Todd M Leventhal, Esq.
Leventhal and Associates, PLLC
Nevada Bar: 8543
626 S. 3rd Street
Las Vegas, NV 89101
702-472-8686 -Office
702-472-8685- Fax
Leventhalandassociates@gmail.com
Attorneys for Defendant

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Elizabeth A. Brown
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IN THE SUPREME COURT

STATE OF NEVADA

JEMAR MATTHEWS, Appellant v. STATE OF NEVADA, Respondent	Case No. 84339

APPELLANT'S OPENING BRIEF

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NRAP 26.1 Disclosure

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

Jurisdictional and Routing Statement

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

Statement of Issues

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

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

III. Was there sufficient evidence to sustain a conviction beyond a reasonable doubt?

Statement of the Case

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

This is an appeal from a second retrial in a first-degree murder case. Around 9:00 p.m. on September 30, 2006, Mersey Williams, Myniece Cook, and Michel-le Tolefree went to Maurice Hickman's home located at 1271 Balzar Avenue in Las Vegas. 3 AA 0579. As the women and Hickman stood in Hickman's front yard, four to five males approached and opened fire on the group, ultimately killing Mersey Williams and wounding Myniece Cook. 3 AA 0587. Moments later, three to four black men carjacked two couples parking a Lincoln town car at 1284 Lawry Avenue, about one block from 1271 Balzar. 5 AA 0971. After ordering the passengers out of the car, the assailants drove the Lincoln down Lawry Avenue, turning left on Martin Luther King Drive. 4 AA 0731.

Meanwhile, Las Vegas Metropolitan Police Department Officers Brian Walter and Bradley Cupp were patrolling the area and heard gunfire. 3 AA 0546. The officers drove by 1271 Balzar, but observed no signs of trouble, so they continued on down Lawry, where they saw a "commotion," at 1284 Lawry (the carjacking). 3 AA 0687. Their suspicions aroused, the officers followed the Lincoln, which rolled through a red light. 3 AA 0690. The officers then activated

their patrol lights and sirens; the suspects accelerated through the next red light, and the officers gave chase. Id.

The chase continued to a church parking lot near the corner of Eleanor Avenue and Lexington Street, where the Lincoln slowed down; the driver, who was holding a sawed-off shotgun, fell or jumped out of the car. 3 AA 0694. The police car hit the driver, who rolled up onto the driver's side hood of the police car (Officer Cupp's side) before rolling off on the passenger side (Officer Walter's side) and taking off on foot. 3 AA 0695.

In addition to the driver, two other black men jumped out of the passenger side of the Lincoln. 3 AA 0699. Officer Cupp elected to chase the front passenger, who was armed with a handgun, while Officer Walter chased the driver. Id.

Officer Walter chased the driver north on Lexington Street and then East on Eleanor Avenue, where he lost sight of the driver after the driver jumped over a chain-link fence. 4 AA 0921. Meanwhile, Officer Cupp watched the front passenger jump over a wall and pursued him into an apartment complex. There, police found him hiding in a dumpster, along with a pair of black baseball gloves and a .45-caliber Glock. 4 AA 0837. The passenger was identified as Pierre Joshlin.

Police recovered a jammed .45-caliber Colt pistol from the Lincoln, and a .22 caliber rifle from the grass between the Lincoln and the church. Police also found a single red-knit glove about one block north of the church. 3 AA 0561. Police set up a perimeter around the neighborhood to search for the still-missing suspects.

About an hour to an hour and a half after the foot chase began, a K9 unit found Jemar Matthews hiding in the bushes behind a house at 1116 Jimmy Avenue. The dog attacked Matthews, biting him and drawing blood. 4 AA 0893. Matthews was then transported in handcuffs and a police car to Officer Walter, who identified him as the suspect driver. 4 AA 0891.

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

In May of 2007, Matthews and Joshlin were tried for the murder of Mersey Williams and related crimes.[1] At trial, a toolmark analyst testified that ten of the

[1] This factual summary of the evidence at the first trial is offered for background purposes only and is derived from the federal district court's orders in Joshlin v. Neven, 2016 WL 4491503 (D. Nev. Aug. 25, 2016) (Dorsey, J.), Case No. 2:13-cv-01014-JAD-NJK and Matthews v. Neven, 250 F.Supp.3d 751 (D. Nev. 2017), Case No. 2:14-cv-00472-GMN-PAL.

39 cartridge cases recovered from 1271 Balzar were fired from the Glock found with Joshlin in the dumpster. Eleven, including the bullet that killed Mersey Williams, were fired by the rifle found near the Lincoln. Officers Cupp and Walter identified Matthews and Joshlin as the suspects they had chased, while the surviving shooting and carjacking victims were unable to identify Matthews.[2] A forensic analyst also testified that gunshot residue was recovered from one of the black gloves in the dumpster with Joshlin and on the red glove found on the sidewalk near where the foot chase began. To explain his presence in the area and his hiding from police, Matthews offered a temporary protective order prohibiting his presence at Jimmy Avenue. The jury convicted both men on all counts, and each received a sentence of life in prison.

Over the next several years, both men unsuccessfully appealed their convictions, ultimately filing post-conviction petitions in federal district court.[3] In August of 2016, a federal district court judge denied Joshlin's petition based on

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[2] Tolefree was able to identify Joshlin.

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

her finding that any trial errors were harmless in light of the "overwhelming" evidence against him.[4]

In March of 2017, a different federal district court judge granted Matthews's petition. She found, as did this Court, that the state had committed prosecutorial misconduct in closing argument and rebuttal by telling the jurors to look at Matthews and Joshlin—both of whom are black men—and arguing that they did not "look" innocent.[5] The judge also found that the state committed misconduct by arguing that if the defendants weren't guilty, then they wouldn't be challenging the gunshot-residue evidence.

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

> *The evidence against Matthews—while sufficient to support his convictions, if viewed in the light most favorable to the State[]—had obvious weaknesses and was far from overwhelming. Unlike Joshlin, who was found in a dumpster with a handgun linked to the shooting, there was no evidence directly linking Matthews to either the*

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

[5] Matthews, 250 F. Supp.3d at 763

shooting or the robbery. About an hour to an hour and a half after the foot chase ended, Matthews was found hiding in a backyard about a block from where the foot chase ended, and some four to five blocks from where the shooting and robbery occurred. The defense suggested, and it remains a possibility, that Matthews had reason to fear apprehension by police other than—and less egregious than—having participated in the shooting and robbery [, the TPO].[6]

The judge also reasoned that many of the victim-witnesses' descriptions did not match Matthews. Additionally, Officers Walter and Cupp had a limited opportunity to view the fleeing suspect that both would later identify as Matthews, and Walter's description of that suspect appeared to grow more detailed (and more consistent with Matthews) over time.[7]

C. The first retrial

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

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[6] Id. at 765.

[7] Id. at 766.

