No. 81962

IN THE NEVADA SUPREME COURT

Larry Brown,

Appellant,

v.

State of Nevada,

Respondent.

Direct Appeal from a Judgment of Conviction
Eighth Judicial District Court
Honorable Valerie P. Adair, District Court Judge
District Court Case No. C-17-326247-1

Appellant's Reply Brief

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TABLE OF CONTENTS

Table of Authorities

Federal Cases

State Cases

Statutory Authority

Other Authority

ARGUMENT

A. The district court committed numerous evidentiary errors in violation of state and federal law.

The district court admitted footwear impressions without expert testimony and analysis. It further admitted unauthenticated and unreliable search history from a phone without establishing a proper chain of custody. These rulings were unconstitutional.

1. The district court abused its discretion by allowing the State to present forensic evidence to the jury unguided by any scientific analysis.

The State acknowledges that the PCAST report from 2016 indicates footwear impressions are not scientifically valid. AB 14-15. Yet, puzzlingly, the State then argues that the report is irrelevant because it did "not assess the reliability of analyses as to whether a particular shoeprint was made by a particular size and make of shoe." AB 14. The basis and purpose of footwear analysis, as illustrated by this case, is to determine whether a shoeprint was made by a particular individual. 4 AA 873-79; 5 AA 945-47. This is what the PCAST report invalidates.

In fact, the State noted below that "[w]hile the State will not be admitting expert testimony related to footwear impressions, the jury must be permitted to visually inspect the photographs of the shoes in

order to compare them to the footwear impressions at the scene." 4AA 781. What the State was advocating for is precisely what the PCAST report addressed:

> PCAST finds that there are no appropriate black-box studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks. Such associations are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.[1]

By concluding the science itself is invalid, the PCAST report did address the methodology behind footwear impressions. Since the State had no other argument to rebut the PCAST report, its concession that the science is invalid is correct and supports Larry's position. Footwear impressions are unreliable – presenting them to the jury, especially without an expert, was error.

Furthermore, the State is wrong to contend that Larry rested his argument entirely on this report. AB 14. Larry argued the footwear

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[1] President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

evidence was unlawful under *Hallmark* v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) or *Higgs v. State*, 126 Nev. 1, 17, 222 P.3d 648, 658 (2010). OB 22-23, 28. The State fails to seriously contest this point. The State does provide an uncited and unsupported claim that mirrors the district court's reasoning, arguing that an expert was not needed because "[t]he distinctive characteristics from the bloody shoeprints at the scene of the crime were so *clearly* similar to the boots recovered from Appellant's residence…" AB 17 (emphasis added). Yet, this is exactly the flawed rationale that makes footwear impression especially prejudicial. The tendency to falsely assume a layperson can reliably interpret this evidence risks erroneous fact-finding at trial. In fact, the whole point of the PCAST report was that even a scientific expert is unable to reliably interpret this evidence – it is doubly concerning for a lay juror to believe they can do so alone. *Supra.*

Adopting the State's posture would create a scenario, which in fact occurred here, in which the jury could simply look at the photos and make a determination that they were the same. Such a position is not rooted in science of the case law and the State fails to cite to any legal authority. It is clear the court erred by departing from its own prior reasoning that

an expert would likely be needed, instead relying on a subjective finding to admit the unreliable evidence without requiring an expert. AB 27-28. The State fails to seriously refute this contention.

Addressing prejudice, the State claims there is "overwhelming evidence" to support its argument that any error was harmless. AB 18. However, the State fails to take into account the weight and impact that the footwear impressions no doubt played in the jury's verdict. Larry testified that he was supposed to meet Anthony at a gas station shortly before the robbery took place. 14AA 2441. He further testified that while waiting for Anthony, he was robbed of his cell phone and other items. 14AA 2443. The jury could have reasonably believed that the items found at the scene, linked to Larry, were consistent with his testimony. However, a footwear impression attributed to him, at the scene, would contradict his testimony. As such, the admission of this forensic footwear evidence was not harmless. The only remedy is reversal.

2. The district court erred by admitting text messages and search history purportedly from Angelisa Ryder.

The State fails to distinguish this case from *Rodriguez v. State*, 128 Nev. 155, 159-160, 273 P.3d 845, 848 (2012). As Larry noted, it was not

confirmed *who* conducted the searches on Angelisa's phone. OB 34. Furthermore, the State provided no evidence of authorship beyond the fact that the trial prosecutor and detectives claimed it was Angelisa's phone. 14 AA 2615. If Angelisa in fact sent the text messages and conducted the searches, the State could have easily produced her to testify.

