IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

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APPELLANT'S REPLY BRIEF

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, a structural error requiring reversal. **Nev. Const. art. I, § 8; U. S. Const. amend. VI, XIV**.

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 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).

Contrary to the State's claim, this statute does confer upon *pro se* defendants a substantive right to directly question jurors during voir dire. C.f. Respondent's Answering Brief ("RAB") at 18. Initially, the plain language of **NRS 175.031** prevents courts from "unreasonably restrict[ing]" the supplemental examination of jurors by "a defendant or his attorney". See, e.g., **Salazar v. State**, 107 Nev. 982, 823 P.2d 273 (1991). This language is substantially the same as that found in **NRS 16.030(6)**, which provides in civil cases that "[t]he judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted."

The State contends that **Whitlock v. Salmon**, 104 Nev. 24, 752 P.2d 210 (1988), is inapposite because it was a civil case interpreting **NRS 16.030** rather than a criminal case interpreting **NRS 175.031**. See RAB at 18. However, as set forth above, the statutes are almost identical and both expressly provide that supplemental examinations by the parties or their attorneys "must not be unreasonably restricted." In **Whitlock**, this Court interpreted the meaning of the phrase, "unreasonably restricted", holding that "[a] complete denial of attorney-conducted voir dire cannot be

construed as a reasonable restriction." 104 Nev. at 28, 752 P.2d at 213. Yet, the holding in **Whitlock** did not depend on **NRS 16.030** being civil in nature. To the contrary, **Whitlock** recognized that "[t]he importance of a truly impartial jury, *whether the action is criminal or civil*, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country." 104 Nev. at 27, 752 P.2d at 212 (emphasis added). Furthermore, **Whitlock** rejected the federal rule that gave trial courts discretion to preclude direct examinations of jurors, relying, in part, on a Texas *criminal case* which held that "the constitutional guarantee of the right to be represented by counsel includes the right to have counsel interrogate the members of the jury panel." **Id**. (citing **De La Rosa v. State**, 414 S.W.2d 668, 671 (Tex.Crim.App.1967)).[1]

The State makes too much of the language in **NRS 175.031** that speaks of "such further inquiry as the court deems proper". That language allows courts to limit the *scope* of the voir dire questions asked, not the substantive right to participate directly in voir dire. See e.g., **Johnson v. State**, 122 Nev. 1344, 1354–55, 148 P.3d 767, 774–75 (2006) (stating that voir dire's "scope rests within the sound discretion of the district court" such

[1] This Court also found the analysis in **Whitlock** to be persuasive in the recently-published criminal case of **Azucena v. State**, 135 Nev. 269, 448 P.3d 534 (2019).

that the court can limit the subject matter of questions asked); accord **Spillers v. State**, 84 Nev. 23, 27, 436 P.2d 18, 20 (1968) ("In a criminal case any party to a jury trial has the right to examine prospective jurors on the voir dire. Extent to which the parties may go in such an examination rests largely in the discretion of the court.").[2] While this Court has also said that district courts may choose the "method" of voir dire,[3] **Whitlock** held that district courts do not have discretion to use a method that completely prevents the parties' attorneys from directly questioning prospective jurors.

The State's claim that the district court had discretion to deny Leonard's direct participation in voir dire is further undermined by **Salazar v. State**, 107 Nev. 982, 823 P. 2d 273 (1991). In **Salazar** – a criminal case – this Court interpreted **NRS 175.031** and held that it was "unreasonable" for a district court to limit defense counsel's supplemental voir dire to 30 minutes. If it was "unreasonable" to limit defense counsel's direct questioning of jurors to 30 minutes, then a complete prohibition of direct questioning, as occurred in the instant case, was necessarily unreasonable. Furthermore, **Salazar** held that the district court's arbitrary time-limitation on direct

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[2] **Spillers** was overruled, in part, on other grounds by **Bean v. State**, 86 Nev. 80, 465 P.2d 133 (1970).

