at 28, 752 P.2d at 212. As a result, **Whitlock** held that a judge may not conduct all of the voir dire himself, and doing so is reversible error, even if the judge gave the parties an opportunity to submit questions and the court "basically presented counsel's questions to the prospective jurors during voir dire." **Id**. at 25, 752 P.2d at 210.

In this case, Leonard was acting as his own attorney for purposes of **NRS 175.031**. Like in **Whitlock**, the court prevented Leonard from asking any supplemental questions of the prospective jurors. (V:1033). Although Leonard was entitled to know whether jurors would require physical evidence for a conviction, the court refused to ask Leonard's proposed question 8. (V:1045). Although the court recognized that Leonard's question 9 about false allegations was relevant and promised to "find a way to revise" it (V:1046), the court failed to ask the first 32 jurors what they thought about

false allegations, or whether they believed witnesses might fabricate. (V:1193-VI:1225-,1240-41). Although the court recognized that Leonard was entitled to ask jurors if they believed a police officer could tamper with evidence (V:1046), the court would not use the word "tampering" when questioning the jurors. Furthermore, without basis to do so, the court changed the wording of practically all of Leonard's remaining questions, minimizing Leonard's concerns about police dishonesty. This was reversible error. Furthermore, even if this Court believes that the judge "basically presented [Leonard's] questions to the prospective jurors during voir dire", the judge still erred as a matter of law. See **Whitlock**, 104 Nev. at 25, 752 P.2d at 210. There is no substitute for the personal right of voir dire. The court's denial of that right was reversible error.

1. Structural error under Sixth Amendment and Nevada Constitution.

Under the Nevada Constitution and the Sixth Amendment of the United States Constitution, Leonard had the right to appear and defend himself as a pro se defendant. **Nev. Const. Art. I, § 8; U. S. Const. amend. VI.** When a defendant represents himself at trial under the Sixth Amendment, he is given the same authority as an attorney would have when conducting a trial:

> A defendant's right to self-representation [under the Sixth Amendment] plainly encompasses certain specific rights to

> have his voice heard. The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

McKaskle v. Wiggins, 465 U.S. 168, 175 (1984) (emphasis added). Likewise, under the Nevada Constitution, a "party accused shall be allowed to appear and defend in person." **Nev. Const. Art. I, § 8**.

By prohibiting Leonard from directly questioning prospective jurors during voir dire, the judge treated Leonard, a pro se defendant, differently from defense attorneys. The judge deprived him of the right "to appear and defend," his right of self-representation, and the right to conduct his own defense. The denial of the right of self-representation is a structural error, not amenable to harmless error analysis. **Cortinas v. State**, 124 Nev. 1013, n. 41, 195 P.3d 315, 323 n. 41 (2008).

2. Due process violation was not harmless.

The district court also violated Leonard's right to due process by preventing him from questioning jurors directly, as required under **NRS 175.031**. See **Ross v. Oklahoma**, 487 U.S. 81 (1988) (due process requires trial court follow procedures codified in jury selection statutes). The procedures in **NRS 175.031** enable parties to obtain enough information on prospective jurors to make intelligent decisions on whether to exercise

peremptory challenges or make challenges for cause. Due process requires a meaningful chance to question jurors for bias and a meaningful use of peremptory challenges. See **U.S. v. Baldwin**, 607 F.2d 1295, 1298 (9th Cir. 1979).

Leonard was denied due process because the district court failed to follow the mandates of **NRS 175.031** for jury selection. See **U.S. Const. amend. XIV; Nev. Const. Art. I, § 8** ("No person shall be deprived of life, liberty, or property, without due process of law").

The error was not harmless because Leonard was deprived of needed information on prospective jurors in order to identify challenges for cause, as allowed by **NRS 16.050**, **NRS 16.060**, **NRS 175.036**, and to make meaningful peremptory challenges under **NRS 16.040** and **NRS 175.051**. At trial, a key aspect of Leonard's defense was his argument that the police manufactured evidence, particularly evidence that *he* approached Officers Haynes and Swartz on the street with a confession, and the contents of the jail call in Exhibit 71.[7] (VII:1444,IX:1950). Yet, the court refused to ask prospective jurors what they thought about "officers who tamper with evidence". Although Leonard's defense required jurors to believe that

[7] Leonard also asked Officer Blasko if he "tampered with" his cellphone prior to obtaining Josie's signature on the consent to search card. (VIII:1726).

testifying witnesses had fabricated claims about him, the court failed to ask the first 32 jurors what they thought about false accusations or whether they believed witnesses might fabricate. (V:1193-VI;1225,1240-41). Leonard could not meaningfully exercise peremptory challenges or challenges for cause without this information. The State cannot show that this error was harmless beyond a reasonable doubt.

II. Leonard's Faretta canvas was invalid because the district court assured him of his right to personally voir dire jurors during the canvas and then denied Leonard that right at trial without recanvasing him.

An accused has the right to self-representation under the Sixth Amendment of the United States Constitution and under article 1, section 8 of the Nevada Constitution. **U.S. Const. amend. VI & XIV**; **Nev. Const. Art. 1, Sec. 8**; **Faretta v. California**, 422 U.S. 806, 819 (1975). Because "the defendant, and not his lawyer or the State, will bear the personal consequences of a conviction", he must "be free to personally decide whether in his particular case counsel is to his advantage." **Faretta**, 422 U.S. at 834.

When an accused chooses self-representation, he must "satisfy the court that his waiver of the right to counsel is knowing and voluntary."

Gallego v. State, 117 Nev. 348, 356-57, 23 P.3d 227, 233 (2001).[8] The record must reflect that the accused was "made aware of the dangers and disadvantages of self-representation" and that "his choice [was] made with eyes open." **Id.**

"The validity of a defendant's waiver of the right to counsel depends on the facts and circumstances of each case, including the defendant's background, experience, and conduct." **Hooks v. State**, 124 Nev. 48, 54, 176 P.3d 1081, 1085 (2008). To ensure a valid waiver, the district court should canvass the defendant to determine if the waiver is made "with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." **Cohen v. State**, 97 Nev. 166, 168, 625 P.2d 1170, 1171 (1981).