1. Jury selection

During jury selection, the state exercised its fifth peremptory strike to remove prospective Juror No. 342, a black woman.[8] Matthews made a Batson challenge, arguing that the state had impermissibly struck No. 342 due to her race. Before the court ruled on whether Matthews had made a prima facie showing of discrimination, the state interjected and proffered a race-neutral reason: it claimed that No. 342 gave "tenuous" responses when asked about being fair and impartial and that she "kind of hesitated and rolled her eyes." Matthews disputed the state's assertions and argued that they were merely pretext. The district court made no specific findings and summarily overruled Matthews's objection.

2. The Conviction

Mr. Matthews was convicted of all counts by the jury in the second trial.

3. The Appeal

On appeal, this Court reversed, finding that:

Because the record significantly belies the State's nondemeanor explanations for using a peremptory challenge on Juror 342, thus indicating the explanations were pretextual, and because the district

[8] This summary is taken from Defendant's Opening Brief in the Appeal of the first retrial.

court did not fully engage in the sensitive inquiry and consideration required at step three in the Batson analysis, we conclude the district court clearly erred in denying Matthews' Batson objection. This constitutes structural error.

D. The Second Retrial

Matthews's second retrial and third trial commenced in November of 2021. The evidence at the third trial was largely the same as that presented during the first and second trials. Below is a brief summary as relevant to this appeal.

1. Jury selection

During jury selection, the state exercised a peremptory strike to remove prospective Juror No. 344, a black woman named Christina Hughes. 3 AA 0495. Matthews made a Batson challenge, arguing that the state had impermissibly struck No. 344 due to her race. The State claimed that their race-neutral reason was that Hughes had failed to disclose a previous arrest. 3 AA 0499-0500. Matthews disputed the State's assertions and argued that they were merely pretext. 3 AA 0503-0506. The district court denied the Batson objection. 3 AA 0507.

The State also exercised a peremptory strike against another Black woman, juror 360, Karen Collins. Matthews brought a Batson challenge. The State alleged as a race-neutral reason that, despite Ms. Collins being a law enforcement officer,

she had expressed doubts regarding the fairness of the criminal justice system in her questionnaire. 3 AA 0508. Matthews argued that this was pretextual. 3 AA 0511-0512. The court denied the Batson challenge on the basis that the State had stated a race-neutral reason. 3 AA 0516.

2. The State's case

The State's first witnesses were Myniece Cook and Michel-le Tolefree. Ms. Tolfree testified that she saw four to five silhouettes but could not identify their race or any clothing. 3 AA 0601. Tolefree was able to identify Joshlin but not Matthews.

Two of the carjacking victims, Melvin Bolden and Geishe Bolden (Orduno) also testified. Melvin Bolden testified that there were three to four assailants, all black males between 17–18 years old. Two of the men had black and red gloves on. Melvin described the suspect who got into the driver's seat as 5'7" or shorter (Matthews is five feet eleven inches tall), and indicated that he would not be able to identify any of the assailants. 3 AA 0360. Geishe testified that there were four assailants; one was wearing a white shirt while the rest were in black. One man was wearing red gloves and was 5'5" or possibly a little taller, although she admitted having previously described him as shorter. 3 AA 0676.

Forensic scientist Crystina Vachon testified about gunshot residue. She testified that gunshot residue (particles containing a fusion of lead, barium, and antimony) was present on the black gloves from the dumpster, the red glove, and Joshlin and Matthews's hands. 5 AA 1088. As to Matthews, that included three partial particles on the right palm; one partial particle on the back of the left hand; and one partial particle on the back of the left hand. Id. (when looking for gunshot residue, looking for a fusion of three elements: barium, led, and antimony). Matthews cross-examined Vachon about possible transfer of gunshot residue and possible issues with contamination and preservation, which she acknowledged. 5 AA 1106.

The lynchpin of the state's case was the testimony of Officers Walter and Cupp. Officer Walter identified Matthews as the suspect driver, who he recalled was wearing blue jean shorts, a black t-shirt, and a red glove. 4 AA 0919. He further testified that, on the night of the shooting, he recognized the driver based on previous interactions in the neighborhood, though he wasn't then-sure of his name. Id.

On cross-examination, Walter admitted that he did not tell homicide detectives during his interview on the night of the shooting that he recognized the suspect driver from previous interactions. 4 AA 0919. On cross-examination, he

admitted that he had not told anyone at the scene that he recognized the driver, but only gave a general description of "[b]lack male, black shirt, blue jeans." 4 AA 0223-0224.

In his testimony, Cupp also identified Matthews as the suspect driver. 3 AA 0639. He also indicated that on the night of the shooting he recognized Matthews from previous interactions, but did not know his name. Like Walter, Cupp acknowledged that, on the night of the murder, he never indicated that he recognized or was familiar with Matthews. 3 AA 0675. And although he now claimed to be driving only five to ten miles per hour when he hit the suspect he identified as Matthews, Cupp acknowledged that he previously testified that he was traveling almost twice as fast. 3 AA 0687–0688.

Now-Sergeant Chad Overson, the K9 handler who ultimately found Matthews hiding in the bushes at 1116 Jimmy Avenue, also testified. Overson testified about his dog, Lasko's, training. Overson described how Lasco had detected and bitten Matthews. 4 AA 0893.

3. The defense's case

Matthews called two expert witnesses of his own: eyewitness-identification expert Dr. Mark Chambers and a firearms and ballistics expert, Ronald Scott. Dr. Chambers testified that studies show that eyewitness testimony is often inaccurate. 5 AA 1116. He explained that a witness's confidence does not equate with reliability; stress, fatigue, and the presence of weapons can negatively impact perception; and that cross-racial identifications are less reliable than intraracial ones. Id. He also opined that the show-up method used in this case is less reliable than a double blind sequential lineup. 5 AA 1119.

Mr. Scott testified that the presence of gunshot residue could be the result of transference. 5 AA 1152.

Matthews also called Andre Carter to the stand. Mr. Carter was a retired Metro detective. When investigating another crime, Mr. Carter interviewed one Nicholas Owens. 6 AA 0028. After discussing with Mr. Carter the other crime, Mr. Owens mentioned to Mr. Carter that Pierre Joshlin, Matthews' co-defendant had stated that he, Joshlin, was then planning to murder Marty Williams. The conversation took place in the presence of Mr. Matthews. However, only Mr. Joshlin discussed an intention to murder Mr. Williams; Mr. Matthews did not. 6 AA 0030.

4. Conviction and sentence

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

Summary of Argument

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

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

Third, the evidence against Mr. Matthews was insufficient to sustain a conviction, as the non-law enforcement witnesses consistently described someone who differed from him significantly in height, dress, and hairstyle.

Finally, the cumulative effect of these trial errors require reversal because the issue of guilt and innocence was close, these errors are severe and numerous, and Matthews was sentenced to life in prison.

