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VS.

Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

[illegible]

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Attorney for Appellant

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3538

Counsel for Respondent

INDEX
KEANDRE VALENTINE
Case No.
(C-16-316081-1)

PAGE NO.

Bench Brief for Evidentiary Hearing Being Held on 12/03/21: Documents Showing the History of Mungai Filed 12/03/21	300-464
Indictment filed 06/29/16	705-710
Motion Asking the Court Take Judicial Notice of the Mungai Case: And Motion Seeking Findings That Systematic Exclusion is Inherent in the Jury Selection Process Based on the Mungai Case and Based on the Jury Commissioner's Failure to Follow the Mandates Giving her Direction; and Motion to Reconsider Estoppel and Issue Preclusion Filed 12/14/21, Date of Hrg: 12/28/21	465-526
Motion Seeking An Order Granting A New Trial Based On Violations Of Due Progress, Prosecutorial Misconduct, And The Right To A Speedy Appeal And/Or Trial filed 04/20/22 Date of Hrg: 05/03/22	001-260
Notice of Appeal filed 11/06/17	711-715
Order Denying Motion Seeking An Order Granting A New Trial Based On Violations Of Due Progress, Prosecutorial Misconduct, And The Right To A Speedy Appeal And/Or Trial Filed 05/18/22	273-277
State's Opposition to Defendant's Motion Seeking an Order Granting A New Trial Based on Violations of Due Process, Prosecutorial Misconduct, and the Right to Speedy Appeal and/or Trial filed 05/03/22.....	269-272
Supplement to 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 filed 04/28/22	261-268

TRANSCRIPTS

Recorder's Transcript of Proceedings: Motion Seeking An Order Granting A New Trial Based On Violations Of Due Progress, Prosecutorial Misconduct, And The Right To A Speedy Appeal And/Or Trial Date of Hrg: 05/03/22	279-299
Transcript of Proceedings Re: All Pending Motions Date of Hrg: 12/28/21	232-260
Transcript of Proceedings Re: Evidentiary Hearing Date of Hrg: 02/07/22	527-704



MOT

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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

Date: December 28, 2021
Time: 11:00 a.m.

MOTION ASKING THE COURT TAKE JUDICIAL NOTICE OF THE MUNGAI CASE; AND MOTION SEEKING FINDINGS THAT SYSTEMATIC EXCLUSION IS INHERENT IN THE JURY SELECTION PROCESS BASED ON THE MUNGAI CASE AND BASED ON THE JURY COMMISSIONER'S FAILURE TO FOLLOW THE MANDATES GIVING HER DIRECTION; AND MOTION TO RECONSIDER ESTOPPEL AND ISSUE PRECLUSION.

COMES NOW, the Defendant, KEANDRE VALENTINE, by and through his attorneys, SHARON G. DICKINSON and TYLER C. GASTON, Chief Deputy Public Defenders, and brings this Motion addressing the upcoming evidentiary hearing and seeking relief. This motion is made and based upon all the papers and pleadings on file herein, and any oral argument at the time set for hearing.

DATED this 14th day of December, 2021.

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

1 POINTS AND AUTHORITIES

2 A. Procedural posture.

3 In an Indictment filed on 06/29/16, the State charged Keandre Valentine with 14
4 felony counts involving crimes of robbery with use of a deadly weapon, attempt robbery
5 with a deadly weapon, burglary while in possession of a firearm, possession of personal
6 identifying information, and possession of credit cards without consent. Keandre's trial
7 began on 07/24/17 and concluded on 08/04/17, with guilty verdicts on all counts. The
8 Court sentenced Keandre on 09/28/17. *Exhibit A: Amended Judgment, amended on*
9 *11/20/19.*

10 More than two years later, on 12/19/19, the Nevada Supreme Court reached a
11 decision on Keandre's appeal. The Court reversed Keandre's convictions under counts 4
12 and 9 for robbery with a deadly weapon. *Exhibit B: Valentine v. State, 135 Nev. 463,*
13 *454 P.3d 709 (2019).* Additionally, the Court returned Keandre's case to District Court
14 for an evidentiary hearing under Step 3 of the fair cross-section test.

15 The return/remand took place on or about 01/31/20. Since the return/remand,
16 Keandre's case has been continued several times due to COVID protocols, difficulty
17 obtaining discovery from the Jury Commissioner during new COVID procedures, and
18 because his case has been transferred to several different departments.

19 Since 2019, the Nevada Supreme Court has remanded a total of four cases for an
20 evidentiary hearing on the fair cross-section issue involving the systematic exclusion of
21 minorities. Keandre's case is one of the four. Each case has involved the jury selection
22 process used by the Eighth Judicial District Court.

23 *State v. Mungai, C-15-306725-1*, was the first of the four cases to proceed to
24 evidentiary hearing on the fair cross-section issue after being remanded down from the
25 Nevada Supreme Court. The evidentiary hearing was held on 04/08/21 and the Eighth
26 Judicial District Court, Department XXIII, filed Findings of Fact and Conclusions of
27 Law on 04/20/21, finding systematic exclusion occurred. *Exhibit C: Mungai Findings-*
28 *Defense incorporates Mungai Bench Brief previously filed.* The District Court found

1 systematic exclusion led to the lack of African-Americans on Mungai's jury because the
2 Jury Commissioner did not use the sources required.

3 **B. Valentine Appeal: reversal in part and return for an evidentiary hearing on Step**
4 **3 of the Sixth's Amendment's fair cross-section guarantee.**

5 The Nevada Supreme Court resolved all issues raised in Keandre's appeal except
6 one – his challenge to a lack of a fair cross-section of the community in his jury venire.
7 Hence, the Court returned his case back to District Court for an evidentiary hearing on
8 Step 3 of the fair cross-section test, finding Keandre made a sufficient showing of
9 systematic exclusion to allow for an evidentiary hearing.

10 The *Valentine* Court said:

11 The district court abused its discretion in denying Valentine's request for an
12 evidentiary hearing on his fair-cross-section challenge. **We therefore**
13 **vacate the judgment of conviction and remand for the district court to**
14 **conduct an evidentiary hearing and resolve the fair-cross-section**
15 **challenge.** None of Valentine's other arguments require a new trial.
16 Accordingly, if the district court determines on remand that the fair-cross-
17 section challenge lacks merit, it may reinstate the judgment of conviction
18 except as to the convictions for counts 4 and 9, which were not supported
19 by sufficient evidence.

20 *Valentine v. State*, 135 Nev. 463, 473, 454 P.3d 709, 719 (2019) (Emphasis added). If the
21 district court finds the fair cross-section challenge is meritorious then the court will order
22 a new trial on the counts that were not reversed.

23 **C. Step 3 of the Sixth's Amendment's fair cross-section guarantee.**

24 A challenge under the fair cross-section clause arises out of the United States and
25 Nevada Constitution's guarantee of due process and equal protection of the laws to any
26 person within its jurisdiction. See U.S. Const. Amend. VI; XIV; Nev. Const. Art. 1 Sec.
27 1; Nev. Const. Art. 1 Sec. 8; Nev. Const. Art. 4 Sec. 21; *Williams v. State*, 121 Nev. 934,
28 939 (2005).

To establish a prima facie violation of the Sixth Amendment's fair cross-section
clause, when members of a specific race are underrepresented in the jury pool/venire, a

1 defendant must show that: (1) the omitted jurors are a “distinctive” group in the
2 community; (2) representation of this distinctive group in the venire is unfair and
3 unreasonable when compared to the number of persons of this race in the community;
4 and (3) under representation is due to systematic exclusion of this racial group in the
5 jury-selection process. *Williams*, at 940; *Evans v. State*, 112 Nev. 1172, 1186-87 (1996);
6 *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *Duren v. Missouri*, 439 U.S. 357
7 (1979).

8 The return/remand of Valentine’s case to District Court only involves an
9 evidentiary hearing on Step 3.

10 **D. Step 3: The jury selection process used in the Eighth Judicial District Court**
11 **failed to follow a court order and NRS 6.045 thereby creating systematic exclusion**
12 **inherent in the jury selection system.**

13 Under Step 3, “systematic exclusion” means “underrepresentation...inherent in the
14 particular jury-selection process utilized.” *Duren* at 66 (systematic exclusion inferred
15 when there was a large discrepancy in minorities called for nearly a year); *Taylor v.*
16 *Louisiana*, 419 U.S. 522 (1975)(systematic exclusion of women occurred when law
17 required women to file a declaration indicating a desire to serve); *Garcia-Dorantes v.*
18 *Warren*, 801 F.3d 584, 591-96 (6th Cir. 2015)(computer glitch may result in systematic
19 exclusion of minorities). Thus, under Step 3, the court focuses on the process used by
20 the Jury Commissioner for creating the master list, issuance of summons, the jury pools,
21 and the jury venire.

22 The Legislature created rules explaining the process the Jury Commissioner must
23 follow to ensure the master list and jury pools/venires represent a fair cross-section of the
24 community.

25 Some of the rules are within NRS 6.045. At the time of Valentine’s trial and as of
26 07/01/17, NRS 6.045(3) required the Jury Commissioner to add the following four
27 sources into the jury master list. NRS 6.045(3) states:

28 ///

1 3. The jury commissioner **shall**, for the purpose of selecting trial jurors,
2 **compile and maintain a list** of qualified electors from information
3 provided by:

4 (a) A list of persons who are registered to vote in the county;

5 (b) The Department of Motor Vehicles pursuant to NRS 482.171 and
6 483.225;

7 (c) The Employment Security Division of the Department of Employment,
8 Training and Rehabilitation pursuant to NRS 612.265; **and**

9 (d) A public utility pursuant to NRS 704.206.

10 NRS 6.045(3)(Emphasis added). The word “shall” is a mandate. The word “shall”
11 means the Jury Commissioner is required to follow the directive given in the statute. *In*
12 *re P.S.*, 131 Nev. 955, 957, 364 P.3d 1271, 1272 (2015).

13 But NRS 6.045 was not the only mandate the Jury Commissioner was ordered to
14 follow. Prior to July 2017, the Jury Commissioner was given another directive for
15 maintaining the master list from then Chief Judge David Barker. In November of 2016,
16 Chief Judge Barker issued an Administrative Order directing that the list of registered
17 voters be added to the names on the jury master list. *Exhibit D: Administrative Order.*

18 However, contrary to the mandates in place, at the time of Keandre’s trial, the Jury
19 Commissioner was only using **two sources** for the creation of the jury master list: (1) NV
20 Energy, and (2) Nevada Department of Motor Vehicles. *Exhibit E: Declaration from*
21 *Jury Commissioner.* By only using two sources, the Jury Commissioner was in violation
22 of NRS 6.045 and the District Court ordered issued in November of 2016.

23 The use of two sources rather than the required four meant that the Jury
24 Commissioner was omitting potential jurors who had a **right** to be included. The
25 omission of jurors who were entitled to be on the list or in the wheel is a serious omission
26 because the more inclusive a master list is then the more likely it will accurately represent
27
28

1 a fair cross-section of the community. National Center for State Court, *The Jury*
2 *Manager's Tool Box*, (2009).¹

3 The Jury Commission's omission of people from the master list was a problem
4 that was inherent in the entire jury selection process. It was inherent because it was a
5 permanent and inseparable quality of the selection process – people were excluded, they
6 were missing, and could not be included in any defendant's jury venire. By excluding
7 people under two of the four sources, the process used inherently created jury pools and
8 venires that were not representative of the fair cross-section of our community.

9 The omission of these two sources is deeply troubling because in 2017, in AB 207,
10 the Legislature added the two additional sources (The Department of Employment,
11 Training, and Rehabilitation, also known as DETR, and voter registration records) in
12 order to remedy the problem of there being few minorities on the jury pools in Nevada.
13 Hearing on AB 207, before the *Assembly Committee on the Judiciary*, 79th Leg. (Nev.
14 03/03/17, p. 13).