[3] See, e.g., **Summers v. State**, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986) (court had discretion to conduct collective voir dire of all jurors as a group rather than individual voir dire).

examination by counsel "effectively deprived appellant of *his right to conduct supplemental voir dire.*" 107 Nev. at 983, 823 P.2d at 273 (emphasis added). As such, **Salazar** implicitly recognized that a criminal defendant has a statutory right to have his attorney personally voir dire prospective jurors.[4]

At the end of the day, there is no basis for this Court to treat civil defendants differently from criminal defendants in terms of their *substantive rights* during voir dire. Indeed, it would violate the Nevada Constitution for this Court to afford civil defendants more substantive protections than criminal defendants in this context. See, e.g., **Nev. Const. Art. 1, § 8** (providing that "in any trial, in any court whatever, *the party accused shall be allowed to appear and defend in person*, and with counsel, *as in civil actions*") (emphasis added). Furthermore, **NRS 175.021(1)** provides that

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[4] Without citing the record, the State claims that "[t]he district court recognized that Appellant would be disadvantaged during voir dire while the State was well prefaced in the process, and thus, neither side was permitted to directly ask questions." RAB at 18; C.f. **NRAP 28(e)** ("every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found"). Contrary to the State's claim, the court gave no explanation for its decision to prohibit the parties from directly participating in voir dire. (V:1033). The court simply told the parties at calendar call, "I'm going to require both sides, because I will do all the voir dire, to submit written questions to me that you want". Id. As in **Salazar**, the court's unexplained decision was completely arbitrary, having no relation to the circumstances of the case.

"[t]rial juries for criminal actions are formed in the same manner as trial juries in civil actions." Therefore, if civil defendants have a substantive right to direct participation in voir dire under Nevada law, then so do criminal defendants.

Here, Leonard was acting as his own attorney for purposes of **NRS 175.031**. Like in **Whitlock**, the court prevented Leonard from personally asking any supplemental questions of the prospective jurors. (V:1033). And by giving Leonard no time to directly question jurors, the district court violated **Salazar** as well. This was a reversible, structural error. See **Whitlock**, 104 Nev. at 25, 752 P.2d at 210; **Salazar**, 107 Nev. at 983, 823 P.2d at 273; **McKaskle v. Wiggins**, 465 U.S. 168, 175 (1984) (defendant's right to self-representation includes the right "to participate in voir dire"); **Cortinas v. State**, 124 Nev. 1013, n.41, 195 P.3d 315, 323 n.41 (2008) (denial of the right of self-representation is a structural error). The court's error also violated Leonard's right to due process and was not harmless beyond a reasonable doubt. See, e.g., **Ross v. Oklahoma**, 487 U.S. 81 (1988) (due process requires trial court follow procedures codified in jury selection statutes).

The State asks this Court to apply plain error analysis because Leonard did not specifically object to the improper voir dire procedure

utilized by the court. RAB at 22. Yet, as a *pro se* litigant, Leonard was relying on the court to adhere to the jury selection procedures mandated by law. Courts have heightened duties when dealing with *pro se* litigants,[5] and on appeal, this Court can apply harmless error analysis notwithstanding a *pro se* defendant's failure to specifically object. See **Garner v. State**, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962) (reviewing unpreserved error under Nevada's prior harmless error statute, NRS 169.110 where defendant had no attorney). While Leonard may not have known that the court was violating his constitutional rights by preventing him from directly questioning jurors during voir dire, he did raise general concerns with the court's questioning of jurors on his behalf. (VI:1240-41,1317-18,1320). Leonard's general