Argument

I. THE COURT IMPROPERLY DENIED DEFENDANT'S BATSON CHALLENGE TO THE DISMISSAL OF JUROR CHRISTINA HUGHES

A. TRIAL PROCEEDINGS

1. The Voir Dire

a. The court questions the panel

The court posed initial questions to the panel as a whole. One question was whether anyone on the panel had been convicted of a felony. The court did not ask whether anyone had been convicted of a misdemeanor.[9]

b. The court questions Ms. Hughes

The Court initially seated 32 prospective jurors. Each side could exercise 8 challenges for the jury, and one additional challenge as to the alternates. In the group of 32, there were a total of four African-Americans. The State excused two

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[9] The entirety of the court's colloquy with the panel regarding prior convictions is as follows:

THE COURT: Has anyone on the panel been convicted of a ***felony****? The record will reflect no response from the panel.*

1 AA 0099 (emphasis added)

of those four.[10] Those two included Prospective Juror No. 344, Christina Hughes, and Prospective Juror No. 360, Karen Collins. The first 32 also included a single Native American, Clayval Becenti.[11]

The Court asked Ms. Hughes three questions: (1) how long she had resided in the jurisdiction, (2) what was her educational background, and (3) whether she could be a fair and impartial juror. Having learned that Ms. Hughes had small children at home, the court followed up with a fourth question, whether the children would be cared for if Ms. Hughes were to be called to serve as a juror.

Ms. Hughes responded that she had been in Clark County for ten years, that she was currently unemployed, caring for her disabled children, that, yes, she could be fair and impartial, and that, yes, her children would be cared for.[12]

The court then said, "[t]hank you very much for your willingness to be here," and moved on to question another potential juror.

c. The prosecutor questions Ms. Hughes

The State questioned several other jurors, and then came to Ms. Hughes.

After initially confusing Ms. Hughes with Ms. Collins (the other African

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[10] 3 AA 0170

[11] 2 AA 0403-0404

[12] 1 AA 0125-0126

American woman on the panel)[13], the State noted that Ms. Hughes had not filled out a jury questionnaire prior to voir dire. Ms. Hughes concurred that she had not filled out a questionnaire:

> *MR. GIORDANI: Oh, Ms. Hughes. I apologize.* ***I believe you are one of the folks that we do not have a questionnaire for. Do you remember*** *--*
>
> *PROSPECTIVE JUROR NO. 344:* ***No****.*
>
> *MR. GIORDANI: --* ***filling out one of these****?*
>
> *PROSPECTIVE JUROR NO. 344:* ***I didn't****.*
>
> *MR. GIORDANI: I'm sorry?*
>
> *PROSPECTIVE JUROR NO. 344:* ***I didn't fill out a questionnaire****.*[14]

The State then went on to pose additional questions to Ms. Hughes. At no time during the further questioning did the State either (a) revisit the issue of the questionnaire, or (b) ask Ms. Hughes any questions whatsoever about any arrests

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[13] *MR. GIORDANI: Okay.... And you can pass the microphone down to -- is it Ms. Collins?*
PROSPECTIVE JUROR NO. 344: Hughes.
MR. GIORDANI: Oh, Ms. Hughes. I apologize.
1 AA 0197

[14] Id. (Emphasis added)

or criminal history she may have had. Nor did the State's questioning provide her any opportunity to "volunteer" matters other than the answers to the specific questions asked.[15]

d. The Court again questions the panel

After questioning jurors individually, the Court concluded its questioning of the panel with the following colloquy:

> *Have you or anyone close to you, such as a family member or friend, ever been accused of a crime? Okay. The record will reflect no response from the panel.*
>
> *Is there anyone on the panel who would have a tendency to give more weight or credence or less weight or credence to the testimony of a witness simply because that witness is a police officer? The record will reflect no further response from the panel.*
>
> *At this time, I'm going to turn the panel over to the State of Nevada.*[16]

2. The State challenges Ms. Hughes for cause

a. The State makes the challenge

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[15] 1 AA 0197-0200

[16] 1 AA 0185

The State challenged Ms. Hughes for cause after informing the Court that they had located a domestic violence conviction in regard to Ms. Hughes from the Henderson Municipal Court.

The State made several assertions of fact in support of the challenge: (1) that Ms. Hughes had been questioned about her criminal history by the court, (2) that Ms. Hughes had then been further questioned by the State regarding her criminal history, and (3) that despite supposedly having been specifically questioned by both the court and the State about whether she had been accused or convicted of a crime, Ms. Hughes had nonetheless failed to admit that she had suffered a conviction.[17]

Initially the State represented to the court that Ms. Hughes had an undisclosed *felony* conviction, although they ultimately conceded that Ms. Hughes' prior conviction was in fact a *misdemeanor* conviction, to wit a misdemeanor domestic battery.[18]

The State argued that Ms. Hughes was untruthful:

Your Honor, we just -- we maintain that the failure to disclose does point to a certain level of ***untruthfulness****. We're concerned, because*

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[17] 2 AA 0431 (emphasis added)

[18] 2 AA 0431

she had no trouble recalling this particular incident today when she was confronted with it individually by Your Honor. However, she had ample opportunity yesterday to raise these issues, these very same topics were discussed with other jurors.[19]

b. The defense objects to the challenge

Defense counsel objected to the challenge.[20]

c. The State claims that the challenge should be sustained because of Ms. Hughes' "inherent dishonesty."

The State responded that the challenge should be granted, because Ms. Hughes failure to admit the existence of her prior conviction demonstrated her *"inherent dishonesty."*[21]

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[19] 2 AA 0431 (emphasis added)

[20] 2 AA 0431

[21] The State made the following argument:

MS. BOTELHO: concerning Christina Hughes, she's in Seat Number 3. We've gone through 32-plus jurors at this point and we've gone through the questionings, ad nauseam, that every opportunity to disclose this. And I would question their motivation for not doing so. I think there's just an ***inherent dishonesty*** *to it. We're entitled to know*

d. Ms. Hughes is questioned further by the court

Ms. Hughes was then brought into court for further questioning outside the presence of the other jurors.[22]

The court asked Ms. Hughes whether she had been *"accused of a crime,"* to which Ms. Hughes responded, *"I have."*[23] The court then asked her further questions about the matter, and Ms. Hughes stated that it was *"a domestic violence incident... that I had with my mother."*[24]

e. The State claims that Ms. Hughes' "failure to disclose points towards tendency for untruthfulness."

After Ms. Hughes left the courtroom, the court brought in another potential juror, Mr. Becenti, regarding whom the State had made a challenge for cause. The State thereafter made an argument as to Mr. Becenti, which referenced Ms.

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this information.