15 In support of AB 207 and on behalf of the Nevada Justice Association, Attorney
16 Robert Eglet testified that in his over 30 years of legal practice, he saw few African-
17 American or Hispanic jurors in the jury pools even though the population of Clark
18 County was 11% African-American and 29 % Hispanic. *Id. at p. 7*. In his experience,
19 Mr. Eglet estimated "African Americans [and Hispanics] in the jury pools [were] closer
20 to 2 to 4 percent of their population" in Clark County. *Id.* "By passing this bill and
21 requiring jury commissioners to draw from multiple and expressly defined source pools,
22 this increases the likelihood of a jury pool that is reflective of its own community," said
23 Mr. Eglet. *Id. at p. 8*. Thus, the Legislature added two additional source lists in order to
24 comply with the fair cross-section guarantee.

25 What is further troubling is that in 2019, the Jury Commissioner was continuing to
26 only use two sources. We know this because when another case was returned for an
27 evidentiary hearing, *Sims v. State*, C-18-335022-1, the Jury Commissioner signed a

28 ¹ http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0025/7477/characteristics-of-effective-mjl.pdf.

1 declaration indicating what sources she used; she acknowledged that at the time of the
2 Sims' trial in 2019, she was only using two sources. *Exhibit F: Jury Commissioner's*
3 *Declaration in Sims; Exhibit G: Agreement with DETR dated 03/18/19.*

4 When the Jury Commissioner does not use all four sources for the master list then
5 she has failed to substantially comply with the rules within the Nevada Revised Statutes
6 designed to guarantee the inclusion of minorities in the jury selection process and she is
7 omitting people entitled to be on the list. *See State ex rel. Gregg v. Maples*, 286 Ala. 274,
8 276 (1970)(reversal when court found the failure to comply with the statutes for the jury
9 selection process was a violation of an essential provision of the jury selection statutes
10 which vitiated the array); *State v. Sardeson*, 174 S.W.3d 598, 600–02 (Mo. Ct. App.
11 2005)(seating jurors by birthdates rather than as required by statute is a substantial failure
12 to comply); *State v. LaMere*, 298 Mont. 358 (2000)(jury commission's failure to
13 substantially comply with statutes governing the procurement of jurors for trial is not
14 harmless). She also failed to comply with Judge Barker's written 2016 directive.

15 Accordingly, the Jury Commissioner's failure to comply with the order and the
16 Nevada Revised Statutes is a failure to substantially comply with the rules that resulted in
17 a violation of the fair cross-section clause.

18 **E. Judicial Notice of Mungai decision.**

19 In *State v. Mungai*, C-15-306725-1, Department XXIII found that the jury
20 selection system used by the Eighth Judicial District Court created systematic exclusion
21 in large part because the Jury Commissioner did not add the four sources as required by
22 NRS 6.045 (3). *Exhibit C, page 11.* After Department XXIII's findings were submitted
23 to the Nevada Supreme Court, the Court remanded the Mungai case back to district
24 court for a new trial.

25 This Court may take judicial notice of the Mungai case. NRS 47.130; NRS
26 47.150. Since the same jury selection process, system, and sources used in Mungai
27 were the same process, system, and sources used here, this Court may take judicial
28 notice of the Mungai findings and then adopt the Mungai decision by finding systematic

1 exclusion here also. *Defense has provided the history of Mungai for the Court in a*
2 *separate bench brief.*

3 **F. Court may use the Mungai testimony to rule in Valentine's favor.**

4 In *Valentine v. State*, 135 Nev. 463, 465-68, 454 P.3d 709, 714-16 (2019), the
5 Nevada Supreme Court explained when an evidentiary hearing was needed for a Step 3
6 fair cross-section claim, comparing it to post-conviction cases. The Court noted that
7 while habeas claims were case specific, Step 3 of the fair cross-section test is not because
8 the system is the same in each case. Court said:

9 But unlike the postconviction context where the claims are case specific, a
10 fair-cross-section challenge is focused on systematic exclusion and
11 therefore is not case specific. Because of that systematic focus, it makes
12 little sense to require an evidentiary hearing on a fair-cross-section
13 challenge that has been disproved in another case absent a showing that the
14 record in the prior case is not complete or reliable.

14 *Id.* at 465-68.

15 At the time of the wording in *Valentine*, the Mungai decision had not occurred.
16 However, now, based on the Court's above discussion regarding prior testimony, this
17 court may use the Mungai prior testimony and order to reach the same result as the
18 Mungai Court. This court may hold that the jury selection system used by the Eighth
19 Judicial District Court in 2017 unfairly and systematically omitted minority jurors who
20 were required to be included and this problem was inherent in the system. Thus, Keandre
21 asks this Court to rule in his favor.

22 **G. Scope of the hearing.**

23 On 12/03/21, the court ruled that Keandre Valentine was not limited to presenting
24 evidence regarding the zip codes for summons and could present other arguments and
25 evidence to show that there was systematic exclusion in the jury selection system used in
26 2017.

27 The court's decision was sound because in Mungai the Nevada Supreme Court
28 directed the district court to discuss the requirements of NRS 6.045 as it applied to his

1 jury selection process. *See Bench Brief on Mungai filed on 12/03/21*. Likewise, during
2 the oral argument in Valentine, the Valentine Court asked questions about the changes
3 within NRS 6.045. The Valentine Court's final directive was for the court to "resolve the
4 fair-cross-section challenge." *Valentine v. State*, 135 Nev. 463, 473, 454 P.3d 709, 719
5 (2019).

6 **H. Collateral Estoppel and Issue Preclusion.**

7 At the 12/03/21 hearing, Keandre Valentine argued that the State should be
8 collaterally estopped from arguing that the jury selection process used in 2017 did not
9 systematically excluded minorities, specifically African-American prospective jurors,
10 based on the Mungai decision. Although this court ruled otherwise, Keandre asks this
11 court to reconsider.

12 Generally, in a criminal case, collateral estoppel acts like double jeopardy by
13 prohibiting the re-litigation of "an issue of ultimate fact once it has been determined by a
14 valid and final judgment of acquittal." *Gonzalez v. Dist. Ct.*, 129 Nev. 215, 218-19, 298
15 P.3d 448, 450 (2013). Although the Mungai decision is not a judgment of acquittal, the
16 issue regarding the lack of the four sources in the master list and the effect it has on the
17 underrepresentation of African-Americans is the same for Keandre Valentine's case.

18 Additionally, issue preclusion prevents a party from relitigating an issue that has
19 already been litigated and decided on the merits. *Five Star Capital Corp. v. Ruby*, 124
20 Nev. 1048, 1055, 194 P.3d 709, 713-14 (2008). Here, the State has already litigated the
21 issue involving Step 3 of the fair cross-section test in Mungai, with a finding that the jury
22 selection process used by the Eighth Judicial District Court in 2017 systematically
23 excluded minorities because all four sources were not included in the master list. Thus,
24 call it estoppel or issue preclusion, either way, the State is stopped from relitigating that
25 issue here.

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1 The rule for issue preclusion is as follows:

2 In Nevada, issue preclusion requires that (1) an issue be identical, (2) the
3 initial ruling was final and on the merits, (3) “the party against whom the
4 judgment is asserted” was a party or in privity with a party in the prior case,
5 and (4) “the issue was actually and necessarily litigated.” *Five Star Capital*
6 *Corp. v. Ruby*, 124 Nev. 1048, —, 194 P.3d 709, 713 (2008). Issue
7 preclusion “is based upon the sound public policy of limiting litigation by
8 preventing a party who had one full and fair opportunity to litigate an issue
9 from again drawing it into controversy.” *Thompson v. City of North Las*
10 *Vegas*, 108 Nev. 435, 439–40, 833 P.2d 1132, 1134–35 (1992). This doctrine
11 ends litigation and lends stability to judgments, thus inspiring confidence in
12 the judicial system. *Willerton v. Bassham*, 111 Nev. 10, 19, 889 P.2d 823,
828 (1995).

13 *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718
14 (2009), *holding modified by Garcia v. Prudential Ins. Co. of Am.*, 129 Nev.
15 15, 293 P.3d 869 (2013)

16 Under this rule, the court must rule in Valentine’s favor. Valentine is asserting the
17 judgment against the State who was a party in Mungai, the ruling by the Mungai district
18 court was final on the merits, the issue was identical and litigated fully. Thus, the State
19 had its chance and is estopped or precluded from a second bite at the apple.

20 CONCLUSION

21 In view of the above, Keandre Valentine asks this Court to grant his motion.

22 DATED this 14th day of December, 2021.

23 DARIN F. IMLAY
24 CLARK COUNTY PUBLIC DEFENDER

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

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

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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing MOTION on for hearing before the Court on the 28th day of December, 2021, at 11:00 a.m.

DATED this 14th day of December, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tyler C. Gaston
 TYLER C. GASTON, #13488
 Deputy Public Defender

I hereby certify that service of the above and foregoing was made this 14th day of December, 2021, by electronic transmission, through Odyssey eFileNV EfileAndServe, to:

DISTRICT ATTORNEY'S OFFICE
Email Address: motions@clarkcountynvda.com

By: /s/ Jennifer Georges
An employee of the
Clark County Public Defender's
Office

EXHIBIT A

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Steven D. Grierson

1 AJOC

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

KEANDRE VALENTINE
#5090875

Defendant.

CASE NO. C-16-316081-1

DEPT. NO. 11

AMENDED JUDGMENT OF CONVICTION
(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165, COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS 205.060, COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165, COUNT 4 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165, COUNT 5 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS 205.060; COUNT 6 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS

1 200.380, 193.165; COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON (Category
2 B Felony) in violation of NRS 200.380, 193.165; COUNT 8 - ATTEMPT ROBBERY WITH
3 USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.330,
4 193.165; COUNT 9 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony)
5 in violation of NRS 200.380, 193.165; COUNT 10 - BURGLARY WHILE IN POSSESSION
6 OF A DEADLY WEAPON (Category B Felony) in violation of NRS 205.060; COUNT 11 -
7 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS
8 200.380, 193.165; COUNT 12 - POSSESSION OF DOCUMENT OR PERSONAL
9 IDENTIFYING INFORMATION (Category E Felony) in violation of NRS 205.465; COUNT
10 13 - POSSESSION OF CREDIT OR DEBIT CARD WITHOUT CARDHOLDER'S
11 CONSENT (Category D Felony) in violation of NRS 205.690 and COUNT 14 - POSSESSION
12 OF CREDIT OR DEBIT CARD WITHOUT CARDHOLDER'S CONSENT (Category D
13 Felony) in violation of NRS 205.690; and the matter having been tried before a jury and the
14 Defendant having been found guilty of the crimes of COUNT 1 - ROBBERY WITH USE OF
15 A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165, COUNT 2
16 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in
17 violation of NRS 205.060, COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON
18 (Category B Felony) in violation of NRS 200.380, 193.165, COUNT 4 - ROBBERY WITH
19 USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165,
20 COUNT 5 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B
21 Felony) in violation of NRS 205.060; COUNT 6 - ROBBERY WITH USE OF A DEADLY
22 WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 7 - ROBBERY
23 WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380,
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1. 193.165; COUNT 8 – ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON
2 (Category B Felony) in violation of NRS 200.380, 193.330, 193.165; COUNT 9 - ROBBERY
3 WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380,
4 193.165; COUNT 10 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS 205.060; COUNT 11 - ROBBERY WITH USE OF A
5 DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 12 –
6 POSSESSION OF DOCUMENT OR PERSONAL IDENTIFYING INFORMATION (Category
7 E Felony) in violation of NRS 205.465; COUNT 13 – POSSESSION OF CREDIT OR DEBIT
8 CARD WITHOUT CARDHOLDER'S CONSENT (Category D Felony) in violation of NRS
9 205.690 and COUNT 14 - POSSESSION OF CREDIT OR DEBIT CARD WITHOUT
10 CARDHOLDER'S CONSENT (Category D Felony) in violation of NRS 205.690; thereafter,
11 on the 28th day of September, 2017, the Defendant was present in court for sentencing with
12 counsel Tegan Machnich, Deputy Public Defender, and good cause appearing.
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17 THE DEFENDANT WAS ADJUDGED guilty of said offenses and, in addition to the
18 \$25.00 Administrative Assessment Fee, \$1,000.00 Restitution and \$150.00 DNA Analysis Fee
19 including testing to determine genetic markers plus \$3.00 DNA Collection Fee, the Defendant
20 SENTENCED to the Nevada Department of Corrections (NDC) as follows: **COUNT 1** - a
21 MAXIMUM of FIVE (5) YEARS with a MINIMUM Parole Eligibility of TWO (2) YEARS.
22 plus a CONSECUTIVE term of THREE (3) YEARS with a MINIMUM parole eligibility of
23 ONE (1) YEAR for the Use of a Deadly Weapon, total 3-8 years; **COUNT 2** - a MAXIMUM of
24 EIGHT (8) YEARS with a MINIMUM parole eligibility of THREE (3) YEARS, to run
25 CONCURRENT with COUNT 1; and **COUNT 3** -- a MAXIMUM of FIVE (5) YEARS with a
26 MINIMUM Parole Eligibility of TWO (2) YEARS, plus a CONSECUTIVE term of THREE (3)
27
28