On appeal this Court gives deference to the district court's decision regarding self-representation. See **Graves v. State**, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996). However, this Court "'indulge[s] in every reasonable presumption against waiver' of the right to counsel." **Hooks**, 124 Nev. at

[8] **Gallego** was abrogated on other grounds by **Nunnery v.State**, 127 Nev. 749, 263 P.3d 235 (2011).

57, 176 P.3d at 1086 (quoting **Brewer v. Williams**, 430 U.S. 387, 404 (1977)).

During Leonard's **Faretta** canvas, the district court repeatedly assured Leonard that if he chose to represent himself, he would have the right to personally question jurors during voir dire:

> THE COURT: . . . Jury selection, in the beginning of the case, is when we bring a 100 people or so in here and **the attorneys choose the 12 that are going to hear our trial. So they get an opportunity to ask some questions. You can't talk about the facts of the case. You can't argue your case. You just get to ask some questions to find out if anybody has any kind of bias or prejudice that might make 'em a bad juror**.
>
> Not jury instructions. This is just talking to people to figure out who you think might be a good juror to hear your case, which can be kind of a very -- there's a lot of nuances to that, a lot of, you know, trying to read people's body language and read into answers that they give and figure out if you think they're being completely honest with you, are they open minded, do you think they'll be fair. There's a lot of kind of skill that goes into that that's borne out over time when the attorneys repeatedly pick juries. **So that can be very difficult for somebody that's never done that before.**
>
> **You kind of understand that you're taking on a big load in that as well?**
>
> THE DEFENDANT: **Yes, sir.**
>
> Do the jury -- do the questions, are they pertained to just, like, certain questions that you can ask or are these questions –
>
> THE COURT: So when we bring the people in I have a number of general questions that I ask 'em, which is just

generally do they have any bias or prejudice related to certain things. I ask 'em questions about what kind of work do they do, you know, are they married, do they have kids, have they ever been jurors before, have they ever been a victim of a crime, have they ever been accused of a crime. We go through a whole series of questions. **And then the attorneys get an opportunity to take over.**

You can follow-up asking them things about answers they may have given to my questions and sometimes there may be areas that you want to ask about as well.

An attorney may want to ask jurors whether anybody's ever had a family member that's had a substance abuse problem because maybe the case has something to do with drugs. Are there jurors who have concerns about possession of weapons because there's a gun involved in a case. Things like that.

But you can't, you know, tell the jury, here's what happened in the case –

THE DEFENDANT: Yeah.

THE COURT: -- what do you think about that? I mean, that's -- that's what they do in their deliberations.

So you're limited in how you can ask questions. And, again, I can't kind of help you with that. I mean, you'll be able to get assistance from your standby counsel but you're kind of on your own.

Do you understand?

THE DEFENDANT: **Yeah.**

(IV:845-46) (emphasis added). When Leonard asked the court to clarify the voir dire process and how objections to that process would be handled, the

court reiterated that Leonard would be able to ask questions directly, subject only to the State's objections and the court's ruling on those objections:

> THE DEFENDANT: What if I ask the question that's, like I don't know it's over the line, you will say, like, can I ask the –
>
> THE COURT: Well, if you ask a bad question, assumedly the State's going to object.
>
> THE DEFENDANT: Okay, yeah, okay.
>
> THE COURT: And then I'll decide whether it's a good question or not.
>
> THE DEFENDANT: That's what I was asking.
>
> THE COURT: Yeah.
>
> THE DEFENDANT: Okay.
>
> THE COURT: Same thing with if they ask a question that you believe is improper and maybe you ask your standby counsel or whatever, you object and then I'll rule on that as well; okay.
>
> THE DEFENDANT: Okay.

(IV:847).

After giving Leonard lengthy assurances that he could personally voir dire the jury panel if he elected to proceed pro se, the court changed its mind on the eve of trial and denied him that right. (V:1033). This was reversible error. As the Supreme Court explained in **Faretta**, a pro se defendant "relinquishes, as a purely factual matter, many of the traditional benefits

associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." 422 U.S.at 835 (quoting **Johnson v. Zerbst**, 304 U.S. 458, 464-65 (1938). During the **Faretta** canvas, the court failed to advise Leonard that he would be relinquishing his statutory and constitutional right to directly question prospective jurors during voir dire. The court's failure to advise Leonard of this consequence of self-representation rendered Leonard's **Faretta** waiver invalid. Because an invalid **Faretta** waiver is a structural error, reversal is required. See **Hooks**, 124 Nev. at 57-58, 176 P.3d at 1087-88 ("[b]ecause harmless-error analysis does not apply to an invalid waiver of the right to counsel, we must reverse Hooks' judgment of conviction and remand for a new trial.").

III. The district court violated Leonard's Sixth Amendment Rights by denying his repeated requests for substitution of counsel.

The Sixth Amendment provides a right to the effective assistance of counsel. **U.S. CONST. amend. VI**; **Strickland v. Washington**, 466 U.S. 668, 686 (1984). Here, Leonard was denied his Sixth Amendment right to effective assistance of counsel when the district court refused his repeated requests to appoint substitute counsel after he demonstrated a breakdown of communication between himself and his deputy public defender. See **U.S. v.**

Moore, 159 F.3d 1154 (1988); **Young v. State**, 120 Nev. 963, 968-69, 102 P.3d 573, 576 (2004); **U.S. Const. amend. VI.**

A refusal to substitute counsel is reversible error "if the complete collapse of the attorney client relationship is evident." **Young**, 120 Nev. at 969, 102 P.3d at 576 ("if the complete collapse of the attorney-client relationship is evident, a refusal to substitute counsel violates a defendant's Sixth Amendment rights"); **Moore**, 159 F.3d at 1158 (defendant "need not show prejudice when the breakdown of a relationship between the attorney and client from irreconcilable differences results in the complete denial of counsel.").

In **Young v. State**, this Court adopted the Ninth Circuit's 3-part test for evaluating Sixth Amendment claims premised on a trial court's refusal to substitute counsel. When reviewing a denial of a motion to substitute counsel, this Court considers three factors: "(1) the extent of the conflict between the defendant and his or her counsel, (2) the timeliness of the motion and the extent to which it will result in inconvenience or delay, and (3) the adequacy of the court's inquiry into the defendant's complaints." **Young**, 120 Nev. at 968, 102 P.3d at 576 (citing **Moore**, 159 F.3d at 1158-59). It is an abuse of discretion for a district court to deny a request to

substitute counsel where a combination of these factors demonstrates an irreconcilable conflict. **Id**. at 972, 102 P.3d at 578.