2 AA 0407 (emphasis added)

[22] 2 AA 0426

[23] *Id.*

[24] 2 AA 0426-0427

Hughes, stating that in both her case and the case of Mr. Becenti, their "failure to disclose" pointed towards "tendency for untruthfulness."[25]

f. The court denies the State's challenge for cause against Ms. Hughes

The court denied the challenge for cause against Ms. Hughes.[26]

3. The State exercises their peremptory challenges

Of eight potential peremptory challenges,[27] the State exercised six, and waived three challenges, 5, 6, and 7. Their first challenge was to Ms. Hughes, who was African American, and their last challenge was to Ms. Collins, who was African American.[28] Of the other three challenges they exercised, two were to Hispanic potential jurors,[29] and one was to the sole Native American on the

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[25] The State made the following argument:

"MS. BOTELHO: Your Honor, ***for the same reasons I stated for Christina Hughes****... you know, voir dire means tell the truth. And I -- his failure to disclose, again, points towards* ***tendency for untruthfulness****.*
2 AA 0441 (emphasis added)

[26] 2 AA 0433

[27] Each side was allowed a ninth peremptory challenge as to the alternates only. 2 AA 0492

[28] 3 AA 0693-0694

[29] 3 AA 0697

panel.[30] Thus, all challenges by the State were to potential jurors who were members of a minority, and of those challenges, 40% of the challenges exercised were specifically to Black panel members. The State conceded that by challenging two African American jurors, they had eliminated two out of four – 50% – of the Black jurors in the initial 32 potential jurors regarding whom they could exercise their strikes.[31]

4. The Defense brings a Batson challenge

The Defense brought a Batson challenge,[32] pointing out that two of the four Black jurors had been challenged by the State, and that that gave rise to an inference that the reasons for excusing the two Black jurors was not race-neutral. The court stated, *"So whether I think there's an inference, I believe the Supreme Court will find that there is an inference. So I'm going to ask the State to state your race-neutral reason and let's just start with Ms. Hughes first."*[33]

5. The State argues that the strikes were for race-neutral reasons

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[30] *Id.*

[31] 3 AA 0700

[32] 3 AA 0494

[33] 3 AA 0499

a. First allegedly race-neutral reason proffered by State: failure to disclose

The State argued that the strike against Ms. Hughes was for a race-neutral reason, specifically that her failure to disclose her conviction gave rise to an inference that she was not truthful.

> *the lack of disclosure gives rise, at least to us, an inference that they're* ***not*** *necessarily* ***going to be truthful*** *or that they're not going to follow instructions...*[34]

The State argued that Ms. Hughes should have volunteered the existence of a prior conviction.

> *As I indicated previously, these two jurors have sat through all of jury selection yesterday and part of today, as we continued our questioning, the State's questioning. At no time did they* ***volunteer*** *this information, even as they saw other individuals in the jury venire being questioned and raising this very issue.*[35]

The State went on to say:

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[34] 3 AA 698

[35] *Id.*

the very nature of the nondisclosure gives the State concern... .[36]

b. Second allegedly race-neutral reason proffered by State: Ms. Hughes' demeanor

The State then continued:

with both of them, when the Court brought them in and confronted them about these convictions, you know, Mr. Leventhal was the one who indicated, and I agree, ***Ms. Hughes actually hesitated. And I think it was more of a, hey, I got caught, as opposed to, you know, a, oops, that was just my mistake****. Okay. I'm sorry, I don't believe that it was just a innocent mistake not disclosing that you were arrested. The police were called, you were arrested for battering your mother, you spent two to three days in jail, showed up in court, pled guilty and was, you know, sentence to do requirements. And you just forgot about it?* ***It didn't look to me as if she forgot it -- forgot about it.***

She hesitated *and then she immediately said, well, yeah, when I battered my mother or when I was, you know -- a battery domestic violence on my mother in 2014. She was able to recall*

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[36] *Id.*

those instances.

c. State's conclusion: jury makeup was as diverse as Constitution mandates

The State concluded by stating that *"the jury makeup is about as diverse as the Constitution mandates."*[37]

6. Defense argues State's reasons were pretextual

a. Defense notes that State had failed to strike a similarly situated white male

Defense counsel first addressed the fact that, despite having waived three of their eight peremptory challenges, the State had not seen fit to strike a white male from the panel, to wit, Mr. Willer, Juror No. 550.

Amongst other things, Mr. Willer had, after being admonished not to speak to counsel, attempted to have a private communication between himself and the Deputy District Attorney.[38] Defense counsel noted that the Defense had used one of their strikes regarding Mr. Willer, while the State had found him of so little interest that they had waived several of their strikes.

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[37] 3 AA 0700

[38] 3 AA 0702 (regarding incident previously discussed in Court, 2 AA 0329-0341)

b. Defense asserts Ms. Hughes' demeanor was not indicative of dishonesty

Defense counsel went on to discuss Ms. Hughes' demeanor, stating that his own observation of Ms. Hughes having been *"very honest and straightforward when she hesitated."*[39]

7. Court denies Batson challenge

The Court denied the Batson challenge on the following basis:

Okay. So the Court is going to make the finding -- I mean, I paid close attention to the ***questioning*** *of all of these jurors. I did not see that the State, Mr. Giordani,* ***questioned*** *her differently than anybody. I know you seem to indicate that he was longer with her. I don't believe that that's true and I don't think that the record will bear that out.*

The State's ***questions*** *to each of these jurors were the same. There were not different* ***questions*** *asked to jurors based on their, you know, based on their ethnicity or their background. I believe the State asked all of these jurors the same* ***questions****. I don't think there was anybody targeted or* ***questions*** *specifically asked someone to try to*

[39] 3 AA 0703

get rid of them. I mean, the State -- we did ask these people, if you have -- if they had any – they'd ever been accused of a crime.

Also, the State struck both of the jurors that came in and said, oh, yeah, I remember. I mean, it would be one thing if they struck Ms. Hughes and then left Mr. Becenti on, that may be a problem. But that's not what they did. They used both of their peremptory challenges to strike the two jurors that, you know, failed or omitted to inform the Court regarding their criminal background.

So I'm going to deny the challenge, make a finding that the State has stated a race-neutral basis.[40]

B. ARGUMENT

1. Controlling law

In Batson v. Kentucky, 476 US 79 - Supreme Court 1986, the United States Supreme Court held that, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."

The Court therefore established a framework for courts to follow during voir dire to determine whether black jurors are being improperly excluded by the

[40] 3 AA 0705-0706 (emphasis added)

prosecution on the basis of their race. The Court gave two examples of what might show unlawful discrimination: (1) a pattern of strikes against black jurors, and (2) a difference in questioning:

> *For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative....*

The Court ruled that the district court must "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and "consider all relevant circumstances" before ruling on an objection that a juror was striken on the basis of race. Batson, 476 U.S. at 93, 96, 106 S.Ct. 1712.

The trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. McCarty v. State, 371 P. 3d 1002 - Nev: Supreme Court 2016 , quoting Snyder v. Louisiana, 552 U.S. 472, 477, 128 S.Ct. 1203 (2008)(emphasis added).