Furthermore, with cell phone evidence concerning other parties, the State provided records purporting to show the location and time certain texts or calls were made. 9AA 1694; 11AA 2113, 2115-16. They did not do this for Angelisa. 14AA 2547, 2615. Proper authentication required more.

Instead, the State relies on the fact that detectives took the phone from Angelisa and she told them it was her number. AB 23. The State correctly notes that Detective Jaeger collected Angelisa's phone on March 20, 2017. 14 AA 2607-11, AB 23. However, glaringly absent from the State's response is an answer to Larry's argument that the detective who introduced her search history and text messages was not Detective Jaeger, but Detective Mangione. 15AA 2629. He did not collect the phone nor extract data from the phone. He simply relied on reports from another

detective who did the extraction. *Id*. In light of all these issues, the State has not established that the messages and search history were authenticated properly under *Rodriguez*. 128 Nev. at 163-64, 273 P.3d at 850 (citing NRS 51.035(3)(b)).

Unable to establish authentication, the State turns its focus to argue that the search history and text messages were not hearsay. AB 22. The State takes umbrage with Larry's claim that the text messages were not offered for "context" as the prosecution and district court claimed. AB 21. However, as Larry noted, and which the State fails to address, this argument was contradicted by the trial prosecutor when they noted that "the text message from, like, 5:30 or whenever it was in the morning, that was **offered to show**, obviously, **to contradict** what Mr. Brown was saying yesterday. Not for the truth, but that this text never would have been made had what he said was the truth. Also – …" 14AA 2644 (emphasis added). Clearly, the text messages were not provided for context but, by the prosecution's own words, were introduced to contradict Larry's testimony. *Id*. The only way the text messages could contradict his testimony is if they were in fact accurate, which by definition means they were offered for the truth of the matter. NRS

51.035. Regarding Larry's argument of double hearsay, the State does not provide a response. AB 40-41; NRS 51.067; *see Polk v. State*, 126 Nev. 180, 184-86, 233 P.3d 357, 359-61 (2010) (The failure to address issues on appeal may constitute a confession of error.); *see also Belcher v. State*, 464 P.3d 1013, 1023-24 (Nev. 2020) (where the State has failed to respond to an issue this Court may overlook the State's failure to argue harmlessness but only in extraordinary cases.).

The State mistakenly argues that even if there was error, it was harmless because the evidence was meant to rebut Larry's testimony. AB 24. This is belied by the record. It was the State, *not* Larry, who introduced an improper question–which the district court confirmed was improper. *Supra.* Based on its own error, the State then claimed the door had been opened for rebuttal. The State cannot ask an improper question, to which an objection was sustained, then claim that very question allows them to introduce improper rebuttal evidence. *See* NRS 50.085(3) (a party may impeach a witness on collateral matters during cross-examination "with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used."); *see also People v. Losey*, 413 Mich. 346, 347, 320

N.W.2d 49, 49 (Mich. 1982) (Michigan Supreme Court noted that the "device of eliciting a denial on cross-examination may not be used to inject a new issue into the case. Similarly, cross-examination cannot be used to revive the right to introduce evidence that could have been, but was not, introduced in the prosecutor's case in chief.")).

The State entirely fails to address that the district court itself explained the prejudice from the improper rebuttal evidence, noting that its purpose or effect would be to "draw a reasonable inference from the content of the search, that she had received information, presumably from Mr. Brown, that there was some kind of a murder or shooting. **Whether it was from Mr. Brown telling her that or because she saw a gun in the car or a big bag of marijuana or anything, there's an inference that's -- there was something that gave her concern that there had been a murder."** 14AA 2645 (emphasis added).

The State also fails to address that there was no evidence of marijuana or a gun in the car. OB 42; AB 20-24. As such, this improper rebuttal evidence was clearly introduced to prejudice the jury against Larry. The text messages and search history were not properly authenticated. Furthermore, they were inadmissible hearsay and

improper rebuttal evidence. These errors necessitate reversal.

B. The State violated *Batson v. Kentucky* and the district court committed structural error.

The State violated *Batson v. Kentucky*, 476 U.S. 79, 82 (1986), and the district court committed structural error in its handling of the *Batson* challenge. The State notes that the district court did not "spell" out all three steps of the Batson inquiry with the "specificity" that this Court prefers. AB 38. This is a gross understatement. The district court's handling of the matter constituted structural error.