A. *Leonard's Repeated Motions were Timely.*

This Court evaluates the "timeliness of a motion to substitute counsel by balancing a defendant's constitutional right to counsel against the inconvenience and delay that would result from the substitution of counsel." **Id.** at 969-70, 102 P.3d at 577. In **Young**, this Court found a defendant's motions timely where his first motion was filed 3.5 months before the actual start of his trial, even though the last motion was filed on the eve of trial.

On ten different occasions from December of 2015 through November of 2017, Leonard repeatedly and consistently advised the court that he had an irreconcilable conflict with his assigned deputy public defender. Leonard requested the appointment of alternate counsel in open court on December 17, 2015,[9] July 21, 2016,[10] July 28, 2016,[11] December 13, 2016,[12] December 20, 2016,[13] November 8, 2017,[14] November 15, 2017,[15], and in three written motions, the first filed on June 29, 2016 (I:238-43), the second filed on

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[9] Complete transcript at (III:648-69).
[10] Complete transcript at (X:2141-2159).
[11] Request at (III:694).
[12] Complete transcript at (III:696-99).
[13] (III:582).
[14] (III:591,721o-p).
[15] Complete transcript at (IV:723-768).

October 21, 2016 (I:244-252), and the third filed on October 25, 2017 (I:261-69). Leonard's trial began on March 18, 2019, a year-and-a-half after his last motion was denied. (III:621-22). Pursuant to **Young**, Leonard's requests were timely.

B. *Extent of Conflict.*

In this case, there was a complete breakdown in Leonard's relationship with his assigned deputy public defender that stemmed from a miscommunication between defense counsel and client that occurred early in their relationship, and that left both parties feeling that the other was racially prejudiced. These concerns first came to light during the December 15, 2017 **Young** hearing, after Leonard expressed his concerns to the court about a statement made by defense counsel during a meeting:

> THE DEFENDANT: Like when she first came to me she was telling me, you know, I'm not just some white girl that doesn't know the streets. And I'm like where's that coming from?
>
> THE COURT: So what if she said that?
>
> THE DEFENDANT: You know what I mean? I'm – I'm – this is [indiscernable]—
>
> THE COURT: So what if she said that?
>
> THE DEFENDANT: To me, I felt that was a borderline racial statement you know. After that, I was asking about the lewdness that I was –

THE COURT: Racial against white people?

THE DEFENDANT: No. I mean, to come [indiscernable]. I hadn't even said a word out of my mouth and you come at me like that and feel like that was even appropriate or necessary.

(III:657-58).

In response, Leonard's deputy public defender told the court that she believed he didn't want a "white female attorney" and the court expressed disdain for Leonard as a result of that disclosure:

THE COURT: Is most of it he doesn't like what you're saying?

MS. MURRAY: I think that there's some deep rooted, you know, thought issues here regarding his interests in having a white female attorney. I mean, I think that that is some of it. I think he's got –

THE COURT: What do you mean? He doesn't want --

MS. MURRAY: -- some upset issues --

THE COURT: -- a white female attorney?

MS. MURRAY: I think that that has something to do with it.

THE COURT: *After he just called you a racist.*

MS. MURRAY: *I know.*

(III:662-63) (emphasis added). Leonard's public defender conceded that she had told him, "I'm not a white girl that doesn't understand the streets."

(III:663). However, she said she had not intended it to be an insulting statement and the court immediately agreed, "Of course not." (III:663).

When the court indicated its belief that *Leonard had racist motives* for seeking to remove his deputy public defender, he tried in vain to defend himself:

> THE COURT: Okay. So you understand that, Mr. Woods. What they're representing to me, you're being adequately defended. You don't get to choose the race, color, gender of your attorney.
>
> THE DEFENDANT: I didn't try to. I didn't imply that at all, Your Honor.
>
> THE COURT: Okay.
>
> THE DEFENDANT: At all.
>
> THE COURT: Okay. So what's your –
>
> THE DEFENDANT: I wouldn't care –
>
> THE COURT: -- deal then?
>
> THE DEFENDANT: -- if they were black, brown, yellow or red. It doesn't matter. I was just asking about the evidence; nothing to do with her personally. I don't know how that got flipped around on me like that . . .

(III:666). When Leonard expressed concern that he now had to be represented by someone who "thinks I have an issue with white women", the court dismissed his concern outright. (III:667-68).[16]

Leonard's relationship with his deputy public defender deteriorated as a result of that first **Young** hearing. In his first written motion to dismiss counsel filed on June 29, 2016, Leonard stated:

> AFTER TRYING TO FIRE MY PUBLIC DEFENDER THROUGH THE NEVADA BAR ASSOCIATION (11/20/15) SHE RETALIATED BY FALSELY STATING TO JUDGE MICHELLE LEAVITT, THAT SHE "THINKS I DON'T WANT A WHITE WOMAN DEFENDING ME" WHICH WAS UNTRUE, UNFAIR, UNPROFESSIONAL, AND RACIST. PLUS I FELT AS THOUGH SHE TRIED TO PREJUDICE THE JUDGE AGAINST ME WITH THESE COMMENTS. (12/17/15).

(I:240).

During the second **Young** hearing, on July 29, 2016, Leonard explained that "this relationship, the trust, rapport, communication has deteriorated so much it's beyond repair." (X:2144). However, when Leonard mentioned his concern about defense counsel's statement to the court that "she don't think I want a white woman defending me", the court told him "I could care less." (X:2145). The court told Leonard that defense counsel's

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[16] Undersigned counsel is not arguing that Leonard's deputy public defender rendered ineffective assistance of counsel by disclosing her belief that Leonard did not want a white woman representing him. See **Bolden v. State**, 99 Nev. 81, 659 P.2d 886 (1983) (ineffective assistance claims more appropriately raised through post-conviction relief, not on direct appeal).

statement "did not affect me at all"; however, Leonard explained that the disclosure affected *him*, because it eroded *his* trust in his own defense attorney. (X:2146-47). Yet, the court ignored Leonard's concern, telling him "that did not affect you and me or anything that has to do with your case. I don't even care about that. I'm beyond that." (X:2147).