Thus, steps two and three **"require"** the district judge to "evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes." McCarty, supra (Pickering, J., with whom Hardesty and Gibbons, JJ., agree, concurring in part and dissenting in part)

Clear error with respect to one juror is sufficient for reversal. McCarty, quoting United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir.1994) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.")

This Court has recognized "the lower court's 'pivotal role in evaluating Batson claims' and the significance of the lower 'court's firsthand observations' regarding **demeanor**. Matthews v. State, 466 P. 3d 1255 - Nev: Supreme Court 2020, quoting Snyder v. Louisiana, 552 U.S. 472, 479, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)(emphasis added).

Because the district court's decision at step three often turns upon the demeanor of the prosecutor exercising the strike, and the demeanor of the juror being struck—determinations that lie uniquely within the province of the district judge, the Nevada Supreme Court has "repeatedly implored district courts to ...

clearly spell out their reasoning and determinations.", Matthews, Supra, (quoting Williams v. State, 134 Nev. 687 at 693, 429 P.3d 301 at 308 (2018)

This Court has further stated that when the district court fails to articulate the Batson factors, the Supreme Court "may not be able to give the district court's decision the deference that it would normally receive." *Id.*

This Court has held that where the district court has failed to articulate its reasoning or to make "findings regarding **demeanor** or credibility," it is "impossible" for the Supreme Court to give its decision deference. *Id.*

2. The district court did not articulate its reasoning or make findings regarding demeanor or credibility.

In denying the Batson challenge, the district court spent the bulk of her remarks on the issue of the types of questions posed to Ms. Hughes by the State.

The first of the four paragraphs of the court's ruling refer only to the court's observation that the Court *"did not see that the State, Mr. Giordani, questioned her differently than anybody."*

The second of the four paragraphs of the court's ruling again refers solely to the issue of whether there was a distinction between the questions posed by the

State to Ms. Hughes by the State as opposed to other jurors: "I did not see that the State, Mr. Giordani, questioned her differently than anybody."[41]

The third paragraph states that the State had also exercised a challenge against another juror who had "*failed or omitted to inform the Court regarding their criminal background*." However, the court fails to mention that the other juror so challenged, Mr. Becenti, was a member of a minority group himself, being the sole Native American on the panel.

The fourth and final paragraph simply states, *"So I'm going to deny the challenge, make a finding that the State has stated a race-neutral basis*."

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[41] At the end of the second paragraph, the court makes the statement, *"I mean, the State -- we did ask these people, if you have -- if they had any – they'd ever been accused of a crime."* This sentence, although not specifically relevant to the issue of whether Ms. Hughes' questioning by the State was different, was factually incorrect. The State had asserted to the court that they had questioned Ms. Hughes regarding her criminal background. And this sentence indicates that the Court accepted that assertion as being true. However, as discussed above, a review of the transcript shows that this assertion was in fact false. The State had not asked Ms. Hughes any such question.

The court's ruling thus consists of only three points: (1) the questions posed by the State, especially those about her criminal history were the same as those posed to other jurors, (2) the State had also excused one other juror on the same basis as that alleged in regard to Ms. Hughes, and (3) that the State had "stated a race-neutral basis."

a. The district court committed "legal error" by conflating the second and third steps

Perhaps most troubling is the court's final remark. The Court only found fit to label one single comment as a "finding," and that "finding" was that the State had "stated a race-neutral basis." The problem with this "finding," is that it doesn't address the third prong of Batson, but only the second.

Defense counsel did not assert that the State had failed to "assert" a race-neutral basis, but rather that the assertion was pretextual.

This Court has held that it is at step three, which only comes *after* the assertion by the State of a race-neutral basis that a "district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a Batson objection and dismissing the challenged juror." Williams v. State, 134 Nev. 687, 689, 429 P.3d 301, 305-06 (2018).

Here, it appears that the district court conflated steps two and three, and denied the Batson challenge on the basis that the State had complied with step two. However, *"[i]t is legal error to conflate 'Batson's second and third steps into one...."* Brown v. State, Nev: Court of Appeals 2021 (quoting Purkett, 514 U.S. at 768)

b. The district court incorrectly denied the Batson challenge on the basis that, in the court's estimation, the State had not questioned Ms. Hughes in a different manner than anyone else.

As stated above, the bulk of the Court's discussion had to do with the issue whether the State's questions to Ms. Hughes differed from those posed to other panel members. However, the Defendant never argued this point in the Batson challenge.

Earlier in the voir dire, at the time of the State's challenge of Ms. Hughes for cause, Defense counsel had made a passing reference to his perception that the State, in their questioning, had "focused on her a little bit longer than the other two people before her."[42] This thought was not pursued further in regard to the challenge for cause, and formed no part whatsoever of the Defense argument as to the Batson challenge.

[42] 2 AA 0400

While differing questioning by the prosecution of Black jurors versus White jurors might be an issue in some other case, it was not an issue raised by the defense in regard to the Batson challenge in this matter.

It is submitted that this Court, in reviewing the district court's duty to perform a "sensitive analysis" regarding the evidence and arguments made by the parties regarding the Batson challenge, should disregard that portion of the district court's decision which relates to an issue not argued by the defense at the time the Batson challenge was raised.

c. The State's use of a peremptory challenge against another minority member does not tend to indicate a lack of discriminatory purpose

The only remaining point made by the court, that the State exercised a challenge on the same basis as they did for Ms. Hughes against a non-Black juror, Mr. Becenti, is not compelling.

Most importantly, Mr. Becenti was himself a member of a minority, being Native American.[43]

Additionally, unlike Ms. Hughes, Mr. Becenti *had* provided a jury questionnaire to the court prior to voir dire.[44] The State's claim that Ms. Hughes

[43] 3 AA 0499

[44] 2 AA 0270

had failed to mention her prior conviction in her questionnaire is not only false by itself, it is even worse when it lumps her in with another individual who actually did provide the Court a questionnaire.

Mr. Becenti's case can also be distinguished from Ms. Hughes in that the State actually did ask him questions that might have elicited a response about his prior conviction,[45] while in Ms. Hughes case, no such questions were asked.

In addition, Mr. Becenti's case can be distinguished in that his prior case had only concluded approximately three months before voir dire took place,[46] unlike Ms. Hughes conviction, which was some six years earlier.[47]

So Mr. Becenti's "failure to disclose" can not really be compared to a claimed "failure to disclose on the part of Ms. Hughes.

The State's excusal of Mr. Becenti *and* Ms. Hughes, rather than showing lack of racial basis, is further proof of racial basis, where, as here, the State excused two of four Black members of the panel, as well as one of only one Native American.