1 YEARS with a MINIMUM parole eligibility of ONE (1) YEAR for the Use of a Deadly
2 Weapon, to run CONSECUTIVE to Count 1, total 3-8 years; **COUNT 4** - a MAXIMUM of
3 FIVE (5) YEARS with a MINIMUM Parole Eligibility of TWO (2) YEARS, plus a
4 CONSECUTIVE term of THREE (3) YEARS with a MINIMUM parole eligibility of ONE (1)
5 YEAR for the Use of a Deadly Weapon, to run CONSECUTIVE to Count 1 and 3, total 3-8
6 years; **COUNT 5** - a MAXIMUM of EIGHT (8) YEARS with a MINIMUM parole eligibility
7 of THREE (3) YEARS, to run CONCURRENT with Counts 1, 2, 3 and 4; **COUNT 6** - a
8 MAXIMUM of FIVE (5) YEARS with a MINIMUM Parole Eligibility of TWO (2) YEARS,
9 plus a CONSECUTIVE term of THREE (3) YEARS with a MINIMUM parole eligibility of
10 ONE (1) YEAR for the Use of a Deadly Weapon, to run CONSECUTIVE to Count 1, 3 and 4,
11 total 3-8 years; **COUNT 7** - a MAXIMUM of FIVE (5) YEARS with a MINIMUM Parole
12 Eligibility of TWO (2) YEARS, plus a CONSECUTIVE term of THREE (3) YEARS with a
13 MINIMUM parole eligibility of ONE (1) YEAR for the Use of a Deadly Weapon, to run
14 CONSECUTIVE to Counts 1, 3, 4, and 6; total 3-8 years; **COUNT 8** - a MAXIMUM of
15 EIGHT (8) YEARS with a MINIMUM parole eligibility of THREE (3) YEARS, to run
16 CONCURRENT with Counts 1, 2, 3, 4, 5, 6 and 7; **COUNT 9** - a MAXIMUM of FIVE (5)
17 YEARS with a MINIMUM Parole Eligibility of TWO (2) YEARS, plus a CONSECUTIVE
18 term of THREE (3) YEARS with a MINIMUM parole eligibility of ONE (1) YEAR for the Use
19 of a Deadly Weapon, to run CONSECUTIVE to Count 1, 3, 4, 6 AND 7, total 3-8 years;
20 **COUNT 10** a MAXIMUM of EIGHT (8) YEARS with a MINIMUM parole eligibility of
21 THREE (3) YEARS, to run CONCURRENT with Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9; **COUNT**
22 **11** - a MAXIMUM of FIVE (5) YEARS with a MINIMUM Parole Eligibility of TWO (2)
23 YEARS, plus a CONCURRENT term of THREE (3) YEARS with a MINIMUM parole

000480

1 eligibility of ONE (1) YEAR for the Use of a Deadly Weapon, total 3-8 years, to run
2 CONCURRENT with Counts 1, 3, 4, 6 7, 8, 9 and 10; COUNT 12 - a MAXIMUM OF
3 THREE (3) YEARS with a MINIMUM parole eligibility of ONE (1) YEAR, to run concurrent
4 WITH Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11; COUNT 13 - a MAXIMUM OF THREE (3)
5 YEARS with a MINIMUM parole eligibility of ONE (1) YEAR, to run concurrent WITH
6 Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; COUNT 14 - a MAXIMUM OF THREE (3)
7 YEARS with a MINIMUM parole eligibility of ONE (1) YEAR, to run concurrent WITH
8 Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 11, 12 and 13; with FOUR HUNDRED AND EIGHTY-NINE
9 (489) DAYS credit for time served. The AGGREGATE TOTAL sentence is FORTY-EIGHT
10 (48) YEARS MAXIMUM with a MINIMUM PAROLE ELIGIBILITY OF EIGHTEEN (18)
11 YEARS.
12
13

14 THEREAFTER, upon inquiry of the Nevada Department of Corrections, the Amended
15 Judgment of Conviction reflects the following: COUNT 11 - a MAXIMUM of FIVE (5)
16 YEARS with a MINIMUM Parole Eligibility of TWO (2) YEARS, plus a CONCURRENT
17 term of THREE (3) YEARS with a MINIMUM parole eligibility of ONE (1) YEAR for the Use
18 of a Deadly Weapon, total 3-8 years, to run CONCURRENT with Counts 1, 3, 4, 6 7, 8, 9 and
19
20 10

21 DATED this 15th day of ~~October~~ ^{November}, 2019.

22
23
24 RICHARD SCOTTI
25 DISTRICT COURT JUDGE
26
27
28

EXHIBIT B

000482

KeyCite Yellow Flag - Negative Treatment
Distinguished by Chaparro v. State, Nev., November 10, 2021

135 Nev. 463
Supreme Court of Nevada.

Keandre VALENTINE, Appellant,
v.
The STATE of Nevada, Respondent.

No. 74468
FILED DECEMBER 19, 2019

Synopsis

Background: After defendant's request for an evidentiary hearing regarding whether jury venire represented a fair cross-section of the community was denied, defendant was convicted in the District Court, Clark County, Richard Scotti, J., of multiple crimes stemming from five armed robberies. Defendant appealed.

Holdings: The Supreme Court, Stiglich, J., held that:

as a matter of first impression, an evidentiary hearing is warranted on a defendant's fair-cross-section challenge to a jury venire when the defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement;

defendant's allegations were sufficient to establish a prima facie violation of the fair-cross-section requirement;

evidence was insufficient to support two of defendant's robbery convictions;

district court did not abuse its discretion in admitting graphs of DNA test results;

prosecutor's closing argument inviting jurors to make inferences not supported by DNA evidence was improper; and

prosecutor's improper closing argument was harmless.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection; Jury Selection Challenge or Motion.

****712** Appeal from a judgment of conviction, pursuant to a jury verdict, of seven counts of robbery with the use of a deadly weapon, three counts of burglary while in possession of a deadly weapon, two counts of possession of credit or debit card without cardholder's consent, and one count each of attempted robbery with the use of a deadly weapon and possession of document or personal identifying information for the purpose of establishing a false status or identity. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Attorneys and Law Firms

Darin F. Imlay, Public Defender, and Sharon G. Dickinson, Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson

City; Steven B. Wolfson, District Attorney, Krista D. Barrie, Chief Deputy District Attorney, and Michael R. Dickerson, Deputy District Attorney, Clark County, for Respondent.

BEFORE HARDESTY, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

*463 A defendant has the right to a jury chosen from a fair cross section of the community, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This court has addressed the showing a defendant must make to establish a prima facie violation of this right. We have said little, however, about when an evidentiary hearing may be warranted on a fair-cross-section claim. Faced with that issue in this case, we hold 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. Because the defendant in this matter made specific factual allegations that could be sufficient to establish a prima facie violation of the fair-cross-section requirement and those allegations were not disproved, the district court abused its discretion by denying Valentine's request

for an evidentiary hearing. None of Valentine's other claims warrant a new trial. We therefore vacate the judgment of conviction and remand for further proceedings as to the fair-cross-section challenge.

*464 **713 BACKGROUND

Appellant Keandre Valentine was convicted by a jury of multiple crimes stemming from a series of five armed robberies in Las Vegas, Nevada. Before trial, Valentine objected to the 45-person venire and claimed a violation of his right to a jury selected from a fair cross section of the community. He argued that two distinctive groups in the community—African Americans and Hispanics—were not fairly and reasonably represented in the venire when compared with their representation in the community. Valentine asserted that the underrepresentation was caused by systematic exclusion, proffering two theories as to how the system used in Clark County excludes distinctive groups. His first theory was that the system did not enforce jury summonses; his second theory was that the system sent out an equal number of summonses to citizens located in each postal ZIP code without ascertaining the percentage of the population in each ZIP code. Valentine requested an evidentiary hearing, which was denied. The district court found that the two groups were distinctive groups in the community and that one group—Hispanics—was not fairly and reasonably represented in the venire when compared to its representation in the

community. However, the district court found that the underrepresentation was not due to systematic exclusion, relying on the jury commissioner's testimony regarding the jury selection process two years earlier in another case and on this court's resolution of fair-cross-section claims in various unpublished decisions. The court thus denied the constitutional challenge.

DISCUSSION

Fair-cross-section challenge warranted an evidentiary hearing

Valentine claims the district court committed structural error by denying his fair-cross-section challenge without conducting an evidentiary hearing. We review the district court's denial of Valentine's request for an evidentiary hearing for an abuse of discretion. *See Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (reviewing denial of request for an evidentiary hearing on a postconviction petition for a writ of habeas corpus); *accord United States v. Schafer*, 625 F.3d 629, 635 (9th Cir. 2010) (reviewing denial of request for an evidentiary hearing on a motion to dismiss an indictment); *United States v. Terry*, 60 F.3d 1541, 1544 n.2 (11th Cir. 1995) (reviewing denial of request for an evidentiary hearing on fair-cross-section challenge to statute exempting police officers from jury service).

"Both the Fourteenth and the Sixth

Amendments to the United States Constitution guarantee a defendant the right to a trial before a jury selected from a representative cross-section of the community." *Evans v. State*, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996). While this right does not require that the jury "mirror the community and *465 reflect the various distinctive groups in the population," it does require "that the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 1186, 926 P.2d at 274-75 (internal quotation marks omitted). "Thus, as long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible."

Williams v. State, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005).

A defendant alleging a violation of the right to a jury selected from a fair cross section of the community must first establish a prima facie violation of the right 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.

Evans, 112 Nev. at 1186, 926 P.2d at 275 (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)). To determine “[w]hether a certain percentage is a fair representation of a group,” this court **714 uses “the absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community.”

Williams, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9. And to determine whether systematic exclusion has been shown, we consider if the underrepresentation of a distinctive group is “inherent in the particular jury-selection process utilized.”

Evans, 112 Nev. at 1186-87, 926 P.2d at 275 (internal quotation marks omitted). Only after a defendant demonstrates a prima facie violation of the right does “the burden shift [] to the government to show that the disparity is justified by a significant state interest.” *Id.* at 1187, 926 P.2d at 275.

Here, Valentine asserted that African Americans and Hispanics were not fairly and reasonably represented in the venire. Both African Americans and Hispanics are recognized as distinctive groups. See *id.*; see also *United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir. 1996). And the district court correctly used the absolute and comparative disparity between the percentage of each distinct group in the venire and the percentage in the community

to determine that African Americans were fairly and reasonably represented in the venire but that Hispanics were not. See

Williams, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9 (“Comparative disparities over 50% indicate that the representation of [a distinct group] is likely not fair and reasonable.”). The district court denied Valentine’s challenge as to Hispanics based on the third prong—systematic exclusion.