1. Prospective Juror Ms. Simon

a. Step One: Prima Facie Case

Although the State provided race neutral reasons for Ms. Simon, Larry noted the first step was still established. 8AA 1494; *Williams v. State*, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018) (the first step becomes moot when the State provides a race-neutral reason for the exclusion of a venire member before a determination at step one)). Instead, the State focuses solely on what Larry argued at trial. While the State is correct that Larry argued in part that inclusion in a protected class was a basis for the first step, such an argument comports with Larry's mathematical argument in his Opening Brief. *Cooper v. State*, 134 Nev. 860, 862-863,

432 P.3d 202, 205 (2018) (citing *Watson v. State*, 130 Nev. 764, 778, 335 P.3d 157, 168 (2014) (approving of a method that compares the percentage of "peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire")); *see also Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) (prima facie case established where prosecutor used 29 percent of peremptory challenges to remove 57 percent of a targeted group that only comprised 12 percent of the venire)).

In addition to its failure to recognize that a prima facie case can be established based on the percentage of peremptory challenges used against targeted group members before and after the venire, the State also fails to acknowledge Larry's argument that a mixed challenge is appropriate under *Diomampo v. State*, 124 Nev. 414, 421, n.4, 185 P.3d 1031, 1036 (2008) (reviewing *Batson* challenge where two jurors were Hispanic and two were African-American); 8AA 1505; OB at 47; AB 24-45. The State's failure to address the mathematical percentages argument shows it cannot refute Larry's claim on the first step regarding Ms. Simon.

b. Step Two: Race Neutral Reasons

The State claims that the race-neutral reasons provided for Ms. Simon were not pre-textual because there were several other Hispanic people on the jury that the State did not intend to strike, she and her children all had criminal records, she spent time with gang members in Los Angeles, and she had been the victim of a crime. AB 29-30.

To begin, the State directly contradicts its own argument. It claims that Larry "characterizes his counsel's argument as a claim there were other jurors with criminal records who the State did not dismiss, this was not counsel's argument. Nor could it have been, as at the time of the Batson challenge to the strike of Ms. Simon, the State had exercised a peremptory challenge against only one other prospective juror—Ms. Devine, who had previously been convicted of battery domestic violence. 6 AA 1126, 1129-30." AB 31. The State suggests Larry argued below only that there were other prospective jurors with convictions. *Id*.

The State is wrong and misrepresents the record. First, the State is wrong because it does what it accuses Larry of doing. The pretextual reasons the State cites in its Answering Brief were *not* the reasons the trial prosecutor raised at the time of the *Batson* challenge. AB 29-31.

Second, the State misrepresents the trial prosecutor's stated race-neutral reasons. The trial prosecutor never claimed that Ms. Simon's children had criminal records. The trial prosecutor *actually* said:

> Her son and daughter have interactions with the system that she didn't really get into although I think that with regard to her daughter she didn't know, to be fair.

8AA 1494. This does not support the assertion that "Ms. Simon *and* her children *all* had criminal records," AB 29 (emphasis added). The actual proffered race-neutral reason below was not valid.

c. Step Three: Sensitive Inquiry

The State fails to refute that its race neutral reasons were pretextual. The State's claim that there were other Hispanic jurors the State did not dismiss does not prove its proffered race neutral reasons were not pretextual. AB 29-30. This is a point Larry raised in his Opening Brief that the State fails to address. Even though other members of a protected class may serve on a jury, "[e]ven a single instance of race discrimination against a prospective juror is impermissible." *Snyder*, 552 U.S. 472, 478 (2008) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory

purpose")). Furthermore, "[i]t is misguided to infer that leaving some members of cognizable racial groups on a jury while striking the only African-American member proves the prosecutor's strike was not racially motivated. *Batson* is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury." *City of Seattle v. Erickson*, 398 P.3d 1124, 1130 (Wn. 2017). The State fails to address Larry's claim in its entirety but doubles down on its uncited argument. *See Polk*, 126 Nev. at 184-86, 233 P.3d at 359-61.