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[5] Courts have a "duty to ensure that *pro se* litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." **Balistreri v. Pacifica Police Dep't**, 901 F.2d 696, 699 (9th Cir. 1988). Appellate courts liberally construe objections by *pro se* defendants to avoid a finding of forfeiture and to permit appellate review. See, e.g., **Haines v. Kerner**, 404 U.S. 519, 520 (1972) (holding pro se complaints "to less stringent standards than formal pleadings by lawyers"); **United States v. Gray**, 581 F.3d 749, 752–53 (8th Cir. 2009) ("We liberally construe pro se objections to determine whether the defendant objected"); **United States v. Ben-Shimon**, 249 F.3d 98, 103-04 (2d Cir. 2001) (general objection of *pro se* defendant at sentencing should have been construed liberally for preservation purposes); **State v. England**, 45 Kan. App. 2d 33, 37, 245 P.3d 1076, 1080 (Kan. App. 2010) ("because England was a pro se litigant, we will liberally construe his objection to criminal history as a motion to correct an illegal sentence"); **Hudson v. Gammon**, 46 F.3d 785,786 (8th Cir. 1995) ("liberally construed, [the defendants'] pro se objection sufficiently directed the district court to the alleged errors").

objections were sufficient to preserve this issue on appeal. See, e.g., **Balistreri**, 901 F.2d at 699; **Haines**, 404 U.S. at 520; **Gray**, 581 F.3d at 752–53; **Ben-Shimon**, 249 F.3d at 103-04; **England**, 45 Kan. App. 2d at 37, 245 P.3d at 1080; **Gammon**, 46 F.3d at 786.

The State further argues that Eighth Judicial District Court Rule ("EDCR") 7.70 allowed the court to revise Leonard's questions to "ensure that only appropriate questions were asked". RAB at 19-20. Yet, EDCR 7.70 does not control this issue. In **Whitlock**, a case that arose in the Eighth Judicial District Court, reversal was still required even though "the trial judge basically presented counsel's questions to the prospective jurors on voir dire [because] he did not allow counsel to participate directly in the process." 104 Nev. at 25, 752 P.2d at 211.

In this case, the court's modifications were insufficient to protect Leonard's constitutional rights, because even with those modifications, Leonard was still deprived of crucial information on prospective jurors. Even though the district court recognized that Leonard had a right to ask jurors whether police officers could tamper with evidence or lie about things (V:1045-46), and even though the district court agreed to modify question 10 to address these matters, the court never once mentioned the possibility of police "tampering" with evidence and only asked some of the jurors if they

believed police might "lie". See Opening Brief at pp. 16-22. Other modified language used by the court minimized Leonard's concerns about police dishonesty. Id. at 25. The modifications caused prejudice because Leonard's entire defense was premised on his contention that the police had fabricated the evidence against him. See Opening Brief at 17. Without answers to those questions, Leonard lacked information necessary to identify challenges for cause and meaningful peremptory challenges. See, e.g., **NRS 175.036** and **NRS 175.051**. And although the State claims that the court properly refused to ask Leonard's question 8 about jurors' views on the State having no physical evidence (RAB at 21), the court could have modified that question to ask jurors whether they would require physical evidence to convict – an appropriate and commonly-asked question during voir dire. As such, the court's denial of Leonard's right to personally voir dire jurors was not harmless beyond a reasonable doubt.

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

before a defendant can validly elect to represent himself at trial, 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), abrogated on other grounds by **Nunnery v. State**, 127 Nev. 749, 263 P.3d 235 (2011). To constitute an effective waiver, 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**.

During Leonard's **Faretta** canvass, 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. (IV:844-847). The district court described a procedure where the court would ask the initial questions "[a]nd then the attorneys get an opportunity to take over. You can follow-up by 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." During the **Faretta** canvass, the district court failed to inform Leonard that he would relinquish his right to directly participate in voir dire if he elected to proceed *pro se*. But as we know, the district court changed its mind on the eve of trial and prevented Leonard from personally questioning any jurors. (V:1033).

The State claims that Leonard "fails to cite to any case law that provides he had the right to question the jurors 'personally'". RAB at 27. Yet, this authority was set forth in Section I of Leonard's Opening Brief and Reply Brief and discussed extensively therein.