*466 We conclude the district court abused its discretion in denying Valentine’s request for an evidentiary hearing. Although this court has not articulated the circumstances in which a district court should hold an evidentiary hearing when presented with a fair-cross-section challenge, it has done so in other contexts. For example, this court has held that an evidentiary hearing is warranted on a postconviction petition for a writ of habeas corpus when the petitioner has “assert[ed] claims supported by specific factual allegations [that are] not belied by the record [and] that, if true, would entitle him to relief.” *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002); see also *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Most of those circumstances are similarly relevant when deciding whether an evidentiary hearing is warranted on a defendant’s fair-cross-section challenge, given the defendant’s burden of demonstrating a prima facie violation. In particular, it makes no sense to hold an evidentiary hearing if the defendant makes only general allegations that are not sufficient to demonstrate a prima facie violation or if the defendant’s specific allegations are not sufficient to demonstrate a prima facie violation as a matter of law. See *Terry*, 60 F.3d at 1544 n.2

(explaining that no evidentiary hearing is warranted on a fair-cross-section challenge if no set of facts could be developed that “would be significant legally”). But unlike the postconviction context where the claims are case specific, a fair-cross-section challenge is focused on systematic exclusion and therefore is not case specific. Because of that systematic focus, it makes little sense to require an evidentiary hearing on a fair-cross-section challenge that has been disproved in another case absent a showing that the record in the prior case is not complete or reliable.¹ With these considerations in mind, we hold 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.²

¹ For the reasons stated herein, it was error for the district court to rely upon the jury commissioner’s prior testimony in denying Valentine’s challenge. That is not to say a district court may never rely upon prior testimony when appropriate.

² We note that, in order to meet the burden of demonstrating an evidentiary hearing is warranted, a defendant may subpoena supporting documents and present supporting affidavits. See *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

Applying that standard, we conclude that

Valentine was entitled to an evidentiary hearing as to his allegation of systematic exclusion of Hispanics. Valentine did more than make a general assertion of systematic exclusion. In particular, Valentine made specific allegations that the system used to select jurors in the Eighth Judicial **715 District Court sends an equal number of jury summonses to each postal ZIP code in the jurisdiction without ascertaining the percentage *467 of the population in each ZIP code. Those allegations, if true, could establish underrepresentation of a distinctive group based on systematic exclusion. Cf.

Garcia-Dorantes v. Warren, 801 F.3d 584, 591-96 (6th Cir. 2015) (discussing a prima facie case of systematic exclusion where a computer used a list to determine the percentage of jurors per ZIP code, but because of a glitch, the list included a higher number of persons from certain ZIP codes that had smaller proportions of African Americans than the community at large). And those allegations were not addressed in the jury commissioner’s prior testimony that the district court referenced.³ Accordingly, the district court could not rely on the prior testimony to resolve Valentine’s allegations of systematic exclusion. Having alleged specific facts that could establish the underrepresentation of Hispanics as inherent in the jury selection process, Valentine was entitled to an evidentiary hearing.⁴ Accordingly, the district court abused its discretion by denying Valentine’s request for an evidentiary hearing.⁵ We therefore vacate the judgment of conviction and remand to the district court for an evidentiary hearing. Cf. *State v. Ruscetta*, 123 Nev. 299, 304-05, 163 P.3d 451, 455 (2007) (vacating judgment of conviction and remanding where district court failed to

make factual findings regarding motion to suppress and where record was insufficient for appellate review). Thereafter, Valentine's fair-cross-section challenge should proceed in the manner outlined in *Evans*, 112 Nev. at 1186-87, 926 P.2d at 275. If the district court determines that the challenge lacks merit, it may reinstate the judgment of conviction, except as provided below.

³ Even if the jury commissioner's previous testimony addressed Valentine's specific allegations of systematic exclusion, reliance on the old testimony would have been misplaced. In particular, the prior testimony mentioned that the system was "moving towards a new improved jury selection process" and legislative amendments regarding the juror selection process were implemented close in time to Valentine's trial. *See* 2017 Nev. Stat., ch. 549, §§ 1-5, at 3880-84. While prior testimony relevant to a particular fair-cross-section challenge may obviate the need for an evidentiary hearing, a district court should be mindful that it not rely upon stale evidence in resolving such challenges.

⁴ It is unclear that Valentine's allegations regarding the enforcement of jury summonses would, if true, tend to establish underrepresentation as a result of systematic exclusion. *See United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006) ("Discrepancies resulting from the

private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*"). Accordingly, he was not entitled to an evidentiary hearing as to those allegations.

⁵ We reject Valentine's contention that the district court's failure to hold an evidentiary hearing evinced judicial bias resulting in structural error.

Sufficiency of the evidence

Valentine argues the State presented insufficient evidence to support his convictions for robbery with the use of a deadly weapon in counts 4 and 9. In considering a claim of insufficient evidence, we *468 "view[] the evidence in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

NRS 200.380(1) defines the crime of robbery as

[T]he unlawful taking of personal property from the person of another, or in the

person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery.⁶

Additionally, we have held that the State must show that the victim had possession of or a possessory interest in the property taken. **716 See *Phillips v. State*, 99 Nev. 693, 695-96, 669 P.2d 706, 707 (1983).

⁶ The Legislature amended NRS 200.380, effective October 1, 2019. 2019 Nev. Stat., ch. 76, § 1, at 408. While the amendments do not affect our analysis in this matter, we have quoted the pre-amendment version of NRS 200.380 that was in effect at the time of the events underlying this appeal. 1995 Nev. Stat., ch. 443, § 60, at 1187.

The challenged robbery counts stem from a similar fact pattern. Beginning with count 4, Valentine was charged with robbing Deborah Faulkner of money; Valentine was also charged with robbing Darrell Faulkner, Deborah's husband, of money in count 3. Valentine was convicted of both counts. However, when viewed in a light most favorable to the prosecution, the evidence produced at trial was insufficient to support a robbery charge as it related to Deborah. While the evidence established that

Valentine took \$100 that Darrell removed from his own wallet, the evidence demonstrated that Valentine demanded Deborah to empty her purse onto the ground but actually took nothing from it. There was no evidence that Deborah had possession of, or a possessory interest in, the money from Darrell's wallet.⁷ Thus, the State presented insufficient evidence for count 4, and the conviction for that count cannot be sustained.

⁷ We are unconvinced by the State's argument that the singular fact of Darrell and Deborah being married, without more, demonstrated that the money in Darrell's wallet was community property of the marriage such that Deborah had a possessory interest in it. See NRS 47.230(3).

Similarly, in count 9, Valentine was charged with robbing Lazaro Bravo-Torres of a wallet and cellular telephone; Valentine was also charged with robbing Rosa Vasquez-Ramirez, Lazaro's wife, of a purse, wallet, and/or cellular telephone in count 11. Valentine was convicted of both counts. Yet viewing the evidence in a light most favorable to the prosecution, the evidence did not establish that Valentine robbed Lazaro. Specifically, Lazaro testified that he *469 told Valentine he did not have cash or a wallet on him and that his phone, located in the center compartment of the truck, was not taken but was used by the couple after the incident was over. Conversely, Rosa testified that Valentine took her purse along with the items in it. The evidence presented by the State did not establish that Lazaro had possession of, or a possessory interest in, the

items taken,⁸ and thus the conviction for count 9 cannot be sustained.

- ⁸ We again reject the State's argument that the mere fact that Lazaro and Rosa were married demonstrated that Lazaro had a possessory interest in Rosa's purse or the items therein. *See id.*

Prosecutorial misconduct regarding DNA evidence

Valentine contends that the State engaged in prosecutorial misconduct during closing argument when discussing the deoxyribonucleic acid (DNA) evidence. In considering a claim of prosecutorial misconduct, we determine whether the conduct was improper and, if so, whether the improper conduct merits reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

During the trial, the State presented an expert witness to testify about the DNA results from a swab of the firearm found in the apartment where Valentine was discovered. The expert testified generally about the procedures her laboratory uses for DNA analysis. She explained that samples are tested at the same 15 locations, or loci, on the DNA molecule and a DNA profile results from the alleles, or numbers, obtained from each of the 15 locations.⁹ When complete information from each of the 15 locations is obtained, the result is a full DNA profile; anything less produces a

partial DNA profile. The results of the DNA testing process appear as peaks on a graph, and it is those peaks that the expert interprets and uses to make her determinations. In considering the information on a graph, the expert indicated that her laboratory uses a threshold of 200—anything over 200 is usable information, while anything below 200 is not used “because it’s usually not reproducible dat[a],” meaning if the sample was tested again, “it’s so low that [she] might get that same information, [she] might not.”¹⁰ The expert maintained **717 that sometimes DNA information is obtained “but it’s not good enough for us to make any determinations on. So in that case we call it inconclusive.”

- ⁹ The expert added that her laboratory also looks at an additional location, the amelogenin, in order to determine the gender of the individual represented in the sample.

- ¹⁰ The expert also testified that anything below 40 indicated that there was no actual DNA profile. She explained that her laboratory uses the thresholds “to make sure that when we say that there is a good, usable DNA profile, that it’s actually a good, useable DNA profile.”

As to the results of the swab from the firearm, the expert testified that she “did not obtain a useable profile, so there was no comparison *470 made.” She stated that the laboratory thresholds were not met and thus

"the profile was inconclusive." The only conclusion the expert was able to make was that the partial DNA profile obtained from the firearm swab was consistent with a mixture of at least two persons and that at least one of the persons was male.

During the expert's testimony, the State offered three exhibits: one was a summary, side-by-side comparative table of the DNA information collected from the firearm swab and from Valentine; and two were graphs of the specific information collected from the firearm swab and Valentine, both graphs showing peaks of information alongside a scale indicating the laboratory's threshold limits. Valentine objected to the admission of the graphs, arguing that they could be confusing to the jury, that the jurors should not be drawing their own conclusions from the graphs, and that he did not want the jurors to think they could discern something from the graphs that the expert could not. The district court overruled Valentine's objection, finding the graphs relevant to the expert's methodology and reliability.¹¹

¹¹ Valentine argues the district court abused its discretion in admitting the graphs. We cannot say the admission of the graphs to show methodology and reliability was an abuse of discretion. But while the graphs may have been relevant for such purposes, the manner in which the information was used by the State, as discussed below, strongly undermined the district court's reasoning for admitting the evidence. See NRS 47.110 (discussing the limited admissibility of evidence and, upon request, the need for an instruction to restrict the

jury's consideration to the proper scope).

Regarding the summary, side-by-side table, the expert testified that every tested location of the firearm swab, save for the location used to determine gender, resulted in either an "NR," meaning no DNA profile was obtained from that particular location, or an asterisk, indicating information was present but "it was so low that [she was] not even going to do any comparisons or say anything."

Regarding the graphs, the State went through the tested locations of the firearm swab and, while continuously commenting that the results were below the laboratory's 200 threshold, asked the expert to identify the alleles for which there were peaks of information. In going through the peaks of information from the firearm swab, the State also intermittently mentioned the corresponding locations and, ostensibly matching, alleles found in Valentine's DNA profile. During cross-examination, the expert repeated the 200 threshold and explained that she does not look at information below that threshold, even if it is close, because it could be incorrect. Valentine asked the expert if she had anything she wanted to add in response to the State's line of questioning regarding each of the locations tested, and the expert reiterated the following:

[T]he profile [from the firearm swab] was inconclusive, and we call it inconclusive because there wasn't enough DNA....
*471 [A]nd we call that inconclusive ...

because if I re-ran that exact same sample, I don't know what kind of results I would come up with. It may be the same, it may be different. So that's why we're not saying that the DNA profile definitely came from the defendant, because it's inconclusive to me.

....

[The thresholds] exist for a reason.

....

Because we don't want to present information that may not be correct or overemphasize something, you know, saying yes, this person is there, when it may not be true because our data is not supporting that it's a strong DNA profile. So we want to be sure when we say there's a match, that it is, in fact, a match.

We don't want to make the wrong conclusions on the item that we're looking at.

....

****718** Despite the expert's testimony, the State pointed to the two graphs and argued that the jurors could assess for themselves whether Valentine's DNA profile matched the DNA profile from the firearm swap. During closing argument, the State made the following comments:

You heard about the DNA evidence in this case. Now, the scientist came in. She told you she could not

make any results. The results that she had for the swab of the gun were below the threshold. But we went through every single one. *And that's something you need to also take a look at when you go back there, just to see what you think for yourself.* When we went through and looked at the items *below the 200 threshold*, but above the 40 threshold *this is what we found*. We found that the swab of the handgun revealed a 12 and a 13 allele. Mr. Valentine, a 12 and a 13 allele. The swab also [had] a 28 allele on the next [location]. A 28 allele on that same [location] for Mr. Valentine.