Furthermore, the State misreads this Court's holding in *Williams*. AB 32-33. The Court did not simply hold that the district court failed to conduct the third step properly because its finding was based on race. AB 33. Rather, it specifically held that "the district court never conducted the sensitive inquiry required by step three." *Id*. (citing *Kaczmarek* v. *State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004) ("At the third step, especially, an adequate discussion of the district court's reasoning may be critical to our ability to assess the district court's resolution of any conflict in the evidence regarding pretext."). Instead, this Court noted that "all the district court said was…'I don't find the State based it on race.'" *Id*. Similarly, here, the district court failed to make a finding at the third

step and provided less of a finding than the district court in *Williams*.

Here, the district court simply found that it was satisfied that the State's reasons were not pretextual. 8AA 1500. This is not a proper finding at the third step and hardly allows for deferential or meaningful review. The State claims the district court did conduct the third step because it simply allowed Larry to respond. AB 33. This is not the required inquiry for the third step and regardless, the district court did not make any findings addressing whether the State's reasons based on Larry's argument were in fact pretextual. As such, this was structural error and the State fails to refute this point.

2. Prospective Juror Mr. Peries

a. Step One: Prima Facie Case

As with Ms. Simon, the State entirely fails to address Larry's mathematical argument based on *Cooper*. OB 49. The State's failure is even more egregious for Mr. Peries because he was the only Asian prospective juror on the panel. 8AA 1497. Larry noted that the percentage of the State's strikes demonstrated an "inference of discriminatory purpose" because the State used 14.3 percent of its challenges to remove 100 percent of all Asian jurors on the panel. *Cooper*,

134 Nev. at 863, 432 P.3d at 204-05; OB 48. This is enough to state a prima facie case. The State completely ignores this argument and as such waives their response. AB 34-36; *see Polk*, 126 Nev. at 184-86, 233 P.3d at 359-61; *see also Belcher*, 464 P.3d at 1023-24.

b. Step Two: Race Neutral Reasons

Larry argued the trial prosecutor's race-neutral reasons were pretextual because they were directly belied by the record. *See Conner v. State*, 130 Nev. 457, 465-66, 327 P.3d 503, 509-10 (2014) ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination."). AB 52. The trial prosecutor inaccurately claimed that Mr. Peries claimed he had negative interactions with law enforcement, inferring he had a negative view of law enforcement. However, the record revealed that Mr. Peries explained that any negativity was entirely his fault or the fault of others 7 AA 1327; 8AA 1498-99. As with Larry's argument about percentages targeted under *Cooper*, the State fails entirely to address this issue, thereby waiving its argument. AB 34-36; *See Polk*, 126 Nev. at 184-86, 233 P.3d at 359-61; *see also Belcher*, 464 P.3d at 1023-24.

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c. Step Three: Sensitive Inquiry

In addition to his argument that the State's race neutral reasons were pretextual, Larry argued that the district court failed to conduct the required sensitive inquiry for Mr. Peries. OB 52-53. Larry informed the court that the trial prosecutor's race-neutral reasons were belied by the record. 8AA 1499-1500. He noted that the district court failed to conduct the sensitive inquiry because it did not address his point that the prosecutor's claim was belied by the record. OB 53. Instead, it returned to the first step of the challenge, finding "[s]o look, I think they stated a legitimate reason. I still don't think though just because people, again, happen to be of an ethnic or racial minority doesn't mean that it's racism or that it's, you know, pretextual." 8AA 1500. This is not a proper finding under the third step. In fact, the State does not attempt to argue that the district court conducted the necessary third step finding for Ms. Peries. AB 36; *supra*. The district court committed structural error and the State's pretextual reason constitutes a sufficient finding that Mr. Peries was dismissed for impermissible racial reasons.

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3. Prospective Juror Ms. Allen

a. Step One: Prima Facie Case

Regarding Ms. Allen, Larry noted that the first step was met because there was disparate questioning. Although the State attempts to refute Larry's argument regarding disparate questioning, it is irrelevant. AB 37. The first prong for Ms. Allen was moot because the State interjected with race-neutral reasons prior to a finding by the district court. 8AA 1504-06; *Williams,* 134 at 690, 429 P.3d at 306.

b. Step Two: Race-Neutral Reason

Although the State fails to address several key factual and legal points, it expends a great deal of argument on Ms. Allen's supposed connection to Detective Dosch. It mirrors the trial prosecutors claim that Detective Dosch's involvement in legal cases of Ms. Allen's family members would make her biased. AB 37-39.

