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Case No.
(C-16-316081-1)

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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff(s),

vs.

KEANDRE VALENTINE,

Defendant(s).

Case No. C-16-316081-1

Department VI

BEFORE THE HONORABLE JACQUELINE M. BLUTH,
DISTRICT COURT JUDGE

TUESDAY, DECEMBER 28, 2021

**TRANSCRIPT OF PROCEEDINGS RE:
ALL PENDING MOTIONS
(Via Audio Via BlueJeans)**

(Appearances on page 2.)

RECORDED BY: DE'AWNA TAKAS, COURT RECORDER

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APPEARANCES:

For the State:

AGNES M. BOTELHO, ESQ.
Chief Deputy District Attorney

For the Defendant(s):

TYLER C. GASTON, ESQ.
Deputy Public Defender
SHARON G. DICKINSON, ESQ.
Chief Deputy Public Defender

1 LAS VEGAS, NEVADA, TUESDAY, DECEMBER 28, 2021

2 [Proceeding commenced at 1:07 p.m.]

3
4 THE COURT: This is C-316081-1. Mr. Valentine is present
5 in custody via BlueJeans.

6 Do I have Ms. Dickerson and/or Mr. Gaston on?

7 Ms. Dickinson, I mean?

8 MR. GASTON: Yes, Your Honor. Tyler Gaston and
9 Ms. Dickinson [indiscernible; audio distortion].

10 THE COURT: Thank you. Via BlueJeans, as well as
11 Ms. Botelho via BlueJeans,

12 Okay, guys, so I have had an opportunity to read
13 through -- or, sorry, not read through, to listen to the JAVS in front
14 of Judge Scotti from the last court date, I can't remember what date
15 it was. Maybe it was -- was it May of -- I can't remember, but you
16 guys know which one I'm talking about.

17 So let's start with -- so let me start with the -- hold on, give
18 me a second. Okay. So in regards to -- I'm going to go with the
19 easiest to the one that'll require most argument on. In regards to
20 the motion asking the Court to take judicial notice of the *Mungai*
21 case and motion seeking findings, that whole thing, and the
22 reconsideration, estoppel, and issue preclusion.

23 So in order -- in regards to the Motion for
24 Reconsideration, I -- there are no new facts that have presented,
25 no -- nor any law that has been presented that is going to make me

1 reconsider my previous decision in regards to *Mungai* or following
2 Judge Spell's decision. So I'm happy to hear on the record if you'd
3 like to say anything on the record in regards to that motion, but I've
4 had the opportunity to read everything and I'm not going to
5 reconsider it at this point in time. But, of course, I do understand
6 that you need to lay a record. So if you'd like to do so, you may do
7 so at this point.

8 MR. GASTON: Your Honor, I don't have anything to add
9 as far as the law or argument [indiscernible; audio distortion]
10 motion. I think the State's opposition -- omnibus opposition should
11 be treated as a failure to respond. And other than that, I made a
12 concession [indiscernible; audio distortion]. But other than that, I
13 don't have any other additional argument to add.

14 THE COURT: Okay. And then --

15 MS. DICKINSON: Your Honor, if I could be heard.

16 There was one additional -- there were a couple of
17 additional arguments in that motion that were not made at the
18 other hearing. Specifically, one of the arguments that's in this
19 motion has to do with [indiscernible; audio cut out] Valentine,
20 allowing a court to use the transcript to make a decision on the
21 Step 3. And the Court knows that this happens all the time in the
22 courthouse. So that was not specifically raised last time.

23 And last time, I think, Mr. Gaston argued that estoppel and
24 we've added an issue preclusion argument in here.

25 THE COURT: Okay.

1 MS. DICKINSON: And then the Court's -- just asking the
2 Court to take judicial notice of the *Mungai*.

3 THE COURT: Yes. No, I understand. I -- so, I mean,
4 technically, I guess, that isn't a Motion for Reconsideration in
5 regards to those two aspects. But I do believe that -- I don't believe
6 issue preclusion nor estoppel to be in line with what I have to do in
7 this case. So I still stand by my initial rulings in regards to those
8 specific arguments made by the defense.

9 So now I want to go -- oh, no, Mr. Gaston, I had a specific
10 question. Because you cut out a little bit, I wanted to make sure I
11 understood what you said. What did you say in regards to you
12 wanted me to strike the State's opposition -- what did you say
13 about that part?

14 Did I lose Mr. Gaston?

15 MS. DICKINSON: Your Honor, I think we may have lost
16 him. I think that what he said was the State's opposition should be
17 treated as a lack of response. And in that sense, the Court should
18 grant our motion. They did not address any of the issues in any of
19 our motions that we filed.

20 I see he's still on there.

21 Are you still there, Mr. Gaston?

22 THE COURT: I don't know, he's not -- yeah, I think we lost
23 him. Well, it looks like he just unmuted.

24 Mr. Gaston, are you there? Okay.

25 Did you want me to wait, Ms. Dickinson, for him?

1 MS. DICKINSON: If you could just wait a few minutes, to
2 see if he's gone. I'm texting.

3 Are you there, Mr. Gaston?

4 THE DEFENDANT: We could proceed without him. We
5 don't have to do all this.

6 THE COURT: Okay. All right.

7 MS. DICKINSON: Whatever the Court wants to do.

8 THE COURT: Okay. Well, let's -- so in regards to -- I'm not
9 going to strike the State's opposition. I mean, I think their position
10 is, listen, all of this was clearly ruled upon. And so I'm not going to
11 strike their opposition.

12 But I want to make sure that we're all on the same page.
13 So in regards to this -- when I listened to Judge Scotti, he said,
14 basically, three things. He said if any discovery issues arise, then
15 the Court will entertain a Motion to Compel documents after a
16 subpoena has been served. That was mainly towards the jury
17 commissioner. That was the first thing.

18 And then the second thing was all witnesses can come to
19 the hearing via BlueJeans, because of the situation we were in at
20 that point in time.

21 And then the third thing he stated is all documents
22 received thus far by the defense from the jury commissioner must
23 be given over by June 10th of '20. All additional documents from
24 the jury commissioner must be seasonably produced, and any
25 documents from the jury commissioner that will used at the hearing

1 must be provided no later than July 15th of 2021.

2 Ms. --

3 MS. DICKINSON: Excuse me, Your Honor, There wasn't
4 anything about 2021 in that JAVS.

5 THE COURT: Oh, I probably -- sorry, I meant '20, probably
6 meant '20. I'm just thinking of the year we were just in. I apologize.

7 Other than that, does that go along with your -- all right.

8 Mr. Gaston is now present.

9 Mr. Gaston, can you hear us now?

10 MR. GASTON: Yes, I can. I'm sorry about that.

11 THE COURT: Okay. That's okay.

12 So I was just going over that I had read the JAVS from
13 Ms. -- from Judge Scotti and looked at his reasoning and what,
14 exactly, it was that he was ordering the defense to turn over in
15 regards to the documents received from the jury commissioner.
16 So --

17 MS. DICKINSON: I think --

18 THE COURT: Go ahead.

19 MS. DICKINSON: Your Honor?

20 THE COURT: Uh-huh.

21 MS. DICKINSON: I was just going to add that with regard
22 to the Motion to Compel, we ended up doing that. But it wasn't
23 until 2021 that we finally filed a Motion to Compel. So that was the
24 process that came about. So it wasn't till 2021 that the motion was
25 heard and it was in front of another judge at that point, and we

1 were finally able to get through making documents.

2 THE COURT: Okay. All right. So in regards to the Motion
3 for Clarification, basically, defense, if I understand your position,
4 you really kind of argue three things.

5 Number one, you couldn't have violated the alleged order,
6 is the wording you used, written by the clerk, because, number one,
7 there was an unknown year.

8 But, number two, even if that was a deadline, the State
9 waived any objection by continuing to accept the documents after
10 July 15th of 2020.

11 And then, third, many of the documents were not received
12 from the jury commissioner until after the 7/15/2020 deadline, so
13 complying with that deadline would have been impossible.

14 Does that pretty much --

15 MS. DICKINSON: That is correct, Your Honor. And we
16 also gave documents to the prosecutor when we received them.

17 THE COURT: Okay. And so, I mean, I think -- I believe the
18 intent of Judge Scotti, especially after, you know, listening to the
19 JAVS, is I really feel like it's consistent with my thoughts on this, is
20 that when you guys come into court, whether it be the prosecutors
21 or the defense, I just want everybody to have had the opportunity to
22 look at what everybody else received, and what's going to be used
23 at the hearing so that everybody comes in here, it's not a hearing
24 by ambush, everybody feels completely prepared, and that we can
25 go forward and not have any other continuances.

1 I mean, I think everybody wants to get this done. I've
2 heard the State, when they were speaking to Judge Scotti, saying,
3 please, like, can we please get this done as soon as possible. This
4 is dragging along.

5 And so let's figure out here, in regard to the Motion for
6 Clarification and Reconsideration, I -- what I'm getting from this is
7 that the defense just wants to clarify whether or not there was a
8 violation of the judge's order or of a discovery request in regards to
9 the Motion for Clarification. Is that fair?

10 MS. DICKINSON: Your Honor, that's fair. And also, we
11 were objecting to the order that the State proposed saying we had
12 violated other statutes.

13 THE COURT: Right. Sorry. Yes. I agree.

14 So, Ms. Botelho, can you talk to me about your position in
15 regards to -- well, okay, let me stop.

16 For the one argument, well, nobody knew what year we
17 were talking about, I mean, I don't -- that one, I don't think, has a lot
18 of teeth, right? And it was very clear in listening to the JAVS that
19 what month everybody was talking about, because you guys had a
20 hearing coming up. So I -- that one I'm not biting into.

21 But this whole part of, listen, they were still receiving
22 documents up until, you know, whatever position, and then they
23 were handing them over. So what do you have to say in regards to
24 that?

25 MS. BOTELHO: Your Honor, I -- part of the reason that I

1 filed the written objection or response in November of 2020 was
2 because it felt like the defense was on this fishing expedition and
3 they were after records which, either one, didn't exist, or two,
4 couldn't be replicated, or three, weren't being produced to them in
5 a certain manner or as quickly as they needed, you know, with
6 COVID happening and everything like that.

7 And so my concern at that time was the defense just kind
8 of casting this super wide net for any and all documents, for any
9 year. And my concern at the time is, well, was them going outside
10 the scope of what I believed the decision in Valentine allowed,
11 which was limited to the ZIP code issue, as we discussed
12 December 3rd.

13 And so when I filed that written opposition, after all of the
14 continuances, throughout the last two years, all of the continuances
15 have been made by the defense, because they were trying to get
16 these documents from the jury commissioner or these documents
17 that their expert needed to look at, raw data, whatever other
18 information, in order for the expert to properly testify at the
19 hearing.

20 And so my position has always been whether it was
21 Judge Scotti, whether it was Judge Eller, whether it was Judge
22 Thompson sitting in for Judge Scotti, and then Judge Holthus, and
23 now yourself, I've always been entitled to all of the data that they
24 plan to present with the -- with -- during the evidentiary hearing.

25 And they acquiesced to that response or to that request

1 because in multiple -- and I've gone, I had -- and asked my secretary
2 to prepare an order for transcripts for all of our hearings, because I
3 see where this is going in terms of, you know, trying to recreate
4 history, it's -- I've asked them over and over, I'm going to need this
5 underlying data, I'm going to need the master list, I need to be
6 provided all of this information so that I can look at it, prepare for
7 cross-examination, as well as determine whether I need to hire an
8 expert,

9 In all of the minutes, the status checks, even some of the
10 orders that have been prepared, the written orders prepared by
11 Judge Eller or Judge Thompson or whomever, whichever judge it
12 was in front of, Judge Holthus, the defense has always taken the
13 position that I was entitled to these documents. And for them to
14 now parse out, oh, well, I'm only required to, you know, disclose
15 information or they're only required to disclose information
16 concerning what the jury commissioner gave them, you know, is
17 just -- it's disingenuous to be very, very, you know, kind in
18 language, because they know they were ordered to produce -- just,
19 even according to the minute entry from May 20th of 2020:

20 Any documents that will be presented at the evidentiary
21 hearing must be produced to the State.

22 And this is what I argued on December 3rd.

23 The intent, Your Honor, even though the evidentiary
24 hearing kept moving and moving and moving and moving, all at
25 the defendant's requests, even though it kept moving, was so that I

1 got the documents, well, first, they get all the documents that they
2 need to set forth their case, and then I get the documentation and I
3 have adequate time to review that. That's always been the position.

4 And so for them to now -- I mean, contrary to even their
5 own language, there are stipulations in orders filed in this case -- or,
6 let's see, let me refer you to this -- the defendant's Motion to
7 Continue Evidentiary Hearing October 28th of 2020. This is the one
8 that I filed a written opposition for. On page 3, Header Number 8:

9 Based on the above, I'm asking the Court to continue the
10 hearing until late December of January. This will give us
11 enough time to collect the documents and for our expert to
12 review them. It will also give the prosecutor time to review the
13 documents for the hearing.

14 So for them to now say that they were not operating on
15 some kind of order, understanding, some type of rule that required
16 them or that led me to believe that they were going to disclose
17 these items to me is just -- it's ridiculous. It is ridiculous.

18 Because not only -- and, of course, that precipitated me to
19 file a response saying, hey, I want them to give me an offer of proof
20 as to what these documents are, because I need -- and I put it in my
21 opposition -- I need to know whether I need to hire a rebuttal
22 expert, whether I need to file a Motion to Strike for it being outside
23 the scope, whether I need to lodge an objection.

24 And then in a lot of their motions, you know, they filed
25 since this 1240 hearing, they're talking about how -- why does the

1 State raise this at a different time? Why did -- I didn't raise it
2 because I've been waiting for them to disclose all of the
3 information, and when they disclose information to me, the night
4 before or the afternoon before a scheduled hearing, that's going
5 to -- that's a problem. That's a problem when the last two years,
6 where it's minute entries, as well as Motions to Continue, as well as
7 stipulations and order all indicate that the State always had the
8 right --

9 MR. GASTON: Your Honor.

10 MS. BOTELHO: -- were always entitled to have the right to
11 review these documents, this raw data that their expert was going
12 to rely on.

13 It just -- It baffles my mind how this can be the position
14 now, that they were not entitled -- that I'm not entitled to this
15 somehow. I mean --

16 THE COURT: Okay. Ms. Botelho, just one second.

17 Mr. Valentine, you're -- I'm sorry, sir, are you having an
18 issue?

19 THE DEFENDANT: Yeah, I'm having a issue right now.
20 Right? Like, I'm trying to -- my ride is going to leave in, like, two
21 minutes. And I'm going to be stuck here all night, basically.

22 THE COURT: Okay. So, wait, let me ask you: Do you
23 want to be here for this hearing or are you waiving your right to be
24 here and you'll allow your attorneys to go on without you?

25 THE DEFENDANT: This is just posted for a status check,

1 right?

2 THE COURT: No.

3 THE DEFENDANT: Or, what --

4 THE COURT: They're arguing about -- basically, they're
5 arguing about what discovery for the hearing we're going to have.

6 THE DEFENDANT: Okay. I just want -- I didn't know all
7 that. I just want to know that the next court date and I'll be at the
8 next court date.

9 THE COURT: Okay. So the next court hearing -- the next
10 court date is going to be an evidentiary hearing on --

11 THE DEFENDANT: Uh-huh.

12 THE COURT: -- we can either do Monday, February 7th, or
13 Friday, February 11th, whichever the parties agree to.

14 7th or the 11th, guys?

15 MS. DICKINSON: 7th.

16 THE COURT: Ms. Botelho?

17 MS. BOTELHO: Brief indulgence, Your Honor. I have my
18 calendar up. The 7th is fine.

19 THE COURT: Okay. February 7th at 1:30.

20 Mr. Valentine, if you'd like to go at this point in time, sir,
21 you can, to catch your ride.

22 THE DEFENDANT: Okay. Thank you very much.

23 THE COURT: You're welcome, sir.

24 Okay. So Ms. Dickinson or Mr. Gaston, your position in
25 rebuttal to the points that Ms. Botelho's brought up in regards to

1 the, you know, previous motions and orders that have been issued.

2 MS. DICKINSON: Your Honor, I'd like to respond.

3 THE COURT: Go ahead.

4 MS. DICKINSON: To make -- Sharon Dickinson, I'd like to
5 respond to this.

6 You know, today, it's December, the end of
7 December 2021. And up until today the prosecutor has never filed a
8 written motion objecting or laying out any of her objections. Not
9 once.

10 She has now come into court and complained about
11 something in November of 2020, I don't know what she's talking
12 about. She's complained about something in October of 28, 2020. I
13 don't have any reference, any way to respond, because she did not
14 put anything in writing.

15 She's complained that she didn't get any of her evidence
16 or her discoveries. She received it all. She received it when we got
17 it. I filed a motion and let the Court know what she's given us.
18 Nothing. And we asked for her to list what we've given her,
19 because we don't want to come back in here to have her do what
20 she did today and complain again, you never gave me anything.
21 That's totally inaccurate.

22 I think part of the confusion is -- was getting the master
23 list. The jury commissioner in the Eighth Judicial District Court
24 does not keep a master list day to day. And it took us a while,
25 because it was the first time the Court had ever been -- the jury

1 commissioner had ever been asked to turn this over. So that was
2 one of the things that took a long time to vet. And when we got it --
3 we don't even have it, actually. It's in a program that the jury
4 commissioner has and all's we could get was a code to get into it.
5 That's what we ended up getting to [indiscernible; audio distortion].
6 Prior to that, she received everything else that we had requested.

7 THE COURT: Okay. So let -- hold on. Ms. Dickinson, let
8 me ask you a question.

9 Ms. Dickinson, on June -- hold on, let me get out my notes
10 from Judge Scotti. So did you comply -- I know you guys are
11 saying an order, because nothing was ever filed, but Judge Scotti
12 did order certain things on the record. So did you guys turn over
13 what you had received? It says: All documents Defendant received
14 so forth from the jury commissioner must be given by June 10th.
15 Did you do that? The ones that you had --

16 MS. DICKINSON: Yes, Your Honor. I did.

17 THE COURT: Okay. All additional documents from jury
18 commissioner must be seasonably produced. Any documents from
19 jury commissioner must be provided no later than mid July
20 of 7/15/21. So at that point in time, before 7/15/21, had you given
21 everything at that point in time that you had?

22 MS. DICKINSON: Yes. That -- yes. We gave everything
23 as we received it, after the -- we went into that evidentiary hearing.
24 We did not receive things right away. I remember one time we
25 received something on a UBS [sic] stick and the prosecutor asked

1 me to e-mail it to her. I couldn't. We eventually -- she had
2 somebody come over and sign for it. So, yes.

3 THE COURT: So --

4 MS. DICKINSON: And the only thing --

5 THE COURT: Go ahead.

6 MS. DICKINSON: So -- yeah. So we gave her everything
7 as we received it or as close as possible after we received it.

8 THE COURT: Okay. So now let's move forward to the
9 hearing that we were supposed to have, you know, it was last
10 month, right? Yeah, it was in --

11 MS. DICKINSON: Right. Right.

12 THE COURT: Well, this month. Like, early this month.

13 The problem that we all encountered in that e-malling that
14 was going on before the hearing, I think it was, like, between 24
15 and 36 hours, you guys e-mail additional documents. When was it
16 that you had received those?

17 MS. DICKINSON: We had never received those in this
18 case. Those came from another case and when we were looking at
19 this case, I said to Mr. Gaston, let's turn these over, because we
20 would want the prosecutor to look at them.

21 THE COURT: Okay. So you had gotten those from
22 *Mungai*? Was it *Mungai* or was it the other case? I think it was
23 *Mungai*.

24 MS. DICKINSON: Actually, it was from *Simms*. From
25 *Simms*.

1 And so absent the JAVS or the transcripts, which I've now
2 ordered from all of these status checks, it's hard for the Court to get
3 a flavor of just how continuing this obligation was supposed to be.
4 And I understand now, yes, we're going to move forward. We're
5 going to move forward. The Court ruled they can talk about DETR
6 records.

7 You know, but what concerns the State is in one of their
8 other motions, you know, Mr. Gaston says something about how,
9 you know, well, I'm not limited to just talking about this. Okay.
10 Now, the same way that they didn't receive any discovery from me,
11 and I -- yes, they did not receive any discovery from me, because
12 guess what? They had the burden of proof.

13 And so I'm entitled to look at it to see -- to look at their
14 documentation, to look at their evidence and see if I have
15 something in rebuttal or contrary to that.

16 And so it just -- it baffles my mind that, you know,
17 Ms. Dickinson, at this point in time, would say something to the
18 effect of, you know, hey, I'm lying because they were never ordered
19 and they were never asked to produce this stuff. And I just -- I don't
20 understand it, because it is in plain black and white, they disclosed
21 these other things to me very willingly. And so, of course there's a
22 flavor of --

23 THE COURT: So let me ask Ms. Dickinson, then,
24 Ms. Botelho.

25 So, Ms. Dickinson, if you -- if Ms. Botelho is correct and

1 you were going to always use the DETR records and always -- and
2 had prepared for an expert, why weren't those handed over?

3 MS. DICKINSON: Well, Ms. Botelho is not correct. She is
4 totally wrong, because it wasn't until we did *Mungai* and *Ortiz* came
5 out in 2021 that we looked at DETR records. So Ms. Botelho is
6 totally incorrect.

7 And if I understand her statements now, now we're no
8 longer arguing about what we received from the jury
9 commissioner, we're arguing about DETR records. So is she now
10 saying yes, she received everything from the jury commissioner,
11 but she's complaining she didn't get DETR records in 2020 when we
12 had -- we didn't even have DETR records at that time.

13 THE COURT: When did you guys get the DETR records?

14 MS. DICKINSON: The DETR records that we gave her, we
15 received as soon as we got them, which was that day or the day
16 after.

17 MS. BOTELHO: See, Your Honor? That is contradictory to
18 what she just said prior to. She said they have this documentation
19 in a different case and when they were preparing for the Valentine
20 case, they said, hey, we better disclose these, because the
21 prosecutor's going to want them.

22 Which leads the Court and myself to believe that they've
23 had it in their possession, which I was going to point out is against
24 what Ms. Dickinson told me when I called her Thursday, the
25 Thursday before the December 3rd hearing, when I asked her, hey,

1 Sharon, what's going on with these? Do you guys plan to use
2 these? She said, oh, in preparing for this hearing on Monday, we
3 looked at it and we decided, oh, we've got the wrong records. So I
4 requested the 2017 records, because that's the relevant records.
5 And then I turned them over to you as soon as I could.

6 I mean, which is it at this point? Which is it?

7 MS. DICKINSON: Listen --

8 MS. BOTELHO: Did you have it?

9 MS. DICKINSON: Your Honor.

10 MS. BOTELHO: Did you have it and fail to disclose it, or
11 did you request it the Monday before, as you told me, and as
12 you've just very succinctly told the Court now?

13 This is the kind of gamesmanship that is infuriating
14 because, as the Court pointed out, I have wanted this hearing to go
15 forward since day one. And for Ms. Dickinson to sit here -- to sit
16 there and tell me that I didn't acknowledge receipt of the discovery,
17 you know, maybe they should read the transcripts. It's on page 19,
18 when I actually say:

19 And so yes, Ms. Dickinson is correct, we did receive the
20 voluminous master list records. We received that a week or so
21 after they received it. And we had conversations about that
22 level of discovery.

23 I mean, what -- she seems so confused about what it is
24 that's at issue here. I'm not saying that I didn't receive discovery.
25 I'm saying I did not receive the total amount of discovery that was

1 needed, that was going to be presented at the evidentiary hearing,
2 because that is what your expert relied on.

3 That's exactly what I'm saying. That's what I said
4 December 3rd; that's what I'm saying now. My version is never
5 going to change. I'm not going to say, oh, I got it and then I didn't.

6 MS. DICKINSON: Your Honor, I want to say I'm tired of
7 Ms. Botelho calling me a liar. She has been doing this since
8 December 3rd and I resent it. It's not true. It's never been true.

9 THE COURT: Okay. Clarify.

10 MS. DICKINSON: It's never been true.

11 THE COURT: Clarify --

12 MS. DICKINSON: I've been accurate with her on
13 everything I've said.

14 Now, the DETR records, I told her we received those DETR
15 records that week. And we realized we needed them in 2021, when
16 she did *Mungai*. I don't have the records from *Mungai*.

17 I'm not sure what else she's calling me a liar about. Does
18 the Court want to send us to the state bar so she can call me a liar
19 there? I did not make those statements to her in a private
20 conversation. And the reason I filed the motions is because I will
21 no longer have private conversations with her, because she
22 misconstrues what I say.

23 THE COURT: Okay.

24 MS. DICKINSON: She's calling me a liar, I resent it. I've
25 been in the courtrooms for over 30 years and never had a

1 prosecutor come in and call me a liar.

2 THE COURT: Okay. All right. So, I mean, listen, we're -- I
3 guess -- so if you could just help me understand this. So in the
4 previous cases, in *Mungai* and *Simms*, they did -- they used DETR,
5 right?

6 MS. DICKINSON: In *Mungai*, they used DETR. I did not
7 have those records.

8 THE COURT: Okay. Did you have an expert prepared to
9 testify to DETR at the hearing?

10 MS. DICKINSON: I assisted Nadia Hojjat with that case.
11 She prepared the expert, I did not prepare the expert.

12 THE COURT: No, I understand. I'm just saying did you
13 know, going into the Valentine hearing, that you were going to
14 use -- that you -- an expert was going to talk about DETR?

15 MS. DICKINSON: Yes.

16 THE COURT: So I guess --

17 MS. DICKINSON: And we -- okay.

18 THE COURT: -- that's what's confusing, though, right?
19 Because if you have an expert who's prepared to talk about DETR,
20 experts need time to review things. So that had to have happened
21 further out than just a few days before a hearing.

22 MS. DICKINSON: Not really, Your Honor.

23 THE COURT: So when did the expert get the DETR
24 records?

25 MS. DICKINSON: He got the DETR records the same time

1 THE COURT: Right.

2 MS. BOTELHO: And I believe that date moved, because I
3 asked for time to, you know, look at the records to see if we were
4 going to be hiring an expert. Is there such a drop-dead deadline at
5 this point in time?

6 THE COURT: I thought that we -- I don't have the minutes
7 pulled. I thought that we had already put that drop-down date on
8 the record, hadn't we?

9 MS. DICKINSON: Your Honor, my understanding, we had
10 a date for her to come in and say if she was going to have an
11 expert. She came into court and said she was not hiring an expert.

12 And with regard to the discovery, I asked the Court to
13 clarify what the Court wanted, because the expert is, obviously,
14 there's some privilege material also. Does the Court want us to
15 turn over privilege work product or what exactly did the Court want
16 us to turn over to the prosecutor?

17 THE COURT: Well, I trust that the parties know exactly
18 what's privilege and what the State wouldn't be entitled to, I mean,
19 work product. But I also trust -- I mean, I feel like everybody on this
20 case is seasoned attorneys, right? So you know what each other
21 are -- what your obligations are and what each other are entitled to.

22 So if there's work product, it's obviously not discoverable.
23 But everything else needs to be turned over so that the State has
24 the opportunity to review documents, graphs, charts, any of that
25 and prepare for cross-examination.

1 MS. BOTELHO: The deadline that you initially gave, Your
2 Honor, was 10 days from the date of the hearing. And then kind of
3 talked about the expert stuff and I don't know if that date changed.
4 That's -- I'm just asking for a clarification --

5 THE COURT: Sure.

6 MS. BOTELHO: -- as to the deadline --

7 THE COURT: So --

8 MS. BOTELHO: -- whether that's passed,

9 THE COURT: So the date of the hearing is going to be
10 February 7th. So if you guys want it 10 days -- if you want the
11 drop-down date to be 10 days, that's fine. If you want it to be two
12 weeks, that's fine. It's really what you guys need in order to
13 prepare. I just want to make sure we have a drop-dead date so that
14 when we come in here on February 7th, this thing is going forward.

15 MS. BOTELHO: Okay.

16 MS. DICKINSON: Your Honor, one other motion we had,
17 and the State has no objection, giving us a list of everything that
18 we've given to them so we're sure they have everything in their file.
19 We don't want to come in on February 4th and be accused of
20 withholding discovery. She did not file an objection to that. I asked
21 for an order for that.

22 THE COURT: Okay.

23 MS. BOTELHO: We talked about this very same issue, as I
24 pointed out. I already told them and I told the Court on
25 December 3rd, on page 19, what I've received. I think the proper

1 method to obtain some sort of documentation as to what the State
2 received would be a receipt of copy filed with the Court with my --
3 with a signature from the State or a party indicating discovery
4 receipt.

5 THE COURT: So --

6 MS. DICKINSON: Your Honor, she's been accepting
7 things during the COVID without a receipt or copy because we
8 couldn't have anybody come over. So I would just ask that she give
9 us a copy of what she received and then we'll check our files.

10 THE COURT: Well, okay. Hold on. So do you,
11 Ms. Dickinson, do you have a printout of everything you believe
12 you've turned over?

13 MS. DICKINSON: No, I don't. But I could put one
14 together. But I'd ask that she put it together, since she accepted it
15 that way.

16 THE COURT: Well, no. No.

17 MS. DICKINSON: Okay.

18 THE COURT: I need you to do a piece of -- I need a
19 document of everything that you believe you've turned over. Then I
20 need Ms. Botelho to review that, and if she hasn't received
21 everything, I need her to reach out to you and get another copy.

22 MS. DICKINSON: Okay.

23 THE COURT: Okay. All right. So, Ms. Botelho, is a 10-day
24 drop off for the deadline before the hearing sufficient for
25 preparation or do you believe 14 days is needed?

1 MS. BOTELHO: Your Honor, actually, I was going to go
2 with the -- I was going to ask the Court for your original intent,
3 which appears to have been 10 days from December 3rd. You said:

4 I'm going to give both sides 10 days to review everything,
5 make sure you have -- pretend you're doing the hearing on
6 the 7th day of the 10 days, that everything you're going to want
7 to use on both sides or experts relied on on that tenth day and
8 that you're going to give that over to each other.

9 THE COURT: Oh, I apologize.

10 MS. BOTELHO: And I'm precluding it.

11 THE COURT: When you were reading it, I thought you
12 said 10 days from the hearing, meaning 10 days from the hearing
13 we are going to have.

14 MS. BOTELHO: Oh.

15 THE COURT: Oh.

16 MS. BOTELHO: And I'm sorry, Your Honor.

17 THE COURT: No, no, no.

18 MS. BOTELHO: It was 10 days from our last hearing.

19 THE COURT: Okay. So it would have been the 13th,
20 right? When did we have our -- when was the day we had our
21 hearing?

22 MS. BOTELHO: December 3rd.

23 THE COURT: Okay. Yeah, everybody agreed to that. So,
24 obviously, everybody -- so we're all on the same page. Everything
25 should have been handed over then, because everybody nodded

1 their heads and told me they agreed to that. So that was the order.

2 MS. BOTELHO: Okay. Thank you.

3 THE COURT: Okay.

4 MS. DICKINSON: So you're saying that everything should
5 have already been turned over. We have turned over some things
6 that are in motion. So I would ask that those be included.

7 THE COURT: What --

8 MS. DICKINSON: The documents, they are court files. I
9 mean, we don't have anything else from the jury commissioner if
10 that's what the Court's asking.

11 THE COURT: I'm just -- I just told everybody anything you
12 want to present had to be turned over by the 13th. That was very
13 clear. Everybody agreed, everybody told me that they agreed to it,
14 so that was my order. So if something hasn't been turned over, it's
15 not coming in.

16 MS. DICKINSON: Well, you're saying that all the
17 documents that we filed in our motions will be prohibited from
18 being introduced?

19 THE COURT: What motion? What documents?

20 MS. DICKINSON: Your Honor, we filed the agreement and
21 request for information. I think she already has that, but I just want
22 to make sure. We have the declarations from the jury
23 commissioner. We filed all of those. We filed -- what else --

24 THE COURT: Well, what was the date you filed this?

25 MS. DICKINSON: The administrative order, which I'm

1 sure she should already have. All the documents that are in the
2 motion asking the Court to take judicial notice and all the
3 documents in our bench briefs. Yeah, I -- I mean, we wouldn't --

4 THE COURT: What date were those filed?

5 MS. DICKINSON: This was filed -- one was filed on
6 the 14th of December, the other was filed on the 3rd.

7 THE COURT: Of December?

8 MS. DICKINSON: The bench briefs were filed on the 3rd.

9 THE COURT: Right. We're talking about 10 days after the
10 hearing. So anything filed after the 13th is not coming in, filed
11 before the 13th or handed over before -- anything handed to the
12 State after the 13th is not coming in. Everything else that was in
13 the State's hands before the 13th is coming in. That's what I stated
14 on the record, everybody told me that was more than enough time,
15 so that's what it is.