(Emphases added.) Valentine objected and argued that the State's own expert said that such a comparison was improper. The district court overruled the objection, finding the prosecutor was merely arguing that some weight should be given to the evidence and stating it was up to the jury to decide the weight to give the evidence. The State continued:

[I]t's worth taking into consideration. You are here for two weeks. Look at all the evidence. This is part of the evidence. You heard that under each [location] there is a number of alleles. And here, though,

yeah, maybe the threshold is under 200,
*there's something here. But just consider
for yourself.*

*472 Next, we have the [location] on the
swab of the handgun, 15 and 16. Mr.
Valentine also at 15 and 16. Next
[location] at 7; Mr. Valentine also at 7.
Next [location] at 12 and 13; Mr.
Valentine also at 12 and 13. So on and so
forth, *matching.*

....
Ladies and gentlemen, it's just worth
considering. Take a look at it. *See what
you think. Make your own
determination.*¹²

(Emphases added.)

¹² In his closing argument, Valentine
attempted to rebut the State's
presentation of the evidence:

The DNA analysis, she seemed to
really know her stuff. State's
expert. They put her on. What did
she testify to? Well, she testified to
a lot with the State and she looked
extremely uncomfortable, which
was clarified on cross that, a lot of
this, well, the peaks, there's a little
bit of peak that sort of matches him.
She was very uncomfortable about
that because as she said on cross,
that's not how it works. It's not
reliable under a certain level. They
can't say inside—for scientific
certainty that it's even possible. It's
even plausible, because they might
get totally different results if they
ran it again. That's why she was
uncomfortable testifying to that.

Without reservation, we conclude the
prosecutor's closing argument was
improper. "[A] prosecutor may argue
inferences from the evidence and offer
conclusions on contested issues" during
closing argument, but "[a] prosecutor may
not argue facts or inferences not supported
by the evidence." *Miller v. State*, 121 Nev.
92, 100, 110 P.3d 53, 59 (2005) (internal
quotation marks omitted). Here, the State
presented an expert witness to testify as to
the DNA results obtained from the swab of
the firearm. *See United States v.
McCluskey*, 954 F. Supp. 2d 1224, 1253
(D.N.M. 2013) ("[J]urors can understand
and evaluate many types of evidence, but
DNA evidence is different and a prerequisite
to its admission is technical testimony from
experts to show that correct scientific
procedures were followed." (internal
quotation marks omitted)). The purpose of
expert testimony "is to provide the trier of
fact [with] a resource for ascertaining truth
in relevant areas outside the ken of ordinary
laity." *Townsend v. State*, 103 Nev. 113,
117, 734 P.2d 705, 708 (1987); *see also*
NRS 50.275 ("If scientific, technical or
other specialized knowledge will assist the
trier of fact to understand the evidence or to
determine a fact in issue, a witness qualified
as an expert... may testify to matters within
the scope of such knowledge."). But after
presenting its expert to testify about a
subject outside the ordinary range of
knowledge for jurors, the State disregarded
that testimony and invited the jury to make
inferences that **719 the expert testified
were not supported by the DNA evidence.
The State asked the jury to consider

evidence about which the expert was emphatic she could make no conclusions, save for her overall conclusion that the evidence was consistent with a mixture of at least two persons, at least *473 one of whom was male. The State then asked the jury to compare the unusable profile to Valentine's DNA profile. This is precisely what the expert said she could not do because it would be unreliable. See *Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008) (holding that expert witness "testimony will assist the trier of fact only when it is relevant and the product of reliable methodology" (footnote omitted)). No evidence was introduced, statistical or otherwise, regarding the significance or meaning of the data that fell below the 200 threshold. To the contrary, the only evidence presented was that such information produced an unusable profile and was not considered by the expert. It is hard to imagine what weight could be ascribed to evidence that was described only as inconclusive, unusable, and incomparable. Rather, the State's use of the expert's testimony can better be viewed as taking advantage of the "great emphasis" or the "status of mythic infallibility" that juries place on DNA evidence. *People v. Marks*, 374 P.3d 518, 525 (Colo. App. 2015) (internal quotation marks omitted). Simply put, the prosecution argued facts not in evidence and inferences not supported by the evidence. This was improper.

We nevertheless conclude that the improper argument would not warrant reversal of Valentine's convictions because it did not substantially affect the jury's verdict. See *Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476. There was evidence presented that

Valentine handled the gun and multiple victims identified Valentine as the perpetrator. Thus, the error was harmless, and Valentine is not entitled to a new trial based on the prosecutorial misconduct.¹³

- ¹³ We have considered Valentine's remaining contentions of error and conclude no additional relief is warranted.

CONCLUSION

The district court abused its discretion in denying Valentine's request for an evidentiary hearing on his fair-cross-section challenge. We therefore vacate the judgment of conviction and remand for the district court to conduct an evidentiary hearing and resolve the fair-cross-section challenge. None of Valentine's other arguments require a new trial. Accordingly, if the district court determines on remand that the fair-cross-section challenge lacks merit, it may reinstate the judgment of conviction except as to the convictions for counts 4 and 9, which were not supported by sufficient evidence.¹⁴

- ¹⁴ This opinion constitutes our final disposition of this appeal. Any future appeal following remand shall be docketed as a new matter.

We concur:

Valentine v. State, 135 Nev. 463 (2019)
454 P.3d 709

Hardesty, J.

Silver, J.

All Citations

135 Nev. 463, 454 P.3d 709

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EXHIBIT C

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THE STATE OF NEVADA

Case No. C-15-306725-1
Dept No. XXIII

-VS-

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants.

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.

James Alphaxard Mungai (hereafter "Mungai") was charged with Battery Resulting

000497

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.
25

26
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

1 January 2021.

2 On January 4, 2021, the instant case was transferred to Department 23 of the Eighth
3 Judicial District Court.
4

5 On January 6, 2021, Mungai filed a Motion for Court Order to Produce Documents,
6 asking the court to sign an order directing the Jury Commissioner to turn over an
7 unredacted copy of the 2017 Prospective Juror Master List. The motion was continued two
8 times to allow for the proper party of interest to be served and have an opportunity to
9 respond.
10

11 On January 25, 2021, with no objection from counsel representing the Jury
12 Commissioner, the court GRANTED the Motion for Court Order to Produce Documents
13 with the condition that the defense sign a protective order.
14

15 On February 7, 2021, the State of Nevada, Mungai and the Jury Commissioner
16 entered into a stipulation and agreement concerning the unredaction of juror information.
17

18 On April 8, 2021, this court held an evidentiary hearing as ordered by The Supreme
19 Court of Nevada.

20 There were two defense witnesses, Jeffrey Martin and Mariah Witt, who provided
21 testimony at the evidentiary hearing concerning the jury panel at the time of Mungai's trial
22 and the overall process in obtaining a jury venires, as further discussed below.
23

24 Defense expert Martin qualifies as an expert Mathematician and Statistician expert
25 as his testimony (1) is qualified in an area of technical or other specialized knowledge; (2)
26 his testimony assists the trier of fact and (3) his testimony was limited to matters within his
27 scope of specialized knowledge. *See Hallmark v. Eldrige*, 124 Nev. 492, 498, 189 P.3d
28

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
26

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
22
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 Defense witness Martin is familiar with the program that the Eighth Judicial Court
3 uses to store the master list and send out summonses. In the recreated 2017 master list,
4 10.62% of prospective jurors identified as Black or African American. In defendant's trial,
5 6.15% of prospective jurors identified as Black or African American. As a whole, the
6 recreated 2017 master list had an absolute disparity of 2.84% underrepresentation for
7 Blacks/African Americans. The 2017 summonses as a whole had an absolute disparity of
8 1.99% underrepresentation and the defendant, Mungai's trial had an absolute disparity of
9 6.45% underrepresentation of Blacks/African Americans. Regarding comparative
10 disparity, the 2017 recreated master list had a comparative disparity of 22.53%
11 underrepresentation of Blacks/African Americans. The defendant's trial had a comparative
12 disparity of 51.16% underrepresentation of Blacks/African Americans. Martin found a
13 statistical significance in the standard deviation here, noting that there were more than 56
14 standard deviations in defendant's trial, where a statistician would expect not more than 2
15 or 3 standard deviations. The federal courts and most state systems use some version of the
16 voter registration polls to issue juror summons. (Testimony of Jeffrey Martin).

17
18 Utilizing pre-pandemic statistics from March 2020, as published on DETR's
19 website, Martin opined that in March 2020, 17.67% of the individuals receiving
20
21
22
23
24
25
26

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 master 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).
6
7
8

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

13 THE COURT FINDS that the record reflects that defendant Mungai established
14 prongs one (1) and two (2) at trial and the remand was limited to conduct an evidentiary
15 hearing on prong three (3).
16

17 THE COURT FINDS that the selection of a petit jury from a representative cross
18 section of the community is an essential component of the Sixth Amendment right to a jury
19 trial. *Taylor v. Louisiana*, 419 U.S. 522, 528, 95 S. Ct. 692, 697, 42 L. Ed. 2d 690 (1975).
20

21 THE COURT FURTHER FINDS that community participation in the administration
22 of the criminal law, moreover, is not only consistent with our democratic heritage but is
23 also critical to public confidence in the fairness of the criminal justice system. Restricting
24 jury service to only special groups or excluding identifiable segments playing major roles
25 in the community cannot be squared with the constitutional concept of jury trial. 'Trial by
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
23
24
25

26
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 contravenes NRS 6.045(5).
4

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

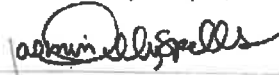
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26 ⁶ Absolute disparity and comparative disparity measurements, courts have recognized, can be misleading when, as
27 here, "members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service." Smith,
28 463 Mich., 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

1 Vehicles did not track the racial composition of summoned jurors and resulted in a
2 statistical significance of underrepresentation of Blacks/African Americans and thus did
3 not represent an accurate cross section of the community.
4

5 The COURT FUTHER FINDS that this underrepresentation of Blacks/African
6 Americans as was due to a systematic exclusion of the group in the jury selection process
7 because the sources utilized did not accurately capture potential jurors of Black/African
8 American racial makeup.
9


10 IT IS SO ORDERED.
11

12 Dated this 20th day of April, 2021

13 
14 THE HONORABLE JASMIN LILLY-SPELLS
15 DISTRICT COURT JUDGE
16 1A9 BBC DCCD 07F5
Jasmin Lilly-Spells
District Court Judge

17 CERTIFICATE OF SERVICE

18 I hereby certify that on or about the date signed I caused the foregoing
19 document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f) through the Eighth
20 Judicial District Court's electronic filing system, with the date and time of the electronic
21 service substituted for the date and place of deposit in the mail to and/or by fax and mail to:
22
23
24

25 
26 Deborah A. Boyer, JEA
27
28

Jasmin Lilly-Spells
DISTRICT JUDGE

DEPARTMENT XXII

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 State of Nevada

CASE NO: C-15-306725-1

7 vs

DEPT. NO. Department 23

8 James Mungai
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Finding of Fact and Conclusions of Law was served via the court's
13 electronic eFile system to all recipients registered for e-Service on the above entitled case as
listed below:

14 Service Date: 4/20/2021

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DC23 LAW CLERK

Dept23LC@clarkcountycourts.us

EXHIBIT D

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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;

///

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

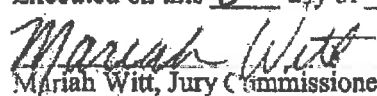
EXHIBIT E

000513

Declaration in response to subpoena issued pursuant to a court hearing held on May 20, 2020

1. I, Mariah Witt, am the Jury Commissioner employed by the Eighth Judicial District Court in Clark County, Nevada.
2. I make this declaration in response to the subpoena issued by the Clark County Public Defender's Office pursuant to a court hearing held on May 20, 2020.
3. In response to the following request from the subpoena: "A declaration listing the sources for data used in compiling the computerized list of jurors as required by NRS 6.045(3) for Mr. Valentin[e]'s venire on 7/24/17," I respond as follows:
 - a. The sources used to compile a list of qualified electors for Mr. Valentine's trial were from the Nevada Department of Motor Vehicles and Nevada Energy.
4. In response to the following request from the subpoena: "A declaration of the names, addressed [sic] and telephone number of all outside vendors used for the compiling master list and issuance of summons," I respond as follows:
 - a. Avenu Insights & Analytics
201 East Main Street, Suite 300
Lexington KY 40507
O +1 859 207 2626

Kathy Gillespie
A&B Printing & Mailing
President/Owner
702-731-5888 Work
702-499-1928 Mobile
KathyG@abprint.com
2908 S. Highland Dr., Ste B
Las Vegas, NV 89109
5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of June, 2020,

Mariah Witt, Jury Commissioner

000514

EXHIBIT F

000515

DECLARATION OF MARIAH WITT JURY COMMISSIONER

I, Mariah Witt, Jury Commissioner, under NRS 53.045, state as follows:

1. I am employed by the Eighth Judicial District Court in Clark County, Nevada as the Jury Commissioner.
1. I make this declaration in response to the subpoena issued by the Clark County Public Defender's Office in State of Nevada vs Tashami Sims, case number C-18-335022-1.
2. The subpoena requests the following: "Source Lists identified. Declaration from the jury commissioner naming the actual source lists used to establish Sims' jury trial held on 01/03/19. In the declaration also indicate when the sources were added and merged into the Master List."
3. The sources used for Mr. Sims' jury trial held on January 3, 2019, were lists from the Nevada Department of Motor Vehicles and NV Energy. These lists were added and merged on March 26, 2018.
4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of May 2021,

Mariah Witt, Jury Commissioner

000516

EXHIBIT G

000517

**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.

000518

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.