At Leonard's final **Young** hearing in front of a different judge on November 15, 2016, it became clear that the attorney-client relationship was irretrievably broken. Although Leonard's deputy public defender made it clear that she bore no racial animosity toward him and that she would continue to diligently defend his case to the best of her ability (IV:746-48), she informed the court that their relationship had completely broken down:

> MS. MURRAY: I don't think in the ten plus years I've practiced out here, in the time I spent working as a student practitioner in Cook County, and the time I've spent in DC, I don't think I've ever had a client relationship where my clients been so distrustful of me and the team working. I do not know if that is a distinct issue that relates to us and the way that the case has been handled. I don't know if that's personality driven. I don't know.
>
> But I can tell the Court that I've -- I've certainly been in situations where someone has moved to dismiss or where, you know, there's been some issues that have arisen, but I've truly never had a situation with a client where I feel like no matter what efforts been extended to communicate that there is something that potentially I am failing on or I am not able to do that continues to have him feel the exact same way as he felt over 18 months ago now.

So it does cause me concern from that positioning –

THE COURT: And that's been there --

MS. MURRAY: -- that he so severely --

THE COURT: -- since the beginning?

MS. MURRAY: Yes, I mean, this began almost -- I don't recall if there were issues prior to leaving justice court or if it was immediately following the move into district court.

THE COURT: Okay.

MS. MURRAY: But I can tell you that from the very beginning it's not been an easy relationship. And I don't fault him for that. I don't have any, you know, I mean, he can have any number of reasons why that might be the case.

But I -- I do feel the Court needs to know that I've -- I've never once come in on one of these and said, there is a breakdown and I don't know how to fix it.

THE COURT: Right.

MS. MURRAY: And that is the position I find myself in. **There is a true breakdown. He genuinely does not trust me. And I don't know what I can do to repair that.**

(IV:749-50) (emphasis added). Leonard's public defender told the court that "if the State were to make an offer in the case, I have concerns over whether or not he would candidly listen to my positioning, my teams positioning, and validly engage in those concerns." (IV:753). Despite the complete breakdown in the attorney-client relationship, the court denied Leonard's motion to substitute counsel. (IV:764-68).

All told, Leonard made 10 separate requests for alternate counsel and was denied at every turn. See Section III (A), supra. Ultimately, Leonard was left with no choice but to proceed *pro se*. Leonard repeatedly informed the court that he would not have elected to represent himself had the court granted his requests for alternate counsel. (II:412;III:698;VI:1307-09;VII:1567-68).

In **Young**, 120 Nev. at 969, 102 P.3d at 576-77, this Court found a "significant breakdown" in the relationship between the defendant and his attorney where the defendant complained to the district court about his counsel on five separate occasions, filed two motions for substitution of counsel describing "a significant conflict and complete breakdown of communication", and where counsel violated a court order to meet with the defendant in jail.

In **Moore**, 159 F.3d at 1159-60, cited with approval in **Young**, the Ninth Circuit found an irreconcilable conflict where the defendant described his relationship with counsel as "clouded by 'an atmosphere of mistrust, misgivings and irreconcilable differences" that involved "serious arguments" about the handling of the case, the client's threat to sue his attorneys and a lack of communication.

In **U.S. v. Williams**, 594 F.2d 1258, 1260 (9th Cir. 1979), relied on in **Moore**, the Ninth Circuit found an irreconcilable conflict where both the defendant and his attorney confirmed that "the course of the client-attorney relationship had been a stormy one with quarrels, bad language, threats, and counter-threats" and the defendant was ultimately forced to "go the pro se route because he could not obtain a different counsel."

In this case, Leonard did not trust his deputy public defender as a result of their communications about race, both in private and in open court. (IV:759). Leonard, an African American man, was accused and ultimately convicted of murdering his girlfriend Josie, a white woman. When Leonard's deputy public defender informed the court of her belief that Leonard did not want a white woman representing him, the court chastised Leonard, telling him "You don't get to choose the race, color, gender of your attorney." (III:666). It was not unreasonable for Leonard to feel distrustful as a result of these interactions, particularly where the court took a harsh tone with him after counsel's disclosure. Defense counsel agreed that "[t]here is a true breakdown. He genuinely does not trust me". (IV:750). Where Leonard harbored such distrust for defense counsel that he was forced to "go the pro se route", the district court erred in finding no "significant breakdown" in

the attorney-client relationship. See **Young**, 120 Nev. at 969, 102 P.3d at 576-77; **Moore**, 159 F.3d at 1159-60; **Williams**, 594 F.2d at 1260.

C. *Adequacy of the Inquiry.*

The district court's inquiry into Leonard's conflict with his deputy public defender was inadequate. During the first **Young** hearing,[17] instead of listening to Leonard's concerns, the court accused him of racism. During the second **Young** hearing,[18] the court ignored Leonard's concerns about the first **Young** hearing, essentially telling him "I don't care." During the first, second *and* third[19] **Young** hearings, the court failed to "explore the degree to which the lack of communication and animosity between [Leonard] and his counsel had prevented his counsel from adequately preparing for trial." **Young**, 120 Nev. at 971, 102 P.3d at 577. This was particularly problematic where defense counsel advised the court of the complete breakdown in the relationship between counsel and client. In addition, during the three hearings, the court "did not inquire into the length of the continuance that would be required for new counsel to prepare [Leonard's] case, nor did the district court attempt to gauge the degree of inconvenience that a delay in [Leonard's] case would cause." **Id**.

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[17] (III:648-69).
[18] (X:2141-59).
[19] (IV:723-768).

Weighing all three factors, the district court abused its discretion in denying Leonard's repeated motions for appointment of new counsel, and a new trial is required to remedy the violation of his Sixth Amendment rights.

IV. Prosecutorial misconduct during initial guilt phase requires reversal.

Prosecutorial misconduct violated Leonard's state and federal constitutional rights to a fair trial and due process of law. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8; Johnson v. Sublett**, 63 F.3d 926, 929 (9th Cir. 1995) (determining "whether prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process"). "When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, [it] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [it] must determine whether the improper conduct warrants reversal." **Valdez v. State**, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

When the defense objects to prosecutorial misconduct, this Court applies a harmless error standard of review. **Id**. For constitutional errors, this Court applies **Chapman v. California**, 386 U.S. 18 (1967), and reverses unless the State shows beyond a reasonable doubt that the error did not contribute to the verdict. **Valdez**, 124 Nev. at 1189, 196 P.3d at 476. When

prosecutorial misconduct is not preserved for appeal, this Court can reverse if plain error affects the appellant's substantial rights by "causing actual prejudice or miscarriage of justice." **Id**. at 1190, 196 P.3d at 477 (internal quotation omitted).