The State claims that the "district court was not bound by the procedure described during the **Faretta** canvass." RAB at 27. But how could Leonard "knowingly" waive his right to counsel without also knowing that, as a result of that waiver, he would lose the right to personally question jurors? This Court "'indulge[s] in every reasonable presumption against waiver' of the right to counsel." See **Hooks v. State**, 124 Nev. 48, 57, 176 P.3d 1081, 1086 (2008) (quoting **Brewer v. Williams**, 430 U.S. 387, 404 (1977)). This Court cannot presume that Leonard would still have elected to represent himself had he known that he would be denied the right to directly question prospective jurors at trial. See, e.g., **Banks v. State**, No. 75106, 449 P.3d 477 (Nev. Sept. 27, 2019) (unpublished) (Banks could not knowingly and intelligently waive his right to counsel where judge did not inform him of penalties for adjudication as habitual criminal at his canvass).

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** canvass, the district court failed to advise Leonard that he would be giving up his statutory and constitutional right to directly question prospective jurors during voir dire. The district 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 v. State**, 124 Nev. 48, 57-58, 176 P.3d 1081, 1087-88 (2008).

III. Prosecutorial misconduct during initial guilt phase requires reversal.

"Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers". **U.S. v. Kojayan**, 8 F.3d 1315, 1233 (9th Cir. 1993). "The prosecutor's job isn't just to win, but to win fairly, staying within the rules." **Id**. Unfortunately, in an effort to obtain convictions in this case, the State failed to abide by the rules, requiring reversal.

Initially, the State undermined Leonard's presumption of innocence during its opening statement when it presented the jury with a PowerPoint slide that declared Leonard "GUILTY". See **Watters v. State**, 129 Nev. 886, 312 P.3d 243 (2013) (reversible error to declare a defendant "GUILTY" in an opening statement PowerPoint presentation).

The State also made numerous improper references to Leonard's custody status throughout the initial guilt phase of his trial. The State does not dispute that multiple references to Leonard's custody status were made; rather, the State claims that such references were appropriate under **Haywood v. State**, 107 Nev. 285, 809 P.2d 1272, 1273 (1991), because they did not relate to Leonard's "current custody status" at the time of trial. RAB at 40. The State is incorrect. Although **Haywood** involved a situation where the State's witness testified regarding the defendant's in-custody status between arrest and trial, this Court recognized that any "verbal references" to custody status "may provide an appearance of guilt that a jury mistakenly might use as evidence of guilt." **Haywood**, 107 Nev. at 288, 809 P.2d at 1273.

The jury also learned, in violation of **Sherman v. State**, 114 Nev. 998, 965 P.2d 903 (1998), that Leonard had previously been to jail. "Because improper references to prior criminal acts affect the presumption of innocence, the admission of such references violates due process and requires reversal" unless found to be harmless beyond a reasonable doubt. **Id**. at 1008, 965 P.2d at 910. Although the State claims that it did not "elicit" any improper testimony from Dora Del Prado (RAB at 40-41), Dora was responding to a direct question by the Prosecutor when she testified that DL

was scared of Leonard because he "[t]hreatened her mother and her that *if he ever went back to jail for any reason...*" (VIII:1772) (emphasis added). And even though the court told the jury to disregard the original statement, the State subsequently *reminded* the jury of the improper statement by having Dora confirm – over Leonard's objection – that Josie was scared to call the police *because of the previously-mentioned threats*. (VIII:1773). As such, the court's attempted curative instruction did not render the statement "harmless beyond a reasonable doubt".

The State also violated **NRS 50.115(3)** when it used leading questions throughout its examination of Detective Embrey in order to argue its case to the jury. The State disputes that its violation of **NRS 50.115(3)** was prosecutorial misconduct. However, in **Skropeta v. State**, No. 69812, 408 P.3d 560 (Nev. December 22, 2017) (unpublished), this Court concluded that repeatedly asking a police detective leading questions on direct examination *was* a form of misconduct.