16 Anything else?

17 MS. BOTELHO: No, thank you.

18 THE COURT: Okay. See you guys on --

19 MS. DICKINSON: Your Honor, I ask that the court reporter
20 transcribe this hearing, please.

21 THE COURT: So you have to submit a court order and I'd
22 be happy to sign it.

23 MS. DICKINSON: Okay.

24 THE COURT: All right. See you on the 7th. Thank you.

25 MS. BOTELHO: Thank you.

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MR. GASTON: Thank you.

[Proceeding concluded at 1:51 p.m.]

///

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability. Please note: Technical glitches in the BlueJeans audio/video which resulted in distortion and/or audio cutting out completely were experienced and are reflected in the transcript.


Shawna Ortega, CET*562



1 SUPP
2 DARIN F. IMLAY, PUBLIC DEFENDER
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4 TYLER C. GASTON, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 13488
6 PUBLIC DEFENDERS OFFICE
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 Tyler.Gaston@clarkcountynv.gov
12 Attorneys for Defendant

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,
11 v.
12 KEANDRE VALENTINE,
13 Defendant,

CASE NO. C-16-316081-1
DEPT. NO. VI
DATE: May 3, 2022
TIME: 9:30 a.m.

15 **SUPPLEMENT TO MOTION SEEKING AN ORDER GRANTING A NEW**
16 **TRIAL BASED ON VIOLATIONS OF DUE PROCESS, PROSECUTORIAL**
17 **MISCONDUCT, AND THE RIGHT TO A SPEEDY APPEAL AND/OR**
18 **TRIAL.**

18 COMES NOW, the Defendant, KEANDRE VALENTINE, by and
19 through Deputy Public Defenders TYLER C. GASTON and SHARON G.
20 DICKINSON, Deputy Public Defenders and files this supplement to the Motion
21 seeking an Order granting a new trial based on violations of due process,
22 prosecutorial misconduct, and the right to a speedy appeal and/or trial.

23 DATED this 28th day of April, 2022.

24 DARIN F. IMLAY
25 CLARK COUNTY PUBLIC DEF.
26 By: /s/Tyler C. Gaston
27 TYLER C. GASTON, #13488
28 Deputy Public Defender

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
By: /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Chief Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing SUPPLEMENT TO MOTION was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountyda.com on this 28th day of April, 2022.

By: /s/Carrie M. Connolly

An employee of the
Clark County Public Defender's Office

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EXHIBIT A

DECLARATION

TYLER C. GASTON makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant in the instant matter, and I am familiar with the facts and circumstances of this case.
2. The emails attached to this exhibit are from me to the Court regarding scheduling the remainder of the evidentiary hearing for Keandre Valentine.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 28th day of April, 2022.

Is/Tyler C. Gaston
TYLER C. GASTON

From: Tyler Gaston

Sent: Monday, February 7, 2022 5:34 PM

To: Jacobs, Krystal <[REDACTED]>; Anna Clark <[REDACTED]>; Sharon
Dickinson <[REDACTED]>; Agnes Botelho <[REDACTED]>; Michael Dickerson
<[REDACTED]>

Subject: Dates for Continued Valentine Hearing

All,

As for Mondays and Fridays, I'm available on March 7th any time after 10:00 am. I'm available all day on March 11th. And then I'm most likely not available until March 28th when I'm available all day as well as on April 1st. I was only looking at Mondays and Fridays so let me know if I should look at other times or dates.

Best,

Tyler Gaston

000265

From: Jacobs, Krystal <[REDACTED]>
Sent: Tuesday, February 8, 2022 5:09 PM
To: Tyler Gaston <[REDACTED]>; Agnes Botelho <[REDACTED]>;
Michael Dickerson <[REDACTED]>; Sharon Dickinson
<[REDACTED]>; Anna Clark <[REDACTED]>
Subject: RE: Valentine Discovery

Agnes & Mike-

These CDs have been received. Please feel free to stop by anytime.

Thanks!
Krystal Jacobs
Dept. 6 JEA
[REDACTED]

From: Tyler Gaston [mailto:Tyler.Gaston@v] <[REDACTED]>
Sent: Tuesday, February 8, 2022 4:36 PM
To: Agnes Botelho; Michael Dickerson; Dickinson, Sharon; Clark, Anna; Jacobs, Krystal
Subject: Valentine Discovery

[NOTICE: This message originated outside of Eighth Judicial District Court -
- DO NOT CLICK on links or open attachments unless you are sure the content
is safe.]

All,

The judge ordered us to disclose the 2017 master list from our expert. He created the 2017 list as a separate document now instead of simply doing the analysis from the 2020 list. He shared that with me on a google drive which I put onto a CD. As for duplicates, he created a list of the duplicates on another google drive which we put onto another cd. That way the state has the 2017 master list as well as the list of names that our expert determined were duplicates. I tried to contact the State today to organize on how to deliver the discovery to them directly and they didn't answer/contact me back. It seems like the safest option to ensure discovery to the State would be to bring the two discs over to the chambers of Department 6 and then the DAs can pick that information up directly from chambers. I'd also just remind everyone that at least one disc has almost 2.6 million names and personal information of citizens of Clark County on it hence my emphasis on making sure I disclose this material directly to the specific prosecutors or through the chambers so that the material doesn't get misplaced. I'm picking up those discs from my IT department and will deliver it to chambers in about 15 minutes.

Best,

Tyler Gaston

000266

From: Tyler Gaston
Sent: Thursday, March 3, 2022 12:06 PM
To: Jennifer Georges <[REDACTED]>
Subject: FW: Keandre Valentine

From: Jacobs, Krystal <[REDACTED]>
Sent: Thursday, March 3, 2022 11:15 AM
To: Tyler Gaston <[REDACTED]>; Agnes Botelho <[REDACTED]>; Michael Dickerson <[REDACTED]>; Sharon Dickinson <[REDACTED]>; Anna Clark <[REDACTED]>
Subject: RE: Keandre Valentine

We are trying so hard --- we have an Atkins hearing that we were supposed to hear tomorrow but we had to move it. I am wtg to hear back from the State and their witness on a good date for them. As soon as I have the Atkins hearing set I'll reach out to you all to get this one set.

Thanks!
Krystal Jacobs
Dept. 6 JEA

From: Tyler Gaston <[REDACTED]>
Sent: Thursday, March 3, 2022 8:25 AM
To: Jacobs, Krystal; Agnes Botelho; Michael Dickerson; Dickinson, Sharon; Clark, Anna
Subject: RE: Keandre Valentine

[NOTICE: This message originated outside of Eighth Judicial District Court - DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

I just wanted to follow up and see if we were any closer to setting a date for the finishing of our evidentiary hearing in this case?

Tyler

From: Tyler Gaston <[REDACTED]>
Sent: Tuesday, February 15, 2022 11:55 AM
To: Jacobs, Krystal <[REDACTED]>; Agnes Botelho <[REDACTED]>; Michael Dickerson <[REDACTED]>; Sharon Dickinson <[REDACTED]>; Anna Clark <[REDACTED]>
Subject: Re: Keandre Valentine

Thanks!

From: Jacobs, Krystal <[REDACTED]>
Sent: Monday, February 14, 2022 4:27 PM
To: Tyler Gaston <[REDACTED]>; Agnes Botelho <[REDACTED]>

000267

>; Michael Dickerson <>;
Sharon Dickinson <>; Anna Clark <>
Subject: RE: Keandre Valentine

It's off calendar -- or rather, I just moved it back to 2/7. Thanks for letting us know.

Thanks!
Krystal Jacobs
Dept. 6 JEA

From: Tyler Gaston [redacted]
Sent: Monday, February 14, 2022 9:11 AM
To: Jacobs, Krystal; Agnes Botelho; Michael Dickerson; Dickinson, Sharon; Clark, Anna
Subject: Keandre Valentine

[NOTICE: This message originated outside of Eighth Judicial District Court -
- DO NOT CLICK on links or open attachments unless you are sure the content
is safe.]

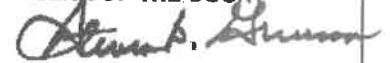
Ms. Jacobs,

I see that we have a hearing scheduled for 2/17 in Odyssey on the State's motion to strike our motion asking the Court to take Judicial Notice of our exhibits and our expert. We already argued these motions though at the evidentiary hearing. If nobody disagrees, can we vacate the court date currently scheduled for 2/17?

Thanks,

Tyler Gaston

000268



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 AGNES M. BOTELHO
6 Chief Deputy District Attorney
7 Nevada Bar #11064
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10
11 Plaintiff,

11 -vs-

12 KEANDRE VALENTINE,
13 #5090875

14 Defendant.

CASE NO: C-16-316081-1

DEPT NO: VI

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION SEEKING AN**
16 **ORDER GRANTING A NEW TRIAL BASED ON VIOLATIONS**
17 **OF DUE PROCESS, PROSECUTORIAL MISONCDUCT, AND**
18 **THE RIGHT TO A SPEEDY APPEAL AND/OR TRIAL**

18 DATE OF HEARING: May 3, 2021
19 TIME OF HEARING: 9:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through AGNES M. BOTELHO, Chief Deputy District Attorney, and
21 hereby submits the attached Points and Authorities in Opposition to Defendant's Motion
22 Seeking An Order Granting A New Trial Based On Violations Of Due Process, Prosecutorial
23 Misoncduct, And The Right To A Speedy Appeal And/Or Trial.

24 This Opposition is made and based upon all the papers and pleadings on file herein, the
25 attached points and authorities in support hereof, and oral argument at the time of hearing, if
26 deemed necessary by this Honorable Court.

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1 **I. MOTION SEEKING AN ORDER GRANTING A NEW TRIAL IS THE IMPROPER**
2 **VEHICLE TO CHALLENGE A DISCRETIONARY RULING ORDERING**
3 **DISCOVERY**

4 In his motion, Defendant argues that:

5 “Keandre’s rights were further violated by the court’s 02/07/22
6 discovery order. After Keandre’s expert testified on 02/07/22, the
7 court ordered the Defense to use the master list given to all parties
8 from the jury commissioner to create a sub-list for the prosecutor
9 to use during her cross-examination of the expert. See Exhibit E:
10 pp.165-178. The Defense followed the court’s directive but
11 objected that it was being forced to give the prosecutor its work-
12 product. See Exhibit F: Notice.”

13 Defendant’s Motion Seeking Order Granting A New Trial, p. 3.

14 Under certain circumstances, a writ of mandamus may be issued to compel the district
15 court to vacate or modify a discovery order. Okada v. Eighth Jud. Dist. Ct., 131 Nev. 834, 359
16 P.3d 1106 (2015). “[A]ny decision of the court in an intermediate order or proceeding, forming
17 a part of the record, may be reviewed” by the appellate courts. Id.; see also NRAP 3B
18 (“Appeals from district court determinations in criminal actions shall be governed by these
19 Rules and by NRS 176.09183, NRS 177.015 to 177.305”). “The correct procedure for
20 reviewing such discretionary decisions is by direct attack, by appeal” Sheriff v. Hatch,
100 Nev. 664, 666, 691 P.2d 449, 450 (1984).

21 Here, Valentine is essentially asking this Honorable Court to hear the appeal of its own
22 order directing Valentine to produce discovery to the State. Such a request is not legally
23 cogent and goes against the jurisdiction of Nevada’s appellate courts to review decisions of
24 the District Courts. This Court already heard Valentine’s objection to the discovery order. It
25 is antithetical to Nevada’s Judicial hierarchy to request this Court to review its own order.
26 Valentine confuses the proper procedures, therefore rendering his entire motion improper.

27 //

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1 **II. Motion Seeking An Order Granting A New Trial Is The Improper Vehicle To**
2 **Challenge A Discretionary Ruling To Continue An Evidentiary Due to Valentine’s**
3 **Discovery Violations.**

4 In his motion, Valentine argues that unreasonable delay in completing the evidentiary
5 hearing denied Valentine the right to a timely appeal and trial. He further asserts that:

6 “It is important to note that much of the delay in holding the
7 hearing was due to the Eighth Judicial District Court’s jury
8 commissioner delay in giving Keandre the discovery he requested.
9 Keandre began requesting discovery in March of 2020, had to file
10 a motion to compel discovery in January of 2021, and then had to
11 litigate further when the jury commissioner objected to the order
12 to compel. Also, the Eighth Judicial Court’s Chief Judge
13 transferred his case three times thereby making the setting of a
14 hearing date difficult. And Department VI took the case off
15 calendar numerous times.”

16 Defendant’s Motion Seeking Order Granting a New Trial, p. 10.

17 Here, as above, Valentine is once again improperly asking this Court to hear the appeal
18 on the various district courts’ decisions to continue the evidentiary hearing. However, a ruling
19 on a continuance is intermediate and is in no way a final disposition or judgment. See NRS
20 177.045; State v. Nelson, 118 Nev. 399, 403, 46 P.3d 1232, 1235 (2002). When a party is

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1 aggrieved by an intermediate order or judgement of the District Court, the proper interlocutory
2 remedy is a direct appeal. See id. Thus, Defendant's Motion should be denied in its entirety.

3 DATED this 3rd day of May, 2022.

4 Respectfully submitted,

5 STEVEN B. WOLFSON
6 Clark County District Attorney
7 Nevada Bar #001565

8 BY /s/ Agnes M. Botelho
9 AGNES M. BOTELHO
10 Chief Deputy District Attorney
11 Nevada Bar #11064

12 CERTIFICATE OF ELECTRONIC TRANSMISSION

13 I hereby certify that service of the above and foregoing was made this 3rd day of May,
14 2022, by electronic transmission to:

15 TYLER GASTON
16 Tyler.gaston@clarkcountynv.gov

17 BY /s/ E. Del Padre
18 E. DEL PADRE
19 Secretary for the District Attorney's Office
20
21
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27

28 AMB/ed/GCU

Almond Simon
CLERK OF THE COURT

1 ORDER
2 DARIN F. IMLAY, PUBLIC DEFENDER
3 NEVADA BAR NO. 5674
4 SHARON G. DICKINSON, CHIEF DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 3710
6 PUBLIC DEFENDERS OFFICE
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 dickinsg@clarkcountynv.gov
12 *Attorneys for Defendant*

13 DISTRICT COURT
14 CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,)
16 Plaintiff,)
17 v.)
18 KEANDRE VALENTINE,)
19 Defendant,)

20 CASE NO. C-16-316081-1

21 DEPT. NO. VI

22 DATE: May 3, 2022
23 TIME: 9:30 a.m.

24 **ORDER DENYING MOTION SEEKING AN ORDER GRANTING A NEW**
25 **TRIAL BASED ON VIOLATIONS OF DUE PROCESS, PROSECUTORIAL**
26 **MISCONDUCT, AND THE RIGHT TO A**
27 **SPEEDY APPEAL AND/OR TRIAL**

28 THIS MATTER having come before the Court on May 3, 2022, and
29 good cause appearing therefor,

30 IT IS HEREBY ORDERED that the Motion Seeking an Order
31 Granting a New Trial Based on Violations of Due Process, Prosecutorial

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000273

1 Misconduct and the Right to a Speedy Appeal and/or Trial is denied based on the
2 reasons announced by the Court at the May 3, 2022, hearing.

3 DATED ____ day of May, 2022.

Please refer to transcript, once
one is prepared, for details of the
court's ruling.

4 Dated this 18th day of May, 2022

5
6 
DISTRICT COURT JUDGE

7 Submitted by:

8 DARIN F. IMLAY
9 CLARK COUNTY PUBLIC DEF.

45A 98815 F2C 19 F27A
10 Jacqueline M. Bluth
11 CLARK COUNTY PUBLIC DEF.
District Court Judge

12 By /s/Tyler C. Gaston
13 TYLER C. GASTON, #13488
14 Deputy Public Defender

15 By /s/ Sharon G. Dickinson
16 SHARON G. DICKINSON, #3710
17 Chief Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing COURT ORDER was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountyda.com on this _____ day of May, 2022

By: /s/Carrie M. Connolly
An employee of the
Clark County Public Defender's Office

Case Name: Keandre Valentine

Case No.: C-16-316081-1

Dept. No.: VI

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2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

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6 State of Nevada

CASE NO: C-16-316081-1

7 vs

DEPT. NO. Department 6

8 Keandre Valentine

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DISTRICT COURT
CLARK COUNTY, NEVADA

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STATE OF NEVADA,

CASE NO. C-16-316081-1

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Plaintiff,

DEPT. VI

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vs.

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KEANDRE VALENTINE,

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Defendant.

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BEFORE THE HONORABLE JACQUELINE M. BLUTH, DISTRICT COURT JUDGE
TUESDAY, MAY 3, 2022

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15

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:
MOTION SEEKING AN ORDER GRANTING A NEW TRIAL BASED ON
VIOLATIONS OF DUE PROCESS, PROSECUTORIAL MISCONDUCT, AND THE
RIGHT TO A SPEEDY APPEAL AND/OR TRIAL**

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APPEARANCES:

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For the State:

AGNES M. BOTELHO, ESQ.
Chief Deputy District Attorney

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For Defendant:

SHARON G. DICKINSON, ESQ.
Public Defenders Office

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RECORDED BY: DE'AWNA TAKAS, COURT RECORDER

1 Tuesday, May 3, 2022, Las Vegas, Nevada

2
3 [Proceedings began at 10:51 a.m.]

4 THE COURT: -- Keandra Valentine, C316081. Mr. Valentine is
5 presenting, in custody. Ms. Dickinson present on his behalf. Mr. Raman present --
6 or no, sorry, Ms. Botelho present on behalf of the State.

7 All right guys so let's -- I guess, Ms. Dickinson's I'll just turn it over to
8 you and let you start. I did have the opportunity to read the State's opposition that
9 was filed, I can't remember if it was last night or this morning, but I know I've had
10 the opportunity to read it so.

11 MS. DICKINSON: Your Honor, before I start, I'd like to make the CDs
12 that we gave to the Court and had Ms. Botelho pick-up from the Court part of this
13 his record. I believe that Mr. Gaston had given the Court two copies, one was for
14 the Court, we're not sure if it had been made a court exhibit at any time so I
15 brought two extra copies that Mr. Gaston gave me. We'd like for it to be an exhibit

16 --

17 THE COURT: Sure.

18 MR. DICKINSON: -- for this motion and Ms. Botelho would still have it.
19 If I could approach?

20 THE COURT: Yes. Whoever. So those will be court's exhibits 1 and 2.

21 MS. DICKINSON: Your Honor, if I understand Ms. Botelho's motion
22 correctly, she's not objecting to any of the facts that I put in our motion seeking a
23 new trial. She's objecting to procedure. She says that what we're really doing is
24 asking this court to rule as an appellate court. And that's not what we're doing. We
25 filed a motion seeking a new trial, which is what the Nevada Supreme Court

1 allowed us to do when we were remanded more than two years ago. We we're
2 going to have an evidentiary hearing, and we still have not completed that
3 evidentiary hearing, and even today, we do not have a date to complete it.

4 Mr. Valentine is sitting in custody just in limbo without a court date. So
5 we brought this motion based on the cumulative effects of what occurred during
6 the two period. And we're asking the Court to just give us a new trial based on
7 violations of due process, prosecutorial misconduct, his right to a speedy appeal
8 and right to a trial. As the Court knows depending on the Court was going to rule
9 on the evidentiary hearing, either he was going to get a new trial or we would have
10 to start more appellate process.

11 THE COURT: Right.

12 MS. DICKINSON: As long as we're in limbo, none of that can happen.

13 THE COURT: So I just wanna stop you for a second because I have a
14 few questions.

15 MS. DICKINSON: Sure.

16 THE COURT: So, I mean, obviously I can't really control -- I recognize
17 I can rule on things, but I can't control what happened before it got to me. I mean I
18 think we all agree with that. But in complete candor, I do feel like it's a bit
19 disingenuous to act like this Court has been dragging its feet, or has taken an
20 evidentiary hearing off calendar multiple times. I went back -- my staff went back
21 and went through, every time we have canceled something, it has actually been a
22 status check. We have never canceled the evidentiary hearing. We have
23 cancelled status checks to see where the parties are at and the scheduling of an
24 evidentiary hearing. But between September of 21 and March 3rd, we stopped
25 counting at 22 e-mails between the Court and the parties in trying to get dates that

1 the parties would agree on.

2 So that's why I'm having a little bit of a difficult time with this motion.
3 To act like -- quite honestly I have not bent over backwards for both the defense
4 and the State in trying to make -- sure that each of you have had the discovery,
5 each of you had the opportunity to be prepared, and walk into this courtroom and
6 have an evidentiary hearing, I have even allowed this hearing to go beyond the
7 parameters that the supreme court is allowing it. And I explained to the parties that
8 the only reason I'm doing that it is because I'm trying to save time because I can
9 see if we -- if I don't allow it beyond the parameters it's going to go back up, it's
10 going to get remanded for me to go beyond the parameters of the original order.
11 And so it was really hard for me to stomach this motion acting like this Court has
12 ever tried to not work with the parties in getting Mr. Valentine his hearing.

13 Now, if you wanna talk about, you know, you feel like the Discovery
14 Commissioner drug their feet, or -- but every single time this case has been on it's
15 only been on for resetting to the hearing and we have, again, over 22 e-mails with
16 the parties trying to get you guys to get dates that you agree. And so it's -- that
17 was really frustrating to read I have to be quite honest.

18 MS. DICKINSON: Your Honor, this motion was not meant to blame
19 this Court. This motion was meant to outline two years of what occurred. In fact, I
20 say from March of 2020 to March 2021 the difficulties resulted from the jury
21 commissioner not giving us the items we needed. In fact, as the Court knows we
22 had to file a motion to compel. So I have included that as the first problem.

23 The second problem did not have to do with this Court; it had to do
24 with our case being switched around to different courts. And I know, Your Honor,
25 doesn't have control over that, we don't have control over that, but that made a lot

1 of confusion occur because we went to three different courts.

2 THE COURT: Right.

3 MS. DICKINSON: The part that talks about when things were taken
4 off calendar that was the only the part that would refer to this specific Court.

5 THE COURT: I just want it to be clear thought, I mean I can print out
6 the e-mails, it's not like hey it was just taken off calendar and Mr. Valentine's just
7 going float in abyss of nothingness. It was the parties are constantly working
8 together trying to work out dates. And, I mean, I think we can all be quite honest,
9 the parties do not agree on, basically, anything; right? It's pretty contentious. And
10 so working on trying to get either discovery to one side of you or the other one of
11 you or picking dates, it's been difficult. And that's what I'm trying to say. Is, like, I
12 feel like, especially my JEA, I feel like she is turning her wheels like trying to get
13 everybody to get a date.

14 Listen I want this hearing to go forward. I understand it is a long
15 process. I understand why you filed the motion. I just want always the record, to
16 be, you know, completely clear, especially on something that I think is going to be
17 looked at with a fine toothcomb because of the process of this case, or the
18 procedure of this case thus far. And so that's why I'm kind of being a stickler in
19 regards the record being laid of what this department is trying to do and having a
20 multiple day hearing.

21 What I -- and I'll you put anything else on the record. I would like to
22 turn more to the discovery aspect of it and the expert. But if there is anything you'd
23 like to say, and of course, I'll give Ms. Botelho an opportunity to respond. Is there
24 anything else you wanted to say in regards to the timing aspect of it?

25 MS. DICKINSON: Your Honor with regard to the e-mails between all

1 the parties and the Court, I'm not aware of 21. I'm sure the Court is accurate
2 between all the parties. I know that any time the Court ask me to e-mail, I did. And
3 I know the same thing with Mr. Gaston, he did. And when we did not hear back,
4 and we know the Courts busy, he e-mailed again. And so we were not getting a
5 date. And so I filed this motion -- we filed this motion because of that. So we're not
6 saying that the Court has delayed it for two -- this particulate Court has delayed it
7 for two years, were concerned about that process.

8 THE COURT: Okay. Let me hearing from Ms. Botelho in regards to
9 the timing part. Ms. Botelho.

10 MS. BOTELHO: Yes Your Honor. I know you had an opportunity to
11 read my opposition. And it is an opposition not so much on the merits; I can
12 respond on the merits if the Court would like; however, I just think it's improper.
13 Even though Ms. Dickinson said this morning that she doesn't take issue with
14 Your Honor necessarily, or your conduct, I think that's belied by the allegations in
15 their -- actual motion, the one that was filed April 20th of 2022.

16 Really in my opposition I parsed out the two the main issues that they
17 are, you know, noting as the basis for Your Honor granting or seeking an order
18 granting a new trial. The first was in regard to the discovery violation or the
19 discovery order. And that is a decision Your Honor made in the middle of our
20 February 7th, 2022 evidentiary hearing wherein, number 1, you found them in
21 violation of the DETR -- of your order from, I believe, it was a month prior or two
22 months prior where you ordered them to turn everything over to me, drop dead
23 deadline I believe was somewhere January 13th or shortly after the -- December
24 3rd, 2021 evidentiary hearing. So think it was like December 13th, 2021 the drop
25 dead deadline. You did find them in violation, but you ruled at that time, even after

1 Mr. Gaston indicated that they didn't have any sort of physical evidence to give to
2 the State concerning the DETR record, and, you know, two or three pages past
3 the transcripts their own expert said, hey I do have these graphs, I do have, you
4 know, these numbers, I did have something printed. You found them in violation.
5 However, you ruled that hey -- I mean how can we have an evidentiary hearing if
6 they don't get the DETR records in? I think the -- this Court recognizes, you know,
7 that at some point we need to have this evidentiary hearing and I -- you are in a
8 sticky predicament, because while you find them in violation it needs to go
9 forward.

10 And so I will agree with the Court you have been just trying to balance
11 all of these interest with giving us an opportunity to properly cross-examine and
12 have access to the underlying data, which is the crux of this case when we're
13 taking about absolute disparity etcetera etcetera. And I think you made it so clear
14 from the December 3rd, 2021 hearing to the February 7th, 2022 hearing, the
15 transcripts are available for both of those dates.

16 You wanted this evidentiary hearing to go forward, sooner rather than
17 later. I believe in the December evidentiary hearing, Your Honor indicated that it
18 made you super nervous that we were, you know, a year almost two years in and
19 this evidentiary hearing -- hadn't been had. I think the Court was frustrated the
20 same way the State was with the discovery issues that arose not just in December
21 but also in February. We have to recognize that the reason the evidentiary hearing
22 could not be completed in February was because the Court did order them to
23 disclose, again, the Court ordered them again, because you did that in an actual
24 written order that they turn over the underlying data concerning Mr. Martin's
25 testimony.

1 And I think the defendant's motion is inaccurate in its depiction of your
2 order. While there was not a new list recreated, certainly there was this underlying
3 data, or underlying data consisting of a list which included or excluded certain
4 people, and from the 2020 list and compiled and actually compiled the data which
5 would've been the most consistent with what they believe the 2017 master list to
6 be. That's what the State wanted. That's what the State has been asking for all
7 this time. You recognized that, because that's how the math computation is -- you
8 know that's the basis of all of the math and in the disparity calculation, which are
9 at the heart of this hearing.

10 And so essentially though what the defense is asking you to do, you're
11 the one who issued that discovery order, you're the one who, you know, told them
12 that they had to disclose these items to us, in fairness in a written order and orally
13 during the hearing. And so what they're asking you to do in this motion is grant a
14 new trial which they just -- Ms. Dickinson just admitted can't be granted until the
15 evidentiary hearing is to be had. I mean that's directly what the Nevada Supreme
16 Court argued -- or remanded this case for. We have to have this evidentiary
17 hearing. If you find some sort of, you know, violation then yes they get a new trial.
18 If you don't, you reinstate the judgment of conviction and we move on and they
19 can start this appellate process again.

20 And so they're asking you, Your Honor, basically to review your own
21 decisions and either reconsider, or on the case of the continuances, or the fact
22 that its lasted two years, basically to review the record and all of the actions from
23 the, you know, the jury commissioner, from the other district courts, and reverse
24 yourself when you granted the continuance. The very limited continuances that
25 you have had to grant, this department, department 6, you Judge Bluth, they're

1 asking you to overruled, or reverse, Judge Holthus, Judge Scotti, you know, any
2 other judge who has had this for a short period of time and has had to move it,
3 you're -- they're asking you to review you own decisions and then reverse yourself
4 and then go against the Nevada Supreme Court's remand order and just say, you
5 know what the heck with the evidentiary hearing that we have -- worked so hard to
6 find -- to have, and let's just set if for a new trial, you know?

7 They even acknowledge in their own motion, Your Honor, that a lot of
8 the continuances don't even have anything do with the State. They don't have
9 anything do with the Courts. And if you look at a bunch of the e-mails it was
10 rescheduled, and status checks were moved, because the defense was not
11 available for whatever reason or whatever date. And so I mean, you're in the
12 homicide division, you're handing -- you're in trial all the time. You have these
13 hearings. The nature of this particular hearing involves setting aside an entire day,
14 not just for actual testimony but just for arguments. And so I too think it's
15 disingenuous.

16 A lot of what was stated here, you know, all though factually correct,
17 you know, on page 8 they say, well the continuances due to obtaining, you know,
18 discovery from the jury commission. But yet they're asking you, you, even though
19 all of the record even by their own motion indicates that there wasn't even any
20 kind of bad faith conduct by anyone in trying to have this. Certainly there was not
21 bad faith or any kind of improper conduct by the State. I'm on record objecting and
22 asking them to -- or asking Judge Scotti, or Judge Eller at the time, for the short
23 that she had it, that we need to have this evidentiary, you know, hearing sooner
24 rather than later. I think when we appeared before you in December the State
25 indicated, look we have victims, were -- if we're gonna have to try this case again

1 we would be prepared to do it, but we want to go forward sooner rather than later.
2 We do have some elder victims that we would like to, you know, be able to
3 present in the event of a new trial.

4 And so really if you read through, you know, this motion and I
5 responded and opposed the way that I did, because procedurally they're in
6 correct. You don't ask the judge who decided to grant a continuance or the judge
7 who -- ordered discovery to review your own decisions and your own orders,
8 reverse it, and then, you know, go to this extreme remedy of granting a new trial. I
9 mean, Ms. Dickinson should know, she's part of their appellate division and she
10 deals with this, that this is the improper vehicle. If they have a problem with Your
11 Honor's decisions or with the other district courts decisions that's what the
12 appellate court is for, and that's why I objected procedurally. If I have to, you
13 know, respond on the merits, I can certainly can do that, but you know what that
14 would consist of, just attaching the transcripts from December 3rd, 2021 and
15 February 7th of 2022. We were all there. We know why that had to be continued.
16 We know what caused those issues and the frustrations from all sides really.

17 And so this is an improper vehicle. The very nature -- even the labels
18 wrong. I mean, I didn't see anything which indicated, you know, any kind of
19 prosecutorial misconduct in their pleadings so I would ask that that actually be
20 stricken from the title of their motion because I couldn't see where it was -- where
21 it's alleged that we violated any kind of, you know, ethical obligation or that the
22 State acted improperly. We asked for discovery we believed was right, which we
23 believed should have been turned over to us. And Your Honor agreed the
24 transcript is there. The basis of Your Honor decision is plain as day on -- words on
25 paper. And so I don't -- I don't understand where this is coming from. I don't

1 understand why they're coming at this in this way. And that's the basis of our
2 opposition.

3 THE COURT: Ms. Dickinson.

4 MS. DICKINSON: Your Honor I begin by saying that there were so
5 many inaccuracies in some of the statements that she made with regard to factual
6 accessions that I was not able to keep up with them. If Court wants me to address
7 that I would need a transcript and go line-by-line.

8 However, I want to point out a couple things. She again claims a
9 discovery violation and that was the reason for the continuance of the hearing.
10 That's not exactly what occurred, we ran out of time. And the court was going to
11 continue the hearing for her cross-examination. And then she stood up and asked
12 for additional information and we object and the Court ordered us to give it to her.
13 So for her to come in and say there was a discovery violation that required the
14 continuances was -- is inaccurate.