A. Undermining Leonard's Presumption of Innocence.

"The rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence." **Haywood v. State**, 107 Nev. 285, 287–88, 809 P.2d 1272, 1273 (1991). The State repeatedly undermined Leonard's presumption of innocence during the initial guilt phase of Leonard's bifurcated trial.

1. "Guilty" PowerPoint Slide During Opening Statement

The State's opening statement included a PowerPoint presentation that included a slide with the word "GUILTY" emblazoned across it. (Court's Exhibit 5). Although Leonard did not object to the PowerPoint slide, it was plain error to show this slide to the jury because it undermined Leonard's presumption of innocence. As this Court held in **Watters v. State**, 129 Nev. 886, 313 P.3d 243 (2013), it is reversible error for the State to declare a defendant "GUILTY" in an opening statement PowerPoint presentation. As in **Watters**, the State's PowerPoint presentation visually declared Leonard "guilty" before a single witness testified. This plain error warrants reversal

because it "undermined the presumption of innocence . . . which is a basic component of '[the] fair trial' guaranteed by the Fourteenth Amendment 'under our system of criminal justice.'" 129 Nev. at 892, 313 P.3d at 248 (quoting **Estelle v. Williams**, 425 U.S. 501, 503 (1976)).

2. References to Leonard's Custody Status and Criminal History.

A defendant's presumption of innocence can be undermined by depicting a defendant in handcuffs, and by referring to the defendant's in-custody status and prior criminal history. See **Haywood**, 107 Nev. at 288, 809 P.2d at 1273 (advising jury of defendant's in-custody status can have the "same prejudicial effect as bringing a shackled defendant into the courtroom"); **Sherman v. State**, 114 Nev. 998, 1008, 965 P.2d 903, 910 (1998) ("improper references to prior criminal acts affect the presumption of innocence").

In this case, during the initial guilt phase of Leonard's trial, the State repeatedly informed the jury that Leonard had been arrested, apprehended, handcuffed, placed in custody, and booked into the Clark County Detention Center in July 2015. (VII:1433, 1404-05, 1500; VIII:1662, 1663, 1664, 1732, 1744-45, 1732, 1744, 1745, IX:1913, 1955). Although Leonard did not object, these references undermined the presumption of innocence.

An additional error occurred when the State elicited testimony from Dora Del Prado about Leonard's prior criminal history over his objection. This happened when the State asked Dora why DL was scared to tell her mother about the alleged molestation:

Q Okay did she say why she was petrified?

A Yeah. She told me numerous times that if – Joe always threatened that if –

Q Hold on. So Joe threatened her?

A **Threatened her mother and her that if he ever went back to jail for any reason - -**

Q So --

THE DEFENDANT: Objection, Your Honor.

THE COURT: Well, I'll strike that statement.

THE WITNESS: I'm sorry.

THE COURT: I want the jury to disregard that.

BY MR ROGAN:

Q So when Joe threatened her before --

A Right.

Q -- That was why she was scared?

A --Yes.

(VIII:1772) (emphasis added). Although the court told the jury to disregard this statement, the State subsequently reminded the jury of the statement by having Dora confirm, over Leonard's objection, that Josie was scared to call the police "because she expressed to you threats that the defendant had made in the past." (VIII:1773). Hearing that Leonard had threatened Josie "if he ever went back to jail", jurors could reasonably infer that Leonard had engaged in prior criminal activity. Under **Sherman**, 114 Nev. at 1008, 965 P.2d at 910, this error requires reversal unless the State can prove it was harmless beyond a reasonable doubt.

B. Improper Leading Questions

Leading questions are generally prohibited during direct examination. **NRS 50.115(3)** ("Leading questions may not be used on the direct examination of a witness without the permission of the court."). A question is leading when it is framed in a way that suggests the desired answer to the witness. 98 C.J.S. Witnesses § 473 (2019). Leading questions are restricted to prevent counsel from testifying through a witness "as to material facts in dispute and to prevent shaping and creating evidence – whether inadvertently or intentionally – that conforms to the interrogator's version of the facts." 98 C.J.S. Witnesses § 472 (2019).

Although the district court has discretion to allow leading questions and an abuse of that discretion is not "ordinarily a ground for reversal . . . the improper allowing of leading questions may be so prejudicial as to require a reversal." **Anderson v. Berrum**, 36 Nev. 463, 470-71, 136 P. 973, 976 (1913); see also **McDavid v. State**, 594 So.2d 12, 17 (Miss. 1992)) (reversible error for state to repeatedly ask leading questions about key factual issue).

In this case, the vast majority of the State's questions to Detective Buddy Embry were leading, in an effort to sum up the State's case at the close of evidence. While playing the surveillance video from Walgreens that captured Josie's murder (State's Exhibit 1), the Prosecutor improperly narrated what was happening in the video and simply had Detective Embry confirm everything the Prosecutor said. (VIII:1841-45). Then, the Prosecutor asked leading questions about Leonard's "surrender" (VIII:1846), about the State's inability to locate the assailant's vehicle (VIII:1848-49), about his investigation into the July 2015 sexual molestation allegations and the evidentiary value of the pictures found in Leonard's cellphone (VIII:1849-51,1854), about his belief that Leonard placed the jail call introduced as Exhibit 71 (VIII:1854), and his belief that Leonard changed his clothes after committing the murder and disposed of the weapon. (VIII:1855-56). In

answering each of these leading questions, the Prosecutor simply answered "yes", "no" or "I did". Although Leonard did not object, the State's misconduct was plain from the record and caused "'actual prejudice or miscarriage of justice.'". **Valdez**, 124 Nev. at 1190, 196 P.3d at 477.

C. Misleading Jury With Facts not in Evidence

It is prosecutorial misconduct for the State to "mislead the jury", and "refer to facts not in evidence." **McGuire v. State**, 100 Nev. 153, 157–58, 677 P.2d 1060, 1064 (1984); **Rose v. State**, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007).