The State also misled the jury on several occasions during closing argument: (1) claiming that Leonard was the "only person" who knew that Josie's assailant drove a Ford Taurus when Garland Calhoun mentioned a Ford Taurus twice in his statement to police, (2) claiming that Leonard admitted to D.L. that he watched her outside of the bathroom, when D.L.'s

testimony indicated he watched from outside her *bedroom*, and (3) claiming without evidence that Josie told D.L., Dora, and Devyn, "He will find me and he will kill me" in order to bolster the eyewitness testimony against him. See Opening Brief at 51-55. Again, there was no evidence introduced that Josie ever told D.L., Dora or Devyn, "he will find me and he will kill me." See Opening Brief at 54. The State fails to cite any portion of the record where D.L., Dora or Devyn ever testified about Josie making such a statement. The State's false argument unfairly linked Leonard to the crime and was not "highly relevant" as claimed by the State. As a result of the extensive prosecutorial misconduct in this case, Leonard's convictions should be reversed.

IV. The court erred by failing to suppress the contents of Leonard's cellphone and dismiss related charges.

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.'" **United States v. Jacobsen**, 466 U.S. 109, 124 (1984); accord **United States v. Mitchell**, 565 F.3d 1347, 1350 (11th Cir. 2009) (21-day delay in obtaining search warrant for lawfully seized computer hard drive violated Fourth Amendment where State could not justify delay); **U.S. v. Pratt**, 915 F.3d 266 (4th Cir. 2019) (31-day delay in

obtaining warrant to search cellphone unreasonable); **U.S. v. Civil**, 2017 WL 4708063 (N.D. Fla. August 1, 2017) (unpublished) (25-day delay in obtaining warrant to search cellphone 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." **Pratt**, 915 F.3d at 271 (citing **U.S. v. Place**, 462 U.S. 696, 703 (1983)). When balancing those interests, courts "must 'take into account whether the police diligently pursue[d] their investigation." **U.S. v. Burgard**, 675 F.3d 1029 (7th Cir. 2012) (quoting **Place**, 462 U.S. at 709). The State bears the burden of proof on the issue of diligence. See **U.S. v. Escobar**, 2016 WL 3676176, *5 (D. Minn. July 7, 2016).

In this case, the district court erred when it failed to suppress the contents of Leonard's cellphone and dismiss Counts 2 and 3 (gross misdemeanor capturing an image of the private area of another person in violation of **NRS 200.604**) based on the State's unreasonable 21-day delay in obtaining a warrant to search the cellphone, where the State provided no justification for the delay. See Opening Brief at 55-61. In his Opening Brief, Leonard relied primarily on three cases: **Mitchell**, **Civil** and **Pratt**, where courts suppressed the contents of hard drives and cellular phones because the

government failed to justify lengthy delays of 21-31 days in obtaining search warrants.

The State does not dispute the applicability of these cases. Instead, the State claims that Leonard disavowed any possessory interest in his cellphone at a November 5, 2018 hearing, and that, as a result, the district court found that he lacked standing to assert a Fourth Amendment Claim. See RAB at 47-48. However, the State's Answering Brief conveniently leaves out a key portion of transcript, several pages later during the same hearing, where Leonard explained what he *meant* when he said the cellphone was never "proved" to be his, and where the district court reached the exact opposite conclusion on the issue of "standing":

> THE COURT: ... All right. And then you have a motion for evidentiary hearing, which is kind of dealing with the search warrant stuff again. It's come up in several motions. So I have to start out by saying, again, if you're -- if you're disavowing any interest in the property seized, then you don't have standing to object to the property seized. Do you understand what I say when I say "standing"?
>
> THE DEFENDANT: Yeah. But even if you're -- you're accused of, you know, I'm accused of the cell phone -- I'm accused –
>
> THE COURT: I -- I understand –
>
> THE DEFENDANT: -- with the cell phone.
>
> THE COURT: -- I understand. But being accused of a crime doesn't mean you automatically have standing to object to a

search of things. You still have to have some type of -- for instance, if somebody searches a home and you don't live there but you've been staying there, then you might have a possessory interest even though it's not your home.