Signature

03/08/2019

Date

Mariah Witt

Printed name

702-671-4512

Phone #

Jury Commissioner, Eighth Judicial District Court

Title

wittm@clarkcountycourts.us

Email Address

000519

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.

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.

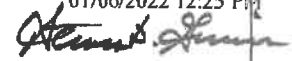
12. The Administrator may request the Comptroller of the Currency of the United States to cause an examination of the correctness of any return or report of any national banking association rendered pursuant to the provisions of this chapter, and may in connection with the request transmit any such report 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, 118] --- (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, 572, 1580; 1997, 1997, 579; 1999, 1756; 2003, 20th Special Session, 214; 2007, 2123; 2013, 96, 2210; 2015, 136, 2674, 2705, 2934, 3373; 2017, 3584, 3882, 4327)


CLERK OF THE COURT

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10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 THE STATE OF NEVADA,)	
)	
13 Plaintiff,)	CASE NO. C-16-316081-1
)	
14 v.)	DEPT. NO. VI
)	
15 KEANDRE VALENTINE,)	
)	
16 Defendant,)	
)	

17 **ORDER**

18 THIS MATTER having come before the Court on December 3, 2021, and
19 December 28, 2021, and good cause appearing therefor,

20 IT IS HEREBY ORDERED that the following motions are denied: Defendant's
21 Motion asking the Court take judicial notice of the Mungai case; and motion seeking findings
22 that systematic exclusion is inherent in the jury selection process based on the Mungai case and
23 based on the Jury Commissioner's failure to follow the mandates giving her direction; and
24 Motion to reconsider estoppel and issue preclusion.

25 ///

26 ///

27 ///

28 ///

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1 The denial of these motions is based on the Court's decision on the record on
2 December 3, 2021, and December 28, 2021.

3 DATED this ____ day of January, 2022.

Dated this 6th day of January, 2022

4 
5
6

DISTRICT COURT JUDGE

7 Submitted by:

8 DARIN F. IMLAY
9 CLARK COUNTY PUBLIC DEFENDER
10

3A9 470 AD48 506D
Jacqueline M. Bluth
District Court Judge

11 By /s/ Sharon G. Dickinson
12 SHARON G. DICKINSON, #3710
13 Chief Deputy Public Defender
14
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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@clarkcountvda.com on this ____ day of January, 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

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 State of Nevada

CASE NO: C-16-316081-1

7 vs

DEPT. NO. Department 6

8 Keandre Valentine
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 1/6/2022

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1 **TRAN**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 **STATE OF NEVADA,**

6 **Plaintiff(s),**

7 **vs.**

8 **KEANDRE VALENTINE,**

9 **Defendant(s).**

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

) **Department VI**

10
11
12 **BEFORE THE HONORABLE JACQUELINE M. BLUTH,**
13 **DISTRICT COURT JUDGE**

14
15
16 **MONDAY, FEBRUARY 7, 2022**

17
18 ***TRANSCRIPT OF PROCEEDINGS RE:***
19 **EVIDENTIARY HEARING**

20
21
22 **(Appearances on page 2.)**

23
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25 **RECORDED BY: DELORIS SCOTT, COURT RECORDER**

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APPEARANCES:

For the State:

AGNES M. BOTELHO, ESQ.
Chief Deputy District Attorney
MICHAEL DICKERSON, ESQ.
Chief Deputy District Attorney

For the Defendant(s):

TYLER C. GASTON, ESQ.
Deputy Public Defender
ANNA C. CLARK, ESQ.
Deputy Public Defender
SHARON G. DICKINSON, ESQ.
Chief Deputy Public Defender
(Via BlueJeans)

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INDEX

Page #

WITNESSES

FOR THE DEFENDANT:

LEAH WITT

Direct Examination	50
Cross-Examination	76
Redirect Examination	93
Recross-Examination	108

JEFFREY MARTIN (via BlueJeans)

Direct Examination	117
Direct Examination (cont.)	169

EXHIBITS

For the State

Exhibit Number 1	88
------------------	----

For the Defendant

Exhibit Number A	60
Exhibit Number B	65
Exhibit Number C	73

1 **LAS VEGAS, NEVADA, MONDAY, FEBRUARY 7, 2022**

2 [Proceeding commenced at 11:37 a.m.]

3
4 **THE COURT:** Good morning, everybody. We are on the
5 record is state of Nevada versus Keandre Valentine. Mr. --
6 C-16-316081-1. Mr. Valentine is present in custody. Ms. Clark, as
7 well as Mr. Gaston, present on his behalf. On behalf of the State,
8 we have Ms. Botelho, as well as Mr. Dickerson.

9 This is on for the hearing that was previously set,
10 however, there have been some motions that have been --

11 **MR. GASTON:** Your Honor, I don't mean to interrupt, I'm
12 sorry. Ms. Dickenson is also appearing on behalf of --

13 **THE COURT:** Oh.

14 **MR. GASTON:** -- Mr. Valentine. She's present on
15 BlueJeans.

16 **THE COURT:** Yeah. Sorry about that.

17 **MR. GASTON:** And I think she's indicating that the sound
18 is off, as well. But.

19 **THE COURT:** That she's -- her sound -- that she can't hear
20 me?

21 **MR. GASTON:** That's right.

22 **THE COURT:** Let's unmute her for a second.

23 **Ms. Dickenson,** can you hear me?

24 [Pause in proceedings; technical issues.]

25 **MS. DICKENSON:** I'm sorry, Your Honor. I was muting

1 myself. I can hear you now. Thank you.

2 THE COURT: Okay. Great. Sounds good.

3 MR. GASTON: Thank you, Your Honor. Sorry to interrupt.

4 THE COURT: Yeah. No, no worries.

5 Okay. So there were some motions filed last week, and
6 then a bench brief, and some opposition, Motion to Strike. I mean,
7 so let's start with that.

8 So, Mr. Gaston, I want to start with you. So can you give
9 me -- let's talk a little bit about the motions you filed and why you
10 filed them. I, you know, in reading the motion and then the reply, it
11 was my understanding that you -- it was an attempt to kind of
12 streamline the evidentiary hearing and that you had either spoke
13 with or attempted to speak with Ms. Botelho in regards to trying to
14 streamline it. And I know that in Mungai, certain experts and
15 documents have been stipulated into. So let's start from there,
16 please.

17 MR. GASTON: Thanks, Your Honor.

18 Yeah, obviously, I think that we could have just waited
19 until the actual trial today --

20 THE COURT: Yeah.

21 MR. GASTON: -- to ask you to do these things.

22 THE COURT: For the hearing.

23 MR. GASTON: But we figured it would be better to file the
24 motions of the evidentiary motions in advance to give a time for
25 you to read, essentially, our reasoning, allow the State a time to

1 object, and we could address it kind of before the evidentiary
2 hearing gets started.

3 And they fall in kind of two categories. Just, one is the
4 defendant's motion -- or asking the Court to recognize that
5 Mr. Martin is an expert. We listed out our reasons in our motion as
6 to why we think he's an expert. We think he pretty clearly meets all
7 of the requirements under Hallmark v. Eldridge to be recognized as
8 an expert. Moreover, he was recognized as an expert in this
9 jurisdiction for this issue by another sitting district court judge, as
10 well. And in that case, specifically, on a similarly related issue,
11 that's Mungai, the State actually stipulated to his being an expert.

12 So, based on all of those reasons, we think the Court
13 should recognize him as being an expert today.

14 THE COURT: So, but talk about, specifically, the range of
15 expertise. Are you talking about as a statistician?

16 MR. GASTON: A statistician, specifically -- but -- yes, as a
17 statistician, generally, but he'll testify, specifically, statistician with
18 respect to jury analysis. So he's testified in hundreds of cases
19 around the country regarding kind of this similar related issue,
20 analyzing jury pools, applying statistical methods to his analysis,
21 and that's the conclusions he'll draw. And he relies on
22 mathematical equations, et cetera, to do so.

23 THE COURT: Okay.

24 MR. GASTON: So that's all we have, basically, with the
25 expert aspect of things.

1 THE COURT: Yeah.

2 MR. GASTON: Obviously, if you disagree, I can just go
3 through the questions today and try to offer them there. But I think
4 we have sufficient basis in the motion, as well as the State's prior
5 stipulation in another case, as well as the fact that he's been
6 recognized in this jurisdiction as expert on this issue before as to
7 why the Court should go and just take judicial notice of him as an
8 expert.

9 Our other aspect of things we were talking about was
10 asking the Court to take judicial notice of the things that we
11 mentioned, which was the census figures used by our expert, the
12 DETR records, the jury commissioner's master list, and the
13 transcript in order of findings in State v. Mungai.

14 We put our -- the evidentiary reasons as to why the Court
15 should be taking judicial notice of those things in our motion.
16 The -- I did reach out to the State to see if they would be stipulating
17 to the admission of those documents, essentially. I sent an e-mail
18 to Ms. Botelho on January 26th; I never got a response and then we
19 filed these motions.

20 THE COURT: So before --

21 MR. GASTON: Sure.

22 THE COURT: I understand the need for the judicial notice
23 for census, DETR, and master list. Mungai I don't really understand.
24 I mean, I think we've gone a little bit back and forth in regards to
25 does everybody recognize the ruling in Mungai. I think, you know,

1 defense has put a few motions in regards to estoppel. I don't
2 understand why I need to take judicial notice of another case.
3 Right? I mean, it's in Odyssey, everybody knows the standing of it.
4 And so what is the need for that?

5 MR. GASTON: We would ask you to take judicial notice,
6 and it's introduced as an actual exhibit, and I believe Ms. Dickenson
7 placed our -- put our reasons for that in the motion. But,
8 regardless, if the Court disagrees on necessity or propriety of taking
9 judicial notice as a exhibit, we would still be asking make it as a
10 court's exhibit.

11 THE COURT: Yeah. I'm fine with that. I just -- and I see
12 the reasoning -- I read the reasoning that Ms. Dickenson put
13 forward. I just don't want it to be looked at as a position of, okay,
14 I've taken judicial notice of it, and therefore I agree with it, I adopt it,
15 and that -- I just want to make very clear. I mean, if you want it as a
16 court's exhibit, of course, I have no problem with that. I just --
17 when we generally take judicial notice of something, we're
18 adopting that, right? So taking judicial of a case that I have
19 previously said I'm not at this point saying I agree or disagree,
20 because I haven't had the hearing makes me feel uncomfortable.

21 MR. GASTON: Sure. It's not a way to, like, backdoor, you
22 saying that you agree with the position on Mungai or anything like
23 that. I think the record's been clear and the Court's position with
24 that. I think it was just a -- basically, try to introduce an evidentiary
25 exhibit without us having to lay foundation for it. I mean, to

1 actually show someone the document and introduce it. Because --
2 and I believe she cited the State v. Acana [phonetic], about taking
3 judicial as to why they can be introduced as exhibit through judicial
4 notice instead of calling someone and lay a foundation, et cetera.