15 With regard to all the transcripts, I think I attached all those to my
16 motion. I think they're all part of this record. She didn't cite to any transcripts for
17 any of these facts that she's saying in her motion. In fact, my understanding is that
18 because she didn't this Court may go ahead and disregard her arguments.
19 Nevada Rules of Criminal Procedure 8 subsection 4 subsection b requires that the
20 party file written opposition within 10 days. Well this was 11 days, it was close. But
21 if the Court looks at *Polk vs. State*, 126 Nevada 180, *Polk* says that when the
22 State fails to address every issue raised, and it's an important issue we raised,
23 some important issues here, the Court may construe that as being a concession.
24 And so I would ask the Court to consider that.

25 But I will go ahead and address some of her statements. She indicates

1 that she does not see anywhere in here where we discussed prosecutorial
2 misconduct. We discuss it on page 5 and 6 when we talk about us having to have
3 our expert put together two CDs for her to look at and we argued that she
4 shouldn't have even asked for them. She had the opportunity to hire her own
5 expert to go ahead and do whatever she wanted with the master list. She has had
6 the master list for, I think, almost a year if not more now, and she hadn't done
7 anything with it as of February.

8 With regard to her saying this is an improper vehicle, this motion. The
9 cases she cites *State vs. Nelson* and *Sheriff Clark County vs. Hatch* have nothing
10 to do with what she's arguing they have to do with pretrial writs of habeas. And
11 she's arguing for the Court to rely on those today that this improper. She hasn't
12 presented the Court with any authority to show that this is improper. So I think that
13 argument should fail.

14 As I said this has been a two year process. We have done everything
15 we could to push the process through. And I realize part of it happened before this
16 Court was ever involved. And it's not this Courts fault that it was transferred and
17 then ended up here.

18 THE COURT: Can you help me out though because I am trying to
19 understand the -- listen I don't ever want either side to ever feel like or be told they
20 have to give up privilege work product. That's never my goal. And I think I've in I
21 think words for the prosecutor are quite fair in that I really have been trying my
22 best to balance for each side in both sides coming in here and feeling like they
23 have what they need and feeling like they're prepared. What I was trying to do
24 with the list is I really feel like a clear record needs to made on this evidentiary
25 hearing in regards who had which documents, what list everybody was working off

1 of, and when we got in to that hearing and really got in to the weeds of that list, it
2 became apparent to me, you know, even as the judge taking copious notes on it,
3 how difficult it was to follow each of the points that the experts was going through
4 and that's why if he was working off a different list, or if he was able to minimize
5 the list like he said, you know, there were certain duplicates to me that didn't seem
6 like work product it seemed like how would the State ever be able to, you know,
7 work on -- even understanding where he was coming from without having that list.
8 So I would like to just hear from you on the specific point of this is why we feel like
9 it's privileged, this is why we feel like it's work product, and they shouldn't have
10 been entitled to it.

11 MS. DICKINSON: Your Honor, both sides received the same list, --

12 THE COURT: Right.

13 MS. DICKINSON: -- the master list. We hired an expert, the State
14 didn't. Our expert went in and he went through this list, which is all electronic, and
15 he was able to determine through the records that we were giving, and we gave
16 the State all of the other records also, where it is likely the master list would have
17 been at the time the summons were sent out. He didn't create a report. He didn't
18 create a separate list. He didn't do any of that. He was just able to -- this electronic
19 version of his -- whatever he did, determine that. He also went through and looked
20 through duplicate names.

21 THE COURT: Right.

22 MS. DICKINSON: So the reason we ended up giving you two CDs
23 rather than one, is based on what the Court said to him, he thought the Court
24 would want to know what the duplicates were. So that's why we have two CDs.

25 So one is, basically, okay here's where I did the cut off -- I'm being

1 very simplest.

2 THE COURT: I know.

3 MS. DICKINSON: Here's where I did the cut up on what everybody
4 has. Now I went through in there and I found duplicates. So he created a separate
5 CD based on what he thought the Court wanted, 'cause the Court wanted to know
6 well what did you end up working off of.

7 THE COURT: Right.

8 MS. DICKINSON: And duplicates would need to be removed, so
9 that's what we ended up with. So why is it privilege? It's privilege because we're
10 paying this expert to go ahead and give us advise and look at things and now
11 we're telling him now you need to go back and create something so that physical
12 thing that you're creating is giving to the prosecutor to make it easier for her, you
13 know, for cross-examination so she could use that against you. She could've had
14 her own expert. She chose not to. She could've asked these questions on cross-
15 examination. We haven't gotten there yet, you know, we're still sort of in limbo.

16 THE COURT: Sure.

17 MS. DICKINSON: So our expert did the best he could thinking of what
18 the Court wanted. So I would compare it to an expert being required to write a
19 report that the State could then use against him when he crosses -- when he's
20 being cross-examined. And that again is a simple way of looking at it. So he was
21 required to create something that wasn't in existence at the time, and we did it.
22 We felt that's privileged. She could've asked him cross-examination; he could've
23 said here's my cutoff date. She could've went from there. We had a lot of
24 discussion about duplicates, and that was why he did the duplicate CD thing. She
25 could've asked about that. So we feel it's privilege. 'Cause we are trying -- 'cause

1 basically we feel we are trying to give them ammunition against us. So you can
2 use it.

3 THE COURT: Sure. I --

4 MS. DICKINSON: Or against our expert.

5 THE COURT: Sure, yeah. Let me ask you though, and I -- on black
6 and white this may come off as like me being -- sardonic and I'm actually asking
7 with -- honestly, if you do think I'm wrong on this discovery issue why not do a stay
8 or take me up on that?

9 MS. DICKINSON: That would be the next step.

10 THE COURT: Okay. All right.

11 MS. DICKINSON: That would be the next --

12 THE COURT: Yeah, I mean, --

13 MS. DICKINSON: I mean --

14 THE COURT: -- I just wanted to know. And I see your -- first you're
15 saying, hey were going to give, the Court, we're gonna give you the opportunity to
16 --

17 MS. DICKINSON: Right.

18 THE COURT: -- you know, rectify this.

19 MS. DICKINSON: Right.

20 THE COURT: But I'm not going to change my mind on that just
21 because I have been clear to both sides multiple times. I, you know, did written
22 order in regards discovery. I want everybody to be on the same field in regards to
23 having access to this information so that we can have a full and through hearing. I
24 recognize that you disagree with me on that, and I think that at this point and time
25 at this juncture if you think, you know, I'm totally wrong about it I think that the

1 proper thing to do is to probably take up and see if I'm right or if I'm wrong on it.

2 In regards to procedurally moving it forward I am happy -- we can set it
3 right now if you guys want. I think its best probably to set it on a Monday, because
4 that way I really have been -- I came on homicide in I think late August, I have
5 been in -- just this year alone I think I'm already in my 7th trial, and it's May. So I --
6 if we get it on a Monday, hopefully, I won't have a trial starting till that Tuesday
7 and then I can give you guys that entire day. What I am going to say though is in
8 regards to argument because it's a multiday hearing and because I have so many
9 notes on it, I will -- I'm going to have arguments submitted in writing with a 30
10 page limit, excluding exhibits, only because that will make it much easier for me to
11 digest all of the information. So I just need to know how much time we need for
12 the rest of the hearing knowing that arguments will not be done on that day. So
13 from -- on your behalf Ms. Dickinson what would do -- what would you gauge
14 timewise?

15 MS. DICKINSON: Your Honor, I'm not doing -- I'm doing part of the
16 hearing, but not all of it --

17 THE COURT: Right.

18 MS. DICKINSON: -- and Mr. Gaston is not here. I do believe that he
19 would like to do some more direct examination on Mr. Martin because we have
20 this new issue --

21 THE COURT: Sure.

22 MS. DICKINSON: -- that came up. So I think he would want to lay a
23 record on that. I --

24 THE COURT: Basically I should ask, do we need a half or full day, is
25 really --

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MS. DICKINSON: I guess you'll have to ask Ms. --

THE COURT: Ms. --

MS. DICKINSON: -- Botelho.

THE COURT: -- Botelho?

MS. BOTELHO: Your Honor, I understand that ultimately, you know, our arguments are going to in writing, but to allow for time because, you know, issues keep getting raised, I would ask for a full day.

THE COURT: Okay.

MS. BOTELHO: I do anticipate being in trial on State vs. Michael Solid (phonetic) the week of the 16th of May and the 23rd as well. It's a two week trial.

THE COURT: Okay. I was looking at -- I wanted to know how the parties felt about June, I think its 5th that I was looking at. Let me look real quick. That's a Monday.

[Colloquy between The Court and The Court Staff]

THE COURT: How does everybody look on June 6th?

MS. DICKINSON: Your Honor, our expert is not available on that date, but he would be available on the 13th.

[Colloquy between The Court and The Court Staff]

THE COURT: I could do -- what about May 31st that's a Tuesday -- Tuesday, May 31st or we'll have to go to Monday, June 20th?

MS. DICKINSON: He is not available May 30th through June 10th. So he would not be able to do the 31st. So you said June 20th? He would be available on June 20th.

THE COURT: Yeah.

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[Colloquy between The Court and The Court Staff]

THE DEFENDANT: Excuse me, Your Honor.

THE COURT: What Mr. Valentine?

THE DEFENDANT: When I get a chance, can I say something?

THE COURT: Yeah, of course.

[Colloquy between The Court and The Court Staff]

THE COURT: Go-ahead Mr. Valentine.

THE DEFENDANT: [indiscernible] you know I've been down a very long time.

THE COURT: I know.

THE DEFENDANT: I'm trying -- if it's possible that I can get like a settlement conference or something settle out on deal or something? I've been here 6 years. I'm trying to go to back to prison.

THE COURT: I know. I know. I know. To be fair I do feel like -- I'm just hoping that Mr. Valentine and -- defense has been in contact -- been in communication. Because when he -- every time he has been here, he has been quite frustrated with the process and, you know, ultimately I know that you have spoken with him but it -- and I imagine that it's his decision to settle, to -- I mean, he's frustrated with the appellate process which I understand.

MS. DICKINSON: Your Honor, my understand -- well what happened previous to coming to this Court, is when we were in Judge Holthus courtroom and she actually had us all trying to settle it, and we had meetings. He has made some offers, and they have all been rejected by the State.

THE COURT: Okay.

MS. DICKINSON: So I've -- the State is well aware -- I even prepared

1 a plea agreement at one point, I think it was a year ago, and submitted it in trying
2 to settle this before we even had hearings.

3 THE COURT: Okay.

4 MS. DICKINSON: And it was ignored. I never got a response --

5 THE COURT: Okay.

6 MS. DICKINSON: -- except when we were in front of Judge Holthus
7 and my understanding was we were rejected. I mean if Ms. Botelho wants to
8 reopen the discussion we are more than happy to do that.

9 THE COURT: Okay.

10 MS. DICKINSON: But we want to get the date set.

11 THE COURT: Agreed. So why don't we do this, June 20th is the date
12 for the hearing at 8:30. Ms. Botelho if there is a offer, or if there is a request for a
13 settlement conference, if you could just let defense know or you could e-mail my
14 JEA, cc defense; however I'll leave that between the parties, of course I don't want
15 to get involved, 'cause I don't think it's appropriate.

16 I understand why you're frustrated. I'm really trying to get this case
17 moving as fast as we possibly can. That's why I'm going to set that for June 20th.
18 In the interim maybe you guys settle it, maybe you don't. June 20th we have that
19 hearing. Then the parties are going to submit their arguments. And then I am
20 either ordering a new trial or I'm ordering that it's stands as is; okay?

21 THE DEFENDANT: I got you.

22 THE COURT: So I feel like there's light at the end of the tunnel.

23 THE DEFENDANT: Okay.

24 THE COURT: All right?

25 MS. DICKINSON: Your Honor, if I could just say one more thing? Mr.

1 Gaston and Ms. Stone who were doing the evidentiary are not here today in court
2 --

3 THE COURT: He's what?

4 MS. DICKINSON: Mr. Gaston is not here.

5 THE COURT: Yeah.

6 MS. DICKINSON: So I need to check with him to make --

7 THE COURT: Sure.

8 MS. DICKINSON: -- sure he's available --

9 THE COURT: So just check--

10 MS. DICKINSON: -- for that June 20th.

11 THE COURT: -- with him. If not then call or e-mail me and then we'll --
12 figure it out.

13 MS. DICKINSON: And, Your Honor, I was gonna submit an order and
14 an order for the transcript if the Court would be inclined. The order will just say you
15 denied our motion. I assume that's what you did?

16 THE COURT: Yeah, yes.

17 MS. DICKINSON: And based on all the arguments you heard --

18 THE COURT: Yes.

19 MS. DICKINSON: -- today.

20 THE COURT: So you -- did you want a copy of the transcript, is that
21 what you're saying? You would like the transcript?

22 MS. DICKINSON: Yes, I need the transcript.

23 THE COURT: Okay so we just have to an order served on my
24 recorder.

25 And just so we're clear, yes I am denying it. Like I stated I think there

1 have been many -- there are many reasons on both sides, defense has asked for
2 continuances, State has asked for continuances, defense has objected, State has
3 objected, we had Covid, I have been working with the parties, I've done half of the
4 evidentiary hearing, now I'm waiting for the other -- we're going to do the other half
5 on June 20th.

6 As far as the protected work product, listen, I have said over and over
7 again to both parties I want everybody to have access to all the information that
8 they need in order to present a full case so that the Court can have a complete
9 understanding. I understand that the defense disagrees with me in regards to that,
10 and like I stated I'm never offended if they think I'm wrong to take me up and then
11 we'll get a clear ruling from the supreme court, but that will be my order.

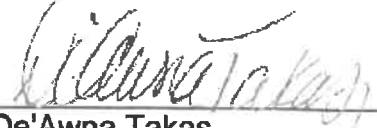
12 MS. DICKINSON: Thank you.

13 THE COURT: All right?

14 [Proceedings concluded at 11:27 a.m.]

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video proceedings in the above-entitled case to the best of my ability.

23 
24 De'Awna Takas
25 Court Recorder/Transcriber



BREF

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

KEANDRE VALENTINE,

Defendant.

CASE NO. C-16-316081-1

DEPT. NO. VI

**BENCH BRIEF FOR EVIDENTIARY HEARING BEING HELD ON 12/03/21:
DOCUMENTS SHOWING THE HISTORY OF MUNGAI**

COMES NOW, the Defendant, KEANDRE VALENTINE, by and through his attorneys, TYLER C. GASTON and SHARON G. DICKINSON, Chief Deputy Public Defenders, and submits this Bench Brief containing the documents and history of the fair cross-section litigation in Mungai, District Court Case C30675 and Nevada Supreme Court Case 75247.

DATED this 3rd day of December, 2020.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Tyler C. Gaston
TYLER C. GASTON, #13488
CHIEF DEPUTY PUBLIC DEFENDER

By: /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
CHIEF DEPUTY PUBLIC DEFENDER

COURT EXHIBIT

MUNGAI – DISTRICT COURT C30675; NEVADA SUPREME COURT NO.
75247

1. Order of limited remand from NSC to District Court on 03/06/20
2. Evidentiary Hearing in District Court held on 04/08/21
3. Findings of Fact and Conclusions of Law filed on 04/20/21
4. Nevada Supreme Court's Decision filed on 09/28/21
5. Remittitur issued and case closed in the Nevada Supreme Court filing on 11/04/21

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ALPHAXARD MUNGAI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75247

FILED

MAR 06 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF LIMITED REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault with use of a deadly weapon and battery resulting in substantial bodily harm constituting domestic violence. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Appellant James Alphaxard Mungai argues the district court erred by denying his fair-cross-section challenge without conducting an evidentiary hearing. A defendant "is entitled to a venire selected from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution." *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). In *Williams*, this court held that a defendant may establish a "prima facie violation of the fair-cross-section requirements" by showing

(1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 940, 125 P.3d at 631 (emphasis omitted) (internal quotation marks omitted).

Here, Mungai objected to the 65-person venire based on an alleged violation of his fair-cross-section right because African Americans were not fairly and reasonably represented. The district court, relying on its recollection of prior testimony from the jury commissioner in another case, denied Mungai's request for a new venire and his subsequent request for an evidentiary hearing based on the systematic exclusion prong. Mungai then alleged the underrepresentation was caused by systematic exclusion because the system sent out an equal number of summonses to citizens located in each postal ZIP code, when minority populations were not equally distributed among ZIP codes. The district court then stated it would consider having the jury commissioner testify anew, which never occurred.

Mungai contends this constitutes structural error that warrants the reversal of his conviction. *See Buchanan v. State*, 130 Nev. 829, 833, 335 P.3d 207, 210 (2014) (reversing the defendant's conviction based on the appearance of judicial bias when the trial court "predetermined the [fair-cross-section] challenge"). We disagree. While the district court stated it would consider holding an evidentiary hearing, the record lacks an express finding that one was warranted. Thus, the record does not show the same appearance of judicial bias that we disapproved of in *Buchanan*.


We conclude, however, that the district court abused its discretion by denying Mungai's fair-cross-section challenge without holding an evidentiary hearing. *See Valentine v. State*, 135 Nev., Adv. Op. 62, 454 P.3d 709 (2019). Considering the third prong of a prima facie fair-cross-section violation, the district court found that the underrepresentation was

not due to systematic exclusion based on prior testimony from the jury commissioner. In *Valentine*, we explained that a district court's reliance on outdated evidence was misplaced. *Id.* at 715 n.3. Here, it does not appear the prior testimony referenced by the district court addressed Mungai's specific allegation of systematic exclusion—the ZIP code argument. Also, legislative amendments regarding the juror selection process took effect before Mungai's trial, rendering the prior testimony outdated. Therefore, we remand this matter to the district court for the limited purpose of conducting an evidentiary hearing with respect to Mungai's fair-cross-section challenge.¹

The district court shall have 90 days from the date of this order to conduct the evidentiary hearing and enter its written findings of fact and conclusions of law. The district court clerk shall transmit the written order to the clerk of this court within 7 days after it is entered.

It is so ORDERED.

Pickering

 , C.J.


Gibbons


Parraguirre

cc: Hon. Susan Johnson, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹We retain jurisdiction over all other issues raised in this appeal and defer ruling on those issues pending the district court's decision on remand.

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

JAMES ALPHAXARD MUNGAI,
Defendant.

CASE NO: C-15-306725-1
DEPT. XXIII

BEFORE THE HONORABLE JASMIN LILLY-SPELLS, DISTRICT COURT JUDGE

THURSDAY, APRIL 8, 2021
**RECORDER'S TRANSCRIPT OF HEARING RE:
EVIDENTIARY HEARING**

APPEARANCES:

For the State:

ALEXANDER G. CHEN, ESQ.
Chief Deputy District Attorney

For the Defendant:

NADIA HOJJAT, ESQ.
Deputy Public Defender

RECORDED BY: MARIA GARIBAY, COURT RECORDER

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1 **Las Vegas, Nevada; Thursday, April 8, 2021**

2 [Proceeding commenced at 1:40 p.m.]

3
4 **THE RECORDER:** State of Nevada versus Mungai, James
5 Alphaxard. Case number C306725.

6 **MS. HOJJAT:** Good afternoon, Your Honor. Nadia Hojjat,
7 number 12401 on behalf of Mr. Mungai. He has not been transported
8 to the courtroom; he is present via the television. This was a case
9 where we had previously made a record about the fact that due to the
10 adversarial nature of this proceeding, due to the fact that this is a
11 hearing that is actually technically, I think, a trial hearing, because it
12 was a hearing that should have happened during trial, that we do need
13 his physical presence. And so, at this time they didn't transport him.
14 I'm prepared, like I'm ready to go forward, but I do believe that it
15 deprives him of his right to be present pursuant to the United States
16 and Nevada Constitutions to not have him in the courtroom able to
17 consult with me during his hearing.

18 **THE COURT:** Mr. Chen, any response?

19 **MR. CHEN:** I don't have a position on this, thank you, Your
20 Honor.

21 **THE COURT:** Thank you.

22 So, I completely understand the Defense's perspective and
23 ideally we would have him present in the courtroom with a number of
24 situations. The timing of this motion, the remand from the Supreme
25 Court, the deadline in which the Motion and the Order has to be done,

1 the number of continuances, and quite frankly, the limit upon the Court
2 with COVID. It simply would not be possible for him to be present. The
3 only other -- the best case scenario with the options that we have right
4 now, would be that he was transported to Lower Level, and honestly
5 until about 12:50, when they came to get me, we thought that we were
6 going to Lower Level and found out that Lower Level had --

7 MR. CHEN: Veteran's Court.

8 THE COURT: --some --exactly. Veteran's Court, and so that
9 spot was taken. Even there, he would be behind the glass, not next to
10 you. So, what we can do is if he needs an opportunity to speak with
11 you, I have no problem with it, you know, us taking a time out, you
12 calling over to the jail. If you need to use a phone within the courtroom,
13 that's completely understandable, we'll give you whatever space you
14 need to make sure that that communication is protected, and that there
15 are not additional listeners to that communication. And he can raise his
16 hand or let the officers know. But that is really the only feasible option
17 that I can have with the circumstances here. We just -- within COVID I
18 just had my staff reach out and call and make sure we were aware of all
19 the rules. We don't have a way for him to physically be in this same
20 room as you outside of Lower Level and my argument would be that
21 that's still separated, it's not next to Counsel.

22 MS. HOJJAT: And, Your Honor, that was our understanding
23 of what was going to occur too. And that was what the Defense had
24 requested previously at the last court date, was that we be in Lower
25 Level. I know Lower Level still has the glass, but at least he would

1 have access to me. And frankly, I could do the hearing from behind the
2 glass. Like, I could be next to him, communicating through that
3 microphone.

4 THE COURT: They won't -- they don't allow you to go in the
5 back in Lower Level.

6 MS. HOJJAT: I mean, in that case, if that's the situation in
7 Lower Level, then our position would be that we'd need one of the
8 courtrooms that are equipped that Defendant's can sit next to their
9 counsel and communicate with their counsel. I mean, this -- this is truly
10 a trial proceeding. This was a proceeding that was supposed to be held
11 originally mid-trial. It is -- I mean, our position is this is -- this falls under
12 the categories of cases that are covered where the Defendant needs
13 access to his attorney throughout the proceeding, not just during breaks
14 and things of that nature.

15 I understand the Court's -- I understand that this case has
16 delayed and dragged in terms of having this hearing. A lot of that was
17 outside of the ability of anybody to control, frankly. As Your Honor said,
18 COVID has been quite a curve ball for all of us, that we've been
19 adjusting. And there was also some issues, not the Jury
20 Commissioner's fault, but, issues with the master list and obtaining --
21 figuring out whether there was a copy of the master list, things of that
22 nature that were -- that took some time and took some communications
23 to resolve, which is what has resulted in the delay.

24 What I will say and what I would request at this time -- I know
25 it's not ideal, but I would request a continuance so that we can have the

1 ability to have my client present. The Nevada Supreme Court has been
2 accommodating in terms of giving us continuances to have this hearing.
3 They have been understanding of the fact of COVID. I think if we sent
4 a request to them explaining to them that we were all ready to go at the
5 hearing and the Defendant was literally not transported to the
6 courtroom, and thus, we need more time, I anticipate that they would be
7 understanding of that and would give us another continuance. And that
8 is the Defense request at this point, is another continuance, because I
9 do believe it violates my client's constitutional right to be present -- to
10 go forward with this hearing without him here.

11 THE COURT: Thank you, Ms. Hojjat.

12 Mr. Chen, do you want to be heard with regard to the request
13 for a continuance?

14 MR. CHEN: We'll submit it, Judge.

15 THE COURT: Thank you, Your Honor.

16 The request is noted for the record and will stand for the
17 record the request at this time is going to be denied. I think that within
18 the COVID restrictions, we've been doing things where we do
19 sentencings and a bunch of other things via video. I don't believe at
20 this time it is in violation of the Nevada Constitution or the United States
21 Constitution. He has the ability to hear and see counsel. And as stated
22 previously, the Court will provide whatever accommodations are
23 necessary so that there can be communication between counsel and
24 the Defendant. In a situation to where there is client confidentiality and
25 attorney-client privilege, where no one is able to hear, or listen, or see,

1 and if we need to vacate the courtroom so they can even see him on
2 video or expressions, I am more than willing to do that.

3 Right now, even dates available for a potential hearing would
4 be well into summer. So, that's just not a feasible option at this time. I
5 think that we have to kind of do the best in what we can, given the
6 situation just as we have done since everyone first found out about
7 COVID.

8 Thank you. Go ahead and call your first witness.

9 MR. CHEN: Nadia, do you want to put the other thing on the
10 record as well?

11 MS. HOJJAT: Oh, that's right, yes.

12 There was one additional thing we wanted to put on the record
13 before --

14 THE COURT: Yes.

15 MS. HOJJAT: -- we proceeded with the hearing.

16 The State did make an offer earlier this week. Unfortunately,
17 due to the prison's scheduling I was not able to talk to Mr. Mungai about
18 it until just now. I stepped outside and called him once he arrived in the
19 holding room. I did convey that offer to him. The offer was to plead
20 guilty to two counts of attempt sexual assault, category B felonies.
21 Each carrying 2 to 20 years in prison. Stipulate to consecutive time on
22 the two counts for a total aggregate sentence of 16 to 40 years in the
23 Nevada Department of Corrections. I did --

24 THE COURT: So, stipulate to the max on each charge --

25 MS. HOJJAT: Consecutive.

1 THE COURT: -- consecutive.

2 MS. HOJJAT: That's correct. For a total aggregate of 16 to
3 40 years in the Nevada Department of Corrections. I did advise Mr.
4 Mungai that he is currently serving life in prison with parole eligibility
5 beginning after 25 years. That is his current aggregate sentence. And I
6 did advise him of the offer that has been made in this case.

7 THE COURT: Mr. Mungai.

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Did Ms. Hojjat have an opportunity to discuss
10 this offer with you?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: And did you have any questions for her? Yes,
13 or no?

14 THE DEFENDANT: No.

15 THE COURT: Okay. Do you feel like you had sufficient time
16 to discuss the offer and have any questions you may have had
17 answered?

18 THE DEFENDANT: Yeah, I don't want nothing to do with the
19 offer. I'm just here for the court proceeding.

20 THE COURT: Okay.

21 Any additional record by either counsel?

22 MR. CHEN: No, thank you.

23 THE COURT: Is the offer revoked at this time?

24 MR. CHEN: For the record, sure, it is.

25 THE COURT: Okay.

1 MS. HOJJAT: All right.

2 The defense calls Mariah Witt.

3 THE COURT: Good afternoon, miss. Go ahead and come
4 up.

5

6 **MARIAH WITT**

7 [having been called as a witness and being first duly sworn testified as
8 follows:]

9 THE CLERK: State and spell both your first and last name for
10 the record.

11 THE WITNESS: Mariah Witt, M-A-R-I-A-H W-I-T-T.

12 MS. HOJJAT: And, Your Honor, before I begin the
13 questioning, I did just want to make a record.

14 Another defense witness, Jeffrey Martin, is present via
15 BlueJeans. He is an expert in mathematics and statistics. My
16 understanding is the Exclusionary Rule is typically experts are allowed
17 to remain on the line and hear testimony, but I just wanted to bring it to
18 everybody's attention in case anybody had any objections.

19 THE COURT: Mr. Chen, any objection to the expert
20 remaining on the line?

21 MR. CHEN: No objection.

22 THE COURT: He'll be allowed to remain.

23 MS. HOJJAT: Thank you.

24 **DIRECT EXAMINATION**

25 BY MS. HOJJAT:

1 Q Good Afternoon, Ms. Witt.

2 A Good Afternoon.

3 Q How are you today?

4 A I'm well, and you?

5 Q Doing good, thank you.

6 How are you employed?

7 A I'm the Jury Commissioner for the Eighth Judicial District

8 Court.

9 Q And how long have you held that position?

10 A Since November of 2012.

11 Q November of 2012.

12 And, can you explain to us your job as a Jury Commissioner?

13 A I'm responsible for ensuring there are enough jurors to serve
14 on jury trials. I also, in general, take care of juror needs. I maintain their
15 attendance and payroll and parking needs, that type of thing.

16 Q Are you also responsible for making sure summonses are
17 sent out to summon jurors to come serve for jury duty?

18 A Yes.

19 Q Okay. And, how do you oversee that process?

20 A Well, we have a regular process that's been in place, since I
21 started. We summon jurors six weeks in advance, so based on our trial
22 volume we will prepare pools for a week at a time. Or a week's period of
23 time, but it's six weeks in advance. And so -- it's usually on Fridays.
24 And I will go in and I will just select the designated date, enter the
25 number of jurors that are required, and the court location. We do have

1 multiple locations because we have Eighth Judicial, we have Grand
2 Jury, and then now we are servicing some of the lower courts too. So,
3 we put in the court location for location 100 and the number of jurors and
4 the date and just hit apply and the system creates the pool.

5 Q Okay. Are you also technically in charge of the master list
6 from which jury summonses are issued?

7 A Indirectly. I mean, we have 3.5 million records in our master
8 list, so that is something that has to be maintained on a computerized or
9 automated basis, so I do coordinate with our IT division. And --

10 Q And let me clarify that. I understand. So, you're not in charge
11 of the technical side of things.

12 A Correct.

13 Q But you are technically the individual who is in charge of
14 maintaining the master list? Not the IT portion of it, but the master list
15 itself?

16 A From the standpoint of making the records available and
17 summoning jurors, yes. But as far as the master list portion itself, that
18 really -- securing that is handled by Court Administration, because there
19 are documents that -- with the outside agencies to procure those lists.
20 And then they are provided in a technological manner through secure
21 file transfer protocol.

22 Q I see. Okay. Thank you. Now I want to kind of call your
23 attention to conversations that we have had about the case of Mungai v
24 State or State v. Mungai.

25 A Okay.

1 Q I, at some point, subpoenaed you for the master list for 2017,
2 is that correct?

3 A Yes.

4 Q Okay. And at some point, in our attempts to obtain the master
5 list or a copy of the master list there was a -- well actually let me back
6 up, I'm so sorry. To be clear, jury summonses come from the master
7 list, correct?

8 A Yes.

9 Q The master list is the pool of all the potential jurors in Clark
10 County who could potentially receive a summons from you?

11 A Yes.

12 Q Okay. Now I want to go back to the phone call. So in the
13 course of attempting to get a copy of this master list, there was at some
14 point a phone call that we were a party to, correct?

15 A Yes.

16 Q And it was yourself, yeah?

17 A Yes.

18 Q Me?

19 A What -- I--

20 Q I was on the phone call?

21 A Yes.

22 Q Mr. Jeffrey Martin was on the phone call?

23 A Yes.

24 Q And a representative from Avenue was on the phone call?

25 A Yes. Yes.

1 Q And Avenue was the technological side of that -- maintaining
2 that master list?
3 A Yes.
4 Q Okay. And your attorney? Mr. Viesca was on the phone call?
5 A Yes.
6 Q Okay. And the basis of the phone call -- the conversation of
7 the phone call was attempting to see if there was any sort of copy of that
8 master list that still existed?
9 A Correct.
10 Q The 2017 master list?
11 A Correct.
12 Q And the reason for that is that Mr. Mungai's trial was in 2017?
13 A Yes.
14 Q And we determined that the subpoenas for his trial were sent
15 out in October of 2017?
16 A You mean the Summonses?
17 Q The Summonses. I'm sorry, yes. The Summonses for his trial
18 --
19 A Yes.
20 Q -- were sent out in October of 2017?
21 A Yes.
22 Q Okay. And so, we were trying to see if we could get a
23 recreation of the October 2017 master list?
24 A Yes, that's --
25 Q And it was determined during that phone call that the 2017--

1 October of 2017 master list no longer exists, correct?

2 A Correct.

3 Q It was determined -- well actually, there was conversation
4 about potentially seeing if there might have been some backups?

5 A Yes.

6 Q And it was determined eventually, after that conversation, that
7 no backups remained?

8 A Correct.

9 Q Okay. And so, there was brainstorming during that phone call
10 about ways that potentially that the list could either be recovered or
11 recreated?

12 A Yes.

13 Q Okay. And it was eventually determined that there was not
14 way to recover the list, but that potentially we could try to get as close as
15 we could to a recreation of the list using the current master list, correct?