If on the other hand somebody searches a residence that you have no interest in, you're not staying there, and items seized or purported to be your property, then you might have a reason to object to the search if it's your property and you knew that it was being stored there.

But if it's not your residence or vehicle or storage space or anything like that, and you're saying, your position is, that's not my property at all either, then you do not have standing to object to the -- to the search and seizure.

So all along, throughout this, you've never said that you were dis -- denying any possessory interest in the phone. You were filing all these motions and it appeared to me that you were saying, yeah, that's my phone, but I'm objecting to the searches that people did of it because I think they were improper.

Now, today it sounds like you're saying, that's not my phone, I think the searches were improper, but also that's not my phone.

THE DEFENDANT: **No, I was basically saying that it was never proven to be my phone.**

THE COURT: Okay. Well, but, proof -- proof is a trial thing again; okay.

THE DEFENDANT: Okay.

THE COURT: I mean, it's going to be their burden to show that this is your phone.

THE DEFENDANT: All right.

THE COURT: And you're the one that that had possession of whatever is on that phone; okay –

THE DEFENDANT: Okay.

THE COURT: --that's for trial. But it's -- an important issue before that is, do you claim ownership in it and therefore have standing to object to the search of it or are you disclaiming any ownership interest in it?

THE DEFENDANT: I was just saying it was not proven to be my phone.

THE COURT: Okay. But you're not listening to the question.

THE DEFENDANT: And I stand on that right there.

THE COURT: So are you now saying that, yes, I mean, I'm --I'm --I'm saying I had a possessory interest in that phone or not? And I'm not saying -- they don't get to come in at trial and -- and necessarily say, Mr. Woods said something in court; okay. But you, a moment ago, said you didn't have any ownership interest in it.

THE DEFENDANT: That's what I was staying away from. I didn't want them to come later on and say, Woods said this was his phone or he said it wasn't his phone.

THE COURT: Yeah, but you can't –

THE DEFENDANT: I was just saying it was never proven to be my phone.

THE COURT: --you can't kind of play both sides of the issue. You can't say, I don't -- I'm not claiming any ownership interest in it but I want to be able to object to the search of it because they haven't yet proven that I had an ownership interest in it.

THE DEFENDANT: **All right. I get it. So I have to say it was –**

HE COURT: Well –

THE DEFENDANT: **-- my phone before I can say –**

THE COURT: **-- well, here's the thing, let's get past that, for purposes of this hearing I'm going to just rule from the basis of Mr. Woods is still asserting some type of ownership interest. I won't make you say that such that you can object to the search.**

(V:994-97) (emphasis added). Where the court told Leonard it would not require him to expressly assert an ownership interest in the cellphone at the hearing, and where the court found that Leonard had an ownership interest in the cellphone, the State cannot now argue on appeal that Leonard lacked standing to raise a Fourth Amendment challenge.

Furthermore, to the extent the State claims that "Leonard never took a possessory interest in the cell phone" the State is simply wrong. RAB at 48. In his original briefing to the court, Woods stated that he had a possessory interest in the cellphone. (II:330). At the October 18, 2018 hearing on Woods' motion to suppress, Woods argued he "had a strong possessory interest in his cell phone and hard drive. They belonged to him and he never voluntarily relinquished his dominion or control over it. Nor did he ever consent to their seizure." (IV:945). At that same hearing, the district court found that he had a privacy interest in his cellphone. (IV:947) ("They then

went and got a warrant to search the phone because that phone was yours. You did have an expectation of privacy in that. So they went and applied for a warrant and a judge signed the warrant that allowed them to search the phone."). Plainly, this Court cannot "affirm" on the basis that Leonard had no possessory interest in his cellphone.