5 I don't think it was a way of asking the Court to -- by
6 taking judicial notice of it, I think it's just saying that the Court's
7 aware of this and is allowing it to be introduced exhibit, but not
8 necessarily, obviously --

9 THE COURT: Adopting the decision.

10 MR. GASTON: -- subject to whatever you said before and
11 all your prior rulings.

12 THE COURT: Okay. Anything else you want to say on
13 those two areas?

14 MR. GASTON: I know the State filed a Motion to Strike
15 those things. I don't think that's proper, any of the rules they're
16 citing to deal with pretrial motions and motions before preliminary
17 hearings. This is an evidentiary hearing, they're a little different.

18 B, nothing we did in our motions are something that we
19 couldn't just do the day of. It's like filing a motion to litigate a
20 hearsay thing in advance that we know is going to come up. It's
21 just, honestly, a more efficient use of everyone's time rather than --
22 and you're -- everyone's a little bit more likely to argue it more
23 effectively and better, because we get to see each other's
24 arguments and research the case law being cited to in advance.
25 The Court gets to see it all and think about it and make a decision --

1 as opposed to making a decision right then and there. So I think
2 doing it in advance is more likely to result in better arguments and
3 a more accurate ruling. Not that you would ever rule inaccurately.

4 But point's still the same: I think doing it in advance is
5 better for reaching a right result. But there's nothing that was
6 precluding us from just not doing it at all today and just asking you
7 right now for the first time. So I don't think a Motion to Strike is
8 appropriate.

9 What I do think is inappropriate is the Court -- is the State
10 not addressing any of the motions on its substance. They rested on
11 the procedural objection and they didn't actually, beyond that,
12 make any objection to our requests. And then I -- but I think we
13 stated all that kind of in our reply.

14 THE COURT: Uh-huh.

15 MR. GASTON: And so I don't really have anything else to
16 add.

17 THE COURT: Okay.

18 MR. GASTON: Thank you.

19 THE COURT: Ms. Dickenson, I just wanted to make sure --
20 I know you're not here in person, so is there anything you wanted
21 to add that -- onto Mr. Gaston's argument before I turn it over to the
22 State?

23 MS. DICKENSON: Your Honor, the only other thing that I
24 would add is that the rule that the State cites does not allow for
25 documents to be stricken. And we did put that in our reply.

1 THE COURT: Okay. All right. So, Ms. Botelho, I will turn
2 it over to you. Can you start, though, with the proposition that,
3 listen, we could have done this on the first day, you know, just
4 orally or in the middle of the hearing, and instead, we chose to just
5 bring it up so all the issues could be ferreted out and we could
6 make it a more efficient hearing. Will you start with that, please?

7 MS. BOTELHO: Yes, Your Honor.

8 Mr. Gaston did e-mail me January 26th, which is -- which
9 was a Wednesday, asking if I would stipulate to the admission of
10 the master list that we received from the jury commissioner, the
11 DETR records and numbers that we received from DETR, and also
12 the census that our -- that their expert relied upon in determining
13 racial composition of Clark County.

14 I did not respond because I felt he needed to, one,
15 introduce these items properly during the hearing, they needed to
16 be authenticated. Given the very, I'd say, adversarial tone that we
17 have taken, particularly regarding discovery, when they say
18 something to the effect of the master list that we received from jury
19 commissioner, one, this is -- this master list isn't even something
20 that they can show or admit. I mean, I have a copy of it, it's just
21 numbers. It's from the 2017 master list.

22 The DETR records, I -- honestly, I don't know if what
23 they're going to be introducing today -- I don't -- that's not enough
24 specificity to tell me what it is that they want, you know, that their
25 expert's going to be testifying to concerning the DETR records.

1 My understanding would be it's limited to what they've
2 disclosed per the Court's order from November -- or, excuse me,
3 December 28th or anything disclosed after, I believe it was
4 December -- and I will get the date -- would not be considered by
5 this Court, would actually be excluded.

6 Number three, the census that their expert relied on was
7 troubling to the State, because that had not been disclosed to the
8 State. I don't know what census they used.

9 And so -- which brings me to the filing by Mr. Gaston on
10 February 1st, 2022, which is the notice of documents and discovery
11 that they were ordered to compile and show the State. So nowhere
12 in this actual notice of documents or discovery was there ever any
13 reference of census documents being disclosed to the State.

14 And so, I mean, unless they can point me to and show me
15 proof of disclosure of the census records, one, I think it should be
16 precluded based on the Court's ruling, which was very, very clear
17 that I don't need to speculate as to what they showed their expert. I
18 should be able to see what it is that they showed their expert,
19 particularly during the expert's testimony, particularly during
20 cross-examination. I should have access to those things.

21 And so I don't even know what they meant when they said
22 the census that their expert relied on. At the time, January 26, I had
23 not received the documents of discovery, the notice of discovery
24 from Ms. Dickenson. And so I -- it's not in here, Your Honor. So,
25 no, I'm not stipulating to any of that.

1 And so to the point that a lot of this could have been
2 handled today and he could have brought it up, sure, he could
3 have. Yes, he could have. And I would have objected the very
4 same way. Basically, what this boils down to is, look, this is an
5 evidentiary hearing, they have a burden of proof. They need to
6 proffer and admit evidence in the proper way, which is through
7 witnesses. Their expert will need to be -- there will be -- there will
8 need to be a foundation laid as to the qualifications of their expert.
9 Sure, he may have testified 10 million times before in another case
10 in this jurisdiction, that doesn't mean he has carte blanche for just
11 being classified as an expert in every single case. And the
12 language, actually, in their motion, was a motion seeking an order
13 from the Court that Expert Jeffrey Martin is an expert. Okay.

14 And so this type of request is actually a substantive
15 motion that needed to have been dealt with in a timely fashion.
16 While there is no rule for evidentiary hearing under the Nevada
17 Adoptive Rules of Criminal Procedure, however, Your Honor laid
18 out a very, very, very, very clear timeline in this case. On
19 December 3rd, when we were here and I complained about all of
20 the late disclosures, all of the late gamesmanship that had been
21 occurring, Your Honor saw fit to say two weeks after this date, there
22 will be no more disclosures. That is it, that is the deadline.

23 I confirmed that with the Court and they were placed on
24 notice on December 28th, no more late notices, no more late
25 disclosures, nothing that will preclude this evidentiary hearing from

1 potentially going forward. And that is what we have here. That is
2 what we have here. Okay.

3 And so I -- the State's suggestion is let's go forward with
4 the evidentiary hearing. Mr. Gaston suggested and indicated to the
5 Court that he could ask the proper foundation questions. Let's do
6 that.

7 In terms of, you know, the records that they want the
8 Court to take judicial notice of, I want to see it. I want to see what it
9 is that their expert relied on, because I want to make sure that it had
10 been disclosed to me.

11 THE COURT: So in regards to -- leave out census for just a
12 second. So DETR and JC master list, those ones you do -- you had
13 within the time period I had stated, right?

14 MS. BOTELHO: Correct.

15 THE COURT: Okay. And so are you just saying that you --
16 when you say let's see it -- I'm sorry, I just want to make sure I
17 understand. So in regards to the those two, are you challenging the
18 authenticity of them in any way or you -- tell me what you want
19 with those.

20 MS. BOTELHO: No. No, I just want to make sure that the
21 records that they produced are, in fact, what their expert relied on
22 and solely what their expert relied on.

23 THE COURT: Okay. So you just want the opportunity to
24 cross expert in regards to that.

25 MS. BOTELHO: Yes.

1 THE COURT: Because otherwise, I'm trying to figure out
2 how other -- what another way you would be able to do that. And
3 so we'll just cross --

4 MS. BOTELHO: Yes.

5 THE COURT: You'll cross the expert on that.

6 MS. BOTELHO: Yes.

7 THE COURT: All right. So, defense, let's go back to you
8 for a second. So they're not stipulating to the expertise, so we're
9 going to deal with that issue. I recognize that Mr. Chen did in
10 Mungai and that he's been recognized as an expert, but, you know,
11 in civil we see it all the time, right? Like sometimes experts in 14 of
12 the civil courts are -- they're found to be an expert and then 12 of
13 the others, the judge doesn't find them to be an expert.

14 So you'll just have to lay the foundation, we'll go through
15 the Hallmark, and we'll move on.

16 MR. GASTON: I'm not -- just to make sure that I made a --

17 THE COURT: Sure.

18 MR. GASTON: I think one difference between that
19 situation and the situation we have here would be that in the civil
20 cases, you have multiple different parties to each civil suit. In this
21 instance, the State of Nevada was a party to each trial, each
22 situation. And, essentially, they're -- and it's kind of just referencing
23 the argument that we made earlier about Mungai. But the State
24 takes -- its improper for, essentially, the State to be taking two
25 different positions in two different cases on the exact same issue, is

1 essentially the basis of our argument when we're referencing the
2 stipulation aspect of things.

3 THE COURT: I understand. But this specific prosecutor, I
4 don't necessarily think because one prosecutor makes a decision, it
5 marries the rest of the prosecution to that decision. So we will have
6 a, I guess, mini hearing on dealing with Hallmark in regards to that.

7 MR. GASTON: Thank you.

8 THE COURT: Now talk to me about this census; was that
9 turned over in the requisite time period?

10 MR. GASTON: So the census, there's nothing to really
11 turn over. The Census Bureau, I mean, I'm sure that the Court
12 already knows this, but the census is something that the U.S.
13 Government --

14 THE COURT: Yeah.

15 MR. GASTON: -- does and it goes around and it takes
16 everybody's info and it makes a big census --

17 THE COURT: Right.

18 MR. GASTON: -- and it has a whole bunch of --

19 THE COURT: But you -- but let's be clear --

20 MR. GASTON: You can't --

21 THE COURT: -- though, you guys, I had stated very -- I
22 mean, I gave everybody a continuance because I wanted everybody
23 to have the opportunity to fully review everything, to fully cross
24 experts. And I said if anything anybody is using needs to be turned
25 over. So if that -- if you didn't either e-mail her and tell her it was

1 being used, the prosecution had to be on notice within that
2 requisite time period of materials you were going to be using. I
3 mean, I was really clear --

4 MR. GASTON: No, I understand.

5 THE COURT: -- because I want it to be fair.

6 MR. GASTON: I'm not arguing for an exception to the
7 rule. I'm just saying there's no physical document for us to hand
8 them. We can't import or export the census into, like, a readable
9 format.

10 THE COURT: I agree.

11 MR. GASTON: So it would -- the notice wouldn't -- so
12 discovery wouldn't be us handing -- giving them any physical
13 documents.

14 THE COURT: Did you tell them that?

15 MS. BOTELHO: It would be putting them on notice that
16 we're using the census numbers in terms of calculating the
17 community for Clark County, which we had done multiple times,
18 and, in fact, we did this -- this, essentially, similar numbers to what
19 we cited to on the first transcript when we actually did the trial.
20 Nothing's really changed. When we made our basis -- when we
21 made this motion in trial in front of Judge Scotti, when I argued
22 that the jury panel wasn't fair and reasonable in relation to the
23 presence of these demographics in the community. And I cited to
24 census numbers in that transcript -- we --

25 THE COURT: Yeah, but in this case, did you?

1 MR. GASTON: That is this case. That -- well, I guess,
2 those numbers haven't changed. That we cited to the U.S. Census
3 when we were making that analysis.

4 We've told the State multiple times that our expert is
5 relying on census numbers when we were talking about the
6 demographics. We've told -- at the last hearing, I was very
7 abundantly clear that all of the stuff that the district attorney wants
8 to make sure that the State relied on is the same stuff that he relied
9 on and testified to in Mungai. In Mungai, he testified to the census
10 numbers, that -- the same numbers he's going to be testifying to
11 here.

12 So that we can't comply with discovery in the sense of
13 giving them anything physical, because there's nothing physical for
14 us to give them.