16 A Correct.

17 Q And the idea was that jurors are added in batches to the
18 master list.

19 A Not exactly, no.

20 Q No? Can you explain to me, I guess, discussed as the
21 recreation of the master list then?

22 A The -- well it depends on what you mean by match -- batches.
23 I mean, it's the various sources are merged.

24 Q And I'm sorry, merged is the word.

25 A Yes.

1 Q Yes.

2 A And there are sources. But as far as smaller groups, no, I
3 mean, it's like the different sources are merged.

4 Q I should clarify. There are multiple merges that occur per
5 year, correct?

6 A Normally two --

7 Q Two merges per year.

8 A -- per year.

9 Q Correct?

10 A They're scheduled.

11 Q Okay.

12 A Yes.

13 Q And the scheduled merges result in individuals from the
14 source list being added from the source list to the master list, correct?

15 A Yes, from the source list. Yes.

16 Q And so the idea was that we could try to recreate the October
17 of 2017 master list by looking at the most recent merge that occurred
18 prior to October of 2017.

19 A No, it's really not possible to recreate the list at any given
20 point and time. There were queries, and that's different. It was an
21 aggregate count as of a certain date.

22 Q Okay.

23 A But the master list itself is an ever-changing document, so
24 there's no way to recreate the master list at a given point and time. So, I
25 believe it was explained to you that there were several caveats that --

1 what you were given was the current master list as of the date that that
2 particular run of the master list was conducted.

3 Q Right.

4 A And some of those people's statuses could have changed
5 since 2017.

6 Q Okay, that's fine.

7 THE COURT: Okay, a point of clarification. And so when you
8 indicate what counsel was given, you're indicating that the master list
9 that was turned over to counsel pursuant to this hearing?

10 THE WITNESS: Yes.

11 THE COURT: Okay, and that was as close to the last merge
12 or prior to October 2017?

13 THE WITNESS: No.

14 THE COURT: Okay.

15 THE WITNESS: It was the most current master list we have
16 available.

17 THE COURT: Okay.

18 THE WITNESS: According to Nevada Supreme Court, Rules
19 of Retention, we maintain the master list until superseded. So, what you
20 were provided was the current list -- the most current list as of that date.

21 MS. HOJJAT: Right, and I understand that. You made that
22 very clear, that you were providing us --

23 THE WITNESS: Okay.

24 MS. HOJJAT: -- with the current master list.

25 THE COURT: As of what date?

1 MS. HOJJAT: Court's indulgence.

2 THE COURT: And additionally, Ms. Witt, when do the merges
3 occur?

4 THE WITNESS: They are scheduled to occur twice per year.
5 They --

6 THE COURT: And are they like same month every twice per
7 year?

8 THE WITNESS: No, there are variations on that depending
9 on IT's demands --

10 THE COURT: Okay.

11 THE WITNESS: -- but typically, it's usually the last quarter of
12 the year and then usually sometime around May.

13 THE COURT: When you say the last quarter of the year are
14 we speaking of the fiscal year or a calendar year?

15 THE WITNESS: I'm sorry, calendar year. So normally like
16 October to December time frame

17 THE COURT: Okay.

18 THE WITNESS: -- and also then May time frame. So--

19 THE COURT: Thank you.

20 THE WITNESS: Normally.

21 BY MS. HOJJAT:

22 Q Fair to say the list that we were given was not the October of
23 2017 master list?

24 A Correct.

25 Q Okay, but there was also conversation during that phone call

1 about ways that we could get as close as it would be possible to get to
2 estimating what the list looked like in October of 2017. Do you
3 remember those conversations?

4 A I remember the conversations, but I also remember there
5 were a number of caveats that Avenue --

6 Q Yes.

7 A -- explained to you as well.

8 Q I remember the caveats. But you would agree with me that
9 Avenue and Mr. Martin discussed ways that the list could be recreated
10 as closely as possible with caveats? Correct?

11 A Yes.

12 Q Okay. Now, I want to talk specifically about 2017.

13 A Okay.

14 Q You just testified, typically there are two merges per year

15 A Yes.

16 Q In 2017 there were not two merges?

17 A No.

18 Q In fact, in 2016 there were two merges?

19 A Yes.

20 Q And in 2018 there were two merges?

21 A I am not sure I would have to look at my notes to see the
22 dates from 2018. I think so, yes.

23 Q Okay. But in 2017 there were not two merges.

24 A No.

25 Q There was only one merge?

1 A Yes.

2 Q Okay. Now I want to talk --

3 A No, excuse me. In 2017 there wasn't a merge.

4 Q There was no merge at all in 2017?

5 A There was no merge in 2017. The most recent merge would
6 have been in -- when we first set up the system in 2016, in March, so
7 that would have been a merge at that time. And then the next merge
8 was conducted in December, but it was after this trial. So, it would have
9 been the March merge would have been the one that applies to this
10 case. And then in 2017 there was no merge conducted.

11 Q Okay, and to be clear this case was in 2017.

12 A Correct.

13 Q Yes. Okay.

14 THE COURT: Okay, so another point of clarification. Sorry.

15 THE WITNESS: Wait, am I getting confused here? Hang on
16 a second, let me see.

17 THE COURT: Two mergers in 2016 --

18 THE WITNESS: Yeah, that's right.

19 THE COURT: One when it was set up in March and then you
20 indicated there was another merger in December. But you said after this
21 trial, but this trial would have been in 2017. So, is the second merger in
22 December 2016 and then no mergers in 2017?

23 THE WITNESS: I'm sorry, yes. I'm sorry.

24 THE COURT: Okay.

25 THE WITNESS: So yes. There was the initial merge, March

1 of 2016 when we transitioned to the new system. And then there was a
2 merge in December 2016. And then the next merge was not conducted
3 until March of 2018.

4 MS. HOJJAT: Okay.

5 THE WITNESS: So, there was no merge --

6 MS. HOJJAT: So, there was no merges in 2017?

7 THE WITNESS: Correct.

8 MS. HOJJAT: Okay.

9 THE WITNESS: So, the March 2016 -- I mean, sorry,
10 December of 2016 merge would have been the most recent one prior to
11 this case, sorry.

12

13 BY MS. HOJJAT.

14 Q Okay. And then I want to talk to you about what occurred end
15 of 2016.

16 A Okay.

17 Q Well, let's back up. In 2016 you were using two sources for
18 the master list?

19 A Correct.

20 Q The two sources were NV Energy?

21 A Correct.

22 Q And the Nevada DMV?

23 A Yes.

24 Q Okay. And then in November of 2016, there was an
25 Administrative Order issued in regards to the master list?

1 A Correct.

2 Q Okay. And that was issued by then, Chief Judge Barker?

3 A Correct.

4 Q And it was Administrative Order 16-07?

5 A If you say so, I don't remember the exact number.

6 Q Okay.

7 A Yeah.

8 Q But you do know which Administrative Order I'm talking
9 about?

10 A I'm aware of the Order, yes.

11 Q And the Administrative Order required that in addition to the
12 DMV and NV Energy that the master list also have as a source the Voter
13 Rolls, correct?

14 A Correct.

15 Q So registered voters in Clark County were to also be added to
16 the master list?

17 A Correct.

18 Q Okay. And this was November of 2016.

19 A If you say so. I don't remember the date of the Order.

20 Q Would it refresh your recollection to see the copy of the
21 Order?

22 A No, I'm sure what you're saying is correct.

23 Q So you have no reason to dispute that it was November of
24 2016?

25 A No. No.

1 Q Okay. So, November of '16 the Order was that Voter Rolls
2 were to be added to the master list?

3 A Correct.

4 Q Now I want to move forward, -- well the purpose of this --
5 backing up. The purpose of this Order was to ensure that a fair cross
6 section of the community was being captured in our master list?

7 A Correct.

8 Q Right? And in fact, the Order specifically says that. That the
9 purpose of this Order and the purpose of adding a source is to ensure
10 that a fair cross section of our community was being captured in our
11 master list?

12 A Correct.

13 Q Okay. Now I want to move forward to November of 2017.

14 A Yes.

15 Q That would be a full year after the Administrative Order was
16 issued?

17 A Yes.

18 Q In November of 2017, there was still only two sources being
19 used for the master list?

20 A Correct. Because the merge had not been conducted yet.

21 Q Okay. So, it was still just NV Energy?

22 A Uh-huh.

23 Q And the DMV.

24 A Yes.

25 Q The Voter Rolls had not been added.

1 A No.

2 Q Okay. I want to talk about what else happened in 2017.

3 A Okay.

4 Q In February of 2017 a Bill was introduced at the Legislature
5 mandating the use of Voter Rules and Unemployment Insurance Rules
6 being used in creating the master list.

7 A Yes.

8 Q So, not only it went beyond Judge Barker's Order, and it
9 required not only individuals from the Voter Rolls, but also individuals
10 who were on the list for Unemployment Insurance to also be added to
11 the master list?

12 A Yes.

13 Q Okay. And the purpose of that Legislative Amendment was
14 the same as the Order, was to ensure that we were getting a fair cross
15 section of the community in our master list?

16 A Yes.

17 Q Okay. And that Bill was proposed in February of 2017?

18 A If you say so, I don't know the exact time.

19 Q Okay. The Bill was signed in June of 2017?

20 A Yes, I believe it was effective in July --

21 Q Okay --

22 A -- 2017.

23 Q -- so you recall the Bill was supposed to be effective July 1st of
24 2017?

25 A Correct.

1 Q Okay. So, then I want to fast forward to November of 2017
2 when Mr. Mungai's trial occurred.

3 A It was actually December I thought.

4 Q Was it December?

5

6 MR. CHEN: December.

7 BY MS. HOJJAT:

8 Q I'm sorry, you're right. December of 2017 when Mr. Mungai's
9 trial occurred.

10 A Okay.

11 Q In December of 2017, the Voter Rolls were not being used?

12 A No.

13 Q And in December of 2017, the Unemployment Insurance
14 Rules were not being used?

15 A No.

16 Q Now, I want to talk to you about your role as the Jury
17 Commissioner.

18 A Okay.

19 Q Are you aware of the statistical makeup of Clark County?

20 A Vaguely, I have a general idea, yes.

21 Q You have a general idea. But you couldn't give us specifics
22 down to the percentage of the demographics of our county?

23 A Not exacts, I mean, I know off the top of my head I reviewed
24 them and looked at them this morning, so I have a general idea, yes.

25 Q Okay. But you don't -- it is not in the course of your job

1 generally -- you do not make it a practice to know the demographics of
2 our county.

3 A I review them periodically, but as just a general point of
4 reference, yes.

5 Q Okay. And as the Clark County Jury Commissioner, do you
6 routinely -- well you don't routinely look at the master list to make sure
7 the master list is reflective of the demographics of the Clark County
8 community?

9 A Well, I -- we run a number of reports on a regular basis that
10 give us those numbers as were going and they are available for
11 selection and the information is retained within the system. So that
12 information is available for --

13 Q Okay, but the system is doing that you said. The computer.

14 A Correct. I mean, there are 3.5 million names, I can't do that
15 myself manually.

16 Q Sure, but you are not sitting down on a monthly basis saying
17 what is the demographics of Clark County versus what are the
18 demographics of my master list, do these demographics match up?

19 A No, I don't do that.

20 Q Okay.

21 MS. HOJJAT: I pass the witness, Your Honor

22 THE COURT: Yes.

23 MR. CHEN: Thank you, Your Honor.

24 **CROSS- EXAMINATION**

25 BY MR. CHEN:

1 Q Jury Commissioner, when you just heard about, for instance,
2 the Administrative Order that was signed by Judge Barker at the time, in
3 2016, you mentioned that by this trial in December of 2017 it still hadn't -
4 - his Order hadn't been incorporated yet?

5 A Correct.

6 Q Was there a reason that it hadn't been incorporated?

7 A Yes. We had not done a merge yet. The -- we had just
8 transitioned to a new jury management system in 2016. It was the first
9 time we were doing a merge. And also, to add the additional sources,
10 it's not just a simple process like flipping a switch. You can't just dump
11 the names into the master list. It's a very complicated technological
12 process that our vendor goes through to merge the sources.

13 And we also had to obtain those sources from those agencies
14 which are outside the privy of the Court. They're not the actual Court
15 themselves. So, I do know in specific the Department of Employment
16 Training and Rehabilitation in particular was -- has intent to provide the
17 list for reasons of confidentiality. And so that's the reason for the delay
18 was we had to get those lists from the outside sources.

19 And then not only that, the new law mandated specific
20 reporting requirements, which basically required our system to be
21 reprogrammed with new categories. Up to that point, ethnicity had not
22 been divided out, so that had to be added. So, it was a much more
23 complex process where you couldn't just flip a switch and have it done,
24 so it took some time.

25 Q And you actually mentioned that one of the agencies was

1 actually difficult to obtain information from. Which agency was that?
2 A The Department of Employment Training and Rehabilitation.
3 Q Is that generally kind of referred to as an unemployment office
4 --
5 A Yes.
6 Q -- or place where people would go seek unemployment
7 benefits?
8 A Yes.
9 Q All right. And that office, though, that wasn't part of the
10 Administrative Order, was it?
11 A No.
12 Q In fact, that was part of the NRS 6.045 that got passed in July
13 of that year?
14 A Yes.
15 Q All right. So, despite the fact that that went into effect, it'd be
16 fair to say that you, as a Jury Commissioner wasn't able to access their
17 database and just dump all those names into your system, is that fair to
18 say?
19 MS. HOJJAT: Objection. Leading.
20 MR. CHEN: I'm sorry?
21 MS. HOJJAT: Leading.
22 MR. CHEN: I'm on Cross-examination.
23 MS. HOJJAT: Actually, pursuant to NRS 50.115, I get to
24 cross and he'd have to direct because the witness is adverse to
25 defense.

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THE COURT: All right, hold on. NRS 50 --

MS. HOJJAT: 50.115. I can approach with a copy.

THE COURT: That's okay. Give me one moment.

Mr. Chen, do you need a copy of it?

MR. CHEN: No, I can pull it up if needed, Your Honor

MS. HOJJAT: It's subsection 4(b).

THE COURT: Thank you.

So, my understanding of this statute specifically, is that the State would be allowed to do leading on cross -examination, but it does not prevent you from doing leading on direct examination as well, because this is an adverse witness. And it's speaking -- (4)(b) is speaking specifically with regard to the prosecution's ability, so I would permit you to do leading, but I don't think that that negates Mr. Chen's ability to lead.

MS. HOJJAT: So, if I may, Your Honor. Subsection (4) says, except that the prosecution may call the accused, a party -- so it talks to any party -- is entitled to call a witness identified with an adverse party and interrogate by leading questions. It then goes on to say, the attorney for the adverse party may employ leading questions in cross-examination the witness only to the extent permissible if the attorney had called that person on direct examination.

So, essentially the idea is that the prosecution can't fail to call a witness, force the Defense to call the witness and then obtain the ability to lead while we are stuck asking non-leading questions. The -- if it's an adverse witness to the defense and a friendly witness to the

1 prosecution, the prosecution is still limited to leading questions only the
2 extent permissible if they had called her on direct examination, and we
3 are allowed to lead.

4 MR. CHEN: Your Honor, I do object to the classification that
5 this is an adverse witness. She is the Jury Commissioner. There's
6 been nothing set forth to indicate that she's anything but -- she's been
7 anything but trying to answer the questions that are asked from either
8 party. But certainly, she doesn't work for my office. She works as an
9 independent person to bring in our juries. If there's an issue with that,
10 certainly Miss Hojjat would point out that there's a problem with the
11 process, but this witness doesn't and hasn't said anything to me, that's
12 inherently adversarial.

13 MS. HOJJAT: And to be clear the witness doesn't have to be
14 hostile, it's just the idea that this is a -- this entire point of this hearing is
15 that we are taking the position that the Jury Commissioner's Office was
16 not doing what they were supposed to do. That is the entire purpose of
17 this hearing. So, this is a witness that is adverse to us, and is friendly to
18 the prosecution by definition.

19 THE COURT: Can you approach with your copy?

20 MS. HOJJAT: Yes, Your Honor.

21 It's the very last line on the bottom of the first page.

22 THE COURT: Thank you.

23 Okay, the Court does find that based upon the purpose of this
24 hearing, it's arguable that Miss Witt is an adverse witness to the
25 defense, so, based upon NRS 50.115(4) subsection (b), the State would

1 be permitted to cross examine to the same extent that they would if this
2 were direct examination.

3 MR. CHEN: Okay.

4 THE COURT: I mean, to lead in cross examination to the
5 same extent that they would in direct examination. Is that clarified?

6 MR. CHEN: Which would be not leading, if I'm not -- are you
7 sustaining the objection, I suppose, Your Honor?

8 THE COURT: Yes.

9 MR. CHEN: Okay. All right, I can rephrase.

10 BY MR. CHEN:

11 Q All right, let me ask some of those questions actually.

12 A Okay.

13 Q You are -- are you familiar with the Clark County District
14 Attorney's Office?

15 A Yes.

16 Q Do you work for the Clark County District Attorney's Office?

17 MS. HOJJAT: Objection, relevance.

18 THE WITNESS: No.

19

20 MR. CHEN: Your Honor, I think important to just --

21 THE COURT: Overruled.

22 MR. CHEN: Thank you.

23 BY MR. CHEN:

24 Q Do you work for the office?

25 A No.

1 Q Do you work for the Eighth -- do you work as an employee of
2 the Eighth Judicial District Court, or are you part of a different entity?

3 A Yes, part of the Eighth Judicial District Court.

4 Q Do you -- is there anyone who's capable of giving you
5 direction then as the Jury Commissioner?

6 A Yes. I take my directions from Court Administration, the Chief
7 Judge, the Chief -- the Court Executive Officer.

8 Q Okay. So would those be your quote unquote bosses, then?

9 A Yes.

10 Q All right. Is that why Judge Barker was the one to -- who
11 served as Chief Judge at the time, the one to administer the
12 Administrative Order that was spoken about earlier?

13 A Yes.

14 Q Okay. Did you take steps when you got that Administrative
15 Order to try and incorporate the process?

16 A I did inquire of Court Administration and was informed that it
17 would be included in the next merge.

18 Q Okay. Which as you stated on what theoretically direct
19 examination that it hadn't merged by December 2017 again?

20 A Correct.

21 Q All right. You mentioned earlier as well that there are
22 programs that help you carry out your task, is that correct?

23 A Yes.

24 Q Am I referring to computer programs?

25 A Yes.

1 Q Now, on these computer programs there -- are those the ones
2 that keep the databases for you?

3 A Yes.

4 Q Is it easy to -- are there difficulties when an Administrative
5 Order, for instance, comes out and you need to add information to those
6 databases?

7 A It's technologically complex, yes.

8 Q Can you describe some of those challenges to the Court,
9 please?

10 A I couldn't give you all of the specific details, because it is -- I
11 just know that it's a random system and it's -- there's an algorithm built
12 within it. And then I think I mentioned when we -- the reporting was
13 changed, so the race categories and ethnicity had to be separated out.
14 So, you can't -- you've got previous records that were under the old
15 categories and new records that would be under the new and trying to
16 merge and get all of that together. I mean, there are just a lot of
17 complexities involved. They have to deal with the duplication of names
18 and then there are various sources that we're utilizing, so we have to
19 make sure that there's no duplication. It's a very complex process that's
20 way over my head.

21 Q Okay. One of the things that was mentioned on direct
22 examination was that NV Energy records were part of the jury master
23 list, is that correct?

24 A Yes.

25 Q Do you know if race is indicated on NV Energy's list that they

1 provide to you?

2 A My understanding, because I haven't visually seen it, because
3 there's so much --

4 MS. HOJJAT: Objection, speculation.

5 THE COURT: Lay additional foundation, Mr. Chen.

6 Sustained.

7 BY MR. CHEN:

8 Q You are the one who was -- all right. Okay, so I asked you if
9 you are aware if race is included. Do you know the answer to whether
10 or not NV Energy provides the Jury Services with the race of their
11 clientele?

12 A My understanding, based on --

13 Q I was going to ask what is your understanding based upon?

14 A Based on the -- there's like a renewal packet that we are sent
15 from the outside entities that renews our use of that master list, and I
16 believe the only thing that is provided is the names and addresses.

17 MS. HOJJAT: I'm going to object to speculation again. I'm
18 just not sure that the witness has established that she knows or what her
19 source of information is.

20 MR. CHEN: She has --

21 THE COURT: Do you want to ask any follow up? I mean, she
22 has stated that this is information that she received in working with these
23 partners about their databases. So, obviously she -- I think she can rely
24 upon the information received from the company in establishing her
25 answer. Anything --

1 MS. HOJJAT: I think she can rely on if she's received the
2 information, I'm just not sure that she actually – can I just ask like two
3 follow up questions?

4 MR. CHEN: I thought she said that she's received it, but.

5 THE COURT: Ms. Witt, did you receive information from
6 these partners?

7 THE WITNESS: Not from the partners. These were -- Court
8 Administration executes those documents with the outside entities. I
9 have seen copies of the renewal packets, which details -- and I don't
10 remember the exact language -- requesting names and addresses. I
11 didn't see any reference to race or anything of that nature on that
12 particular document. So, to my knowledge and based on my
13 conversations with IT and other court staff -- Court Administration, it is
14 my understanding that it's only the names and addresses. We don't
15 secure the race information from them, it's just names and addresses.

16 THE COURT: Okay, thank you.

17 Objection is overruled, but counsel you can follow up on cross
18 examination.

19 MS. HOJJAT: Thank you, Your Honor.

20 THE COURT: Or Renewed Direct, whatever we're calling it
21 now.

22 MS. HOJJAT: Thank you, Your Honor.

23 BY MR CHEN:

24 Q All right. So, is the same to your understanding, true, of other
25 lists that are provided to your office?

1 A To the best of my knowledge, yes.

2 Q To the best of your knowledge, is that literally any list that's
3 provided to you for potential jurors?

4 A Yes.

5 Q Okay. So, when sometimes we're in trial and when we
6 receive a list, occasionally it will -- when we're preparing for trial and we
7 find out who's going to be in our courtroom as a potential juror,
8 sometimes there are races listed on there. Where do those -- where
9 does that information come from?

10 A It's self-reported. So, it isn't until the jurors respond to the
11 summons and respond to the questions that we know what their race is.
12 Unless they have served before and it's in the record from the last time
13 they served.

14 Q Okay. One of the issues in this particular case has to do with
15 zip codes where summonses were sent. As the Jury Commissioner, do
16 you know if -- do you know how it is that Summonses are issued to the
17 individuals who may serve on a jury?

18 A I'm not sure I understand what you mean.

19 Q Sorry. Let me start over. This direct examination is throwing
20 me off a little bit on this. So, are summons issued to potential jurors?

21 A Yes.

22 Q All right. Is that list randomly created?

23 A Yes.

24 Q How is it that those summons are sent? Like, if someone
25 receives a summons in the mail, how is it that they received a

1 summons?

2 A When I create the pool within the system the jury
3 management system randomly selects them from the master list from all
4 available records.

5 Q Is this a computer program that does this?

6 A It is.

7 Q Does this computer program account for the race of any
8 individual who's going to receive a summons?

9 A No.

10 Q So -- in addition to the fact that it's random, is there any type
11 thing on the program that would show that or that would indicate a
12 certain number of summonses to particular zip codes?

13 A No.

14 Q So, of all the people in Clark County that have entered your
15 database because they qualify under either statute or Administrative
16 Order, all the people who arrive are random, is that correct?

17 A Yes.

18 Q Without paying attention to either where they live within Clark
19 County or their race, is that a fair statement?

20 A Yes.

21 Q Additionally, at any time, do you as the Jury Commissioner, try
22 to prevent anyone who qualifies on the master list from serving on the
23 jury?

24 MS. HOJJAT: Objection, relevance.

25 MR. CHEN: Your Honor, we're talking about a systemic

1 exclusion here, so if the Jury Commissioner isn't trying to systemically
2 exclude anyone then I think that's relevant for the purposes of our
3 hearing.

4 THE COURT: Overruled.

5 BY MR. CHEN:

6 Q Jury Commissioner, do you ever try to exclude particular
7 groups that are qualifying in the master list?

8
9 THE COURT: But I will -- one moment, I will say this. It does
10 need to be -- the question needs to be tailored to the time in which we
11 are speaking, so --

12 MR. CHEN: Okay.

13 THE COURT: it is too broad, if we're speaking of in 2017, but
14 not just ever as long as she's been a Jury Commissioner.

15 BY MR. CHEN:

16 Q Okay. Well then, you've served since when as the Jury
17 Commissioner?

18 A November 2012.

19 Q Okay. So, I think it would be safe for you to speak at least in
20 terms of the time that you've been Jury Commissioner from 2012 until
21 this trial in 2017. Have you as Jury Commissioner ever try to preclude
22 or systemically exclude people who are on that master list?

23 A No.

24 Q Has it been the practice of your office to use the computer
25 system that randomly selects individuals that qualify?

1 A Yes.

2 Q Now, I want to go back to July of 2017 as well. That's the time
3 that Ms. Hojjat mentioned NRS 6.045 changed and went into effect. Did
4 those changes in the NRS did they automatically change your list on
5 July 1, 2017 of potential jurors?

6 A No.

7 Q Can you explain to us why that is?

8 A Because it's not something that you can just dump additional
9 sources into the master list. It's a technological process where those
10 sources have to be merged into one master list.

11 Q For instance, with the unemployment list that was now part of
12 NRS, did you reach out to that agency to inquire about obtaining their
13 information?

14 A I didn't. It was done through Court Administration.

15 Q Okay. Do you oversee Court Administration?

16 A No.

17 Q Okay. Does Court Administration work with you in developing
18 these lists?

19 A Yes, I serve at the direction of Court Administration.

20 Q Okay. So, safe to say that in the course of your work as the
21 Jury Commissioner, you communicate with Court Services?

22 A Yes.

23 Q In the course of your communication with Court Services,
24 were you able to get a list of the unemployment individuals in July of
25 2017?

1 A Well, our IT division eventually got it, yes.

2 Q Do you know when it is that that information was finally
3 provided?

4 A I'd looked at it earlier today, but I honestly don't remember
5 because I know it wasn't on the next merge, it was on the subsequent
6 one, so I don't think it was -- yeah, I don't remember the exact date.

7 Q Based upon what you're saying though, is it safe to say that in
8 July 2017 when this trial happened that you did not have that list?

9 MS. HOJJAT: Objection, leading.

10 MR. CHEN: I can rephrase, Your Honor.

11 THE COURT: Go ahead.

12 BY MR. CHEN:

13 Q In December 2017, did you have a list from the
14 Unemployment Office?

15 A No.

16 Q Is it safe to say -- well, if you did not have that list could you
17 incorporate that into the master list of potential jurors?

18 A No.

19 Q I'll ask the same question that I had earlier of you, with
20 regards to NV Energy records. With regards to records from the
21 Unemployment Division, do you know if they provide you with the race of
22 the individuals to which -- that are going to be entered into your master
23 list?

24 A No. It's my understanding that all race and ethnicity
25 information is self-reported by the jurors.

1 Q And then even -- today for instance, if we were to have a Jury
2 Trial, would those names from that division be included in your master
3 list?

4 A I'm sorry?

5 Q If we had a Jury Trial today in 2021 --

6 A Yes.

7 Q Would the information that's provided -- that was provided by
8 the Unemployment Office, would that be in a master list for 2021?

9 A In a pool for today --

10 Q Yes.

11 A If I created -- yes, it included at this time.

12 Q At this time are the Summonses still randomly sent out to
13 whoever's on the list of potential jurors?

14 A Yes.

15 MR. CHEN: Court's brief indulgence.

16 BY MR. CHEN:

17 Q Just because we have you here today, Jury Commissioner, in
18 today's date if Summonses are issued for a Jury Trial, would you pay
19 attention or would you make sure that every zip code is getting an equal
20 number of summonses?

21 A No.

22 Q So, again, based upon the population of potential jurors, are
23 those randomly chosen by the computer system?

24 A Yes.

25 MR. CHEN: I will pass the witness, thank you.

1 **REDIRECT EXAMINATION**

2 BY MS. HOJJAT:

3 Q Hello again.

4 A Hi.

5 Q So, you did not personally request the -- let's back up. The
6 Department of Unemployment Training and Rehabilitation is colloquially
7 referred to as DETR?

8 A Yes.

9 Q Is that correct?

10 A Yes.

11 Q Okay. So, when we talk about DETR that's what we're talking
12 about?

13 A Yes.

14 Q Okay. You did not personally request the information from
15 DETR?

16 A No.

17 Q It's your understanding that the information was requested
18 from DETR?

19 A Yes, I've been told that it was requested, yes.

20 Q What date?

21 MR. CHEN: Objection, hearsay.

22 THE WITNESS: I don't know the exact date that it was
23 requested.

24 THE COURT: Sustained as to hearsay.

25 BY MS. HOJJAT.

1 Q The information -- well, have you received information about
2 the request in the course of your duties, as the Jury Commissioner?

3 A Yes.

4 Q And it's your job to be reviewing these records, making sure
5 the records are up to date as the Jury Commissioner, correct?

6 A Yes. I mean, I again, I receive my direction from Court
7 Administration. So, it's really -- it's not me --

8 Q Right.

9 A -- going up the chain of command telling them. It's them
10 telling me, this is what we're doing. We're getting the list, we're doing --
11 you know, it comes down to me, not goes up.

12 Q And I guess when you say Court Administration, who are you
13 talking about?

14 A I am talking about the Chief Judge, the Court Executive
15 Officer, my immediate supervisor, the Assistant Court Administrator, and
16 the Judges on the Executive Committee and whoever makes the
17 decisions about the operations of the Court.

18 Q Okay, so when you're receiving this information, you're
19 receiving this information from people like the Chief Judge?

20 A Correct.

21 Q Okay. And you're receiving this information in the course of
22 your duties as the Jury Commissioner?

23 A Yes.

24 Q And you're communicating with these individuals in your
25 course of your duties as a Jury Commissioner?

1 A Yes.

2 Q To ensure that your master list is containing information it's
3 supposed to contain?

4 A Yes.

5 Q Okay. So, when we're talking about you being told that the
6 information was requested, who specifically told you the information was
7 requested?

8 A My immediate supervisor.

9 Q Okay, so not one of the Judges?

10 A No, it was not a Judge.

11 Q Okay, and who was the one who made the request for the
12 information from DETR?

13 A I couldn't tell you specifically who in Court Administration
14 made the request. I don't know. They work together as a team. So, it
15 may have been my -- in the past I do know it was my -- the Assistant
16 Court Administrator that I reported to at that time, Tim Andrews. And I
17 can't -- I think he was still my supervisor in 2017. So, he would have
18 requested it and coordinated it at that time. It would --

19 Q I'm sorry, so let's talk about 2017 specifically. In 2017
20 specifically, it would have been the Assistant Court Administrator --

21 A Yes.

22 Q -- who would have requested the information?

23 A Yes.

24 Q Okay. And then your position is that DETR was not
25 responding to this request?

1 A Yes, that's my understanding.

2 Q Okay. Are you aware that's because NRS 612.265 expressly
3 says that only you or the Chief Judge can request the information, that
4 they would not respond to the Assistant Court Administrator?

5 A Well then, I would imagine that they would go through the
6 Chief Judge, but I can't --

7 Q Okay.

8 A -- say that.

9 Q So, but it's your testimony today that it was the Assistant
10 Court Administrator who submitted the request?

11 A That executes the documents I think at the direction of the
12 Chief Judge.

13 Q Okay.

14 A That's my understanding.

15 Q But you are the Jury Commissioner, right?

16 A Yes.

17 Q And you did not execute the request?

18 A I did not execute the request.

19 Q Despite the fact that the statute actually provides you as one
20 of only two individuals who could execute the request?

21 A Yes. I did not make the request.

22 Q Okay. And then, I want to go back to-- you said you have a
23 general idea of when the request was executed. You don't know
24 specifically, but generally when was the request executed?

25 A I have an idea of when it was included in the merge. The

1 actual date as to when they requested the list, I couldn't tell you. I don't
2 know

3 Q Okay. So, you can't sit here and tell us the law into effect July
4 of 2017, August of 2017 this request was made?

5 A Right. I don't know the exact date.

6 Q Okay. You can't sit here and tell us the law went into effect
7 July of 2017, September of 2017 the request was made?