In reality, the State misconstrues Larry's argument. AB 42. The issue was not his connection to her brother's case but rather *her knowledge* of his involvement. This was the argument Larry's counsel raised. 8AA 1514. He noted that neither the State nor the court was aware of whether Ms. Allen had any knowledge of Detective Dosch's

involvement. *Id*. The prosecutor confirmed he was not sure what she knew. *Id*. However, during voir dire she clearly stated that she did not know the detective involved in her brother's case, was never interviewed for that case, and her brothers had no ill will towards the detective. 8AA 1463-64, 1512-14. *See Conner v. State*, 130 Nev. 457, 465-66, 327 P.3d 503, 509-10 (2014) ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination.").

c. Step Three: Sensitive Inquiry

Larry argued that the record is conflated as to the second and third steps. *Williams*, 429 P.3d at 307 (*quoting United States v. Rutledge*, 648 F.3d 555, 559) (7th Cir. 2011) ("The analytical structure established by *Batson* cannot operate properly if the second and third steps are conflated."))). OB 53. The State fails to address this argument. AB 42. The State does cite to other jurors who it dismissed had involvement with law enforcement. AB 42. Two of the jurors the State references themselves had interactions with law enforcement. *Id*. Ms. Allen had never been arrested but instead the reason provided was Detective Dosch's association with her brothers, which as discussed above, neither the State nor district court ever addressed if she was aware of this alleged

association. 8AA 1514.

The State then mirrors the trial prosecution's argument that they could not have discriminated against Ms. Allen because there were other African American jurors on the panel that they did not dismiss. AB 43. This is irrelevant. Larry provided substantial case law that the presence of other minorities or even from the same targeted member group does not determine whether a *Batson* violation occurred. OB 52. The State fails to cite a single case to support its argument that the presence of other African-Americans belies discriminatory intent. AB 43; *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this Court need not consider claims not cogently argued or supported by authority).

Furthermore, the State takes the unusual step of transmitting video of the venire so this Court may see the racial composition of the jurors not dismissed by the State. *See* State's Motion to Transmit Video Recording of Proceedings. This is also deeply concerning. Essentially, the State is arguing that the video of jurors not dismissed will be helpful because this Court can simply look at it and determine the race of the jurors. *Id.* However, this does not bolster the State's argument regarding

racial discrimination, if anything it strengthens Larry's argument. The State postulating that mere observation can help this Court ascertain the race or ethnicity of individuals shows how out of touch the State is on this matter. *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1054 (11th Cir. 2005). (Deference given to district court's finding of fact "that one could not identify Hispanic jurors in this particular case simply by their appearance and accent.") As such, just as with the other jurors, the State fails to refute Larry's argument.

The district court committed numerous structural errors in its handling of the *Batson* challenge. As discussed above and throughout Larry's Opening Brief, it improperly conducted a *Batson* challenge one juror at a time, instead of when all the peremptory challenges had been exhausted, and failed to provide proper findings at the third step–in some instances failed to conduct the third step at all.

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4. Judicial Bias[2]

Larry noted that throughout all the *Batson* challenges, the district court demonstrated bias against him. For example, he noted that the court *improperly* asked defense counsel why it removed a prospective juror who was of Eritrean descent. OB 56. The reason it was improper is because there was not a *Batson* challenge pending against Larry. 8AA 1516. The State was tasked with providing a race neutral reason and instead raised an argument that can best be described as 'well, what about them?' or 'well, they did it too.' *Id.* The State provides no case law to support this assertion. The district court, instead of ignoring this argument, unmoored from legal authority, actually entertained the State's question and prompted defense counsel to answer. 8AA 1515. The State, instead of acknowledging that such a question and argument was structurally improper, actually treats the trial prosecutor's argument as if it is deserving of credulity. It is important to note that the State fails

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[2] As noted in his Opening Brief, Appellant reiterates that he is aware of the untimely passing of The Honorable Valerie Adair and does not intend for this argument to convey disrespect. This judicial bias claim speaks only to the circumstances of this individual issue, not to the personal or professional character of the judge generally.

to cite a *single* case to support its argument regarding the juror of Eritrean descent. AB 43-44; *See Edwards v. Emperor's Garden Rest.*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Completely ignoring Larry's argument and relevant legal authority, which indicate the impropriety of the district court's question to defense counsel, the State claims that after the improper question, the prosecution noted "[i]sn't that a racial reason?" and indicated the State was going to make a *Batson* challenge. 8 AA 1515–16; AB 44. Conveniently absent from the State's recitation of the facts is a point Larry raised, specifically the district court's response to the State's question:

> [Prosecutor #1]: Isn't that a racial reason?
> **THE COURT: Yeah, that's a racial reason.**

8 AA 1515-16 (emphasis added). The State omits that it was only *after* the district court provided an encouraging answer to a question the State should not have asked that the State then indicated it would raise a *Batson* challenge. *Id.*; AB 44.