1. Claiming Leonard was the "only person" who knew Josie's assailant drove a Ford Taurus.

Garland Calhoun and Yesenia Rivas both testified that they believed Josie's assailant left the scene in a Ford Taurus. (VII:1583,1600). So, when Leonard subsequently cross-examined Detective Embrey, he asked, "Is there any evidence of the defendant related ever to a Ford Taurus before or after this incident?" (VIII:1858). On redirect, the prosecutor misled the jury by insinuating that Leonard's question to Detective Embrey established his guilt because he was the "only person" who knew the make and model of the getaway car:

> Q Mr. Woods talked to you about a Ford Taurus and said, Was there any connection to a Ford Taurus? And that there was nothing connecting him to a Ford Taurus. Not one person,

except for Mr. Woods, has specifically said that that car is a Ford Taurus. Would you agree with me?

A I agree.

Q He seems to be the only person who has that knowledge. Would you agree with me?

A Yes.

(VIII:1863). The next day, Leonard objected that the State's improper questioning falsely implied that he had knowledge of the crime that no one else had, where Garland Calhoun had mentioned a Ford Taurus twice in his statement to police and the State had sent him two big pictures of a Ford Taurus in his discovery. (IX:1887). Yet, instead of offering a curative instruction, the court refused to do anything because "evidence is over." (IX:1887). The State's misconduct undermined the presumption of innocence and was not harmless beyond a reasonable doubt. **Valdez**, 124 Nev. at 1189, 196 P.3d at 476.

2. Claiming Leonard admitted to watching DL outside of the bathroom.

During closing, the State argued that Leonard took the photographs of DL that were found on his cellphone because, "[h]e admitted that he was the person standing outside of her window, that he would watch her". (IX:1951). The court sustained Leonard's objection but did not tell the jury to disregard the improper argument. (IX:1951).

Then, the State argued that on July 17th, Leonard told DL,

> I've been watching you when you're in the *bathroom*. And where were those photographs taken, while DL was in the bathroom? She testified. And she told you that they were taken from up above the shower, looking down at her – *just like the defendant said – outside of the bathroom*.

(IX:1951-52) (emphasis added). Leonard immediately objected, because DL testified that Leonard admitted to watching her outside of her *bedroom*[20] – not the bathroom. (IX:1952). Yet the court overruled the objection, and the State doubled down and again told the jury, "she said bathroom". (IX:1952).

These misstatements during closing argument were not harmless. In order to convict Leonard of capturing an image of the private area of another person, the State had to prove that Leonard actually "captured" the images in question. See **Coleman v. State**, 134 Nev. 218, 416 P.3d 238 (2018); **NRS 200.604**. Capture means "means to videotape, photograph, film, record by any means or broadcast." **NRS 200.604(8)(b)**. Yet, Detective Darr, who examined Leonard's cellphone, could not say how the images came to be on the phone, or who viewed them; he only knew the dates they were viewed. (VIII:1823-25). The prosecutor's false claim that Leonard admitted to watching DL outside of the *bathroom* where the pictures were taken, supplied the needed link that was missing from Detective Darr's testimony.

[20] DL's testimony is in the record at (VII:1489).

Importantly, the jury was never instructed on the definition of the phrase "capture". And the court gave the jury an inaccurate definition of the phrase "private area", rather than the statutory definition. Compare (II:515) with **NRS 200.604(8)(d)**. Under these circumstances, the State's misconduct requires reversal of Leonard's convictions for capturing an image of a private area of another person.

3. Claiming Josie told DL, Dora and Devyn ,"He will find me and he will kill me".

Three eyewitnesses testified that Josie's assailant stabbed her while saying a variant of the phrase, "I told you I'd find you, I told you I'd kill you." (VII:1508,1580,1599). Leonard contended that the eyewitnesses were mistaken when they identified him as the assailant at trial.

Over Leonard's objection, the State was permitted to argue, "Josie saw – forsaw her own death on July 17th. She knew exactly how she was going to die. And she told her daughter that and she told Devyn that and she told Dora that. She said, He will find me and he will kill me." (IX:1963).[21] Although DL and Devyn both testified that Leonard had *previously* made death threats (VIII:1499,1758), and Dora testified that Leonard had simply "[t]hreatened her mother", *none of them* testified that Josie said, "He will

[21] The State made a similarly improper argument during penalty phase, when it vividly described "the thoughts that Josie Jones had to be having as she took her last breath." (X:2117).

find me and he will kill me." The State's false claim that Josie told them, "He will find me and he will kill me", was unduly prejudicial in a case where Leonard contended that the three eyewitnesses were mistaken about his identity and all three eyewitnesses heard the assailant repeat that phrase.

D. Golden Rule Argument

"An attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties." **Lioce v. Cohen**, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008). During closing argument, the prosecutor asked jurors to imagine themselves driving through a yellow light, deciding whether to "push down on the accelerator or push down on the brake", to argue that Leonard's actions were deliberate and premeditated. (IX:1918-19). But such "[g]olden rule arguments are improper because they infect the jury's objectivity." **Id**. at 22, 174 P.3d at 984. Although Leonard did not object, the error was plain and prejudicial.[22]

V. Court erred by failing to suppress contents of Leonard's cellphone and dismiss related charges.

Prior to trial, Leonard moved to suppress the contents of his cellphone based on the State's unreasonable delay in obtaining a search warrant after

[22] The State also made an improper golden rule argument during penalty phase, asking jurors "What is worse than getting a phone call that your parent has passed? Or actually seeing your parent die right before your very eyes this way?" (X:2166).

seizing his phone. (II:236-363). Leonard's argument was premised on **U.S. v. Mitchell**, 565 F.3d 1347 (11th Cir. 2009), which held that a 21-day delay in obtaining a search warrant for a lawfully seized computer hard drive violated the Fourth Amendment, where the State presented no justification for the delay. The State opposed Leonard's motion without addressing **Mitchell**, instead arguing that under **U.S. v. Leon**, 468 U.S. 897 (1984), the cellphone's contents could not be suppressed if the warrant, once it was issued, was valid. (II:409A-E). Agreeing that the warrant was valid, but without addressing **Mitchell**, the court denied Leonard's motion. (IV:940-950).[23]

Leonard then moved to dismiss the cellphone-related charges, arguing again that under **Mitchell**, the State's unreasonable delay in searching his phone required the charges' dismissal. (II:439-442). This time, the State responded to Leonard's **Mitchell** argument, arguing that the delay between the seizure of the cellphone and the subsequent search was "reasonable" under the balancing-test set forth in that case. (II:449-457). The court denied

[23] This ruling was error. See **U.S. v. Burgard**, 675 F.3d 1029 (7th Cir. 2012) (refusing to apply **Leon**'s "good faith" exception on similar facts: "When an officer waits an unreasonable time to obtain a search warrant, in violation of the Fourth Amendment, he cannot seek to have evidence admitted simply by pointing to a late-obtained warrant. If this were all that was needed, evidence would never be suppressed following these types of violations because, by definition, the police would always have a warrant before they searched.").