8 A No, I can't tell you that.

9 Q You can't tell us it was made in October of 2017?

10 A No.

11 Q In fact, you can't provide us any assurance that a request was
12 even made to DETR for these documents from them by the time the
13 summonses were going out for Mr. Mungai's trial?

14 A I can tell you that I asked about it, immediately, when the law
15 was passed. I inquired up the chain of command and was told that it
16 was in progress.

17 Q I understand. But you cannot tell the Court today that by the
18 time the summonses went out for Mr. Mungai's trial, any official who is
19 actually authorized to make the request had specifically made the
20 request of DETR for that information. Correct?

21 A I can't tell you. I have no reason to not believe them.

22 Q Okay. But, you can't tell us -- this isn't a situation where you
23 were specifically told the request was made prior to that date. You
24 genuinely don't know when the request was made, right?

25 A Yes. I don't know.

1 Q Okay. So, you can't tell us that it was made before those
2 Summonses went out?

3 A I don't know what date it went out --

4 Q Okay.

5 A -- or it was made. I don't know, yeah.

6 Q Okay. So, when we're talking about the fact that you didn't
7 have this information before these Summonses went out, it's entirely
8 possible nobody had requested it by the time these summonses went
9 out. Correct?

10 A I don't know.

11 Q Okay. So, that's a yes, it's possible?

12 A No, it's I don't know.

13 Q Okay. So, if you don't know, then it's maybe yes, and it's
14 maybe no. Right? It could be either one.

15 A It could be either one.

16 Q Okay. So, it's possible that it's yes?

17 A I don't know.

18 Q Okay.

19 Now, I want to talk about race on the master list. Are you
20 testifying that the master list does not contain race?

21 A No.

22 Q No. I'm sorry, point of clarification. Was that no, the master
23 list doesn't contain race or no you're testifying to that?

24 A The master list has racial categories in it.

25 Q Okay.

1 A And there are records from jurors --
2 Q Okay.
3 A -- with their racial content --
4 Q Okay.
5 A -- once it had been provided --
6 Q Okay.
7 A -- And we keep that information historically --
8 Q Okay.
9 A So, yes there is race information on the master list, but not all
10 records have race information.
11 Q Okay. So, so there is race information on the master list?
12 You agree with that?
13 A Yes.
14 Q But not all records have race?
15 A Correct.
16 Q Okay. And you have not personally seen the data coming
17 back to tell us whether race is included from any of these individual
18 sources?
19 A I may at one time have actually asked to look at it to see one
20 of them, but it's a huge file. It's like 3.5 million records.
21 Q Right. No, no, I understand --
22 A So I think at one point I did actually ask just so I could look at
23 it, but then when I see that excerpt of the master list it's --it has historical
24 data. So, again, some of those records do have the race information
25 and some do not, and I can't tell from looking at that extract whether or

1 not that was provided historically or whether it was provided

2 Q Right.

3 A -- during this particular merge, but it's my understanding

4 Q So let me ask --

5 A -- it's all self-reported.

6 Q Okay. But so, the answer is, you don't actually know who's

7 providing race and who's not. You have things that you believe based

8 on some stuff that you've seen, but you have not actually physically

9 looked at it and seen who is providing race information and who is not

10 providing race information.

11 A I've not seen the breakdown of the different sources, no.

12 Q Okay. Thank you.

13 And then, just to go back to the Administrative Order, that was

14 from November of 2016, so that was a full eleven months before the --

15 or the summonses were sent out for Mr. Mungai's trial, correct?

16 A Yes.

17 Q Okay. And is it your testimony that the Voter Rolls were

18 refusing to turn over information?

19 A I'm sorry?

20 Q Is it your testimony that the Nevada Voter Rolls were refusing

21 to turn over that information?

22 A No, they just hadn't been included yet because we had not

23 done a merge yet.

24 Q Okay, so you did have that information?

25 A I don't know at what point they obtained that information.

1 Q Okay.

2 A My understanding is that it would be incorporated into the next
3 merge.

4 Q Okay. So, it's entirely possible that the information was in
5 possession of your office at the time of October of 2017?

6 A It's possible.

7 Q Okay. And we're talking about eleven months after the
8 Administrative Order requiring that information to be in the master list.

9 A Yes.

10 Q Right. So, it's possible within that eleven months your office
11 did received that information.

12 A It's possible.

13 Q Okay, but a merge simply didn't occur?

14 A There were reasons for it not occurring, but yes.

15 Q Okay. So, because a merge didn't occur, that information was
16 not added.

17 A Right. You can't just dump it in, it has to be done through a
18 merge process.

19 Q Okay. But there was a merge in December of 2016, yes?

20 A In when?

21 Q December of 2016.

22 A Of 2016, yes.

23 Q Yes, okay.

24 I'll pass the witness.

25 MR. CHEN: I have nothing further, Your Honor

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THE COURT: Thank you.

QUESTIONS BY THE COURT:

One moment.

Who decides when the merge occurs?

THE WITNESS: Court Administration.

THE COURT: Okay. And you indicated it's not the same time each year?

THE WITNESS: Usually it's May and October. That's usually what they target. Sometimes there are delays for whatever reasons, but those are usually when they target it. Sometimes it takes a month or two. It's a technological process. It does vary.

THE COURT: And so, it's a technological team who does it?

THE WITNESS: Yes.

THE COURT: And how long does the process take?

THE WITNESS: You know, I don't know exactly how long they take to do it.

THE COURT: You testified a little bit earlier about reports that you get. Were you getting -- generating these reports in 2017?

THE WITNESS: We were.

Which report specifically, Your Honor?

THE COURT: You didn't specify the reports in your testimony

--

THE WITNESS: Oh, okay.

THE COURT: -- that I recall.

THE WITNESS: I was probably referring to the race reports,

1 but yes.

2 THE COURT: You did say that, on Direct / Defense first
3 Cross, there were some questions I believe about the master list and
4 you indicated that there were some reports that were generated that you
5 could review with regard to race, but you didn't -- there wasn't a specific
6 name for the report, so I don't know.

7 THE WITNESS: Oh, okay.

8 THE COURT: But you do believe you were generating reports
9 back in 2017?

10 THE WITNESS: We've generated reports all along as much

11 THE COURT: Okay.

12 THE WITNESS: -- as we'd had the capability, yes.

13 THE COURT: Okay.

14 Ms. Hojjat, do you have any follow up questions based on the
15 questions I asked?

16 MS. HOJJAT: Just a couple, Your Honor.

17 THE COURT: Okay.

18 **FURTHER REDIRECT EXAMINATION**

19 BY MS. HOJJAT:

20 Q I want to clarify, are you generating reports based on the
21 master list, or reports based on the jury panels that are being put
22 together?

23 A I am generating reports based on the pool --

24 Q Okay.

25 A -- which is somebody summoned for a day.

1 Q Okay.

2 A I am generating reports on people in attendance on a given
3 day. And I am generating reports based on an actual case. And then
4 the daily attendance reports are combined into a monthly and then the
5 monthly are combined into an annual. So, they are numbers that we
6 maintain on a regular basis.

7 Q I see. So, just to clarify, the reports all seem to be directed at
8 individuals who are actually showing up, is that correct?

9 A Correct.

10 Q The reports are not categorizing how many summonses are
11 being sent out to individuals or how many individuals are on the master
12 list. They're all focused once individuals arrive at the courthouse?

13 A They're based on who was summoned, yes.

14 Q Okay.

15 A Yes.

16 Q Okay, but based on actual response to summonses --

17 A Yes --

18 Q -- not just --

19 A -- because that's where we get the race information.

20 Q Okay. So, the reports are not based on Summonses sent.

21 A I'm sorry?

22 Q The reports are not based upon summonses sent, they're
23 based on responses to summonses, correct?

24 A Yes.

25 Q Thank you.

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THE COURT: Mr. Chen.

FURTHER RECROSS EXAMINATION

BY MR. CHEN:

Q So, Jury Commissioner, let me ask you this then. When in the process of sending Summonses, if I were to tell you that census says that the Asian population is roughly 9% in Clark County, would you be able to go into the potential list and find 9% of Asians, send summons to make sure that those people are going to be as part of the jury pool in any given trial?

A No.

Q All right. Are you able to do that for any potential ethnic or racial group within Clark County?

A No.

Q And so, as you mentioned a minute ago, the only way that you're capable of knowing even the race when you report the reports that are generated, it's because of self-reporting.

A Yes.

Q All right, thank you.

ADDITIONAL REDIRECT EXAMINATION

BY MS. HOJJAT:

MS. HOJJAT: But again, so we're clear -- actually, never mind.

THE COURT: Okay.

Ms. Witt, thank you for your time and your testimony today

1 you are free to go.

2 THE WITNESS: Thank you.

3 THE COURT: We're going to take a quick break. I'm going to
4 allow Ms. Hojjat to call her client and make sure that he doesn't --

5 Ms. Witt, can I put you on hold please until she calls her client

6 --

7 MS. WITT: Sure.

8 THE COURT: -- just to make sure that there's no additional
9 questions based upon that communication?

10 MS. WITT: Sure.

11 THE COURT: I think that would be fair --

12 MS. WITT: Sure, no problem.

13 THE COURT: -- so I'm going to give you a quick break to call
14 your client, okay?

15 MS. HOJJAT: Thank you.

16 UNIDENTIFIED SPEAKER: Court's in Recess.

17 THE COURT: Thank you.

18 [Recess taken at 2:48 p.m.]

19 [Proceeding resumed at 3:05 p.m.]

20 [Colloquy off the record]

21 THE COURT: We are back on the record in State of Nevada
22 versus James Mungai.

23 During that recess, the Court did allow defense counsel an
24 opportunity to speak with Mr. Mungai. And did ask that Ms. Witt remain
25 here as the witness in case she needed to be recalled after said

1 consultation.

2 MS. HOJJAT: Thank you, Your Honor. Yes, and there were
3 two matters -- well, yes, two matters that I wanted to bring up. One of
4 them in relation to the consultation with Mr. Mungai. I realize that I didn't
5 previously make this record and I just wanted to have it clear, because I
6 know things are so different across courts right now. I wanted it to be
7 clear that, for the record, that if Mr. Mungai were out of custody, that he
8 would in fact be allowed to be present in the courtroom and sitting right
9 next to me at counsel table, that we are having hearings for out of
10 custody defendants where they are allowed in the courtroom. It is only
11 in custody defendants that are being kept out of the courtroom and not
12 being allowed to sit next to their counsel during these hearings. And
13 that just goes to my earlier objection to his inability to be present. There
14 is a difference right now in how out of custody defendants and in
15 custody defendants are being allowed into the courtroom.

16 In addition to that, we do need to recall Ms. Witt.

17 THE COURT: Okay.

18 Ms. Witt, please go ahead and come back up. Thank you for
19 your patience. You are still under the same oath --

20 MS. WITT: Okay.

21 THE COURT: --that you took and duty that you took.

22 **MARIAH WITT**

23 [Resumed the stand and testified further as follows:]

24 Go ahead, Ms. Hojjat.

25 MS. HOJJAT: Thank you, Your Honor

1 If I can approach Madam Clerk, I have one more exhibit to
2 mark actually.

3 THE COURT: Yes.

4 MS. HOJJAT: Thank you. And I believe this one is going to
5 be stipulated to, so [indiscernible].

6 MR. CHEN: I'll stipulate to the admission of both of them,
7 Nadia.

8 MS. HOJJAT: Oh, will you? Actually. Okay. I believe the
9 State's stipulating to the admission of Defense Exhibits A and B.

10 THE CLERK: A and B? Okay.

11 I'll fill the rest in later.

12 MS. HOJJAT: Thank you.

13 If I may approach the witness, Your Honor?

14 THE COURT: You may.

15 **ADDITIONAL DIRECT EXAMINATION**

16 BY MS. HOJJAT:

17 Q And Ms. Witt, just for the record, earlier when we were talking
18 about the Administrative Order, I'm showing you what's been admitted
19 as Defense Exhibit B --

20 A Yes.

21 Q Does this look like the Administrative Order --

22 A Yes.

23 Q -- in regards to adding the Voter Rolls to the master list?

24 A Yes.

25 Q Thank you.

1 Now, I'm showing you what's been stipulated to as Defense
2 Exhibit A.
3 A Yes.
4 Q This was provided to us during the break, correct?
5 A Yes.
6 Q And actually, so your attorney is present in the courtroom and
7 has been watching these proceedings?
8 A Yes.
9 Q And as he was listening to you testify, it sounds like he
10 communicated with your office and found an agreement and request for
11 information pursuant to NRS 612.265?
12 A Yes.
13 Q So, this would be the request to DETR for the information.
14 A Yes.
15 Q And it is pursuant to that NRS that I talked about earlier that
16 lays out how the request needs to go to DETR for the Jury
17 Commissioner to be able to receive this information.
18 A Yes.
19 Q Okay. And it is a document that was signed by you?
20 A Yes.
21 Q And the document was signed by you on March 8th of 2019.
22 A Yes.
23 Q Thank you.
24 THE COURT: Was that 2019?
25 MS. HOJJAT: And --

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Yes.

BY MS. HOJJAT:

And so, we're clear, in searching for any requests that were made to DETR pursuant to NRS 612.265, this was the only document that your attorney was able to find that you guys are aware of that is a written request to DETR from you, correct?

A Yes.

Q Thank you.

MS. HOJJAT: I will pass the witness.

THE COURT: Are you moving for admission of the stipulated documents?

MS. HOJJAT: I am so sorry, Your Honor, yes. The State has stipulated to both documents, move to admit both exhibits.

MR. CHEN: No objection to this. We just stipulate to admission of A and B.

THE COURT: Defense A and Defense B will be so admitted.

[DEFENSE EXHIBITS A and B - ADMITTED]

ADDITIONAL CROSS-EXAMINATION

BY MR. CHEN:

Q Ms. Witt, this exhibit, Defendant Exhibit A, which is the agreement in request for information - it's titled as. . Did you -- was there -- do you remember a history to the up of this document?

A I do now. It had completely skipped my mind because it had been a discussion back and forth. So, when the law was passed requiring the DETR list to be added, there was a statewide effort,

1 actually, through the Administrative Office of the Courts to secure the list
2 from DETR. And so, we were receiving emails and communications
3 from the Administrative Office of the Courts that they were pounding out
4 the details to try to reach some sort of an agreement so we could get the
5 list. And then at the point that those issues had been resolved that's
6 when I signed this document.

7 Q Okay. So, would I be correct in stating that this 2019 – it's
8 signed March 8th 2019, this was not --

9 MS. HOJJAT: Objection, leading.

10 BY MR. CHEN:

11 Q Was this the beginning of the process of trying to get the
12 information?

13 A No.

14 MR. CHEN: No further questions, thank you.

15 THE COURT: Thank you.

16 Anything further?

17 MS. HOJJAT: That's it, Your Honor.

18 THE COURT: Okay.

19 You are free to go, this time for real.

20 THE WITNESS: Okay. Thank you.

21 THE COURT: Thank you.

22 Defense, call your next witness, please.

23 MS. HOJJAT: Thank you, Your Honor.

24 The defense calls Jeffrey Martin, who is present via
25 BlueJeans.

1 THE COURT: Mr. Martin, please stand and raise your right
2 hand.

3 **JEFFREY MARTIN**

4 [Having been called as a witness and being first duly sworn testified as
5 follows:]

6 THE CLERK: Thank you. Please have a seat. State and
7 spell both your first and last names for the record.

8 THE WITNESS: Jeffrey, J-E-F-F-R-E-Y. My last name is
9 Martin, M-A-R-T-I-N.

10 THE CLERK: Thank you.

11 THE COURT: You may proceed.

12 MS. HOJJAT: Thank you, Your Honor.

13 **DIRECT EXAMINATION**

14 BY MS HOJJAT:

15 Q Mr. Martin, what do you do for a living?

16 A I'm a Mathematician Statistician.

17 Q And what is your educational background?

18 A I have a Undergraduate Degree in Mathematics and
19 Economics from Vanderbilt and a Master's Degree in Economics from
20 the University of Chicago.

21 Q Okay. And in the course of your work as a Mathematician and
22 Statistician, have you analyzed jury lists?

23 A Yes, I have.

24 Q What types of jury lists have you analyzed in the course of
25 your work?

1 A Looked at jury lists since 1997. I've looked at local lists, at
2 State Court type lists and jury lists from the Federal Courts.

3 Q Okay. And when you're looking at these jury lists are you
4 doing statistical analyses on these lists?

5 A Yes.

6 Q Are you doing statistical analyses specific -- specifically with
7 regards to demographic racial makeup of jury lists?

8 A Yes.

9 Q And approximately how many jury lists would you estimate
10 that you have analyzed in your career?

11 A I don't know how many. I'm currently working on about 20
12 cases. I've looked at thousands of jury lists across the country.

13 Q Okay. So, when you say you don't know how many, it's
14 because it's such a high quantity?

15 A That's correct.

16 Q Okay. And have you previously testified in regards to the
17 analyses that you have done on jury lists?

18 A Yes.

19 Q Approximately how many times would you estimate that you
20 have testified regarding analyses of jury lists in your career?

21 A Since 1997 I've testified hundreds of times. I couldn't give you
22 a precise number, but hundreds of times.

23 Q Okay. And these analyses and this testimony all relates back
24 to your work as a Mathematician and Statistician and your analysis of
25 jury lists in regards to that.

1 A That's correct. I've testified on other issues too, but hundreds
2 of times in dealing with jury lists and jury composition issues.

3 MS. HOJJAT: At this time, I would ask the Court to qualify Mr.
4 Martin as a expert Statistician and expert in data analysis as it relates to
5 jury lists and jury composition issues.

6 THE COURT: State, do you wish to be heard on the issue?

7 MR. CHEN: I would stipulate that he's an expert in statistics.
8 I don't know specifically what questions Ms. Hojjat's going to get from
9 him or answers she's going to get from him, but I do think he's qualified
10 to testify about mathematics.

11 THE COURT: He will be so deemed to be an expert in those
12 regards.

13 MS. HOJJAT: Thank you, Your Honor.

14 THE COURT: His testimony will be accepted.

15 MS. HOJJAT: Thank you, Your Honor.

16 BY MS. HOJJAT:

17 Q Mr. Martin, have you had the chance to review data that was
18 provided to you prior to your testimony here today?

19 A Yes, I have.

20 Q Okay. So, what have you looked at?

21 A I've looked at the current jury list that Ms. Witt was talking
22 about. I've looked at other lists that are people summoned from that list.
23 I've looked at census materials as it relates to Clark County, and I've
24 looked at other documents that were provided to me, - affidavits and
25 notices and that type of thing.

1 Q So, fair to say that everything the Jury Commissioner provided
2 in response to the subpoenas that were sent to her, you've taken a look
3 at?

4 A That's correct.

5 Q Okay. Now, you mentioned looking at Census numbers.
6 What census numbers did you look at?

7 A So, I looked at -- since we're dealing with particularly the date
8 October 2017 or November -- you know, late in the year 2017-- I looked
9 at the benchmark census numbers that are released every year from the
10 United States Bureau of Census about Clark County and about persons
11 who are age 18 and above and our citizens of the United States.
12 Specifically, those that are called the American Community Survey.
13 They are provided every year for every county in -- they're the
14 benchmark for this type of analysis.

15 Q Okay. So, you looked at the American Community Survey for
16 which year specifically?

17 A 2017.

18 Q Okay. And is that because that was the year that this trial
19 occurred?

20 A That's correct.

21 Q And when you're talking about looking at the eligible
22 population of people over 18 who are citizens, are those the numbers
23 that are used for this analysis in other State Courts and in Federal
24 Court?

25 A Those are the benchmark numbers that are used, particularly

1 by the Federal Courts and then used in State Courts as well, depending
2 on their particular circumstances, I guess.

3 Q Okay. So, according to those census numbers, what were the
4 demographics of Clark County, with respect to individuals who identified
5 as Black or African American in 2017?

6 A Okay. So, persons who identified as Black or African
7 American in 2017 in Clark County that was -- there are 12.60% of the
8 population.

9 Q 12.60%, correct?

10 A That is correct.

11 Q Okay. Now, when you were looking at these numbers and
12 doing the statistical analysis of jury lists, which -- what list would you
13 ideally be using when you're doing your statistical analysis?

14 A Usually the best list to look at is the list that is used to
15 summon the jurors. And you know, I describe it as the big list or
16 sometimes, as you're using, the determine the master list. So, it's the
17 list that the computer randomly goes to and selects how many summons
18 that the Jury Commissioner or Jury Clerk wants to send out.

19 Q In this case did that list exist from October of 2017?

20 A No, it was -- no.

21 Q Okay. Did you make efforts to obtain that list?

22 A Yes. Of course. You know I asked you to request it. But we
23 also were involved in phone call like Ms. Witt was talking about, with Ms.
24 Witt and the folks at Avenue, who are the computer IT folks.

25 Q Okay. And what information was given to you during that

1 phone call?

2 A We went through a number of options to see how we could
3 get the jury list or something close to it. And a couple of things were
4 suggested, like Ms. Witt said; you know, backups and other backups
5 both either at Avenue or within the Jury Commissioner's Office that, you
6 know, would have been about that time. Those weren't found, so I've
7 worked, you know, like I've said, for a certain period of time in this type
8 of area. I'm familiar with a lot of these jury systems. And I was familiar
9 with the folks at Avenue. And we could talk and discuss, you know,
10 another way to recreate the list, which I've done in, you know, other
11 places as well --

12 Q Okay.

13 A -- besides Clark County.

14 Q And did Avenue discuss with you a possible way of recreating
15 that list using the dates from previous merges?

16 A Yeah, not using the dates from previous merges, but using
17 particularly the participant number that's in the current jury file -- jury list.

18 Q I see. Okay. So, was something eventually supplied to you
19 based on the conversation with Avenue?

20 A Right. So, I was supplied the current jury list and we talked
21 about how to take that list and to pull out what would have been the
22 2017 -- recreation of the 2017 list.

23 Q And what methodology was that, that was discussed and that
24 you ultimately used?

25 A There's a certain amount of details here, but in general the

1 way the Avenue system works is very common. People are given a
2 sequential participant number and when the jury list is updated and
3 more people are added, the participant numbers start at where the last
4 ones ended off and are added on. So, if you look at those participant
5 numbers, you get a range at when groups of people are added to the
6 jury list. And you see very specific breaks where -- based on the people
7 being summoned, you can see where new people are getting
8 summoned.

9 Those breaks mirror what Ms. Witt was talking about. The
10 first group -- if you want me to go there. The first group in 2017 started
11 showing up in the January 2017 summons. So, they were put in before
12 then, but they were getting summoned in January 2017. The next time
13 that a big group gets added, or a group gets added, is in the summons
14 that show up in May of 2018. So, those are consistent with what Ms. Witt
15 was talking about, about when the jury list gets -- more people get
16 added to the jury list.

17 Q I see. So, based upon your viewing of the list and your
18 analysis, it looked like no names were added to that list in 2017 at all?

19 A That's correct.

20 Q Okay. And so, using this methodology, you did your best to
21 recreate the October 2017 master jury list.

22 A Correct.

23 Q Okay. Now, is this recreation that you were working off of an
24 exact recreation of the October 2017 master jury list?

25 A Well, we don't have the exact 2017 jury list, so we can't say

1 for absolutely certain that it's exactly the same. So, we don't have
2 anything to compare it against. This is with the data that we have. In
3 my experience this is as close as we're going to get.

4 Q Okay. Are there potentially flaws to this methodology of
5 recreating a list?

6 A Flaw meaning have we missed some people? Sure. Some
7 people may have been taken out of the list. The -- you know, there's a
8 number of things that could have happened. But if you look at it from
9 sort of a crosschecking, maybe it was a way to look at it. All the people
10 who --

11 THE COURT: A who?

12 BY MS. HOJJAT:

13 A -- were summoned in 2017 show up on this list.

14 Q I'm sorry, Mr. Martin, I'm going to stop you for a second.

15 A Sure.

16 Q You cut out for a second, so can you start over?

17 A Sure.

18 Q I think you said if you look at it for maybe a crosschecking, is
19 that what you said?

20 A Right. In terms of crosschecking the reliability of the list that
21 we came up with, there's two things that you notice right away. One is
22 all the people who are summoned in 2017 are on that list. And then
23 secondly, if you look at the youngest person on the list, that should be
24 consistent with you have to be 18 to be a juror. And of course, each of
25 these times that we're adding people is a different date. The folks who

1 are added right before 2017, they're born -- the youngest people are
2 born in 1998, which would be consistent with turning 18 in 2016, and
3 therefore -- and then the people added in 2018, their youngest people
4 were born in 1999, consistent with turning 18 in 2018. So, those
5 crosschecks, you know, what we've done with the recreation of the list.

6 Q Okay. Obviously would it have been your preference to have
7 the original list?

8 A Absolutely.

9 Q But was that something that was outside of your control?

10 A Yes.

11 Q And I'm so sorry, you're cutting out.

12 A I'm sorry, I'm right next to my router here.

13 THE COURT: Okay, that appears to be better. Thank you.

14 MS. HOJJAT: That's better, thank you.

15 THE WITNESS: Okay.

16 BY MS. HOJJAT:

17 Q So, was it outside of your control, having that master list?

18 A Yes.

19 Q Was that something that was outside of the control of the
20 Defense completely in this case?

21 A Yes.

22 Q Typically in cases who is the one who is responsible for
23 keeping copies and backups of the master list?

24 A Well, it's the -- you know, the Jury Clerk or the Clerk of Courts
25 or the Administrative Office within the Court that keeps the jury list.

1 Q Okay. Thank you.

2 Now, I want to talk to you about the recreation of the October
3 2017 list, okay? And from here on out I'm just going to refer to that as
4 the master list to be shorter, but I want you to know that what we're
5 talking about is the recreation of the October 2017 list that you
6 recreated. Okay?

7 A Okay.

8 Q All right. Were there duplicates that you observed on the
9 master list?

10 A Yes.

11 Q Okay. And can you tell us just briefly --

12 THE COURT: I apologize, was that a yes?

13 THE WITNESS: Yes, I'm sorry. Yes.

14 THE COURT: Thank you.

15 BY MS. HOJJAT:

16 Q And can you tell us just briefly what a duplicate is?

17 A Well, as I defined it in this circumstance it was persons who
18 were duplicated on the list. So, they would have the same first name,
19 same last name, same date of birth. And then I also looked at persons
20 who had the same first name, the same date of birth and the exact same
21 address, including city and zip.

22 So, the first group, which is first name, last name, date of birth
23 -- there were not very many of those duplicates, which is -- which shows
24 that the duplication procedure used by the Court -- that's what they were
25 centering on and they caught most of those duplicates.

1 The second group I'm talking about, where you have the first
2 name, date of birth and address, catches another group of people. And
3 what they are is what you most likely think of is persons who have
4 changed their name, maybe through marriage, and that type of thing.
5 That's some of them, but actually the most of those people are people
6 who have hyphenated names -- in other words one of the sources will
7 have a hyphenated name and the other source will just have of those
8 two hyphenated names. Or very, very minor misspellings --

9 Q Okay.

10 A -- of the lase name.

11 Q So, basically what you're looking for in duplicates is you want
12 to make sure that we're not looking at the same person twice?

13 A That's correct.

14 Q Okay. So, if you see two Nadia Hojjat's with the exact same
15 date of birth, you don't want me on that list twice.

16 A Right.

17 Q And could I be on a jury panel twice? Could I be summoned,
18 and could I be juror number 3 and juror number 40 in a jury panel?

19 A That's a self-correcting problem. If you get set two Summons,
20 only one of you is showing up.

21 Q Right. So, I -- because a person cannot serve two positions
22 on a jury, when you have duplicates you remove those duplicates from
23 the equation, correct?

24 A Correct.

25 Q Okay. So, going forward I'm going to ask you to exclude

1 duplicates from your calculations, given that a person can only hold one
2 position in a jury pool in a jury demand. Okay?

3 A Okay.

4 Q All right.

5 All right. So, excluding duplicates, what were the
6 demographics of the reconstructed 2017 October master list with
7 respect to individuals who self-identified as Black or African American?

8 A Okay.. To be clear, when we talk about eliminating duplicates

9 --

10 Q Yes.

11 A -- I'm not eliminating both, I'm just eliminating one.

12 Q Right.

13 A If that makes any sense.

14 Q Yes. Absolutely it does.

15 A If you're on the list twice, I'm just eliminating you once, not
16 eliminating you twice.

17 Q Right, from the calculations. So, if you count the person once
18 for the calculation, you don't count them twice for the calculation.

19 A That's correct.

20 Q Because they're only one person.

21 A So, the -- on that recreated master list from 2017, African
22 Americans made up 9.76% of the list.

23 Q Okay. Did you also look at all the persons who were
24 summoned in 2017?

25 A Yes.

1 Q And what were --

2 A So, all the people who -- I'm sorry.

3 Q What were the demographics of all the people who were
4 summoned in 2017, with respect to individuals who self-identified as
5 Black or African American?

6 A Right. Of the group that was summoned in 2017, 10.62%
7 were Black or African American.

8 Q Okay. And did you look at the persons in Mr. Mungai's trial
9 venire?

10 A Yes.

11 Q And what were the demographics of the persons in Mr.
12 Mungai's trial venire who self-identified as Black or African American?

13 A There were 6.15% of the venire was persons who self-
14 reported as Black or African American.

15 Q Okay. So now, as Statistician, we have our census data of
16 what percentage of Clark County identifies as Black or African
17 American. And then we have these numbers for our master list, our
18 Summons, our venire, of individuals who identify as Black or African
19 American. What kind of analysis do you do with these numbers?

20 A The most common analysis is our two calculations. One is
21 called Absolute Disparity and the other's called Comparative Disparity.

22 Q Okay. And are these two types of calculations that are used
23 by the courts nationwide in the United States?

24 A Yes. I'm asked to present those type of calculations in every
25 case that I'm asked to provide information on.

1 Q Okay. So, it's used by the states. Is it used by the Federal
2 Court?

3 A Yes.

4 Q Are you familiar -- are those calculations that are used by the
5 Nevada Supreme Court here in the state of Nevada?

6 A Yeah.

7 As you know, I'm not a lawyer, I'm a Statistician. I have
8 looked at -- you sent me a case, the Morgan case -- I looked at it and
9 that was -- dealt with a discussion of Absolute Disparity and
10 Comparative Disparity.

11 Q Okay. And the case you're referring to is *Morgan v. State*?

12 A That's correct.

13 Q And that's a case from the State of Nevada, the Nevada
14 Supreme Court?

15 A That's correct.

16 MS. HOJJAT: And just for the record, the citation on that is
17 134 Nevada 200. It's a 2018 case.

18 BY MS. HOJJAT:

19 Q And in that case, Mr. Martin, was the Nevada Supreme Court
20 engaging in these calculations of Absolute and Comparative Disparity?

21 A Yes.

22 Q Okay. So, this is to your knowledge, calculations that have
23 been acknowledged and used by our court here in the state of Nevada.

24 A That's correct.

25 Q Okay. Now, lets talk about each one of these. Lets start with

1 Absolute Disparity. What is Absolute Disparity?

2 A Well, Absolute Disparity as a formula is just a difference
3 between the percentage a group is in the population and the percentage
4 that same group is in the jury list. And you just subtract the two
5 numbers -- it's always shown as a positive number, but it can represent
6 under representation or over representation.

7 Q Okay. So, for example, in this case if we have 12.6% in our
8 general population and 9.76% on our master list, you would subtract
9 those two numbers to calculate the Absolute Disparity, is that correct?

10 A That's correct.

11 Q Okay. Now, lets talk about the second type of analysis you
12 mentioned, Comparative Disparity. What is Comparative Disparity?

13 A Comparative Disparity is a rate mathematically. So, instead of
14 just the absolute difference between the two numbers, it's the
15 percentage difference between the two. So, for instance, if you
16 calculated Comparative Disparity of 50%, what that's telling you is you're
17 missing half of the group.