Next, the State again misrepresents Larry's argument. While the State omits that the district court essentially encouraged the prosecution to raise its own *Batson* challenge, it devotes a section to a discussion

about lighthearted joking and analysis of racial matters that occurred at various points between defense counsel, the State, and the court. AB 45. It claims that "[a]ppellant now characterize[s] the colloquy as improper, it is clear from the record that the attorneys were merely engaging in lighthearted joking outside the presence of the panel, and that the district court was not inappropriately assisting the State." *Id.* Larry never claimed that any such conversation was evidence of judicial bias. OB 55-56. Instead, he focused on the district court constantly interrupting defense counsel during the Batson challenge–which the state does not address–improper question regarding the Eritrean juror, and a finding that prompted the State to raise a *Batson* challenge. *Id.* The State misrepresents Larry's argument on judicial bias, and fails to cite relevant legal authority to support its position.

The State's race-neutral reasons were pretextual for all three jurors and in the case of Mr. Peries were belied by the record. The district court omitted structural error as evidenced by the confusing record, failure to conduct the third step properly, or at all, and its failure to make a finding at the third step or citing back to the first step. The district court demonstrated judicial bias, which further prejudiced Larry. Finally,

requesting a *Batson* challenge contemporaneously for each juror instead of waiting for both sides to conclude their challenges deprived Larry of a chance to show a pattern. *See Watson*, 130 Nev. at 775, 335 P.3d at 166 (Although a pattern is not necessary, the defendant may establish the first step of a *Batson* challenge by demonstrating a pattern of strikes.).

The State fails to refute these arguments. The only remedy of this severe Constitutional violation is reversal and a new trial.

C. The district court's rulings violated Larry's rights under the Confrontation Clause.

1. The district court abused its discretion by allowing Cellebrite to limit its own testimony.

The State fails to refute Larry's claim that the district court abused its discretion and violated Larry's Confrontation rights by permitting Cellebrite to limit its testimony in a sealed hearing. The State rests its position on Cellebrite's reference to a non-disclosure agreement during the sealed hearing:

> THE WITNESS: I wouldn't say that they're probably – I wouldn't know a hundred percent, but, for example, it's secrets that probably be like, for example, getting out into the public because this is a law enforcement only thing. So that's why

> we don't want to discuss this stuff out in public too.
> Also the competitor edge too.

11 AA 2015-16. This hardly supports the State's uncited assertion that allowing Cellebrite to limit its testimony benefits "the community at large." AB 47. What *does* serve the community at large is enforcing the constitution. *Janus v. AFSCME*, Council 31, 585 U.S. __, __, 138 S. Ct. 2448, 2486 (2018) ("when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution."); *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 586 (2012) (Supreme Court noted that invalidating an application of a statute was not unconstitutional because it was merely enforcing the Constitution). The State further fails to explain *how* or why a vague reference to a non-disclosure agreement, without detail, overrides Larry's constitutional right of Confrontation. AB 47. Of course it does not. *See Edwards,* 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (this Court need not consider claims not cogently argued or supported by authority).

Ironically, the district court itself noted the lack of prejudice to Cellebrite when the issue of a non-disclosure agreement was raised:

> THE COURT: Well, nobody's asked him to say anything proprietary yet. And, you know, that protects him civilly. So in -- if there were a court order to answer the question then, you know, a nondisclosure agreement is really an instrument that protects the company. And then if he violates it, I'm sure either in the contract or just under general legal principles there could be a civil action against this employee.

11 AA 2018-19. The State makes an equally unsupported claim that "[i]f Cellebrite was forced to testify in a sealed or public hearing, there is a high likelihood that the information would fall into the wrong hands and make it possible for individuals to learn how to circumvent the software in order to avoid detection or prosecution." AB 47. The State fails to cite to a single case for this assertion or provide any information as to how such a breach would happen. *Id*. *See Edwards,* 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.In reality, the ruling below elevated the concerns of a private company – and by extension, they remarkably claim, the public interest over protecting the constitutional rights of the public. *Id.* In ratifying the Sixth and Fourteenth Amendments, it is clear that the Founders, States, and the Public did not dilute the Confrontation Clause to ensure a private company can proect the "inner workings" of its "proprietary" interests. AB 47. G*iles v. California*, 554 U.S. 353, 362