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[45] 2 AA 0270-0273

[46] 2 AA 0398

[47] 2 AA 0396

d. The Court's ruling consisted primarily of a refutation of an argument that the Defense had not made

The first three paragraphs of the Court's ruling referred primarily to the issue of whether the State's had questioned the African American jurors in a different way than they had questioned the white jurors:

> *Okay. So the Court is going to make the finding -- I mean, I paid close attention to the **questioning** of all of these jurors. I did not see that the State, Mr. Giordani, **questioned** her differently than anybody. I know you seem to indicate that he was longer with her. I don't believe that that's true and I don't think that the record will bear that out.*
>
> *The State's **questions** to each of these jurors were the same. There were not different questions asked to jurors based on their, you know, based on their ethnicity or their background. I believe the State asked all of these jurors the same **questions**. I don't think there was anybody targeted or questions specifically asked someone to try to get rid of them. I mean, the State -- we did ask these people, if you have -- if they had any – they'd ever been accused of a crime.*[48]

[48] 3 AA 0507 (emphasis added)

e. The Court failed to address the argument that the Defense actually had made

The Defense argued that the striking of the two black jurors (in the further context of the other strikes by the State were against minorities), evidenced what the Batson Court described as a *"pattern" of strikes against black jurors included in the particular venire... [that] give[s] rise to an inference of discrimination.*[49]

The Court never addressed this argument at all, instead focusing almost exclusively on the State's questioning of the jurors.

This does not constitute the "sensitive analysis required.

II. THE COURT IMPROPERLY DENIED DEFENDANT'S BATSON CHALLENGE TO THE DISMISSAL OF JUROR KAREN COLLINS

a. The court questions the panel about connections to law enforcement

Amongst the questions posed by the Court to the panel, the Court asked,

Is there anyone on the panel who's ever been engaged in law enforcement work or have a spouse or close relative who's ever been engaged in law enforcement work?

[49] Batson, *Supra*

Juror No. 360, Karen Collins, responded that both she and her husband were employed by Nevada Parole and Probation, and that she had been so employed since 2010, over ten years.

Ms. Collins went on to volunteer that:

> *I can't honestly say that I haven't seen any codefendants' cases that have come across my desk and/or have written PSI reports on them, if any. Because I was in court services prior to Interstate Compact.*[50]

The Court then asked Ms. Collins, *"is there anything about your employment that would affect your ability to sit as a fair and impartial juror if you were selected to serve?,"* to which Ms. Collins answered, "no."

b. The court questions Ms. Collins

The Court later individually questioned Ms. Collins, and again asked if there was anything which would make it difficult for her to be a fair and impartial juror, to which she again answered, "no."[51]

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[50] 1 AA 0110-0111

[51] 1 AA 0130-0131

The Court later questioned Ms. Collins about her experience dealing with (other) law enforcement when she had been the victim of a burglary. Ms. Collins stated that she was satisfied with the way that the police had handled the matter.[52]

c. The prosecutor questions Ms. Collins

When the State began questioning Ms. Collins, Ms. Collins agreed that in the jury questionnaire she had answered yes to the question whether she believed that "the system is effective," but that she had also answered no to the question whether she believed that *"the system is fair."*[53]

Ms. Collins explained that *"as a presentence investigator... the defendant has already been to trial... **they obviously are guilty**...."* She went on to say, *"I've wondered, really, were they beyond a reasonable doubt, did the State prove their case? Obviously, the State won. But just looking at everything, I sometimes would think did they really – "*

d. The Defense questions Ms. Collins

Counsel for the defense later questioned Ms. Collins. In response to a question about presentence reports she had written, Ms. Collins stated, *"It was fair*

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[52] 1 AA 0174

[53] 1 AA 0212

and it was impartial, it was based on scoring, a scale, and it was just based on the facts."[54]

2. Batson challenge

The State struck Ms. Collins with a peremptory challenge, after which the Defendant raised a Batson challenge.[55]

3. The State argues that the strikes were for race-neutral reasons

The State argued that the strike against Ms. Collins was because *"she feels the criminal justice system is not fair at times while working at P&P."*[56] The State went on to say that the strike was based on Ms. Collins' previous exposure to other criminal case files in her capacity as a Parole and Probation Officer: *"I can't emphasize enough how much this juror has the ability to see in a DA file."*[57]

The State concluded with the final argument that, *"that's a lot of information that the average person going into that deliberation room would not have."*[58]

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[54] 1 AA 0223

[55] 1 AA 0235-0236

[56] 3 AA 0510

[57] *Id.*

[58] 3 AA 0511

4. Defense argues State's reasons were pretextual

The Defense argued that the State's proffered reasons were pretextual, noting that Ms. Collins had stated that she had no familiarity with the instant case or any of the witnesses or co-defendant, that she had been fair and impartial when writing her presentence investigation reports, and that she could be fair and impartial in this trial.[59]

After a question from the Court, the Defense observed that the State's proffered race-neutral reasons had to be taken in the context of the fact that, in addition to striking the two black jurors, Ms. Hughes and Ms. Collins, the State had struck the sole Native American juror on the panel as well.[60]

The Court then posed the following question to defense counsel:

*Okay. Do you think they, you know, were **questioning** her to get her to say something so that they could bump her based on her race?*

Defense counsel responded that, *"I don't think any of the **questioning** of her was any different. However, I do think her background, certainly, is different."*[61]

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[59] 3 AA 0510

[60] 3 AA 0510-051185-186

[61] 3 AA 0511

Defense counsel attempted to bring the discussion back to the issue of the percentage of black jurors that were stricken by the State, *"However, again, back to the numbers discussion...,"* and argued that *"And it just doesn't square up that someone in law enforcement is all of a sudden not going to be a good prospective juror for them."*[62]

The Court responded with the observation that *"I always get offended when someone from law enforcement or that type of a background says something like that in front of a bunch of jurors. Like, you know, they know, they have more information, her knowledge is superior,"* the Court concluded, ***"So I don't think there was any different questioning of her."***[63]

5. Court denies Batson challenge

The Court began its ruling on the Batson challenge as to Ms. Collins by stating:

> *Okay. So based on the totality of the circumstances again, I don't think that **the questioning** of Ms. Collins was any different than any of the other jurors, or the State was not **questioning** her and just waiting to perempt her. I think the questioning of all these jurors was*

[62] 3 AA 0512=0513

[63] 3 AA 0514

similar. And I don't think there was different treatment of jurors in ***the questioning*** *based on their race or the color of their skin.*[64]

The Court concluded:

So with that, I'm going to make a finding ***the State did state a race-neutral reason***. ***So I'm going to deny the Batson challenge***.[65]

Argument

a. Legal framework

As discussed above in relation to juror Hughes, Batson and its progeny require that, as part of the "sensitive inquiry" that the district court must undertake, the court must evaluate both the words and the demeanor of a juror who is peremptorily challenged, as well as the credibility of the prosecutor.

Steps two and three require the district judge to "evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes."[66]

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[64] 3 AA 0515-0516 (emphasis added)

[65] 3 AA 0516 (emphasis added)

[66] Batson, *Supra*.