18 Q Okay. Why would somebody engage in looking at
19 Comparative Disparity as opposed to Absolute Disparity?

20 A So, the problem, or the issue with absolute disparity is that it's
21 very harsh on small groups. In other words, if you have a group in the
22 population that makes up 10% of the population, if you're missing, you
23 know, 5% of that group, the Absolute Disparity is still 5%, but you're
24 really missing a large part of that group. Compared to if it was a larger
25 portion of the population, say 75%. If you -- if the jury list was 70% of

1 that group, you'd still have an Absolute Disparity of 5%, but obviously
2 you're not missing as big a group -- big a part of that group. It's just the
3 difference between absolute numbers and rates of numbers. Rates take
4 into account the size of the group that you're talking about, and so
5 they're not as harsh on small groups. They treat small groups the same
6 way they treat large groups.

7 Q Okay. So, is the point of looking at Comparative Disparity to
8 make sure we're treating all groups the same when we're calculating
9 whether somebody is missing?

10 A Yes.

11 Q Okay. So, you said that Comparative Disparity is calculated
12 by dividing, is that correct?

13 A As a formula, Comparative Disparity is the Absolute Disparity
14 divided by the population percentage.

15 Q I see. Okay. So, lets start looking at the numbers that we
16 have in this case.

17 Looking at the Absolute Disparity, what was the Absolute
18 Disparity with respect to individuals who identified as Black or African
19 American on the jury list in 2017; the master jury list from October 2017?

20 A That Absolute Disparity is 2.84% under representation.

21 Q Okay.

22 A And the way you get that is the 12.6 that's the population
23 minus 9.76. So, the end result is 2.84% under representation.

24 Q Okay. And then let's look at the Absolute Disparity with
25 respect to individuals who self-identified as Black or African American

1 who were summoned as a whole in 2017. What was that?

2 A So, looking at that group, the Absolute Disparity is 1.99%
3 under representation.

4 Q Okay. And then looking at Mr. Mungai's venire specifically,
5 what was the Absolute Disparity for individuals who identified as Black
6 or African American for venire?

7 A Mr. Mungai's venire -- the Absolute Disparity is 6.45% under
8 representation.

9 Q Okay. So, now I want to ask you about the Comparative
10 Disparity, because you told us the Absolute Disparity is harsher on
11 smaller groups because there already such small numbers.

12 THE COURT: Okay. One moment, point of clarification for
13 the Court and we're getting some feedback. The 2.84%, what is that
14 number representative of? It's not his venire and it's not the year of
15 2017, so what is it?

16 MS. HOJJAT: It was the master list.

17 THE COURT: Okay. Master list, thank you. And then the
18 1.99 was 2017?

19 MS. HOJJAT: Yes.

20 THE COURT: Okay, thank you.

21 BY MS. HOJJAT:

22 Q All right. So, now, you were saying Absolute Disparity is
23 harsher on smaller groups, because they're already a smaller part of the
24 population. So, let's talk about --

25 A That's correct.

1 Q -- Comparative Disparity, okay? What was the Comparative
2 Disparity with respect to individuals who identified as Black or African
3 American on that 2017 master list?

4 A The Comparative Disparity was 22.53% under representation.

5 Q 22 --

6 A So, as a translation when -- we're missing about a quarter of
7 that group than we would have expected for African Americans -- Black
8 or African Americans.

9 Q Okay. So, 22.5% disparity between the number that should
10 be on the list and the number that is actually on the list, correct?

11 A Right.

12 Q And that's an under representation?

13 A Right. Correct.

14 Q So, as we just said, that's almost 1 in 4 African Americans
15 who should be on the list who are not on the list, correct?

16 A Something between 1 in 4 and 1 in 5.

17 Q Correct. Thank you. Now, I want to talk about the
18 Comparative Disparity with respect to individuals who identified as Black
19 or African American who were summoned in 2017. What was that
20 Comparative Disparity?

21 A That Comparative Disparity was 15.76% under representation.

22 Q Okay. And then I want to talk about Mr. Mungai's venire.
23 What was the Comparative Disparity for Mr. Mungai's specific Venire?

24 A Comparative Disparity for Mr. Mungai's venire was 51.16%
25 under representation.

1 Q Okay. Now, I want to talk to you about these numbers,
2 because we're seeing some variance. With the venire, which is the
3 smaller number, we're at a 51% Comparative Disparity. But when we
4 get to the master list, we're at a 22%, almost 23% Comparative
5 Disparity. Can you explain to us why we might see differences between
6 big groups and small groups?

7 A Well there's -- for a smaller group there's a more of a random
8 variability that occurs and of course, you've -- well a smaller group the
9 randomness allows for a wider range as it were than a bigger group.

10 Q Okay. When we see these numbers, should we be expecting
11 the same 50% from the venire in the master list? Should we be saying if
12 it's not 50% in the master list, well then it's not a big deal?

13 A You had a lot of things in that question there, counselor

14 Q Sorry, sorry, let me break that down.

15 A Try that again.

16 Q Yeah, let me break it down.

17 Actually, you know what, I'm going to move on, we'll come
18 back to that question in a little bit.

19 Did you look at standard deviations at all?

20 A Yes.

21 Q Are standard deviations also a commonly accepted type of
22 mathematical calculation?

23 A Yes.

24 Q Okay. Explain to us what is a standard deviation from
25 [indiscernible].

1 A So, standards deviations look at the randomness that's
2 involved whenever you pick a group out of a larger group. So, we have
3 the master list and we're going to summon some people from it. We're
4 not going to summon everybody, we're going to summon some of the
5 people from it. You know, just the way life is, if the master list is 10% of
6 some group, say African Americans, when you draw a smaller group of it
7 you wouldn't expect to get exactly 10%. There's some luck of the draw -
8 - some randomness that occurs. The question is -- or what a statistician
9 faces is, is that variance -- that randomness, is it within the realms of
10 what you would expect mathematically or is it something beyond the
11 realm of something that just happened randomly?

12 So, standard deviations is a scientific method to determine
13 whether when we get -- you know, when we have a list that's 10% and
14 we draw a list and it's 12%, is that something that we should have just
15 expected randomly, or is it the result of some other effect?

16 Q So, how many standard deviations would you say is still -- or
17 does the mathematical community say is still within the realm of
18 accepted versus outside of what number are you looking at there's some
19 other force causing issues with the numbers?

20 A Statisticians typically use either two or three standard
21 deviations from expected. Two meaning that you get outside that range
22 less than 5% of the time and three standard deviations, meaning you get
23 outside of what you're expecting 0.5% of the time.

24 So, the other way of looking at it is, you're within two
25 standard deviations 95% of the time just randomly. You're within three

1 standard deviations 99.5% of the time roughly, just based on luck of the
2 draw.

3 Q Okay. So, if you're outside of three standard deviations,
4 would you say it's still random or would you say at that point there's
5 something systemic going on?

6 A A statistician would say that's statistically significant, and that
7 it would reflect that there's something systematic occurring other than
8 just a random luck of the draw; there's something systematic.

9 Q Okay. So, outside of three standard deviations, a statistician
10 would say is not random and is in fact systematic. Is that correct?

11 A That's correct.

12 Q Thank you.

13 Now, I want to talk to you about the standard deviations from
14 expected in Mr. Mungai's case with respect to African Americans on the
15 master list. How many standard deviations from expected were -- was
16 the numbers with respect to individuals who self-identified as Black or
17 African American on that 2017 master list?

18 A Were more than 56 standard deviations to [indiscernible].

19 Q Fifty-six standard deviations?

20 A Correct.

21 Q So, you said two or three could be random; outside of two or
22 three something systemic is going on?

23 A Correct.

24 Q On this list, it was 56 standard deviations below the expected
25 number of African Americans on the list?

1 A That's correct.

2 Q I want to talk to you about the standard deviations in regards
3 to the summonses. What was the standard deviation from expected of
4 individuals who self-identified as Black or African American who were
5 summoned in total in 2017?

6 A That group is 21 point -- well, 21 standard deviations too low.

7 Q Twenty-one standard deviations too low. And I'm sorry, you
8 cut off, can you repeat that?

9 A Twenty-one standard deviations too low.

10 Q Okay. And I want to talk to you -- oh, let me ask you this.
11 Why are we not looking at standard deviations for Mr. Mungai's jury
12 venire of 65 people?

13 A Of course we could, but what standard deviations do, is it
14 takes into account the size of the sample. The venire is a very, very
15 small number compared to the master jury list, and therefore, the ranges
16 are wider. And so, typically you don't look at getting a statistically
17 significant result from a very, very, very small sample. Just because
18 there's some randomness that occurs in small groups.

19 Q Can you give us an example?

20 A However --

21 Q Oh I'm sorry. I was going to say can you give us an example -

22 -

23 A Go ahead.

24 Q -- that we would understand as laymen in terms of small
25 versus big randomness?

1 A Sure. It's my pleasure to talk about probabilities to a Court in
2 Las Vegas.

3 If you have a coin -- a fair coin I might add-- and you flip it four
4 times, you're either going to get zero heads, you know, 25% heads, one
5 head, 50% heads, 25% tails, 100% tails. You know, you're going to get
6 one of those. And you might, you know, if you flip coins, it's likely you're
7 going to get three heads and one tail. That doesn't strike anybody as
8 odd. And so, you're a little bit away away from 50%.

9 However, if you flip that coin a thousand times, or even one
10 hundred times, the chances that you'd be very far off of 50% are very
11 low. So, that's what standard deviations is doing, is it's saying, you
12 know, if we have a really large sample and we're off, then we should
13 believe it.

14 Q I see. So, with small numbers randomness can have a big
15 impact, because it's a small number. But when you're looking at huge
16 numbers, like millions on a master list, you shouldn't be very off because
17 it's such a huge number. Randomness should not a play a very large
18 part?

19 A That's correct.

20 Q Okay. And that's what standards deviations measures is how
21 much off of the normal you are?

22 A Yes.

23 Q Okay. So, let me ask you in this case, when we're talking
24 about 56 standard deviations and a 22.5% Comparative Disparity, are
25 these numbers statistically significant?

1 A Statistically significant applies to standard deviation.

2 Q Okay.

3 A So, yes, on the standard deviation. On the -- I guess the other
4 number you were talking about Comparative Disparity --

5 THE COURT: Hold on one moment. I want to make sure we
6 hear you. We're getting some feedback from the jail, please.

7 Okay, I think we're clear, thank you.

8 So, start again. Statistical significance applies to standard
9 deviation was the last thing the Court heard.

10 BY MS. HOJJAT:

11 A Yeah starting over. Statistical significance applies to the
12 standard deviation analysis. The Comparative Disparity and Absolute
13 Disparity are not the scientific type calculations that a standard deviation
14 is. So, as a statistician I have to use my words carefully. When I say
15 significant, I'm talking about statistically significant. And that means
16 using a standard deviation type of analysis as opposed to Absolute
17 Disparity and Comparative Disparity.

18 Q I apologize, I became a lawyer because I was bad at math.
19 This is kind of my worst case scenario, is an entire hearing about math.
20 So, the standard deviation in this case is it statistically significant?

21 A Yes.

22 Q Okay. And when we say statistically significant, what you are
23 saying is this is systemic?

24 A That's correct.

25 Q And that is the mathematical term for this, that this

1 underrepresentation of African Americans on a 2017 master list is
2 systemic?

3 A That's correct.

4 Q Okay.

5 Now, I want to talk to you -- I mean, you have a lot of
6 experience working with jury lists all across the country and doing these
7 analysis on jury lists all across the country. What are the causes of
8 systemic underrepresentation of a group on a master list?

9 A So, I like to think of it as sort of going chronologically through
10 your process. So, you start with the population, right? And we know
11 what -- from the Census Bureau what the population is in Clark County.
12 And then you choose source lists to try to get you close to that
13 population. Driver's lists is a very common source list. Electrical bills -
14 less common, but not unheard of. Frankly, most courts use some
15 version of the voter registration list, which we didn't use in 2017. And
16 then, once again with the uninsured -- unemployment insurance list, that
17 -- that's a less used, but not unheard of.

18 So, what you want to look it is -- look at is are those lists
19 representative of the community? And as a statistician, I can tell you the
20 more lists you have, the more closely you're going to represent the
21 community. That's just -- that's what statisticians call law of large
22 numbers, is the bigger group you get, the more likely you are to
23 represent the community.

24 Q So, in this case --

25 A So, that's --

1 Q --sorry. So, in this case you heard the testimony that there
2 was supposed to be, in 2017, four sources being used, but there were
3 only two. Would that have an effect on the demographic representation
4 of the master list?

5 A Sure. Yes.

6 Q Okay. And you said that in most places they use the Voter
7 Rolls. But here in Nevada, in Clark County, they were not using the
8 Voter Roll in 2017, correct?

9 A That's correct.

10 Q Okay. And in fact, you heard the testimony, and you had the
11 chance to review the order. They were under order to use that Voter
12 Roll.

13 A That's my understanding, that's correct.

14 Q Okay. Now, were you able to take a look at the demographics
15 of Nevada's Voter Registration list?

16 A No. So, the -- no, but let me explain.

17 Q Yes.

18 A To register to vote in Nevada, you don't have to give your
19 racial designation. I live in Georgia, when I register to vote I have to
20 actually tell them my self-reported racial designation. But that's not true
21 in Nevada. So, the voting list doesn't have your race on it, and so to --
22 so it's a lot trickier to try to figure out what the demographics of that list
23 are.

24 Q Okay. So, in this case you were not able to take a look at the
25 specific demographics of the voter list. However, you told us that the

1 law of big numbers says that when you add massive lists, like the voter
2 list, just by mathematics, the list becomes more representative of the
3 population. Is that correct?

4 A That's correct.

5 Q Okay.

6 A Assuming of course that you've handled the duplicates
7 correctly.

8 Q Okay.

9 A But --

10 Q So --

11 A -- but --

12 Q Oh, go ahead.

13 A -- my experience is that usually it goes the other way around.

14 Usually, you start with a voting list -- that's a federal requirement and
15 then you're allowed to add on the driver's license list. But to give you an
16 idea, usually adding on the driver's license list adds an additional 20 or
17 30% of people. What it's saying is that there's 20 or 30% that aren't
18 registered to vote but do have a driver's license or a personal
19 identification card. There's some people who have a driver's license but
20 aren't registered to -- there's some people who are registered to vote but
21 don't have a driver's license or personal identification card, or it's
22 expired.

23 Q Okay. So, it sounds like --

24 A So, the rule of thumb is to add about another 20 or 30%.

25 Q Twenty or thirty percent is what happens when you add the

1 DMV list to the Voter Roll?

2 A That's correct.

3 Q But that's because most places start with the Voter Roll?

4 A That's correct.

5 Q In this case, the Voter Roll wasn't even included, correct?

6 A That's correct.

7 Q Okay. So, I mean, based on those numbers, the Voter Roll is
8 a statistically significant tool that is supposed to be utilized in comply
9 with these master lists?

10 A Yeah, once again when I say statistically significant, I'm
11 talking about standard deviation analysis.

12 Q I'm sorry. I'm so sorry. The --

13 A It adds a substantial portion onto the list, that's correct.

14 Q It is substantial. The Voter Rolls are substantial.

15 A That's correct.

16 Q And they play a substantial role in that master list?

17 A That's correct.

18 Q All right.

19 Now I want to talk to you about what we referred to as the
20 DETR list. Did you have a chance to look at the self-published Nevada
21 DETR information?

22 A I was not able to look at the actual list. And taking a step
23 back, what I would normally do is look at any of the sources to see
24 whether a representative --

25 Q I'm sorry. Hold on one second sir, we are getting feedback.

1 Hold on one second.

2 MS. HOJJAT: Is it possible for us to mute CCDC?

3 THE RECORDER: You want me to mute them? I can mute.

4 MS. HOJJAT: I'm just concerned about the feedback.

5 THE RECORDER: But he's not going to be able to hear you.

6 MS. HOJJAT: Oh, they can't hear us if we mute, them so they
7 can't talk?

8 THE COURT: No, they would be able to hear, but they
9 wouldn't be able to speak. So, if your client or the Officer need to get
10 our attention then they wouldn't be able to speak. And unfortunately,
11 right now -- well not unfortunately, but the way that the system works
12 we're going to see Mr. Martin as [indiscernible] and not the jail, so. The
13 jail is tiny, so I wouldn't be able to ascertain whether the Officer or your
14 client --

15 MS. HOJJAT: Okay.

16 THE COURT: So, we'll try to work through it. If it gets a little
17 more problematic, then we'll go from there.

18 MS. HOJJAT: Okay.

19 THE COURT: Um --

20 THE RECORDER: That vision -- that version.

21 MS. HOJJAT: I would prefer not because he's the one
22 testifying, we need to be able to see him clearly.

23 THE COURT: Okay.

24 THE COURT: You're good to go now.

25 THE WITNESS: Please let me know if you can hear me or if I

1 need to stop.

2 MS. HOJJAT: You're fine.

3 BY MS. HOJJAT:

4 Q Okay. So, we were talking about what you were able to see
5 from the self-published DETR information.

6 A Correct. So, I wasn't able to see the actual list that was used
7 in 2017 -- well, it wasn't used in 2017. But I wasn't able to see the
8 actual list. Fortunately the Department of Training - I believe ya'll called
9 it the Department of --

10 Q Employment Training and Rehabilitation.

11 A That's correct. The Department of Employment Training and
12 Rehabilitation publishes statistics on their website, going back --
13 currently right now back to March 2020. March 2020 is a pretty good
14 date in the sense that whereas the pandemic had sort of started in
15 March, it sort of reflects, you know, to the best that we can, what the
16 numbers were like before the pandemic. The pandemic has had an
17 effect on unemployment insurance claims.

18 Q Sure.

19 A But using those numbers from March 2020, they show that
20 African Americans --

21 Q And I'm going to stop you for one second.

22 A -- sure.

23 Q I'm going to stop you for one second, because I want to talk to
24 you about that for one more second.

25 So, fair to say the shutdowns and all the issues that started in

1 Nevada in 2020 didn't start until the very end of March and so they
2 wouldn't be reflected in the March unemployment numbers, they would
3 start after March. They would start April and on would be what would
4 reflect those issues that we encountered because of COVID, is that
5 correct?

6 A Yes. Certainly, the majority.

7 Q Okay.

8 A You know, there were some people getting sick before March,
9 but --

10 Q Sure. But --

11 A -- the big shutdown for employers incurred in March and after.

12 Q Right. The end of March. So, in terms of looking the numbers
13 that were available to you, the March of 2020 number would be the
14 truest reflection of what Nevada looked like before COVID, because
15 those claims wouldn't start rolling in until April, anybody who was
16 affected, end of March. Correct?

17 A That's correct.

18 Q Okay. Sorry. Okay, so go ahead. So, you were able to look
19 at those March of 2020 numbers.

20 A Right.

21 Q Demographically, what did you see?

22 A And so, they actually -- the Department of Employment
23 Training and Rehabilitation collects racial information. And their figures
24 show that 17.67% of the unemployment insurance claims were for
25 persons who were Black or African American.

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Q Okay.

THE COURT: Can you say that number again?

BY MS. HOJJAT:

A That is statewide, not for Clark County specifically, but it's for statewide.

Q And can you repeat that number please?

A 17.67% African American.

Q Okay. And since we're looking at -- since that number -- since the DETR reports are from statewide, let's talk about statewide for a second. What percentage of Nevada generally, self-identifies as Black or African American on the census?

A So, the most current numbers are from 2019 and they show that Nevada is 9.95% Black or African American.

Q Okay. And are we using the 2019 number because we're trying to get as close to that 2020 number because we're trying to look the numbers comparatively. Is that correct?

A That's correct.

Q So, we're talking about 9.95% generally African American, but 17.67% of the DETR list is African American?

A That's correct.

Q So, fair to say there is an overrepresentation of African Americans on the DETR list?

A That's correct.

Q Okay. So, let's talk about those numbers for a second. Did you look at the Absolute Disparity of African Americans

1 overrepresentation on the DETR list?

2 A So, if you do that calculation, Absolute Disparity is 8.12%
3 overrepresentation of African Americans on the DETR list.

4 Q Okay. And did you look at the Comparative Disparity?

5 A The Comparative Disparity would be 85.11%
6 overrepresentation.

7 Q Okay. So, fair to say that African Americans are well
8 represented on the DETR list?

9 A Yeah. Statistically, what you would say is African Americans
10 are disproportionately represented on the DETR list.

11 Q Okay. So, when you got your master jury list from 2017, if that
12 DETR list had been added in there and the names from the DETR list
13 had been added in there, would that have proportionately increased the
14 statistics and the demographics of African Americans on that master jury
15 list?

16 MR. CHEN: Your Honor, I'm going to object to that question,
17 that he can't answer, because these are 2020 statistics versus 2017
18 statistics. We don't know what the unemployment rate was in 2017
19 when we're trying to create this list. So, I think that we're comparing
20 apples and oranges and having him answer that question.

21 MS. HOJJAT: He's an expert, he can do hypotheticals. I can
22 rephrase the question slightly as a hypothetical.

23 THE COURT: Or lay additional foundation, otherwise the
24 objection's sustained.

25 MS. HOJJAT: Okay.

1 BY MS. HOJJAT:

2 Q Sir, let me clarify. We're going to do this hypothetically. You
3 didn't have access. There was nothing published prior to March of
4 2020, correct?

5 A There's nothing on the website prior to 2020 --

6 Q Okay.

7 A -- March 2020.

8 Q So, we're working with the March 2020 numbers because
9 that's we had available to us, correct?

10 A That's correct.

11 Q Okay. So, hypothetically, assuming that the numbers on the
12 DETR list were relatively average throughout the year, that there wasn't
13 some crazy spike or dip in any particular year, demographically.
14 Assuming that the demographics were relatively even, is it fair to say
15 that the DETR list has an overrepresentation of African Americans?

16 And I'm sorry, your sound didn't come through.

17 A Yes.

18 Q Okay. And is it fair to say that if you take a list that has an
19 overrepresentation of a particular group and you add it to the master list
20 that would increase the representation of that group on a master list?

21 A Yes. There's two effects going on. First of all, adding a new
22 source list in helps you get more people from Clark County, for instance
23 on the list. And it should help you with your representation of all groups.
24 But secondly, particularly in a list that is skewed in this way towards
25 Black or African Americans, you would expect that it would increase the

1 Black or African American representation in the master jury list.

2 Q Okay. So, is it a fair inference to reach that if the source that
3 had been statutorily required, the DETR list, had been used in the 2017
4 master list, that it may have created -- that it would have created, likely,
5 a more representative master list?

6 A That would be my expectation, yes.

7 Q Is it fair to say that if the other source that was statutorily and
8 by Court Order required to be used for the master list -- the Voter Rolls -
9 - had been used for the master list, we would likely have had a master
10 list that was more representative of our population?

11 A Yes. That would be my expectation.

12 Q Okay. And this is as a Mathematician as a Statistician looking
13 at the numbers, looking at the data -- this is your opinion?

14 A Yes.

15 Q Okay.

16 Now, I just briefly wanted to ask you one other question. In
17 previous court hearings, Ms. Witt had testified about summonses being
18 sent by zip code and zip code being some sort of determinate factor in
19 who was receiving summonses. You had a chance to look at the master
20 list. You had a chance to look at the summonses that were being sent.
21 Did you see anything that reflected that?

22 MR. CHEN: Objection, --

23 THE WITNESS: To be clear --

24 MR. CHEN: -- Your Honor. The only testimony that we had
25 from Ms. Witt is that that's never happened. So, I think there's no basis

1 to ask him this question, because there's -- she was on the stand. I
2 asked her specifically about zip codes and she said that it's never
3 happened.

4 MS. HOJJAT: Your Honor, this was the entire basis of our
5 objection down -- at trial originally. So, I'm trying to clarify why -- I mean
6 the reality of the situation is, we objected. We put forward this reasoning
7 based on prior testimony that Ms. Witt had give at other hearings. So,
8 we put forward the reasoning. It's in the order, so I feel like I need to
9 address it. I need to explain whether it panned out or not. The fact that
10 we found other major discrepancies and major issues that I think are
11 absolutely determinative of the issue here, is absolutely a separate
12 issue, but we do actually need to address this issue. And so, this is the
13 individual who looked at these things and can tell us whether that was
14 accurate or not.

15 THE COURT: So, as the record is at this time, when you
16 objected originally at the trial, Ms. Witt did not come and testify, her prior
17 testimony had been utilized?

18 MS. HOJJAT: So, what happened at the original trial, is that
19 we objected, and we asked for a hearing. The Judge denied it based on
20 her memory of a previous hearing she had with Ms. Witt. What I
21 explained was, that since that hearing that she had was with Ms. Witt,
22 Ms. Witt had given a subsequent testimony at a different hearing where
23 she specifically said zip codes are how these summonses are being
24 sent out.

25 So, I need to address that, because that is a claim that I made

1 based on Ms. Witt's testimony in a different hearing. And that is one of
2 the basis for this hearing being granted.

3 THE COURT: But that prior or alternate testimony regarding
4 zip codes was not part of this record, because that transcript was not
5 entered into as being part of the record -- it wasn't admitted, right?

6 MS. HOJJAT: No, it is part of the record in that I made those
7 representations.

8 MR. CHEN: Which I understand she made those
9 representations, Your Honor. That's the basis for having the hearing
10 today, is because the Court said, look if there was additional information
11 that Ms. Witt could have given in this trial, the Court should have
12 entertained it. And that's the basis -- that's the entire order is based
13 upon this zip code argument, which she's now stated in those uncertain
14 terms that that never happened.

15 MS. HOJJAT: No. Okay. So, we're clear, she didn't say she
16 never said that. She's now taken back her position and said, well that's
17 not how they were being sent. You never asked her if she said it before.

18 MR. CHEN: She hasn't been impeached on it, which would
19 be --

20 MS. HOJJAT: Nobody's impeaching on her. I'm not trying to
21 call her a liar. I'm just trying to clarify why we're not talking about zip
22 codes more during this hearing, because I'm confident the Supreme
23 Court's going to be curious about it. And the reality is, she said it at a
24 hearing, so I brought it up and I objected based on it in this case. My
25 expert looked through the records -- there's no basis for it. I mean, --

1 THE COURT: Hold on.

2 MS. HOJJAT: -- I'm happy to give the Court the case number
3 where she said it. I have that case name and number, because it was
4 my case as well. I crossed her on that one too. She said it. So, I
5 brought it up. I need to clarify that it's not accurate.

6 THE COURT: What's your specific question to him again?

7 MS. HOJJAT: My specific question is, when he looked at
8 these summonses that were sent and he looked at the master list, does
9 he find it to be accurate -- were zip codes involved in the sending of
10 summonses?

11 THE COURT: Okay. With regard to that question the
12 objection is overruled.

13 BY MS. HOJJAT:

14 Q So, Mr. Martin, you had the opportunity to view the
15 summonses that were sent. Did you find that zip codes played any part
16 in that?

17 A Me, it looked like the summons were sent out randomly as
18 regards to zip codes.

19 Q Okay.

20 A So, what I'm saying there is that there didn't seem to be a set
21 or ordained pattern for which zip codes got summons and which ones
22 didn't, and how many summons went to each zip code. It appeared to
23 be random to me.

24 Q Okay. So, it wouldn't be accurate to be --

25 A Random in -- sorry.

1 Q Go ahead.

2 A Random as it goes as far as zip codes go. Yes.

3 Q Okay. Thank you. Okay, so it wouldn't be accurate to say
4 that they were being sent out by zip code?

5 A It does not appear that they were if there was -- yeah.

6 Q Okay.

7 A No. There does not appear to be so.

8 Q But in looking at the list and looking at the master list and in
9 looking at the summonses, you identified these other issues in terms of
10 significant underrepresentation of individuals who identify as Black or
11 African American, both on the master list and in the summonses that
12 were sent in 2017. Correct?

13 A That's correct.

14 Q And you identified the issue of the fact that there were
15 supposed to be four sources being used in 2017 for the master list and
16 there were in fact only two of those statutorily required four sources
17 actually being used in effect?

18 A Correct.

19 Q Okay.

20 MS. HOJJAT: I'll pass the witness.

21 MR. CHEN: May I begin, Your Honor?

22 THE COURT: You may.

23 **CROSS-EXAMINATION**

24 BY MR. CHEN:

25 Q Sir, as you mentioned, that it appears that the summonses

1 were sent out randomly, correct?

2 A Randomly in as far as zip codes go, that's correct.

3 Q Okay. And that's consistent with the testimony that you heard
4 Ms. Witt give earlier, was that these summonses are sent out randomly
5 by computer, correct?

6 A That's correct.

7 Q And you've worked with that company -- who's the computer
8 company again that you mentioned earlier you work with?

9 A Avenue.

10 Q Yeah.

11 A They've gone through a number of different name changes,
12 but their current name is Avenue.

13 Q Avenue stores the databases for the jury lists, is that fair to
14 say?

15 A I don't know if they stored it there. I imagine the databases
16 are kept locally in Clark County.

17 Q Okay.

18 A But they create those databases.

19 Q And the selection comes from those databases --the
20 selections of jury pools come from those databases, right?

21 A That's correct.

22 Q Okay. Now, this master list that you and Ms. Hojjat have been
23 referencing -- this is the list -- is this a list in which you have to log in
24 some information to be able to access all the names and information?

25 A I'm not sure exactly what you're asking for. Are you talking

1 about the original download?

2 Q Exactly. Is this one that you have a paper copy of, this master
3 list, or did it come in a form in which you had to log into like an online
4 database or online sharing system to be able to access this master list?

5 A I believe so. I don't recall precisely, but it is a list of 3.5 million
6 records, so and Avenue's a sophisticated computer place. I suspect
7 you're right, I download it from their secure site.

8 Q Okay. The information then from that -- you heard Ms. Witt
9 testify that -- about whether or not race is something that's provided to
10 her by the organizations that provide to the list. You remember her
11 testimony about that?

12 A Yes, I do.

13 Q So, in your experience and -- in looking at this list was there a
14 race for every single person who was listed on the master list?

15 A No.

16 Q Okay. So, there are some people that would be on the list
17 that could be African American, or Caucasian, or Asian or any other
18 race, but they're not necessarily identified by the master list, is that a
19 correct statement?

20 A Absolutely.

21 Q And so that would go towards your standard deviation as well,
22 right?

23 A Not exactly. Or maybe -- that's a hard question to answer --

24 Q Let me follow up and see --

25 A -- specifically let me tell you how I would answer it.

1 MS. HOJJAT: He's not done speaking.

2 THE WITNESS: Yeah.

3 MR. CHEN: I'm not trying to interrupt him.

4 BY MR. CHEN:

5 Q But let me just try to clarify, because we're talking about a
6 specific standard deviation maybe different from the one you're talking
7 about. So, for instance, you testified earlier, right, that African
8 Americans on the master list made up – what was your percentage for
9 that?

10 A 9.76%.

11 Q Okay. That's not an absolute number is what I'm trying to say,
12 is it?

13 A Well, if I'm trying to -- I'm trying to interpret your question.

14 Q Sure.

15 A That is 9.76% of the persons that we have their racial
16 identification for. I think that's probably what you're getting at.

17 Q Exactly. So, if someone did not racially identify, they could fit
18 into the percentage of people on the master list, you just wouldn't have
19 any knowledge about that person?

20 A That's correct.

21 Q And were you, as a Statistician, able to come up with a
22 standard deviation of that 9.7%? So, whether within 1 or 2% it would go
23 either way that the list was maybe more like 11 or it was like possibly
24 7%? Like did you have any kind of calculation you were able to do in
25 this list with regards to that?

1 A Yes. That's the calculation we did. So, the 9.76 is 56
2 standard deviations too low.

3 Q Okay. All right. So, part of the problem too, with -- I guess I
4 would say getting an accurate number was that you had to recreate the
5 master list, right?

6 A That's correct.

7 Q So, we can assume that there's some type of error there. It's
8 not going to be perfect, because you had to do the best you could do,
9 correct?

10 A Correct. There was -- there's potentially some error. So we're
11 talking about, as I tried to explain, maybe not successfully. We wanted
12 to make sure that we could cross reference it to some other sources,
13 such as people who got summoned. Obviously if we were missing a
14 whole bunch of those we would be concerned. We weren't missing any
15 of them. Or if the dates of birth didn't align the way that we would have
16 expected it.

17 Q Okay.

18 A But if your question is, do we know absolutely for certain if this
19 is exactly the jury list as it was in 2017, unfortunately I can't tell you
20 exactly if it is.

21 Q Exactly. Okay. And so, we can anticipate that there would be
22 some error potentially in the numbers that you have. Not your fault at
23 all, it's just the fact the list isn't exact to 2017?