The State further relies on the district court's finding that Leonard "never requested return of the cellphone." RAB at 48. Yet, the only "evidence" supporting that finding was a bare assertion in the State's Opposition to Defendant's Motion to Dismiss Count's 2-7 that "during the fourteen days that he was out of custody, the defendant never sought the return of his cellular phone". See (II:455). The State did not attach an affidavit from anyone at CCDC or the LVMPD to support this factual claim. And Leonard told the district court that, when he was released from CCDC, he asked them what happened to his phone. (V:999-1000). Therefore, the district court's finding is unsupported by evidence. Furthermore, as set forth in Leonard's Opening Brief, the district court refused Leonard's request for an evidentiary hearing and did not require the State to introduce any evidence explaining the delay in obtaining the search warrant. (III:614;V:994). Without such evidence, this Court cannot affirm the district

court's finding that "the delay was reasonable". See **State v. Ruscetta**, 123 Nev. 299, 163 P.3d 451 (2007).

The State argues that dismissal of Counts 2 and 3 was not an appropriate remedy for a Fourth Amendment violation. RAB at 49. Yet, the State acknowledges that evidence obtained in violation of a constitutional right must be suppressed. RAB at 49. Had the district court properly suppressed the contents of Leonard's cellular phone, there would have been no evidence to support Counts 2 and 3, set forth below:

> COUNT 2 – CAPTURING AN IMAGE OF THE PRIVATE AREA OF ANOTHER PERSON
>
> did, on or about the 9th day of March, 2015, willfully, unlawfully, knowingly, and intentionally capture an image of the private area of another person, to-wit: breasts and/or body of [D.L.], a fifteen year-old girl, without her consent and under circumstances in which [D.L.] had a reasonable expectation of privacy.
>
> COUNT 3 – CAPTURING AN IMAGE OF THE PRIVATE AREA OF ANOTHER PERSON
>
> did, on or about the 23rd day of March, 2015, willfully, unlawfully, knowingly, and intentionally capture an image of the private area of another person, to-wit: breasts and/or body of [D.L.], a fifteen year-old girl, without her consent and under circumstances in which [D.L.] had a reasonable expectation of privacy.

(II:499-500). Without the images or the cellphone linking those images to Leonard, the State could not have proven beyond a reasonable doubt that

Leonard captured "an image of the private area of another person". See **NRS 200.604(1)**. Therefore, dismissal was an appropriate remedy in this case, and this Court may properly reverse Counts 2 and 3 on appeal. See, e.g., **Padilla v. State**, No. 73353, 2019 WL 6840114, *3 (Nev. Dec. 13, 2019) (unpublished) (where firearm was suppressed, and "possession of the firearm is central to a conviction under NRS 202.360, Padilla's conviction cannot stand"); **State v. Luchetti**, 85 Nev. 343, 486 P.2d 1189 (1971) (affirming dismissal of unlawful possession of marijuana charges where physical evidence of marijuana was suppressed).

V. Weapons Phase Errors.

The district court erred when it allowed the Sergeant Reyes to testify, over Leonard's objection, that it was "illegal for someone who is a felon to possess firearms." See Opening Brief at 62-63. The State asks this Court to apply plain error analysis and determine that Reyes' statement was not an improper legal conclusion because Leonard objected to the statement for a different reason. RAB at 50. However, this Court can still apply harmless error analysis notwithstanding a *pro se* defendant's failure to specifically object. See **Garner**, 78 Nev. at 373, 374 P.2d at 529; see also footnote 5, supra (setting forth cases where appellate courts liberally construe objections by *pro se* defendants to permit appellate review).

Citing **United States v. Duncan**, 42 F.3d 97, 101 (2d Cir. 1994), the State argues that Reyes' reference to "illegal" firearms possession did not state a legal conclusion. RAB at 50. However, the testimony at issue in **Duncan** differs from the testimony at issue in this case. In **Duncan**, the defendant took issue with expert testimony that he filed false tax returns and laundered money in a case where the defendant "was not charged with filing false tax returns or with money laundering." 42 F.3d at 102 (emphasis added). Had the defendant been charged with those crimes, the expert's testimony would have been improper. See **id.**; accord **United States v. Robinson**, 255 F. Supp. 3d 199, 206 (D.D.C. 2017) ("'expert witness may not deliver legal conclusions on domestic law, for legal principles are outside the witness' area of expertise under Federal Rule of Evidence 702.' As such, the Court will not allow Dr. Romanoff to testify that Defendant's conduct was 'criminal' or 'illegal'"). Where Leonard was charged with possession of firearms by a prohibited person, Reyes' testimony that it was "illegal" for Leonard to possess firearms was improper and should have been stricken.