Furthermore, the court must *"discuss which facts or circumstances alleviated its concerns...."* [67]

b. The Court failed to address the Defense's argument

As was the case in regard to juror Hughes, the district court failed to consider all of the relevant circumstances, and failed to make an adequate record of its reasoning.

Specifically, a review of the transcript discloses that, while defense counsel at trial consistently made one particular argument, the district court consistently responded to a quite different argument, and one which the defense had not made.

The argument made by the defense centered on the statistics: out of five challenges actually exercised, all five appear to have been against minorities: two Black women,[68] one Native American,[69] and two Hispanics.[70]

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[67] Id.

[68] 3 AA 0693-0694

[69] 2 AA 0403-0404

[70] 3 AA 0499

The defendant therefore took the position that *"it just doesn't square up that someone in law enforcement is all of a sudden not going to be a good prospective juror for them."* [71]

The Court, however, did more than simply accept the State's arguments. Rather, in relation to the State's argument that Ms. Collins had been excused because she had expressed doubt about the results in some cases she had seen years previously as a P&P officer, the Court made a point of stating that she:

> *g[o]t offended when someone from law enforcement or that type of a background says something like that in front of a bunch of jurors. Like, you know, they know, they have more information, her knowledge is superior. And she basically did say that, that her knowledge was superior to what a jury had determined, because she looked at everything.*[72]

Neither the State nor the Court had expressed any such high dudgeon when a juror, who happened to be a white male, Mr. Thomas Willer, juror no. 550, expressed doubts about whether the criminal justice system worked perfect justice in every case.

At the beginning of Day 2 of the trial, the Court held a hearing outside of the presence of the other jurors with Mr. Willer. The Court noted that:

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[71] 3 AA 0512-0513

[72] 3 AA 0513

> *At the end of the day yesterday, it appeared to me as though you were trying to talk to the district attorney. And I've indicated to you that the district attorney could not speak to you. But I'm concerned about what you said to the district attorney. I mean, I just want to make sure you're okay.*

Mr. Willer stated that he had wanted to have a private conversation with the Deputy District Attorney about a case in which he believed that a Justice Court judge, after reviewing the evidence which Mr. Willer had submitted to the Court, had made an incorrect decision.

According to Mr. Willer, the underlying facts were as follows:

Another individual, one Bob Sheridan, had made threats against Mr. Willer's life, going so far as to get a tattoo on his hand *"guaranteeing [Mr. Willer's] death date."* [73]

Mr. Willer provided the Justice Court with in support of his request for a protective order, and despite the fact that he knew the Justice Court Judge's family and had voted for her,[74] the Justice Court had denied his request.

Mr. Willer expressed his belief that (a) he had personal knowledge regarding a matter involving facts, namely death threats, that he believed should be considered to be a criminal offense, (b) that those facts had been submitted to

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[73] 2 AA 0331

[74] 2 AA 0337

the authorities, (c) that the detective he had contacted had incorrectly determined that no crime had been committed, and (d) that the court which had handled his request for a restraining order had incorrectly determined the case against him, in despite of what he considered to be clear evidence in his favor.

In short, Mr. Willer believed that the facts as submitted to the court proved one thing, but that the court had somehow ruled the opposite.

Because of this belief, Mr. Willer felt a *"dissatisfaction with the legal system.. and the criminal justice system right now."*[75]

Mr. Willer further agreed that he was *"dissatisfied with the court system as well, with, basically, Judge Letizia, for not hearing [him] out."*[76]

However, despite his dissatisfaction with the court system, Mr. Willer later stated that:

> *I think I have a built-in bias towards law enforcement. I think I do, you know, on subjective opinion matters. So that's my honest opinion.*

The Court asked Mr. Willer to explain his bias, and he stated, *"the fact that they're law enforcement, I believe, tends to make them credible...."* The Court then

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[75] 2 AA 0332

[76] 2 AA 0337

asked whether his bias toward law enforcement *"would interfere with [his] ability to be fair and impartial,"* to which Mr. Willer responded, no.[77]

The Defense challenged Mr. Willer for cause. The State objected to the Defense challenge for cause, and the Court denied the challenge.[78]

Ultimately, the Defense used a peremptory challenge to strike Mr. Willer.[79] When arguing the Batson challenges, the Defense raised the issue of Mr. Willer, particularly in regard to the first African American juror struck by the State, Ms. Hughes.[80] But the comparison between Ms. Collins and Mr. Willer is perhaps even more striking.

The State justified their strike as to Ms. Collins on two bases: (1) that Ms. Collins had the temerity to second guess whether a judicial decision had been correct, to wit that of a jury verdict, and (2) that Ms. Collins had seen the file containing materials – some potentially introduced in evidence and some not – that the prosecution had used to obtain that verdict.

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[77] 2 AA 0388

[78] 2 AA 0458

[79] 3 AA 0702

[80] Id.

Mr. Willer's *"dissatisfaction with the legal system.. and the criminal justice system"* was based on precisely the same two elements as for Ms. Collins: (1) he believed an incorrect legal result had occurred, and (2) he believed that he knew better than the fact-finder in his case because he had access to the original records which were in the court's file.

While it might be claimed that the fact-finding process of a jury in a criminal case is of greater weight than the fact-finding decision made by a Justice Court judge in a protective order matter, they are conceptually similar undertakings. And if it is "offensive" for a Black juror to second guess one sort of fact-finding decision in one sort of case, it should also be "offensive" for a white juror to second guess a different sort of fact-finding decision in a different case.

But here, not only did the State fail to use their own peremptory challenge in regard to Mr. Willer, but they objected when the defense challenged Mr. Willer for cause.

c. The Court focused on an argument not raised by the Defense.

Rather than undertaking the "sensitive inquiry" mandated in a Batson challenge, which should have entailed addressing the issues actually raised by the Defense, the Court instead focused on an issue not raised by the Defense as to Ms. Collins, to wit the issue of whether the State had employed different questioning

of the jurors based on their race. This was the same issue which the Court had addressed as to Ms. Hughes, despite the fact that the Defense had not raised the issue.

Counsel for the Defense had clearly stated that this was not the basis of their Batson challenge:

> *THE COURT: Do you think that there was **questioning** different of Ms. Collins than there was of other jurors?*
>
> *MR. TANASI: **No, Your Honor. I can't say that they asked any questions that were different than other jurors**.*
>
> *THE COURT: Okay. Do you think they, you know, were **questioning** her to get her to say something so that they could bump her based on her race? I mean, that's what I'm trying to get at.*[81]

The Defense had made it clear that the basis of their Batson challenge was not any alleged disparate questioning, but rather the facts that (1) of the five jurors challenged by the State, all were minorities, and two were African Americans, (2) as to Ms. Collins in particular, the State's purported reasons were not plausible in light of her being both a law enforcement officer, and the spouse of another law enforcement officer, and (3) the State had not had expressed the same reservations

[81] 3 AA 0710 (emphasis added)

about a white juror who had had similar doubts about whether the justice system always reached the right result.