24 A Yeah. No insult taken, but there's possibly some movement
25 that we're talking about rather large numbers here. 3.5 million on the

1 current list -- about 2.6 million on that 2017 list.

2 Q Okay.

3 A So, I wouldn't expect the numbers to do a lot of moving
4 around statistically, but in terms of it moving maybe some, sure.

5 Q Okay. In terms of the Comparative Disparity that we were
6 talking about, I believe you said in Mr. Mungai's case the Comparative
7 Disparity was 51.16, is that right?

8 A That's correct.

9 Q Okay. And generally, since you deal with these issues a lot
10 and you testify a lot on these issues, you know that in general 50%
11 Comparative Disparity is kind of one of the benchmarks that a Court
12 uses when determining whether there's been a systematic exclusion,
13 right?

14 A So, you know, as I said before, I'm not a lawyer I don't want
15 anyone to misinterpret my legal research or anything like that. I'm not a
16 lawyer. There are different benchmarks that are used for all of these
17 numbers. So, the one of the problems with Comparative Disparity is that
18 people have different ideas of what is -- what is a big number and what
19 isn't a number. So, that's where something like standard deviations
20 comes into play, where there's a scientific basis behind it.

21 Q And the science can only be good as the data that's input into
22 the science or the mathematics, right?

23 A Absolutely.

24 Q All right. And I appreciate that I know that you've clarified
25 you're not an attorney, but we certainly all respect your mathematical

1 skills, sir.

2 A Oh, thank you.

3 Q So, when you were -- I think you testified in general that when
4 you added the DETR statistics, the diversity of the master list changed.
5 Is what you testified to?

6 A Well we didn't add the DETR list, so I was just looking at if we
7 had added it.

8 Q Fair. Okay and did you do calculations for any other type of
9 racial makeups from DETR? So, for instance did you look at Asians and
10 what that would have done? Did you look at Hispanics and what that
11 would have done? Had you -- did you perform those calculations?

12 A Uh no, but I could.

13 Q Okay. Do you have statistics in front of you for the other racial
14 groups that were reported by DETR?

15 A I could look them up on the website if you wanted me to.

16 Q If it's not too much trouble.

17 A I don't have that printed out in front of me.

18 Q I'm just curious, I'm not -- not too much trouble. I couldn't find
19 it myself, so maybe you could?

20 A Sure. I -- if that's -- I want to do whatever's appropriate. I
21 don't mind looking for it.

22 MS. HOJJAT: I'm -- I'll be honest I'm not sure the relevance.

23 MR. CHEN: I think it matters in terms of -- we're trying to --
24 we've only asked about one particular group. I'd like to see what
25 happens if you put other statistics into this what that would do to the jury

1 list. So, that's the reason that I'm asking these questions.

2 THE COURT: The objection below was specific to African
3 Americans and or Blacks?

4 MS. HOJJAT: Yes, Your Honor.

5 MR. CHEN: You know what, Judge --

6 THE COURT: It's not highly relevant, but I will allow it as to --
7 not to every race, if you have, you know, one or two that you want to
8 question, that's allowable.

9 MR. CHEN: Okay. I appreciate that, Your Honor.

10 BY MR. CHEN:

11 Q Just wondering, sir, do you have the statistics easily available
12 now that we've kind of been debating this for a bit? If not, it's no issue,
13 but --

14 A I do have them in front of me now.

15 Q Could you just read off what the -- and this-- I won't go into
16 depth with it, but if you could just read off what the makeup is of the
17 people who are receiving unemployment insurance?

18 A Sure.

19 THE COURT: As well as the year and month if available as to
20 where this data is coming from and specifically the website that you are
21 on as well, so we have a clean record.

22 MR. CHEN: Thank you.

23 THE WITNESS: Okay.

24 THE COURT: And it is --

25 THE WITNESS: So, starting with --

1 THE COURT: -- one moment. It's April 8th, 2021 at
2 approximately 4:28 p.m. Pacific Standard Time.

3
4 A Okay. And, specifically, the website is Nevadaworkforce.com.
5 And then we've got a bunch of other things after that. But so those
6 things are
7 /portals/197/ui%20monthly%20claims%20press%20release\dashboards/
8 ETA203.HTML. But I suspect that if you just went to
9 Nevadaworkforce.com you could follow the links to get to this report. It's
10 for March 2020. The same numbers we were using before. And break -
11 - the racial breakdown they have is 2.4% for American Indian or Alaskan
12 Native; 5.5% for Asian; 17.7% for Black or African American; 2.4% for
13 Native Hawaiian or other Pacific Islander; and 53.5% for White persons.

14 Q All right. So, thank you for doing that. And so just as an
15 example --

16 A No problem.

17 Q -- in this particular database so to speak, you mentioned
18 African Americans were overrepresented by roughly 5%, is that right?

19 A 17.7 compared to about 10, so yeah --

20 Q And then --

21 A -- 7% or so.

22 Q -- you just mentioned, I believe, that for instance, Asians were
23 about 5% of the reported on DETR?

24 A That's correct.

25 Q So, the -- I don't know if you have the census statistics, but

1 that would -- if Asians made up closer to 9% of the population, then they
2 would be underrepresented by this database?

3 A That's correct.

4 Q All right. So, other than the fact that by including this
5 database, as you mentioned, the more names the more general diversity
6 you get, that would be your only real takeaway about adding this list to
7 the master list, right? So, basically, I'm just saying --

8 A It would be --

9 Q -- by adding this you're getting more names. By more names
10 you're generally going to get more diversity?

11 A That's true too, but also if you add a list that is like this list,
12 skewed demographically towards Black or African Americans, you would
13 expect the representation of Black or African Americans to go up
14 because you've included this list.

15 Q But if you've included this list, you would theoretically have
16 less of a percentage of Asian Americans --

17 MS. HOJJAT: Objection, relevance.

18 MR. CHEN: Your Honor, I think the whole point is whether
19 these lists are fair and systematic, so I'm trying to understand what
20 would be fair or not.

21 MS. HOJJAT: But I think that's -- respectfully that's not the
22 argument here. And I can absolutely understand, perhaps, in another
23 venue that might be the argument and should be an argument that's
24 made. But the Legislature has decided that this is a list that should be
25 used for the master list. And the objection that we made down below

1 that specifically led to this hearing is whether African Americans are
2 being underrepresented on our master jury list.

3 So, the question is whether we are excluding lists that we're
4 supposed to be including that would lead to more African Americans on
5 our master list. It's not a valid argument to say well but adding this list
6 that's statutorily required would exclude other groups. That's just --
7 that's not the point of this hearing in particular, if that makes sense.

8 THE COURT: It does make sense, and I understand what the
9 particular argument is. The objection is going to be overruled, because
10 it is with regard to systematic exclusion. So, I'll allow him to explain
11 overall -- I think that -- I get the question, I get the argument, I get your
12 thing. I think that there's some additional things that have been testified
13 to, so I am going to allow him to explain.

14 MR. CHEN: And I think he did, Your Honor. I don't have
15 anything further on that issue.

16 THE COURT: I didn't hear a response.

17 Did you hear a response, Ms. Hojjat?

18 MS. HOJJAT: To be completely frank, I'm not sure that there
19 was a question. It was a little bit -- I mean, what was the question?

20 BY MR. CHEN:

21 Q I think I basically said, sir. And if I could, Your Honor. That if
22 we were able to use the representation of minority groups based upon
23 this DETR list, Asians would be underrepresented in the potential jury
24 pool, because they're underrepresented as a compared to the of Asians
25 in Clark County on this list.

1 A Is that a question to me?

2 Q Yes, it is.

3 A Okay. That's not exactly how it works. In the sense that when
4 you have -- the goal of adding varied source lists is to make sure we
5 capture everybody. So, you run into this issue of whether a voter also
6 has a driver and whether a driver is also on the DETR list. Or whether
7 someone on the DTR [sic] list is also on the utility list -- Nevada electric
8 and those type of things. So, what you want to do is add varied source
9 lists that catch all the people that maybe one source list didn't catch, and
10 those source lists did catch. In the situation we're in where we haven't
11 caught a group of African Americans, then naturally you're going to look
12 for a list that might have those folks on it. To the extent that Asian folks
13 are already represented in the other list and would be represented -- and
14 would already be represented from the other lists as they are on the
15 DETR list. You get into all those sorts of interactions.

16 So, the idea of multiple lists is, you're right. If you just did
17 DETR list by itself that would probably be problematic because it
18 overrepresents African Americans and as you were saying
19 underrepresents Asian people. That would be a problem. So, by itself,
20 it would be a problem. But in a context where you're adding multiple
21 sources in, then it becomes an advantage.

22 And I'm sorry if I went on for a long period of time, I hope that
23 made some sense.

24 Q Okay. And one thing I do want to also just clear up with you is
25 both terms have been used, systematic and systemic. Is there a

1 difference for you in the use of either term?

2 A No.

3 Q Okay. And so, if I'm hearing your testimony sir, basically
4 you're saying that every juror -- jury that was drawn in 2017 before
5 DETR was added to that list, you're basically saying that every juror at
6 that time was -- would have most likely statistically been under-
7 representative of groups of people. Is that ultimately your testimony?

8 MS. HOJJAT: Objection, misstates the testimony.

9 THE COURT: Sustained. One, as to relevance.

10 MR. CHEN: Well, Your Honor, respectfully, I thought the
11 whole idea is whether our juries are fair or not. So, if 2017 every juror --
12 jury was pulled the same way, if we're saying that the pools weren't fair,
13 then ultimately, I just want to know that that's his testimony. That they're
14 saying that these pools, no matter whether it was Mungai's trial or any
15 other trial, it was systematically unfair. Because that's what they were
16 saying. Systematically, they're underrepresented. Systematically, it's
17 not a fair jury venire. So, I think it's a relevant question. It kind of goes
18 to the issue that we're here, I thought.

19 MS. HOJJAT: But I think that misstates --

20 THE COURT: I also --

21 MS. HOJJAT: Oh, sorry, go ahead.

22 THE COURT: I also don't know how he's able to answer that
23 question. Because here what's been looked at is not only what was
24 going on within the summons, but also specific to this jury venire. And
25 so, the way that I understand the evidence -- it's been a long time since I

1 took statistics, but I did take it -- is that these things cannot be looked at
2 singularly but are looked at kind of as a whole and that's why you have
3 so many different parts. And so, by asking overall -- you're one, asking I
4 think for a legal conclusion in an expert -- I think you're asking for a legal
5 conclusion, but also without the additional information, how is he able to
6 answer that question?

7 MR. CHEN: I think he's answering the question. I mean,
8 maybe I misheard the testimony. But he was basically saying, either
9 systemically or systematically, African Americans are being precluded
10 because of the lists that the Jury Commissioner was using.

11 THE COURT: Okay, so is your question specific then, are you
12 saying over the year 2017 looking at the summons that were sent out,
13 African Americans were systematically excluded, or is your question,
14 over the course of 2017 -- talking about like everyone, there's some
15 systematic issue?

16 MR. CHEN: I'm asking him if his opinion is that African
17 Americans for everyone who came from the 2017 list were
18 systematically excluded.

19 MS. HOJJAT: And if I can respond to that.

20 THE COURT: Yes.

21 MS. HOJJAT: I think the issue is, Mr. Martin has not looked at
22 every single venire from 2017. I think Your Honor hit it on the head. He
23 hasn't looked at all the venires. And the reality is, as he's explained
24 over and over again, you expect variants. You expect standard
25 deviation from the norm. And so, the fact that by coincidence -- and

1 when we're talking about the small numbers in terms of venires -- four
2 jurors versus eight jurors makes a huge difference in whether we've got
3 adequate representation or underrepresentation.

4 So, when we are looking at under-representation in the
5 summonses sent, that doesn't mean that every single individual venire
6 necessarily was underrepresented. Some of them could have been
7 overrepresented. Some of them significantly underrepresented. We
8 don't know how the individuals were distributed amongst those venires.
9 He hasn't seen any of those numbers. But --

10 MR. CHEN: I'm asking about the master list, though.

11 MS. HOJJAT: Right. But that wasn't the question,
12 respectfully. If that's the question --

13 MR. CHEN: I'm asking the master list, which all jury venires
14 come from the master list. And if the master list is defective, wouldn't it
15 naturally lead to the conclusion that, yes, statistically one venire might
16 be incredibly diverse. But that's not the issue -- it's not the dependent
17 venire. We're talking about the list. The master list that he --

18 THE COURT: So, your question is specific as to his expert
19 opinion as to what results would be rendered from the master list?

20 MR. CHEN: Exactly.

21 THE COURT: Okay.

22 MR. CHEN: Which all trials, as we all know, come from the
23 master list. That's his testimony.

24 THE COURT: As to that question, --

25 MS. HOJJAT: I feel like that's the part of the question I object

1 to.

2 THE COURT: -- then the objection is overruled.

3 MR. CHEN: All right. Great.

4 THE COURT: As to the master list. But, as to a conclusion
5 that there -- okay. I think that you can lay some foundation and ask
6 about the master list. And you can also -- he's an expert, you can also
7 ask about his expert opinion based upon that information. I don't believe
8 that he can come to the legal conclusion as to what occurred in
9 absolutely every jury trial without --

10 MR. CHEN: Sure.

11 THE COURT: -- those statistics or mathematical numbers to
12 come to -- to make the formula.

13 MR. CHEN: No, I under -- I understand.

14 BY MR. CHEN:

15 Q So, sir, I guess I'll go back to you. You're basically saying the
16 master list is flawed, right?

17 A That's correct. It underrepresents African Americans.

18 Q Okay. And you don't know necessarily -- because you don't
19 make the list, you don't know why it's flawed, but you would just say
20 statistically it's your expert opinion that it's flawed. Right?

21 A That's correct.

22 Q And so, it's your ultimately, you're just saying that if you were
23 to draw from this list as Clark County trial courts did or may, you would
24 just say that that's a flawed list to draw from. That's ultimately your
25 testimony, right?

1 A You had a lot in there. But, yes, if the master list is flawed,
2 then if you randomly draw from it, you're going to get the results that are
3 based on that master list. Correct.

4 MR. CHEN: That's all I have, thank you.

5 MS. HOJJAT: Brief redirect, Your Honor?

6 THE COURT: Yes.

7 MS. HOJJAT: Thank you.

8 **REDIRECT EXAMINATION**

9 BY MS. HOJJAT:

10 Q Okay. To clarify, you are not issuing an opinion as -- right
11 now, in this hearing -- as to any trial other than the venire that you
12 looked at in James Mungai and the master list, correct?

13 A That's correct.

14 Q You're not issuing an opinion on any other case that went to
15 trial in 2017 here today?

16 A That's correct.

17 Q Okay. Because you've talked about standard deviations,
18 you've talked about randomness and chance. Just because there's a
19 flawed master list doesn't mean every single venire was necessarily
20 flawed.

21 A I guess what you're looking for is a philosophical answer as
22 opposed to a statistical answer?

23 Q No. Actually, that's a bad question --

24 A Every --

25 Q -- that's okay, you do not have to answer it.

1 A Yeah.

2 Q Yeah. I guess what I will say is you are not rendering an
3 opinion as to any other venire from 2017.

4 A No.

5 Q But you are rendering an opinion as to James Mungai's
6 venire.

7 A [No audible response]

8 Q And the -- that was a yes?

9 A Yes.

10 Q And the opinion that you are rendering is that there was a
11 comparative disparity of over 50% in this venire?

12 A Correct.

13 Q Which means approximately like half the African Americans
14 one would expect to see were missing from this venire.

15 A Right.

16 Q And when you traced it back you saw that in 2017 the
17 summonses issued demonstrated an almost 16% comparative
18 underrepresentation.

19 A That's correct.

20 Q And when you trace that back you observed that the master
21 list demonstrated an almost 23% comparative underrepresentation of
22 individuals who identify as Black or African American?

23 A That's correct.

24 Q And when you have a list that is missing between one and
25 four and one and five people who are supposed to be on it, that is a

1 thing that will lead to a flawed venire like we had in James Mungai.

2 Correct?

3 A That's correct.

4 Q And when you are looking at numbers like twenty -- almost
5 23% underrepresentation, comparative underrepresentation, that is off
6 by 56 standard deviations.

7 A Correct.

8 Q It is not random.

9 A [No audible response].

10 THE RECORDER: I can't hear him.

11 MS. HOJJAT: I'm sorry, that answer didn't come through.

12 BY MS. HOJJAT:

13 Q It is not random.

14 A That's correct.

15 Q Okay.

16 A It is not random.

17 Q It is what mathematicians and Statisticians would call
18 systematic?

19 A That's correct.

20 Q Thank you.

21 Now, I want to talk to you for a minute about some of the
22 things that Mr. Chen talked to you about in terms of some numbers
23 being missing or potentially some people not reporting and the numbers
24 potentially being a little bit off.

25 You said there were 2.6 million people on that master list in

1 2017, correct?

2 A That's correct.

3 Q And when we are talking about a number that big you are just
4 not going to see a lot of movement when you are account for little
5 variances, correct?

6 A That's correct.

7 Q Thank you.

8 THE COURT: Mr. Chen?

9 MR. CHEN: Nothing further.

10 THE COURT: Ms. Hojjat, please confer -- we're going to take
11 a small break from Ms. Hojjat to confer with her client to ensure there's
12 no additional -- nothing additional from this witness.

13 MS. HOJJAT: Thank you.

14 THE RECORDER: Court is in recess.

15 [Recess taken at 4:45 p.m.]

16 [Proceeding resumed at 4:50 p.m.]

17 [Colloquy off record]

18 THE COURT: Back on the record in State of Nevada versus
19 James Mungai.

20 Counsel had an opportunity to speak with Mr. Mungai to
21 confer with him with regard to this hearing. Are there additional
22 questions of Mr. Martin?

23 MS. HOJJAT: No additional questions, Your Honor.

24 THE COURT: Okay. Thank you.

25 Mr. Martin, thank you very much for your testimony. You are

1 released --

2 THE WITNESS: Thank you, I --

3 THE COURT: -- as a witness here.

4 THE WITNESS: Thank you. I appreciate it. I hope my
5 internet didn't go in and out on you.

6 THE COURT: No.

7 THE WITNESS: And thank you very much for doing this
8 remotely. I'm going to get my second vaccination shot tomorrow. And I
9 appreciate ya'll being willing to allow me to testify remotely.

10 THE COURT: More than welcome, that is our preference in
11 the Eighth Judicial District Court to ensure that we keep as many people
12 safe as possible.

13 MS. HOJJAT: Thank you, Mr. Martin.

14 THE COURT: Okay. Counsel, argument.

15 MS. HOJJAT: And Your Honor, it is the Defense burden to
16 show that by -- I want to say it's a preponderance of the evidence -- it is
17 not a high burden that the exclusion of African Americans from Mr.
18 Mungai's jury venire was not random. That it was systematic. That is
19 literally the burden, is to demonstrate that the fact that -- and I shouldn't
20 use the word exclusion -- I should use the word the underrepresentation.
21 It is indisputable that there was a underrepresentation in his particular
22 venire. The Supreme Court in their order of limited remand, I think
23 made it pretty clear that we are having this hearing in response to the
24 third prong.

25 There's three prongs for **William**. Prong one, that African

1 Americans -- or that whatever group we are challenging is a distinctive
2 group. African Americans and individuals who self-identify as Black
3 have recognized again and again as a distinctive group in our case law.

4 Prong two, that there was underrepresentation on the
5 particular venire. We demonstrated that, and I think that the remand
6 was not for that purpose. I think it's pretty clear we got over the 50%
7 comparative disparity, which is the threshold here in Nevada.

8 So, then prong three was that we needed to demonstrate that
9 it was not random. That African Americans were underrepresented on
10 his venire. And that it was systematic. And I think that we have more
11 than met that burden by a preponderance of the evidence.

12 I think the testimony was quite clear in this case. Our master
13 list in 2017 was severely underrepresented in African Americans. We
14 are talking about 20 -- nearly 23%. Over 22% under-representative of
15 African Americans. When you have -- when you're drawing from a list
16 that is so under-representative, of course you are going to end up with
17 certain venires that are severely underrepresented in African Americans.
18 That's just basic statistics, and that's precisely what our expert testified
19 to here today. I don't think there was anything that came out in cross
20 examination that really changed what he was saying. Changed the
21 numbers. Changed the math.

22 Realistically, Your Honor, the burden is not -- and I want to be
23 very clear on this -- the burden is not to show that it's deliberate. The
24 burden is to show that it's systematic, and those are two very different
25 things. Systematic just means that the way that the system is set up

1 and the way that the system is operating is causing this problem. And
2 that's exactly what we have here. The way the system was set up and
3 the way the system was operating is what caused this problem. We had
4 -- we were not drawing from the corporate sources prior to 2017.

5 We had Judge Barker, our Chief Judge, recognize the
6 problem in November of 2016 and say we need to add sources. We
7 need to at the very least add our Voter Rolls, which is such a huge
8 source. That is the primary source for most other jurisdictions. It is the
9 primary source for the Federal System. And Judge Barker recognized
10 that and issued an Executive Order in November of 2016.

11 Fast forward of October of 2017 when Mr. Mungai's summons
12 are being sent and they still have not added that list. In fact, they did
13 zero mergers in 2017, zero mergers. And the Jury Commissioner
14 testified, it sounds like they had that data by 2017, before his
15 summonses were sent out. They had it and they just didn't do a merger
16 that year

17 And then above and beyond that, we had the Legislature
18 stepping in and saying we are recognizing the, again, systematic
19 problem that we have here of under-representation of jury pools that are
20 not reflective of our community, are not a fair cross-section of our
21 community. We are stepping in and requiring the DETR list and
22 requiring the voter list. And again, neither one of those sources was
23 being utilized in October of 2017 when the summonses in this case were
24 sent out.

25 Frankly, Your Honor, I don't think it's even my burden to

1 demonstrate that those two sources needed to be added and weren't. I
2 think I have demonstrated it, but I don't think I needed to. I think a
3 simple as the master list is under-representative, this is systematic, this
4 is the way we are doing things is not working is the only burden I had. I
5 demonstrated that. And we went one step further and demonstrated
6 that this wasn't even some sort of situation where, gosh we didn't know
7 anything was going on and we had no idea how to fix this problem. We
8 knew there was a problem. It had been recognized by both the Courts
9 and the Legislature that there was a problem. Solutions to the problem
10 had been mandated and were not being implemented. And what we
11 had was a master list severely underrepresentative of African Americans.
12 And what Mr. Mungai got was a venire that was severely
13 underrepresented in African Americans.

14 We have met our burden and Your Honor, at this point -- I
15 mean, our position at trial was that we were entitled to a new panel. The
16 procedural posture of the case now is that if the Court agrees with us
17 that we have demonstrated that this was systematic, we are entitled to a
18 new trial. And that is what we are asking the Court for, because Mr.
19 Mungai did not have a fair cross-section of his community on his panel
20 and on his venire, and the reason for that is the systematic
21 underrepresentation of African Americans on the master list.

22 I'll submit it.

23 THE COURT: Thank you.

24 Mr. Chen.

25 MR. CHEN: I can make it quick and brief, Your Honor.

1 So, essentially, what we're talking about here is like, what she
2 said, the systematic exclusion. And the standard by the United States
3 Supreme Court, the standard that the Nevada Supreme Court uses in
4 *Williams v. State* 121 Nevada 934, is that the comparative disparity, it
5 says there's likely there's problem with the list that you're generating if
6 it's over 50%. We're at fifty-one point something for the comparative
7 disparity. So, this isn't a perfect jury, I'm not saying that it was an
8 absolutely representative jury, but that's not the standard.

9 Essentially, we've tried to create a master list. There's going
10 to be some error in creating a master list. So, then when you compare it
11 to the numbers that we have, we're right at the level that **Williams** is.
12 That we're right around 50% and that's -- there's going to be error as he
13 said. In the jury venire you expect error because there's only 65 people
14 potentially in it. So, just mathematically, I think we're in the range of a
15 fair venire and per the standard using *Duran v. Missouri the United*
16 *States Supreme Court Case* 439 U.S. 357, as used by *Williams v. State*
17 *121 934*, I think we're within that range here and that the trial verdict
18 should stand.

19 MS. HOJJAT: And if I may briefly respond, Your Honor

20 THE COURT: Mr. Chen, were you finished?

21 MR. CHEN: I was.

22 THE COURT: Go ahead.

23 MS. HOJJAT: All right. And my response, Your Honor, is -- I
24 mean, I -- what Mr. Chen is discussing is prong two. My understanding
25 is this hearing was a remand for prong three. I think we are already on

1 prong three. We are on the question of whether the decision that this
2 venire was underrepresented has already been made. We never would
3 have even gotten to the remand if the 51% was not sufficient. There
4 never would have been new order for limited remand. The only reason
5 we got to the order for limited remand was the 51% was sufficient and
6 the burden was on the Defense to show that it was systematic.

7 Mr. Chen doesn't dispute that portion, because there was no
8 disputing the numbers that were presented here today. They are
9 overwhelming. The remand was not for the purpose of determining
10 whether this venire was underrepresented, the remand was for the
11 purpose of determining why this venire was underrepresented; whether
12 it was random or whether it was systematic, we've demonstrated that it
13 was systematic.

14 THE COURT: Mr. Chen, I do agree that the remand was with
15 regard to prong three. I'm going to allow you an opportunity to make
16 any additional arguments that you would like with regard to prong three.

17 MR. CHEN: I would say that the reason for the remand was it
18 is prong three. Based upon this argument that I guess I would add that
19 it was on the zip code argument. And if you read the order in Mungai,
20 the entire reliance on granting today's hearing has to do with prong three
21 as it relates to zip codes. So, I think there, as well, the testimony didn't
22 come out that that's ever happened, and so, I can't add anything else to
23 it. But the numbers are what they are. The evidence came out as it is,
24 but I think that the order is very specific in terms of why the order was
25 granted and how there would have been a systematic exclusion if this

1 zip code argument was true. And it's stated in the order, so, I really
2 think that was the purpose of today's hearing.

3 MS. HOJJAT: Can I --

4 THE COURT: Let me just make sure that I understand your
5 argument.

6 Are you saying that the Court found that there was -- prong
7 two was met based upon the zip code argument and had there been
8 testimony that really there's no such thing as a zip code argument, then
9 prong two would not have necessarily been met because you were right
10 at the cusp or right on the standard that has been delineated in both
11 U.S. Case Law and Nevada State Case Law?

12 MR. CHEN: Yeah. I think that's a good way of putting it, Your
13 Honor.

14 THE COURT: Okay. Please, let me know if I'm incorrect.

15 MR. CHEN: No, no, no, no. I appreciate --

16 THE COURT: I just want to make sure I understand your
17 argument very clearly.

18 MR. CHEN: Yeah, no, that's great, thank you.

19 THE COURT: So, I've been doing court since 8:30 this
20 morning.

21 MS. HOJJAT: Wow.

22 THE COURT: So, look, if I miss something, no offense. But I
23 want you to have an opportunity to make your argument and to clarify
24 anything that needs to be.

25 MR. CHEN: No, I have nothing to clarify, Your Honor. Thank

1 you.

2 THE COURT: Okay.

3 MS. HOJJAT: Can I address --

4 THE COURT: You get the last words.

5 MS. HOJJAT: Thank you, Your Honor.

6 I would disagree that they -- the purpose of this hearing was
7 just the zip codes. I think the Nevada Supreme Court was quite clear in
8 the order; they were remanding it for a hearing on the issue of
9 systematic exclusion and that the zip code argument that I've raised
10 below was one factor, one consideration, one possible source of a
11 systematic exclusion. They did not remand this solely for a hearing on
12 zip codes.

13 They found -- prong two has nothing to do with zip codes, and
14 I maybe misunderstood what Mr. Chen was saying here. Prong two has
15 nothing to do with zip codes. Prong one is distinctive, prong two is
16 underrepresentation, prong three is is that underrepresentation caused
17 by systematic issues. Prong one is met. Prong two is met -- has
18 nothing to do with zip codes. Prong three - the remand was for the
19 hearing.

20 The remand was not simply an inquiry into zip codes and
21 nothing else. I think the hearing is quite clear. They said, considering
22 the third prong of a prima facie cross-section violation, the District 4
23 Court found the underrepresentation was not due to systematic
24 exclusions based on prior testimony. In *Valentine* we explained that a
25 District Court's reliance on outdated evidence is misplaced. Here it does

1 not appear the prior testimony referenced addressed Mungai's specific
2 allegation of a systematic exclusion- the zip code argument. Also,
3 Legislative Amendments regarding the juror selection process took
4 effect before Mungai's trial, rendering the prior testimony outdated.
5 Therefore, we remand this matter to the District Court for the limited
6 purpose of conducting an evidentiary hearing with respect to Mungai's
7 fair cross-section challenge. They did not remand it for a hearing with
8 respect to zip codes. It was the entire challenge that we made. They
9 themselves went out of their way to list more than one issue, not just the
10 zip code issue.

11 I, in full disclosure, in candor to the Court, that's why I
12 questioned my own expert about the zip code issue. It ended up that
13 whatever Ms. Witt had said at that prior hear, maybe it was a
14 misunderstanding, maybe she misspoke. That wasn't the case. Zip
15 codes have nothing to do with those summonses. But we discovered a
16 huge problem and we discovered that the issue with the venire is
17 absolutely systematic when we looked at it. When we looked at the
18 master list, we discovered the systematic problem that is leading -- that
19 led to the issue with Mr. Mungai's venire. We presented it to this Court
20 as appropriate, as allowed by this hearing.

21 I think we've met our burden. I don't think the State has -- I
22 don't think that there's anything here, and I don't think even the State is
23 arguing that this isn't systemic, because it just -- the numbers are so
24 overwhelming that it is. The master list was flawed here.

25 THE COURT: Thank you both for arguments. Thank you

1 both for your professionalism. I thoroughly enjoyed having you in front
2 of me. I think that you are great litigators. I'm taking this under
3 submission. We'll be issuing our own order. The order to the Supreme
4 Court is due by April 19th, so it will be completed by that date.

5 Go ahead and put this on my Chambers, please. Just so that
6 my Law Clerk and I discuss it on Chambers for Thursday, next
7 Thursday.

8 THE CLERK: The 15th?

9 THE COURT: Yes. Today's Thursday is over.

10 THE CLERK: I hope so.

11 Okay.

12 THE COURT: And I still have three more matters to get you
13 for my Chambers.

14 MR. CHEN: Are we off record on this one?


15 THE RECORDER: No, hold on.

16 THE COURT: Off record please.

17 [Proceeding concluded at 5:05 p.m.]

18 * * * * *

19
20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio/video proceedings in the above-entitled case to the best of my ability.

22
23 
24 Nancy Maldonado
25 Court Recorder/Transcriber

EXHIBIT(S) LIST

Case No.: **C306725**

Dept. No.: **23**

Plaintiff: State of Nevada

vs.

Defendant: James Mungai

Hearing Date: 4/8/21

Judge: Lilly - Spells

Court Clerk: Chambers

Recorder: Garibay

Counsel for Plaintiff: Alex Chen

Counsel for Defendant: Nadia Hojjat

HEARING BEFORE THE COURT

DEFENDANT'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
A	Agreement and Request for Information	4.8.21	Stip	4.8.21
B	16-07 Administrative Order	"	"	"

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FILED

2016 NOV 22 A 10:49

Anna L. Schmitt
CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF
The Jury Master List

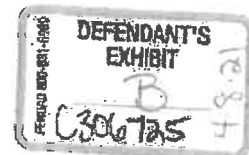
Administrative Order: 16-07

WHEREAS, Rule 1.30 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada ("EDCR") charges the Chief Judge of the Eighth Judicial District Court ("Court") with various responsibilities, such as supervising the administrative business of the Court, ensuring the quality and continuity of its services, supervising its calendar, reassigning cases as convenience or necessity requires, assuring the Court's duties are timely and orderly performed, and otherwise facilitating the business of the Court;

WHEREAS, EDCR 6.10 requires the Court to utilize the list of licensed drivers as provided by the State of Nevada Department of Motor Vehicles and Public Safety ("DMV") in assembling a list of qualified jurors in Clark County ("Jury Master List") and further permits the Chief Judge to incorporate additional information sources in forming the Jury Master List;

WHEREAS, pursuant to EDCR 6.10, the Court currently utilizes the names and addresses of active licensed drivers obtained from the DMV, along with the names and addresses of active utilities subscribers obtained from Nevada Energy, Inc. in forming its Jury Master List;

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WHEREAS, adding a third source of names and addresses for obtaining qualified jurors may further expand the Jury Master List and help ensure that the Jury Master List represents a fair cross section of the Clark County community.