Leonard's motion. (V:484). Although Leonard also requested an evidentiary hearing to address the unreasonable delay in searching his cellphone (II:464-66), the court denied his request for a hearing. (III:614;V:994). These errors require reversal.

Evidence obtained in violation of a constitutional right must be suppressed. **Somee v. State**, 124 Nev. 434, 444, 187 P.3d 152, 159 (2008). "A motion to suppress presents mixed questions of law and fact. On appeal from an order [denying] a motion to suppress, '[t]his court reviews findings of fact for clear error ....'" **State v. Lloyd**, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013) (alteration in original) (citation omitted). This Court reviews a district court's legal determination of the constitutionality of law enforcement's conduct de novo. **Cortes v. State**, 127 Nev. 505, 509, 260 P.3d 184, 187 (2011).

A seizure that is "lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable searches.'" **U.S. v. Jacobsen**, 466 U.S. 109, 124 (1984). A seizure based on probable cause can later become "unconstitutional if the police act with unreasonable delay in securing a warrant." **Mitchell**, 565 F.3d at 1350 (quoting **U.S. v. Martin**, 157 F.3d 46, 54 (2d Cir. 1998));

accord **U.S. v. Place**, 462 U.S. 696, 710 (1983) (90-minute warrantless detention of respondent's luggage deemed unreasonable).

To determine whether a delay between a seizure and a subsequent search warrant is unreasonable, courts must "balance the government's interest in the seizure against the individual's possessory interest in the object seized." **U.S. v. Pratt**, 915 F.3d 266 (4th Cir. 2019) (citing **Place**, 462 U.S. at 703). When balancing those interests, courts "must 'take into account whether the police diligently pursue[d] their investigation.'" **Burgard**, 675 F.3d at 1033 (quoting **Place**, 462 U.S at 709).

1. Leonard's possessory interest in his cellphone.

In **Mitchell**, the Eleventh Circuit held that a defendant had a strong possessory interest in his computer hard drive, which was "the digital equivalent of its owner's home, capable of holding a universe of private information." 565 F.3d at 1352 (quoting **Kansas v. Rupnick**, 280 Kan. 720, 125 P.3d 541, 542 (2005)). The Supreme Court has since recognized that cellphones are "microcomputers" that contain *even more* "sensitive personal information" than a person's home. **Riley v. California**, 573 U.S. 373, 394-97 (2014). Cellular phones are so pervasive in modern life that one poll found that "nearly three-quarters of smart phone users report being within five feet of their phones *most of the time*, with 12% admitting that they even

use their phones in the shower." **Riley**, 573 U.S. at 395 (emphasis added). Where Leonard had a substantial possessory interest in his cellular phone, the State's 21-day delay in obtaining a warrant to search that phone constituted a "substantial interference" with that right. See **Mitchell**, 565 F.3d at 1351 (21-day delay in obtaining warrant to search hard drive was "substantial interference"); **U.S. v. Civil**, 2017 WL 4708063 (N.D. Fla. August 1, 2017) (25-day delay in obtaining warrant to search cellphone unreasonable); **Pratt**, 915 F.3d at 272 (31-day delay in obtaining warrant to search cellphone unreasonable).

An individual's possessory interest in seized property diminishes "if he consents to the seizure or voluntarily shares the seized object's contents." **Pratt**, 915 F.3d at 272. Yet, Leonard did not consent to the seizure or voluntarily share the contents of his cellular phone with police. (IV:945). Citing **U.S. v. Sullivan**, 797 F.3d 623 (9th Cir. 2015), the State argued that Leonard's possessory interest in his cellphone diminished during the brief period that he was in CCDC. (II:455). The court relied on that argument in denying Leonard's motion to dismiss. (V:984). Yet, even when a defendant is incarcerated, he *still* retains an interest in his property, and the State must *still* give an explanation for the delay. **Civil**, 2017 WL 4708063, *3.

2. The government's interest in the seizure.

Like the defendants in **Mitchell**, **Civil**, and **Pratt**, Leonard does not dispute that the government had an interest in seizing his cellphone. Rather, Leonard contends that the contents of his cellphone should have been suppressed (and related charges dismissed) because the State failed to justify its 21-day delay in obtaining a warrant to search that phone. See **Pratt**, 915 F.3d at 273 (rejecting state's claim that it could retain phone "indefinitely because it had independent evidentiary value, like a murder weapon").

3. Whether police diligently pursued the investigation.

In determining the reasonableness of the State's delay in seeking a warrant, courts "consider 'the nature and complexity of the investigation' and 'any other evidence proving or disproving law enforcement's diligence in obtaining the warrant.'" **Civil**, 2017 WL 4708063, *4 (quoting **U.S. v. Laist**, 702 F.3d 608, 614 (11th Cir. 2012)). The State bears the burden of establishing the reasonableness of the delay. See **U.S. v. Escobar**, 2016 WL 3676176, *5 (D. Minn. July 7, 2016).

In this case, the State never presented any evidence to justify the 21-day delay in obtaining a search warrant. Instead, the State offered a one-line explanation in its opposition to Leonard's motion to dismiss: "this case was initially investigated by patrol officers; follow-up investigation – including

the drafting of a search warrant – was to be completed once available resources of law enforcement could assign a detective to the case." (II:456). Yet, the State attached no affidavits from members of law enforcement, nor did it explain why the original patrol officers could not have obtained a warrant to search Leonard's phone when they applied for and successfully obtained the warrant to search the Pinon Peak home for firearms.