(2008) (The Confrontational Clause initially included only two exceptions, a dying declaration and forfeiture by wrongdoing). This does not pass constitutional muster. There are specific, well established exceptions to the Confrontation Clause, rooted in the common law–this is not one of them. *Crawford v. Washington*, 541 U.S. 36, 38, 54 (2004) (the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."). While the State does acknowledge the district court allowed Cellebrite's testimony in a sealed hearing, it does not address Larry's argument that a sealed hearing by its very nature of secrecy addressed any concern of proprietary information being revealed. 11AA 2020, 22-24; OB 64.

Unable to adequately respond to Larry's argument that his fundamental right to Confrontation was violated, the State attempts to argue that even if it was not, any testimony was irrelevant. AB 48. Specifically, the State notes that "[a]s the district court *opined*, the technology is so immensely complicated, anyone without a computer science degree would be unlikely to understand it." AB 48 (emphasis added). The State is correct that the district court's ruling was unmoored

from any legal authority and clothed entirely in subjectivity. But Nevada courts are not afraid to educate juries on complex, scientific information pertains to a material question at trial. Admissibility of potentially confusing testimony is determined by determining if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. NRS 48.035.

In response to Larry's claim regarding chain of custody, the State tries to play down the significance of the error here by asserting that Cellebrite does not analyze or alter data in any way but simply copies the cell phone. AB 48. First, that testimony is not too complicated for a jury to understand. Second, this is the key flaw with the State's argument and why the district court abused its discretion: if that is the extent of Cellebrite's actions, it should have had no issue answering other relevant questions related to Larry's phone. 11AA 2024-26.

Finally, the State makes an argument that is flawed and belied by the record. It claims that Larry's Confrontation Clause rights were not violated because he was able to cross-examine Cellebrite on two occasions. AB 48. Inadequate cross-examination or partial cross-examination does not pass constitutional muster and the State fails to

cite to a single case to support this proposition. *See Edwards,* 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38). As highlighted by Cellebrite's refusal to answer why Larry's phone was sent to them twice, Larry was not able to *effectively* cross-examine Cellebrite, as is his Constitutional right under the Sixth Amendment. 11AA 2024-26. Larry was allowed to cross-examine Cellebrite twice. However the first time, his ability to cross-examine was puzzlingly and improperly limited in a sealed hearing and limited even further during trial. 10 AA 1789; 11AA 1996. There is no legal authority to support the position that *some* or *partial* compliance with the Sixth Amendment passes Constitutional muster. Unlike the State's assertion that permitting Cellebrite to limit its testimony serves a community interest, private companies should not be allowed to dictate the scope of their testimony based on vague references to unidentified concerns of proprietary secrets. 11 AA 2025-26. This is especially pertinent in a homicide trial, where Larry's freedom, perhaps the most basic right of all, was at stake. *See Mattox v. United States*, 156 U.S. 237, 244 (1895) ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.").

The State fails to refute Larry's argument, because it cannot. This Court must protect Larry's rights and an *actual* community interest at large to uphold and protect fundamental Constitutional rights. The only way to do this is to reverse his judgment and conviction.

2. The district court abused its discretion in allowing Cellebrite to testify via video as it violated Confrontation Clause as well as notice requirements.

The State fails to refute Larry's claims that the district court abused its discretion and violated Larry's Confrontation rights by permitting Cellebrite to limit its testimony in a sealed hearing.

The State acknowledges Larry's argument that *Lipsitz v. State*, 442 P.3d 138, 143 (Nev. 2019) and *Maryland v. Craig*, 497 U.S. 836 (1990) are controlling. AB 49. However, the State fails to address how permitting Cellebrite to testify remotely, applying those cases, advanced an important public policy. *Lipsitz*, 442 P.3d at 144 (citing *Craig*, 497 U.S. at 850.).

Instead, the State claims that "[a]ccordingly, moving the testimony even one day would pose an undue burden on Cellebrite's business because the witness would have to fly into Las Vegas from New Jersey. 9 AA 1628–30." AB 50. The State furthers adds that the first prong of

Lipsitz was satisfied because having to fly out would have delayed the trial, impacting judicial economy, the jurors would be financially impacted by a further delay, and Cellebrite would have suffered financial hardship due to having to fly their witness into Las Vegas as they were already suffering manpower issues. AB 51. None of this is adequate.