IT IS HEREBY ORDERED, pursuant to EDCR Rule 1.30 and EDCR 6.10, that court administration shall obtain from Clark County the names and addresses of all active registered voters in Clark County and incorporate those names and addresses into the Court's Jury Master List on the next scheduled Jury Master List update.

IT IS FURTHER ORDERED, for all subsequent Jury Master List updates, court administration shall utilize names and addresses obtained from the DMV, Nevada Energy and active registered voters in Clark County in forming the Jury Master List.

Entered this 22nd day of November, 2016.

By: 

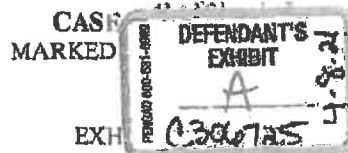
DAVID BARKER
Chief Judge
Eighth Judicial District Court

**AGREEMENT
AND
REQUEST FOR INFORMATION**

Information as requested pursuant to this Agreement and Request for Information (agreement) below is requested pursuant to the provisions of Nevada Revised Statutes 612.265.

I certify that the Eighth Judicial District Court meets the definition prescribed in section 10 of NRS 612.265, that I have read the provisions of NRS 612.265 and that I am authorized to make this request and, thereby, enter into this agreement on behalf of the Eighth Judicial District Court. I understand that the information received from the Department of Employment, Training and Rehabilitation, Employment Security Division (ESD) as a result of this request for information is confidential and/or privileged and cannot be disclosed or be open to public inspection in any manner. I understand that such a disclosure or opening of such information to public inspection by me or any representative of my organization might constitute a gross misdemeanor pursuant to NRS 612.265(13).

I further certify that the Eighth Judicial District Court will take all steps reasonably required to ensure that information received from ESD as a result of this agreement is not disclosed in violation of NRS 612.265, and is safeguarded and stored in a place physically secure from access by unauthorized persons, and in such a manner so that unauthorized persons cannot obtain the information by any means. I further certify that the Eighth Judicial District Court personnel who receive this information on behalf of the Eighth Judicial District Court under this agreement will be limited to those with a need to access this information for the purposes limited by this agreement. I further certify that the Eighth Judicial District Court will undertake precautions to ensure that only authorized personnel are given access to information disclosed hereby which is stored in computer systems, and will require each recipient of information under this agreement to instruct all personnel having access to such data about the safeguard and confidentiality requirements of this agreement and NRS 612.265. I acknowledge that all such personnel of Eighth Judicial District Court will adhere to NRS 612.265 and the requirements of this agreement; and that all infractions will be reported promptly to ESD.



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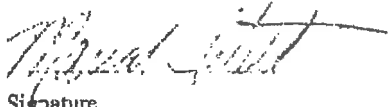
I further certify that the Eighth Judicial District Court will be subject to audit and/or on-site inspection by ESD to ensure that the requirements of NRS 612.265 and this agreement are being met.

On behalf of the Eighth Judicial District Court, I hereby request a single file with the following information from ESD's files:

Name, Address, and Date of Birth of persons who receive Unemployment Insurance benefits in any county.

This agreement may be terminated immediately by ESD if changes in governing State or Federal laws or regulations render performance hereunder illegal, impracticable or impossible. This agreement is subject to cancellation at any time and by either party upon written notification. ESD is, and remains, the custodian of record with respect to the information provided pursuant to this agreement.

I further certify that I have authority to bind my organization to the commitments set forth above.



03/08/2019

Signature

Date

Mariah Witt

702-671-4512

Printed name

Phone #

Jury Commissioner, Eighth Judicial District Court

Title

wittm@clarkcountycourts.us

Email Address

000439

NEVADA REVISED STATUTE 612.265

Disclosure Of Information By Employment Security Division

NRS 612.265 Disclosure of Information by Employment Security Division and Administrator; duty of Division of Industrial Relations of Department of Business and Industry to provide certain information to Administrator; penalty for improper use or dissemination of certain information.

1. Except as otherwise provided in this section and NRS 239.0115 and 612.642, information obtained from any employing unit or person pursuant to the administration of this chapter and any determination as to the benefit rights of any person is confidential and may not be disclosed or be open to public inspection in any manner which would reveal the person's or employing unit's identity.

2. Any claimant or a legal representative of a claimant is entitled to information from the records of the Division, to the extent necessary for the proper presentation of the claimant's claim in any proceeding pursuant to this chapter. A claimant or an employing unit is not entitled to information from the records of the Division for any other purpose.

3. The Administrator may, in accordance with a cooperative agreement among all participants in the statewide longitudinal data system developed pursuant to NRS 400.037 and administered pursuant to NRS 223.820, make the information obtained by the Division available to:

(a) The Board of Regents of the University of Nevada for the purpose of complying with the provisions of subsection 4 of NRS 396.531; and

(b) The Director of the Department of Employment, Training and Rehabilitation for the purpose of complying with the provisions of paragraph (d) of subsection 1 of NRS 232.920.

4. Subject to such restrictions as the Administrator may by regulation prescribe, the information obtained by the Division may be made available to:

(a) Any agency of this or any other state or any federal agency charged with the administration or enforcement of laws relating to unemployment compensation, public assistance, workers' compensation or labor and industrial relations, or the maintenance of a system of public employment offices;

(b) Any state or local agency for the enforcement of child support;

(c) The Internal Revenue Service of the Department of the Treasury;

(d) The Department of Taxation;

(e) The State Contractors' Board in the performance of its duties to enforce the provisions of chapter 624 of NRS; and

(f) The Secretary of State to operate the state business portal established pursuant to chapter 75A of NRS for the purposes of verifying that data submitted via the portal has satisfied the necessary requirements established by the Division, and as necessary to maintain the technical integrity and functionality of the state business portal established pursuant to chapter 75A of NRS.

Information obtained in connection with the administration of the Division may be made available to persons or agencies for purposes appropriate to the operation of a public employment service or a public assistance program.

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5. Upon written request made by the State Controller or a public officer of a local government, the Administrator shall furnish from the records of the Division the name, address and place of employment of any person listed in the records of employment of the Division. The request may be made electronically and must set forth the social security number of the person about whom the request is made and contain a statement signed by the proper authority of the State Controller or local government certifying that the request is made to allow the proper authority to enforce a law to recover a debt or obligation assigned to the State Controller for collection or owed to the local government, as applicable. Except as otherwise provided in NRS 239.0115, the information obtained by the State Controller or local government is confidential and may not be used or disclosed for any purpose other than the collection of a debt or obligation assigned to the State Controller for collection or owed to that local government. The Administrator may charge a reasonable fee for the cost of providing the requested information.

6. The Administrator may publish or otherwise provide information on the names of employers, their addresses, their type or class of business or industry, and the approximate number of employees employed by each such employer, if the information released will assist unemployed persons to obtain employment or will be generally useful in developing and diversifying the economic interests of this State. Upon request by a state agency which is able to demonstrate that its intended use of the information will benefit the residents of this State, the Administrator may, in addition to the information listed in this subsection, disclose the number of employees employed by each employer and the total wages paid by each employer. The Administrator may charge a fee to cover the actual costs of any administrative expenses relating to the disclosure of this information to a state agency. The Administrator may require the state agency to certify in writing that the agency will take all actions necessary to maintain the confidentiality of the information and prevent its unauthorized disclosure.

7. Upon request therefor, the Administrator shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, and may furnish to any state agency similarly charged, the name, address, ordinary occupation and employment status of each recipient of benefits and the recipient's rights to further benefits pursuant to this chapter.

8. To further a current criminal investigation, the chief executive officer of any law enforcement agency of this State may submit a written request to the Administrator that the Administrator furnish, from the records of the Division, the name, address and place of employment of any person listed in the records of employment of the Division. The request must set forth the social security number of the person about whom the request is made and contain a statement signed by the chief executive officer certifying that the request is made to further a criminal investigation currently being conducted by the agency. Upon receipt of such a request, the Administrator shall furnish the information requested. The Administrator may charge a fee to cover the actual costs of any related administrative expenses.

9. In addition to the provisions of subsection 6, the Administrator shall provide lists containing the names and addresses of employers, and information regarding the wages paid by each employer to the Department of Taxation, upon request, for use in verifying returns for the taxes imposed pursuant to chapters 363A, 363B and 363C of NRS. The Administrator may charge a fee to cover the actual costs of any related administrative expenses.

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10. Upon the request of any district judge or jury commissioner of the judicial district in which the county is located, the Administrator shall, in accordance with other agreements entered into with other district courts and in compliance with 20 C.F.R. Part 603, and any other applicable federal laws and regulations governing the Division, furnish the name, address and date of birth of persons who receive benefits in any county, for use in the selection of trial jurors pursuant to NRS 6.045. The court or jury commissioner who requests the list of such persons shall reimburse the Division for the reasonable cost of providing the requested information.

11. The Division of Industrial Relations of the Department of Business and Industry shall periodically submit to the Administrator, from information in the index of claims established pursuant to NRS 616B.018, a list containing the name of each person who received benefits pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS. Upon receipt of that information, the Administrator shall compare the information so provided with the records of the Employment Security Division regarding persons claiming benefits pursuant to this chapter for the same period. The information submitted by the Division of Industrial Relations must be in a form determined by the Administrator and must contain the social security number of each such person. If it appears from the information submitted that a person is simultaneously claiming benefits under this chapter and under chapters 616A to 616D, inclusive, or chapter 617 of NRS, the Administrator shall notify the Attorney General or any other appropriate law enforcement agency.

12. The Administrator may request the Comptroller of the Currency of the United States to cause an examination of the correctness of any return or report of any national banking association rendered pursuant to the provisions of this chapter, and may in connection with the request transmit any such report or return to the Comptroller of the Currency of the United States as provided in section 3305(c) of the Internal Revenue Code of 1954.

13. The Administrator, any employee or other person acting on behalf of the Administrator, or any employee or other person acting on behalf of an agency or entity allowed to access information obtained from any employing unit or person in the administration of this chapter, or any person who has obtained a list of applicants for work, or of claimants or recipients of benefits pursuant to this chapter, is guilty of a gross misdemeanor if he or she:

- (a) Uses or permits the use of the list for any political purpose;
- (b) Uses or permits the use of the list for any purpose other than one authorized by the Administrator or by law; or
- (c) Fails to protect and prevent the unauthorized use or dissemination of information derived from the list.

14. All letters, reports or communications of any kind, oral or written, from the employer or employee to each other or to the Division or any of its agents, representatives or employees are privileged and must not be the subject matter or basis for any lawsuit if the letter, report or communication is written, sent, delivered or prepared pursuant to the requirements of this chapter.

[Part 4:59:1941; A 1945, 119, 1955, 218] — (NRS A 1965, 115, 1967, 627, 1971, 749, 1983, 409, 858, 1987, 1463, 1989, 1170, 1991, 351, 2464, 2466, 1993, 534, 624, 657, 803, 1811, 1995, 579, 1580, 1997, 1997, 579, 1999, 1756, 2003, 2004 Special Session, 214; 2007, 2123; 2013, 96, 2210; 2015, 136, 2674, 2705, 2934, 3373; 2017 3584, 3882, 4327)

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Alexander G. Chen
CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA)	Case No.	C-15-306725-1
)	Dept No.	XXIII
Plaintiff,)		
-vs-)		
)		
JAMES ALPHAXARD MUNGAI)	FINDINGS OF FACT AND	
)	CONCLUSIONS OF LAW	
Defendants.)		

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing on the 8th day of April, 2021, at the Hour of 1:30 p.m. before Department XXIII of the Eighth Judicial District Court, in and for Clark County, Nevada, with Judge Jasmin Lilly-Spells presiding, Plaintiff being represented by the STATE OF NEVADA, by and through, Alexander G. Chen, Esq., and Defendant James Alphaxard Mungai, represented by, the CLARK COUNTY PUBLIC DEFENDER, by and through, Nadia Hojjat.

The Court having conducted an evidentiary hearing, heard argument, reviewed pleadings and relevant law hereby makes the following Findings of Fact and Conclusions of Law concerning the Defendant's Fair Cross Section challenge.

FINDINGS OF FACT

James Alphaxard Mungai (hereafter "Mungai") was charged with Battery Resulting

1 in Substantial Bodily Harm Constituting Domestic Violence and Sexual Assault with Use
2 of a Deadly Weapon Resulting in Substantial Bodily Harm.

3
4 Mungai's trial began on December 4, 2017 and concluded December 13, 2017. The
5 jury returned a guilty verdict on all counts charged.

6 On January 30, 2018, the court imposed a minimum of twenty-four (24) months and
7 a maximum of sixty (60) months for Count 1 and a minimum of fifteen (15) years to life
8 for Count 2, to run concurrent with Count 1. The court imposed a minimum of eight (8)
9 years and a maximum of twenty (20) years for deadly weapons enhancement consecutive
10 to Count 2 for an aggregate total of a minimum of twenty-five (25) years to life with
11 lifetime supervision pursuant to NRS 179D.460.

12
13
14 On February 27, 2018, Mungai filed a Notice of Appeal with The Supreme Court of
15 Nevada.

16 On June 11, 2018, Mungai filed a Petition for Writ of Habeas Corpus.

17
18 On March 6, 2020, The Supreme Court of Nevada filed an Order of Limited
19 Remand finding that the district court abused its discretion by denying Mungai's fair-cross-
20 section challenge without holding an evidentiary hearing and ordered the district court to
21 conduct an evidentiary hearing addressing Mungai's argument that the 65-person venire
22 violated his fair-cross-section right because African Americans were not fairly and
23 reasonable represented, specifically due to systematic exclusion related to summonses sent
24 disproportionately based on postal ZIP codes.

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27 Upon remand, Mungai's case was set for an evidentiary hearing on July 28, 2020;
28 however, the hearing was continued for COVID-19 related reasons which lasted until

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January 2021.

On January 4, 2021, the instant case was transferred to Department 23 of the Eighth Judicial District Court.

On January 6, 2021, Mungai filed a Motion for Court Order to Produce Documents, asking thr court to sign an order directing the Jury Commissioner to turn over an unredacted copy of the 2017 Prospective Juror Master List. The motion was continued two times to allow for the proper party of interest to be served and have an opportunity to respond.

On January 25, 2021, with no objection from counsel representing the Jury Commissioner, the court GRANTED the Motion for Court Order to Produce Documents with the condition that the defense sign a protective order.

On February 7, 2021, the State of Nevada, Mungai and the Jury Commissioner entered into a stipulation and agreement concerning the unredaction of juror information.

On April 8, 2021, this court held an evidentiary hearing as ordered by The Supreme Court of Nevada.

There were two defense witnesses, Jeffrey Martin and Mariah Witt, who provided testimony at the evidentiary hearing concerning the jury panel at the time of Mungai’s trial and the overall process in obtaining a jury venires, as further discussed below.

Defense expert Martin qualifies as an expert Mathematician and Statistician expert as his testimony (1) is qualified in an area of technical or other specialized knowledge; (2) his testimony assists the trier of fact and (3) his testimony was limited to matters within his scope of specialized knowledge. *See Hallmark v. Eldrige*, 124 Nev. 492, 498, 189 P.3d

1 646, 650 (2008); *See also* NRS 52.075.

2 Ms. Witt serves as the Jury Commissioner for the Eighth Judicial District Court in
3 Clark County, Nevada.

4
5 The Prospective Master List of Jurors is an ever changing document. The jury
6 commissioner caused summons for defendant Mungai's trial to be sent out in October
7 2017. The 2017 master list of potential jurors no longer exists, as the requisite retention
8 period is until the document is superseded.¹ Testimony of Jury Commissioner. Defendant
9 Mungai, the Jury Commissioner and defense expert, Martin brainstormed ways to recreate
10 the 2017 Master List of Prospective Jurors. (Testimony of Jury Commissioner and Jeffrey
11 Martin).

12
13
14 In reviewing the current master list of potential jurors, Martin recreated a 2017
15 master list of prospective jurors by removing individuals who turned (18) eighteen after
16 the original 2017 list was created, reviewing United States Census Bureau data and
17 reviewing the sequential numbering system of how the software merges and adds
18 prospective jurors. Additionally, Martin searched for and removed duplicate entries in
19 recreating a 2017 master list. (Testimony of Jeffrey Martin).

20
21 The master list of prospective jurors is voluminous; containing approximately 3.5
22 million records. (Testimony of Jury Commissioner). Martin crosschecked the recreated
23 2017 list and noted that the recreated list contained every juror who received a summons in
24 2017 and that the youngest potential juror's birthdate coincided with the timing of the prior
25 2017 and that the youngest potential juror's birthdate coincided with the timing of the prior
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27
28 ¹ The 2017 master list was superseded in March 2018. (Testimony of Jury Commissioner).

1 merger. (Testimony of Jeffrey Martin).

2 The electronic system currently in use was set up in March, 2016. There are
3 approximately two mergers done each year to add additional eligible jurors to the list.
4 There was a systematic merger in December, 2016. No mergers occurred in 2017. Two
5 mergers occurred in 2018, with the first done in March 2018. (Testimony of Jury
6 Commissioner).
7

8
9 In 2017, the master list was comprised from data from Nevada Energy and the
10 Department of Motor Vehicles. In November of 2016, the District Court Chief Judge
11 authored Administrative Order AO 16-07 requiring that that master list include voter
12 registration data beginning with the next merger. (Testimony of Jury Commissioner; *See*
13 *also* Evidentiary Hearing Exhibits). In February 2017, the Nevada Legislature drafted NRS
14 6.045 mandating that data from voter registration and the Department of Training and
15 Rehabilitation (DETR) be added to increase the master list of potential voters. NRS 6.045
16 became effective on July 1, 2017. At time of Mungai's trial, the master list of potential
17 voters did not include data from DETR or voter registration because (1) no mergers were
18 conducted in 2017; (2) there was some difficulty in obtaining the necessary information
19 from outside sources to add the data and (3) the program was not equipped to handle the
20 implementation of NRS 6.045. (Testimony of Jury Commissioner).
21
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23
24 The Jury Commission utilizes a computer program which auto generates summons
25 by randomly selecting individuals from the list. The program does not account for race or
26 zip codes. The Jury Commission tracks the race of individuals who appear for jury duty
27 but is unaware whether the sources used to comprise the master list include racial
28

1 demographics. (Testimony of Jury Commissioner)².

2
3 Defense witness Martin is familiar with the program that the Eighth Judicial Court
4 uses to store the master list and send out summonses. In the recreated 2017 master list,
5 10.62% of prospective jurors identified as Black or African American. In defendant's trial,
6 6.15% of prospective jurors identified as Black or African American. As a whole, the
7 recreated 2017 master list had an absolute disparity of 2.84% underrepresentation for
8 Blacks/African Americans. The 2017 summonses as a whole had an absolute disparity of
9 1.99% underrepresentation and the defendant, Mungai's trial had an absolute disparity of
10 6.45% underrepresentation of Blacks/African Americans. Regarding comparative
11 disparity, the 2017 recreated master list had a comparative disparity of 22.53%
12 underrepresentation of Blacks/African Americans. The defendant's trial had a comparative
13 disparity of 51.16% underrepresentation of Blacks/African Americans. Martin found a
14 statistical significance in the standard deviation here, noting that there were more than 56
15 standard deviations in defendant's trial, where a statistician would expect not more than 2
16 or 3 standard deviations. The federal courts and most state systems use some version of the
17 voter registration polls to issue juror summons. (Testimony of Jeffrey Martin).
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22 Utilizing pre-pandemic statistics from March 2020, as published on DETR's
23 website, Martin opined that in March 2020, 17.67% of the individuals receiving
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27 ² The Jury Commissioner suggested that the raw data has a category for racial demographics but that none of the
28 sources used to generate the mater list independently track racial data. The Jury Commissioner testified that the racial
data within the master list is maintained from information received upon jurors responding to the summonses. The
court found this testimony speculative.

1 unemployment benefits within the entire state of Nevada were Black/African American.³
2 Based upon this data, adding DETR records as a source of potential voters would have
3 created a comparative disparity of 85.11% overrepresentation of Black/African American
4 potential jurors within Clark County, thereby minimizing the underrepresentation of
5 Blacks/African-Americans from the master list. (Testimony of Jeffrey Martin).
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9 **CONCLUSIONS OF LAW**

10 The court having reviewed the pleadings, documents on file, relevant law, testimony
11 from the evidentiary hearing and argument from the parties;

12 THE COURT FINDS that the record reflects that defendant Mungai established
13 prongs one (1) and two (2) at trial and the remand was limited to conduct an evidentiary
14 hearing on prong three (3).
15

16 THE COURT FINDS that the selection of a petit jury from a representative cross
17 section of the community is an essential component of the Sixth Amendment right to a jury
18 trial. *Taylor v. Louisiana*, 419 U.S. 522, 528, 95 S. Ct. 692, 697, 42 L. Ed. 2d 690 (1975).
19

20 THE COURT FURTHER FINDS that community participation in the administration
21 of the criminal law, moreover, is not only consistent with our democratic heritage but is
22 also critical to public confidence in the fairness of the criminal justice system. Restricting
23 jury service to only special groups or excluding identifiable segments playing major roles
24 in the community cannot be squared with the constitutional concept of jury trial. 'Trial by
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26

27
28 ³ Martin testified that he did not have access to DETR data and used the closest in time data to 2017 from DETR that he could find.

1 jury presupposes a jury drawn from a pool broadly representative of the community as well
2 as impartial in a specific case. . . . (T)he broad representative character of the jury should
3 be maintained, partly as assurance of a diffused impartiality and partly because sharing in
4 the administration of justice is a phase of civic responsibility.’ *Thiel v. Southern Pacific*
5 *Co.*, 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting).
6

7 THE COURT FINDS that “systematic exclusion” means “underrepresentation ...
8 inherent in the particular jury-selection process utilized.” *Evans v. State*, 112 Nev. 1172,
9 1186–87, 926 P.2d 265, 275 (1996) citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct
10 664, 668 (1979).
11

12 THE COURT FINDS that “without an awareness of the makeup of the lists used to
13 select the jury pool or the actual jury pool itself, a jury commissioner cannot adequately
14 determine whether the jury pool or the jury lists reflect a fair cross section of the
15 community. If the jury list does not produce jury pools that reflect a fair cross section of
16 the community, then the jury commissioner should use more lists than mandated by
17 statute.”⁴
18

19 THE COURT FURTHER FINDS that “without having knowledge of the
20 composition of jury pools and jury lists, an assertion that they provide juries comprising a
21 fair cross section of the community is mere speculation.” *Williams v. State*, 121 Nev. 934,
22 942, 125 P.3d 627, 632 (2005). The Court finds that at the time of the defendant’s trial the
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27 ⁴ In 2002, the Nevada Jury Improvement Commission recommended that at least three source lists be used to
28 constitute jury pools. Jury Improvement Commission, *Report of the Supreme Court of Nevada 10* (2002), available
at http://www.nvsupremecourt.us/DOCS/reports/rpt_0210_jury.PDF *Williams v. State*, 121 Nev. 934, 942, 125 P.3d
627, 632 (2005).

1 Jury Commissioner was not aware of the racial makeup of the summoned jurors unless said
2 juror had previously served as a juror in the Eighth Judicial District Court, which
3
4 contravenes NRS 6.045(5).

5 THE COURT FINDS that the parties presented testimony at the evidentiary hearing
6 with regard to prong two (2): "that the representation of this group in venires from which
7 juries are selected is not fair and reasonable in relation to the number of such persons in the
8 community." *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005).
9

10 THE COURT FINDS the recreated 2017 master list to be valid reconstruction of the
11 original list given the steps taken to recreate the document and the testimony of both the
12 Jury Commissioner and witness Jeffery Martin.
13

14 THE COURT FINDS that Mr. Martin's testimony at the evidentiary hearing
15 establishes that there was a comparative disparity of 51.16% underrepresentation in the
16 defendant's trial.⁵
17

18 THE COURT FINDS that the Eighth Judicial District Court took steps through its
19 Administrative Order 16-07 to enhance the potential juror master list.

20 THE COURT FINDS that after NRS 6.045 became effective, the Jury
21 Commissioner took steps to comply with the statutory requirements and add additional
22 sources to the potential juror master list, but ultimately did not comply until mergers were
23 conducted in 2018.
24

25 THE COURT FURTHER FINDS that at all times the Jury Commissioner utilized a
26

27
28 ⁵ Appellant argues that the comparative disparity at trial was 63.12% or 50.08% depending on whether there were four or three Blacks/African Americans on the venire. The Respondent disputes this calculation in their brief at page 20.

1 random computerized system to send jury summons to potential jurors. The potential jurors
2 were selected in a fair manner. *See Sayedzada v. State*, 134 Nev. 283, 134 Nev. Adv. Op.
3 38, 419 P.3d 184 (2018).
4

5 THE COURT FURTHER FINDS that the Jury Commissioner did not intentionally
6 or actively take any steps to exclude potential jurors of any racial makeup or otherwise.
7

8 THE COURT FURTHER FINDS that the statistical significant deviation of 56
9 standard deviation points as well as the comparative disparity of 22.53%
10 underrepresentation of Blacks/African Americans on the master list illustrates an
11 underrepresentation of Blacks/African Americans as potential jurors in the 2017 master list
12 utilized at the time of Mungai's trial.⁶
13

14 THE COURT FINDS that adding additional sources for potential jurors as
15 recommended in AO 16-07 and mandated by NRS 6.045 would have created a more
16 comprehensive potential juror pool.
17

18 THE COURT FURTHER FINDS that the underrepresentation of Blacks/African
19 Americans on the master list directly contributed to the disparity in defendant Mungai's
20 trial.
21

22 THE COURT FINDS, that although unintentional, the system in place at the time of
23 defendant Mungai's trial, which solely utilized Nevada Energy and Department of Motor
24

25
26 ⁶ Absolute disparity and comparative disparity measurements, courts have recognized, can be misleading when, as
27 here, "members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service." Smith,
28 463 Mich., at 203–204, 615 N.W.2d, at 2–3. And to our knowledge, "[n]o court ... has accepted [a standard deviation
analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." *United States v. Rioux*, 97

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Vehicles did not track the racial composition of summoned jurors and resulted in a statistical significance of underrepresentation of Blacks/African Americans and thus did not represent an accurate cross section of the community.

The COURT FUTHER FINDS that this underrepresentation of Blacks/African Americans as was due to a systematic exclusion of the group in the jury selection process because the sources utilized did not accurately capture potential jurors of Black/African American racial makeup.

IT IS SO ORDERED.

Dated this 20th day of April, 2021



THE HONORABLE JASMIN LILLY-SPELLS
DISTRICT COURT JUDGE
1A9 BBC DCCD 07F5
Jasmin Lilly-Spells
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f) through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail to and/or by fax and mail to:

Deborah A. Boyer

Deborah A. Boyer, JEA

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DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada
vs
James Mungai

CASE NO: C-15-306725-1
DEPT. NO. Department 23

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Finding of Fact and Conclusions of Law was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DC23 LAW CLERK

Dept23LC@clarkcountycourts.us

#4

000457

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ALPHAXARD MUNGAI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75247

FILED

SEP 28 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault with the use of a deadly weapon and battery resulting in substantial bodily harm constituting domestic violence. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Appellant James Mungai argued that the district court erroneously denied his fair-cross-section challenge without conducting an evidentiary hearing. Before voir dire commenced, Mungai objected to the 65-person venire because it contained only four African-Americans and thus did not represent a fair cross-section of the community. *See Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005) (explaining that a defendant "is entitled to a venire selected from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution"). The district court denied Mungai's claim without conducting an evidentiary hearing on the systematic exclusion allegations he made, instead relying on its recollection of prior testimony from the jury commissioner in another case on a similar allegation. This court issued an order of limited remand for the district court to conduct an evidentiary hearing on Mungai's claim. *See Mungai v. State*, Docket No. 75247, Order

SUPREME COURT
OF
NEVADA

10 10 2021

21-27898

000458


of Limited Remand at 3 (Mar. 6, 2020); *Valentine v. State*, 135 Nev. 463, 466, 454 P.3d 709, 714 (2019) (concluding that “an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement”).

After the hearing, the district court rejected Mungai’s challenge in part but nevertheless found that systematic exclusion affected the composition of Mungai’s venire and resulted in an underrepresentation of African Americans.¹ Based on the district court’s finding, Mungai would be entitled to relief. *See Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (providing that “when a petit jury has been selected upon improper criteria . . . we have required reversal of the conviction because the effect of the violation cannot be ascertained”); *Cortinas v. State*, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008) (holding that structural errors are “intrinsically harmful . . . [and] necessarily render a trial fundamentally unfair” (internal quotation marks omitted)). Thus, this court ordered the parties to submit responses addressing the effect of the district court’s order on the instant appeal without expressing an opinion on the merits. *See Mungai*, Docket No. 75247, Order to Show Cause at 2 (June 16, 2021). While the State does not concede the propriety of the district court’s order, it acknowledges that Mungai is entitled to a new trial based on the finding of systematic exclusion in the jury selection process. Mungai agrees. Because the parties

¹The Honorable Jasmin D. Lilly-Spells, Judge, presided at the evidentiary hearing.

concur, and without expressing any opinion regarding the merits of the district court's order, we

ORDER the judgment of conviction VACATED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Cadish


_____, J.
Pickering


_____, J.
Herndon

cc: Hon. Susan Johnson, District Judge
Hon. Jasmin D. Lilly-Spells, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Because relief is warranted on this basis, we need not reach Mungai's remaining contentions.

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000461

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ALPHAXARD MUNGAI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 75247
District Court Case No. C306725

FILED
NOV 04 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 26, 2021

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

cc (without enclosures):

- Hon. Susan Johnson, District Judge
- Clark County Public Defender \ Phillip J. Kohn
- Clark County Public Defender \ Howard Brooks, Chief Deputy Public Defender
- Clark County Public Defender \ William M. Waters, Chief Deputy Public Defender
- Clark County Public Defender \ Nadia Hojjat
- Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney
- Clark County District Attorney \ John T. Niman

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on OCT 28 2021

[Signature]
Deputy District Court Clerk

RECEIVED
APPEALS
OCT 28 2021
CLERK OF THE COURT

RECEIVED
NOV 03 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

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21-30871

000462

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ALPHAXARD MUNGAI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 75247
District Court Case No. C306725

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgement of conviction VACATED AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 28th day of September, 2021.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
October 26, 2021.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 3rd day of December, 2021, by electronic transmission, through Odyssey eFileNV EfileAndServe, to:

DISTRICT ATTORNEY'S OFFICE
Email Address: motions@clarkcountyda.com

By: /s/ Carrie Connally
An employee of the
Clark County Public Defender's Office

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4 KEANDRE VALENTINE,) Case No.
5 Petitioner,)
6) Dist. Ct. C-16-316081-1
7 vs.)
8)
9 THE EIGHTH JUDICIAL DISTRICT)
10 COURT OF THE STATE OF NEVADA,)
11 IN AND FOR THE COUNTY OF CLARK,)
12 AND THE HONORABLE JACQUELINE)
13 BLUTH, DISTRICT JUDGE,)
14 Respondents,)
15 and)
16 THE STATE OF NEVADA,)
17 Real Party in Interest.)
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24 **PETITIONER’S APPENDIX – VOLUME II – PAGES 232-464**

25 DARIN F. IMLAY
26 Clark County Public Defender
27 309 South Third Street
28 Las Vegas, Nevada 89155-2610

Attorney for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155

AARON D. FORD
Attorney General
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Carson City, Nevada 89701-4717
(702) 687-3538

Counsel for Respondent

29 **CERTIFICATE OF SERVICE**

30 I hereby certify that this document was filed electronically with the
31 Nevada Supreme Court on the 26th day of ~~May~~^{May}, 2022. Electronic Service of the

1 foregoing document shall be made in accordance with the Master Service List as
2 follows:

3 AARON D. FORD SHARON G. DICKINSON
4 ALEXANDER CHEN TYLER GASTON

5 I further certify that I served a copy of this document via e-mail:
6 HONORABLE JACQUELINE BLUTH
7 DISTRICT COURT, DEPT. VI
8 c/o dept06lc@clarkcountycourts.us

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

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