The district court also erred in failing to instruct the jury on the proper mens rea required for conviction of weapons possession charges under **NRS 202.360** – that Leonard knew he belonged to the relevant category of

persons barred from possessing a firearm. See **Rehaif v. United States**, 588 U.S. __, __, 139 S. Ct. 2191, 2195-96 (2019); **Hager v. State**, 135 Nev. 246, 447 P.3d 1063 (2019).

Citing **Hager**, the State suggests that there is no mens rea for the crime of illegal firearm possession under **NRS 202.360** and that the crime is essentially a strict liability crime, because knowledge is not one of the three "main elements" identified in **Hager**: (1) the status element, (2) the possession element, and (3) the firearm element. RAB at 51. Yet, **Hager** recognized that the three main elements in **NRS 202.360** were similar to the three main elements of the federal statute at issue in **Rehaif**. And **Rehaif** held that the "status element" included a knowledge requirement, based on the longstanding "presumption in favor of scienter". 588 U.S. at __, 139 S. Ct. at 2195. The presumption in favor of scienter is the "presumption that criminal statutes require the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission.' **Id**. (quoting Black's Law Dictionary 1547 (10th ed. 2014)). Applying that presumption, **Rehaif** held that "the Government must 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." 588 U.S. at __, 139 S. Ct. at 2200.

While **Hager** may not have specified that knowledge is required to establish the "status element" under **NRS 202.360**, that conclusion is implicit given the decision's reliance upon **Rehaif**. The knowledge requirement is also supported by other decisions of the Nevada Supreme Court. In **Ford v. State**, this Court applied the same "presumption in favor of scienter" to determine that Nevada's pandering statute included a specific intent requirement. Like **NRS 202.360**, Nevada's pandering statute did not explicitly mention mens rea. Yet, this Court was unwilling to deem pandering a strict liability crime based on the very same legal authority cited in **Rehaif**:

> While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements," they occupy a "generally disfavored status" and "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437–38, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952) ("mere omission ... of intent [in a criminal statute] will not be construed as eliminating that element from the crimes denounced"); *see United States v. X–Citement Video, Inc.*, 513 U.S. 64, 70, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (many "cases interpret[ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them").

Ford v. State, 127 Nev. 608, 614, 262 P.3d 1123, 1127 (2011). For the same reason, this Court should expressly hold that **NRS 202.360** required the State

to prove that Leonard knew he belonged to the class of persons prohibited from possessing a firearm.

As in **Ford**, the failure to give the proper mens rea instruction was reversible error even though Leonard did not object at trial. See **Ford**, 127 Nev. at 626, 262 P.3d at 1134. Knowledge that one belongs to the relevant category of persons barred from possessing a firearm is an essential element of **NRS 202.360**. Yet, as set forth above, the State improperly presented expert testimony that it was "illegal" for a felon to possess a firearm, without regard for the knowledge requirement. In addition, the jury received the same general intent instruction that was given in **Ford**, along with the same "confusing" language that "addressed motive and admonished the jury that '[m]otive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict." **Id**. at 625, 262 P.3d at 1134; see also (II:518,543). Because the court's instructional error affected Leonard's "substantial rights", reversal is required. **Id**.

VI. Remaining Errors.

Leonard is satisfied that his Opening Brief adequately addresses all remaining issues and incorporates by reference all arguments made therein.

///

CONCLUSION

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.

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

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

DATED this 10 day of June, 2020.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10 day of June, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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