First, the State's citation does not support the claim that Cellebrite had "manpower issues." *Id*. Secondly, even if it did, the State's claim that there would be a financial burden on Cellebrite stretches the limits of credulity. A plane ticket, or a related cost should not produce a "financial burden" for a private company that "receive[s] phones from various law enforcement agencies across the country and use[s] advanced proprietary software to attempt to access those phones…" *Id*., 11AA 2001. Further, the trial prosecutor below never mentioned any harm to jurors. 8AA 1628-30. In fact, the prosecutor never submitted a single piece of evidence or an affidavit to support its argument that Cellebrite could not attend

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in person, despite having several months of sufficient notice.[3] *Id*.

The State also fails to address Larry's argument that the district court erred because it applied an incorrect legal standard, noting that "the issue is whether or not he can effectively testify over Skype." 8AA 1631; *See Lipsitz*, 442 P.3d at 140 ("Under *Craig*, two-way video testimony may be admitted at trial in lieu of physical, in-court testimony only if (1) it is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured."). The court's analysis entirely overlooks the first prong. Had it applied this prong, it would have denied the request to testify remotely because it was not "necessary" to advance any conceivable "important" interest of the "public." *Id*.

As Larry noted, in *Lipsitz*, this Court found a public policy concern was advanced, where the witness was in drug rehabilitation in Florida and the defendant would not agree to a continuance. That is in stark contrast to a private company with months of notice complaining of mere

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[3] The State's Supplemental Notice of Witnesses And / Or Expert Witnesses filed on June 7, 2019, listed Cellebrite. 2AA 468. The State argued to the district court on December 12, 2019, that Cellebrite requested to testify via video. 8AA 1628-29.

inconvenience. 2AA 468; 8AA 1628-30. Allowing a company to simply not participate in person because of the cost of a plane ticket would render the standards of *Lipsitz* and *Craig*, practically speaking, a dead letter, as it would apply to any out-of-state witness. The State concludes by claiming allowing Cellebrite to testify audio-visually benefitted the defense because the Larry requested their testimony. AB 51. Once again, the State fails to cite a single case for this unsubstantiated proposition.

The State correctly admits that this case occurred prior to COVID and the decision to allow Cellebrite to testify remotely had nothing to do with that. AB 52. However, the State actually asks this Court to still consider the COVID protocols and the importance of those adjustments in light of this case. *Id*. This is absurd and serves only to weaken the State's argument. Unlike Cellebrite having to pay for a plane ticket or an employee being on vacation or sick, the adjustments in judicial policy were obvious and necessary, in response to a global pandemic ravaging health, safety, and the economy worldwide, thus advancing an important public policy concern.

Finally, the State argues if there was any error, it was harmless because of the overwhelming evidence against Larry. AB at 53. The State

makes a *supra* citation, presumably to the section on footwear impressions and Candace's cell phone. However, the State again fails to take into account the importance of this particular evidence. Although the State failed to argue that the error from admitting the footwear impressions was not harmless, its reliance on its argument there is flawed because each evidence and issue is unique. The impact from permitting Celebrate to limit its testimony in a sealed hearing, to the jury, and testifying remotely cannot be compared to the error from admitting footwear impressions without expert testimony and vice versa. *Supra.* Cellebrite limiting its testimony violated Larry's constitutional right to Confrontation and improperly interfered with his right to due process and a fair trial. OB 68-70. As such, the State fails to explain how such a constitutional error was harmless beyond a reasonable doubt.

The State fails entirely to refute Larry's argument as to why Cellebrite was allowed to limit its testimony in a sealed hearing and it fails to establish that Cellebrite's superficial reasons for testifying remotely were necessary to advance an important public policy interest. The only remedy is reversal.

D. Cumulative error warrants a new trial.

Although each of the issues raised on appeal warrants reversal, the cumulative effect of the numerous trial errors also warrants a new trial. The gravity of the errors and the significance of a murder conviction prevent any finding that these errors were harmless or insignificant.

CONCLUSION

Larry respectfully submits his judgment of conviction be reversed.

Dated November 2, 2021.

Respectfully submitted,

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/s/ *Navid Afshar*
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Deputy Special Public Defender

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 Microsoft Word in Century Schoolbook, 14 point font.

2. I further certify that this brief does comply with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it contains 6864 words; or

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

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

Dated November 2, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2021, a copy of the foregoing brief (and appendix) was served as follows:

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