Nonetheless, the Court ruled primarily on the basis of an issue not raised by the Defense, that of whether the questioning of jurors of different races had been the same or not:

> *Okay. So based on the totality of the circumstances again, I don't think that the **questioning** of Ms. Collins was any different than any of the other jurors, or the State was not **questioning** her and just waiting to perempt her. I think the **questioning** of all these jurors was similar. And I don't think there was different treatment of jurors in the **questioning** based on their race or the color of their skin*.[82]

The Court went on to refer to the issue of Ms. Collins' expressed doubts regarding the infallibility of the justice system:

> *clearly made indications that I thought probably should have been made both sides nervous, that regardless of what the jury had seen, regardless of what all the evidence was, when she got the file in her review was superior to what a jury had rendered.*[83]

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[82] 3 AA 0515-0516

[83] 3 AA 0516

The Court did not address the disparate treatment of Ms. Collins and Mr Willer. Nor did the Court address the issue raised by the Defense[84] in regard to Mr. Willer had repeatedly talked about his dissatisfaction with the system, going so far as to say that he was "pissed."[85]

d. The Court again conflated steps two and three

As discussed in regard to Ms. Hughes, supra, *"[i]t is legal error to conflate 'Batson's second and third steps into one...."* Brown v. State, Nev: Court of Appeals 2021 (quoting Purkett, 514 U.S. at 768).

Again, that is exactly what the Court did here. The Court's final sentence in ruling on the Batson challenge to Ms. Collins was, *"[s]o with that, I'm going to make a finding* ***the State did state a race-neutral reason***. ***So I'm going to deny the Batson challenge***."[86]

The assertion that the State "did **state** a race-neutral reason" is simply that step two was satisfied. It does not constitute the sensitive inquiry into step three.

Conclusion

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[84] 2 AA 0457

[85] 2 AA 0454

[86] 3 AA 0516

The Court did not address the Batson issues raised by the Defense as to either Ms. Collins or Ms. Hughes, instead choosing to focus on an issue specifically disavowed by the Defense. As such, the Court did not provide the sensitive analysis required in a Batson challenge. The conviction must be reversed and remanded for a new trial.

III. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION

As argued in closing by defense counsel, the State presented insufficient evidence to support a conviction beyond a reasonable doubt.

In reviewing a challenge to the sufficiency of the evidence, this Court has held that it is to consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[87]

Here, it is submitted that the evidence submitted does not meet that standard, in light of the consistency of the descriptions by the witnesses who observed the crime that did not match Mr. Matthews in height, hairstyle, or clothing.

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[87] McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) Franks v. State, 432 P.3d 752, 135 Nev.Adv.Op. 1 (2019).

It is informative in this regard to review the decision of the judge in his Federal habeas case. While the judge in that case was reviewing the evidence from Mr. Matthews' prior trial, the identification issues remain equally troubling based on the evidence presented at the trial subject to the instant appeal.

Judge Navarro wrote:

> ***The evidence against Matthews... was far from overwhelming***.
> *Unlike Joshlin, who was found in a dumpster with a handgun linked to the shooting, there was no evidence directly linking Matthews to either the shooting or the robbery. About an hour to an hour and a half after the foot chase ended, Matthews was found hiding in a backyard about a block from where the chase ended, and some four or five blocks from where the shooting and robbery occurred. The defense suggested, and it remains a possibility, that Matthews had reason to fear apprehension by police other than -- and less egregious than -- having participated in the shooting and robbery.* ***Matthews, at five feet eleven inches tall, with a corn row hair style, and wearing blue denim shorts and a long-sleeve shirt, did not***

closely match the descriptions of the assailants given by the victims who testified at trial. [88]

In Mr. Matthews most recent trial, the witnesses again testified that the assailant was 5'5" to 5'7", wearing corn rows, and dressed all in black, with a hoodie and long pants. By contrast, Mr. Matthews, was 5'11", did not have corn rows, and was wearing shorts and a long sleeved shirt at the time of the arrest.

Myniece Cook testified that the assailant was dressed head to toe, all in black,[89] and had an afro hair style.[90]

Michel'le Tolefree testified that the assailant was wearing a black hoodie,[91] and was five feet six inches to five feet seven inches.[92]

Geishe Bolden testified that she was 5'5", and that the assailant was her height or shorter, and was wearing dark pants.[93]

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[88] Matthews v. Neven, Case 2:14-cv-00472-GMN-PAL (USDC Nev. 2017), Document 34, p. 14-15 (emphasis added)

[89] 3 AA 0605

[90] 3 AA 0607-0608

[91] 3 AA 0626

[92] 3 AA 0631

[93] 3 AA 0673

Melvin Bolden testified that he came face to face with the assailant, and that the assailant was the same height or shorter than Melvin, who was 5'7".

It is submitted that the State cannot have proved their case beyond a reasonable doubt where numerous eyewitnesses saw the assailant, and every one of them gave absolutely consistent descriptions that did not match Mr. Matthews.

Conclusion

The court addressed arguments that the defense did not make, and failed to address the arguments that the defense did make. By no stretch of the imagination can it be said that the district court "[undertook] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" or that the court "consider[ed] all relevant circumstances" before ruling on the Batson objections. As a result, the two black potential jurors were excluded On that basis, the conviction must be overturned, and remanded for a new trial.

The evidence against Mr. Matthews was insufficient to sustain a conviction, as the non-law enforcement witnesses consistently described someone who differed from him significantly in height, dress, and hairstyle.

Finally, it is submitted that the Batson argument and the sufficiency argument are interrelated. Where jurors are improperly excluded on the basis of race, the reliability of the jury's verdict is called into question. Likewise, when, as

Judge Navarro has noted, the evidence is "far from overwhelming," the potential for a Batson violation to have affected the outcome of the trial is heightened.

For the above reasons, Mr. Matthews' conviction should be reversed and remanded for a new trial.

Respectfully submitted,

/s/ Todd M. Leventhal

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Leventhal and Associates, PLLC

Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements or NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman Font, Size 14.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has typeface of 14 points or more, and contains less than 14,000 words, to wit 13,734 words.

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

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Procedure.

Dated: July 13, 2022

/s/ Todd M. Leventhal

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Leventhal and Associates, PLLC
Todd M. Leventhal, Esq.
NV Bar No. 8543
626 South Third Street
Las Vegas, NV 89101
Leventhalandassociates@gmail.com
(702)472-8686
Attorney for Appellant

Certificate of Electronic Service

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July13, 2022. Electronic service of this document will cause the document to be served on all participants in the case.

Dated: July 13, 2022

/s/ Todd M. Leventhal
Todd M. Leventhal
Nevada Bar No. 8543
Leventhal and Associates, PLLC
626 S. Third Street
Las Vegas, NEV 89101
702-472-8686