As in **Mitchell**, **Civil**, and **Pratt**, the State failed to demonstrate diligence to justify the State's delay in obtaining a warrant. And the court failed to make any findings of fact regarding the state's diligence when it denied Leonard's motion. (V:984). Because the State failed to justify the 21-day delay in obtaining a warrant to search Leonard's cellphone, the contents of that phone should have been suppressed and counts 2 and 3 (capturing an image of the private area of another person) must be reversed. See **Mitchell**, 565 F.3d at 1352 ("the excuse offered for the three-week delay in applying for the warrant is insufficient"); **Civil**, 2017 WL 4708063, *4 (without explanation, 25-day delay unreasonable); **Pratt**, 915 F.3d at 273 ("a 31-day delay violates the Fourth Amendment where the government neither proceeds diligently nor presents an overriding reason for the delay").[24]

[24] Alternatively, if this Court finds the existing record insufficient to establish an unreasonable delay requiring suppression, Leonard is still entitled to an evidentiary hearing to address those matters, and a remand is

VI. Errors relating to weapons phase of trial.

A. Eliciting improper legal conclusions from lay witness on redirect.

When Leonard cross-examined lay witness[25] Sergeant Landon Reyes, he did not ask any questions about the legality of firearms possession. (IX:2008-23). Yet, on redirect, the State falsely claimed that Leonard had done so and got Sergeant Reyes to testify, over Leonard's objection, that it was illegal for a felon to possess firearms:

> Q Now, he asked you, Is it illegal for someone to possess firearms? Do you remember that question?
> A Yes.
> Q Is it illegal for someone --
> THE DEFENDANT: Objection.
> MR. ROGAN: -- to possess firearms?
> THE DEFENDANT: I never made that statement.
> THE COURT: Well, overruled.
> You can ask your question, Mr. Rogan.
> BY MR. ROGAN:
> Q Is it illegal for anyone to possess firearms?
> A No.
> Q Is it illegal for someone who is a felon to possess firearms?
> A Yes.

(IX:2025).

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required. See **State v. Ruscetta**,123 Nev. 299, 163 P.3d 451 (2007); **U.S. v. Smith**, No. 17-2446, 759 Fed. App. 62, *65 (2d Cir. January 7, 2019) (remanding for evidentiary hearing regarding reason for 31-day delay between seizure of tablet and warrant).

[25] Witness notices in the record at (I:77,272).

Lay witnesses may offer opinions or inferences that are "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." **NRS 50.265**. As a lay witness, Reyes was not permitted to testify about the legality of weapons possession by an ex-felon. This was an improper legal conclusion and it invaded the province of the jury. The error was not harmless.

B. Failure to instruct on essential element.

In **Rehaif v. United States**, 139 S.Ct. 2191, 2200 (2019), the United States Supreme Court held that the federal statute criminalizing possession of firearms by certain classifications of prohibited persons, **18 U.S.C.A. § 922(g),** requires the government to "prove both that the defendant knew he possessed a firearm *and* that he knew he belonged to the relevant category of persons barred from possessing a firearm." The Supreme Court reversed the appellant's convictions in **Rehaif** because the jury was not instructed that the defendant had to know he belonged to the relevant category of persons barred from possessing a firearm. In **Hager v. State**, 135 Nev. adv. Op. 34, 447 P.3d 1063, 1065 (2019), this Court cited **Rehaif** with approval, noting that **NRS 202.360** contains the *same main elements* as the federal statute.

A month before **Rehaif** was published (and four months before **Hager** was published), Leonard was convicted of two counts of possession of a firearm by a prohibited person, under **NRS 202.360**. During Leonard's trial, the court failed to instruct the jury that the State was required to prove Leonard "knew he belonged to the relevant category of persons barred from possessing a firearm." (III:532-546). Under **Rehaif** and **Hager**, which are now controlling law,[26] the court's plain instructional error requires reversal of Leonard's firearms convictions.

Under the Sixth Amendment of the United States Constitution, the jury must "find all elements of a given crime" and the court's failure "to instruct the jury about essential elements of a crime constitutes constitutional error in that the jury may convict the defendant without finding the defendant guilty of a necessary element of a crime." **Rossana v. State**, 113 Nev. 375, 383, 934 P.2d 1045, 1050 (1997) (citing **U.S. v. Caldwell**, 989 F.2d 1056, 1061 (9th Cir.1993)).

Leonard's trial was rendered fundamentally unfair by the court's failure to instruct the jury on the scienter element of the two weapons possession charges. The court's instructional error lowered the State's

[26] See **Henderson v. United States**, 133 S.Ct. 1121 (2013) ("whether a legal question was settled or unsettled at the time of trial, 'it is enough that an error be 'plain' at the time of appellate consideration'").

burden of proof on those charges. See **U.S.C.A. V, VI, XIV.** Because the instructional error was plain from a review of the record and caused "actual prejudice or a miscarriage of justice", a new trial is required, notwithstanding Leonard's failure to object. **Valdez**, 124 Nev. at 1190, 196 P.3d at 477.

VII. Cumulative error requires reversal.

The cumulative effect of trial errors may violate a defendant's state and federal constitutional right to due process and a fair trial, although the errors are harmless individually. **Valdez**, 124 Nev. at 1195-96, 196 P.3d at 481; **Parle v. Runnels**, 505 F.3d 922, 927 (9th Cir. 2007) (citing **Chambers v. Mississippi**, 410 U.S. 284 (1973).

To establish cumulative error, Leonard incorporates all factual allegations and legal arguments contained in this appeal as if fully set forth herein. The cumulative effect of these errors deprived Leonard of fundamental fairness and resulted in a constitutionally unreliable verdict. Whether or not any individual error requires reversal, the totality of these multiple errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these constitutional errors was harmless beyond a reasonable doubt. In the

alternative, the totality of constitutional violations substantially and injuriously affected the fairness of the proceeding requiring reversal.

CONCLUSION

For the reasons set forth herein, Leonard requests that his convictions be vacated and that he be granted a new trial on all counts except for counts 2 and 3 which must be dismissed.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Deborah L. Westbrook*
Deborah L. Westbrook, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2610
(702) 455-4685

CERTIFICATE OF COMPLIANCE

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

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

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3. Finally, I hereby 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 a 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 in

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

DATED this 13 day of February, 2020.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Deborah L. Westbrook*
Deborah L. Westbrook, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2610
(702) 455-4685

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13 day of February, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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P.O. Box 1989
Ely, NV 89301

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