15 THE COURT: I agree.

16 MR. GASTON: But we can give them notice that we were
17 intending on having our expert testify about the census numbers of
18 Clark County demographics. And that's what we're comparing to --
19 that's what we're going to use to try to, essentially, argue that this
20 was the demographics of Clark County at this time. And then we
21 use that to compare to what was actually appearing in the venire.
22 And the State's been on ample notice this entire time that the
23 expert's going to be relying on census numbers.

24 THE COURT: So --

25 MR. GASTON: On an -- also, just as a common-sense sort

1 of argument, it's just kind of silly for the State to argue that they
2 would think anything else, because what else could we use to show
3 the demographics of Clark County as in, in the census? Like,
4 obviously, we have to have -- we're coming in here to argue that
5 the -- it's not a fair cross-section of the community, aka, that this
6 doesn't represent that. What else -- where else do we get the
7 numbers of that if we aren't using the census?

8 THE COURT: I --

9 MR. GASTON: So not only did we affirmatively cite to the
10 census when we actually made this objection the first time during
11 trial, we brought up multiple times when we talked to them that our
12 expert is going to rely on the census. We've told them multiple
13 times that there's nothing, really, that our expert is going to testify
14 to in terms of source of information that wasn't testified to in
15 Mungai, and he testified to that in Mungai. So the -- and then it's
16 just silly to think that we would not be using the census.

17 So I think the State has been on ample notice that our
18 expert is going to rely on the U.S. Census numbers for Clark County
19 demographics.

20 THE COURT: Ms. Botelho.

21 MS. BOTELHO: Your Honor, on December 3rd we talked a
22 lot about how, while they would like you to adopt the ruling from
23 Mungai, a lot of the documents were different. In Mungai, he
24 used 2020 jury master lists. He used 2020 DETR records, or
25 Ms. Hojjat, whoever it was that handled it from their office.

1 And so it's not fair to say that just because you knew
2 those items were being used in Mungai under a different case,
3 where the challenge was very -- were -- was different in the sense of
4 it related to African-Americans, and here we have Hispanics.

5 And I would just let the Court know we're -- I would
6 actually ask the Court to ask the defense where it is that they got
7 the census records, because let's say it's on a website, okay. Have
8 you ever sent a link to someone, you know, from a website saying,
9 hey, these are the numbers that we are going to be using. It is 2020
10 or whatever year it is, and these are the numbers that we're going
11 to be looking at. This is what our expert relied on.

12 I mean, the order was clear as day that they needed to
13 disclose everything. Everything that -- they did not disclose
14 anything. And so to say that there's nothing documentary that
15 could have been, how about printing it off of the website? How
16 about changing it into a PDF and e-mailing it? Okay. How about a
17 phone call saying, Hey, Agnes, instead of an e-mail that says the
18 census that our expert relied on in determining racial composition
19 of Clark County, how about one that says, Hey, we're going to be
20 relying on -- it's on this website, it's 2020 or it's every 10 years, so
21 we're going to do 2010 or 2020. And here's what -- here's where it
22 is. Okay?

23 This lack of diligence by the defense is just -- it has started
24 at the beginning of this case and it's only continued through this
25 hearing. The lack of diligence that's actually caused this particular

1 hearing to have to be had two years after the remand.

2 And so I would ask that it be precluded. The Court did not
3 say, when you ordered everything to be turned over, the drop-dead
4 deadline, the Court didn't say, Hey, you know, not -- but just not the
5 documents that she knew about that you were using in Mungai.
6 The Court didn't make any exceptions like that. The Court said
7 anything that you plan to use, anything that your expert is going to
8 rely on, you disclose. You disclose. That hasn't been done.

9 Clearly, as, you know, this filing by Ms. Dickenson has
10 very, very nicely laid out, that wasn't disclosed. And I think that
11 now that is definitely in violation of the discovery order. There is
12 absolutely something they could have sent me to tell me, within the
13 two-week time period that you gave them after December 3rd, to let
14 me know, Hey, these are the exact documents that my expert
15 looked at. That wasn't done.

16 THE COURT: What is your response to Mr. Gaston's
17 argument that -- how -- like, how -- what other metric would we be
18 able to use in trying to determine the number of individuals within
19 each race or ethnicity; what's your argument in regards to that?

20 MS. BOTELHO: My argument would be it's not for me to
21 determine. They are -- they have the burden of proof. And so am I
22 supposed to, in preparing for this hearing, think about how they are
23 going to prove their case or how they're going to prove their facts?
24 I mean, was I supposed to be sitting in my office thinking, hmm,
25 what other ways could they -- so they must be using this. You

1 know, I relied on the Court's very, very, very, very clear order that
2 these items needed to be disclosed.

3 THE COURT: What's that e-mail that you just read dated?

4 MS. BOTELHO: January 26th.

5 THE COURT: Okay. Mr. Gaston, which -- remind me,
6 because I don't have it in front of me, the year of the census you're
7 using is?

8 MR. GASTON: That might be --

9 THE COURT: Ms. Dickenson?

10 MR. GASTON: That might be a best question for either
11 our expert, Mr. Martin, or Ms. Dickenson. I don't know whether it's
12 a -- I was just going to ask him to explain it. I don't know how he --
13 why he thinks the numbers he's using are a good representative, et
14 cetera, because I don't know if he uses 2010 census or 2020 census
15 then backdates, or if there's some subset of the census that's 2017.

16 So while the information's not hard to obtain, I don't know
17 the answer to that off the top of my head.

18 THE COURT: So just kind of as a point, that brings me a
19 little bit of concern. Because if you don't know, then how is she
20 going to know to fact check?

21 MR. GASTON: But I could know the answer in two
22 seconds just by asking Mr. Martin what it was and then referring.
23 So with respect to the State's points about fact checking, we are
24 using the census numbers that are most accurately going to
25 represent the community and when we are pulling that jury list

1 in 2017. If -- and this has been indicated every single time ever,
2 back to my point, I think it -- if you just take -- if we just back step a
3 second from the weeds --

4 THE COURT: Sure.

5 MR. GASTON: -- and take an eagle-eye view of
6 everything, it's a little silly to think that we are not going to rely on
7 census numbers to show the demographics. And if the State had a
8 question as -- because I hadn't been specific enough and when I
9 was giving notice or when I was using the number of census, she
10 wanted to know, Hey, there's actually two census things here,
11 which one are you guys relying on or whatever, you know, in all of
12 this time that the DA is talking about, it's kind of been a black hole
13 of communication. There's been zero phone calls and zero e-mails
14 back from the State asking for clarification or anything like that
15 when we provided it.

16 It wouldn't have been hard, even while her justification as
17 to why she didn't respond to my January 26th e-mail is because she
18 disagreed with me for all of these reasons, I mean, I've inferred
19 from her silence that that was a no. But that would be an example,
20 she could have replied no.

21 And so, similarly, if she had a question because it wasn't
22 clear, when I'm referring to census numbers, what we're referring
23 to, she could have asked and I would have been happy to provide
24 clarification. And maybe there's a -- and I could have asked my
25 expert and we could have had more clarification. So I referred to

1 census numbers generally, because they are the same numbers
2 that are -- that he testified to using in Mungai. They're -- so that's
3 also why we take two seconds to figure it out.

4 THE COURT: So hold on. Let me ask you two questions,
5 though.

6 MR. GASTON: Yes.

7 THE COURT: In regards to -- because you had said we
8 had -- we have mentioned -- so outside of Mungai, because I don't
9 think, Hey, we have to look at Mungai -- I don't ever think that either
10 side has to go look in another case to figure out what discovery
11 you're going to use in this case. So I'm taking Mungai out of it.

12 But you have said, Hey, listen, we talked about census
13 records, both when it was in front of Scotti and then multiple times
14 after that, we've referred to it time and time again. I just don't -- I
15 usually take copious notes --

16 MR. GASTON: Sure.

17 THE COURT: -- of everything you guys say and do once a
18 hearing starts.

19 MR. GASTON: Sure.

20 THE COURT: But we can't seem to quite get this thing
21 started. So I don't have any notes --

22 MR. GASTON: And I have the answer now too, Your
23 Honor.

24 THE COURT: Okay. Yeah, can you tell me that?

25 MR. GASTON: It's the 2017 census.

1 THE COURT: Okay. 2017 census. Okay.

2 MR. GASTON: So --

3 THE COURT: There was a --

4 MS. BOTELHO: Okay.

5 MR. GASTON: So what --

6 THE COURT: 2017 census. Go ahead.

7 MR. GASTON: So with respect to my general point is,
8 yeah, so the State should have been on notice that we were going
9 to be using the census numbers to do the demographics. I
10 argued -- I cited to the census at the trial. The census is in -- the
11 census -- this specific census and the numbers are in the appeal of
12 the case, which, obviously, is giving them notice. Every time we've
13 ever mentioned, talked about demographics, I've mentioned our
14 expert looking at the census or comparing this to the census
15 numbers multiple times.

16 I guess there could be some quibble over what I mean
17 when I say the word the census, because, obviously, when this
18 trial's done in 2017, I'm referring to whatever census numbers I
19 had --

20 THE COURT: Right.

21 MR. GASTON: -- I would highly doubt I had the most
22 accurate 2017 census numbers when I was referring to it the first
23 time around.

24 But that's not an issue of failure to put the State on notice
25 of anything. We've talked about the expert notice that those

1 numbers are testified to or are in the appeal. And the State could
2 have asked for clarification if they needed any further -- or if they
3 were actually confused. Instead, it seems like the State took a
4 strategy of not responding at all, not asking for any follow-up,
5 showing up, and then hoping to object to everything to, essentially,
6 win on that kind of approach as opposed to genuinely make an
7 effort to make sure that she had all -- that she had all of her
8 questions answered, that if there were any miscommunications or
9 anything like that.

10 So I don't think -- ultimately, I just don't think that the --
11 there was a discovery violation with respect to talking about the
12 census.

13 THE COURT: So --

14 MR. GASTON: And a silent -- oh, sorry.

15 THE COURT: One more thing. Because you had said I
16 don't -- it seems kind of silly, because I don't really know where we
17 would get these numbers anyways. And my immediate thought
18 when we were talking about this is, you know, whenever I get the
19 jury breakdown, it always says the percentages.

20 MR. GASTON: Oh.

21 THE COURT: I think you guys get these. Sometimes I get
22 confused on what the judge gets and what you guys get in regards
23 to the jury packet.

24 MR. GASTON: You're saying that you get a -- you're
25 saying that the packet you get has a -- not that I -- if I can ask the

1 Court a question, that you get a percentage of that race in the
2 community?

3 THE COURT: No, no, no. Percentage breakdown of -- this
4 is the percentage of African-Americans, this is percentage of --

5 MR. GASTON: Oh, the race report and the ethnicity
6 report.

7 THE COURT: Yeah.

8 MR. GASTON: That's -- so that's prepared from the
9 jury's -- that's prepared by the jury office. That's a recent thing
10 that's only happened the last few years.

11 THE COURT: Oh, okay.

12 MR. GASTON: And that's prepared by the jury
13 commissioner or the jury person's office.

14 THE COURT: Yeah.

15 MR. GASTON: And they -- it has a list, and that's from the
16 people self-identifying their race when they're responding to the
17 jury. But that's not the census numbers we're referring to. That
18 would be the numbers that would be representative of peoples'
19 responses to the questions who were actually in the panel of -- in
20 that packet of information that are called up to the courtroom,
21 the 60 people you get called up or whatever --

22 THE COURT: Yeah.

23 MR. GASTON: -- to be on the jury. But that's not
24 representative of the people in the community or anything like that.

25 THE COURT: See, but I thought that there was a

1 breakdown in regards to -- and I could be wrong, we could even ask
2 Ms. Witt at some point, but I thought that there was a breakdown in
3 regards to the percentage that we have compared to the percentage
4 in the community.

5 MR. GASTON: So that'll be a point at the evidentiary
6 hearing. But the -- respectfully, I don't think that's true. Because I
7 don't think the jury commissioner tracks the race report -- the races
8 compared to the community very often.

9 THE COURT: I don't know that --

10 MR. GASTON: And that was brought up in Mungai and
11 would be an area of questioning today. But they -- other than
12 comparing to the census numbers, there's no way they would know
13 how to do that anyways.

14 THE COURT: Right. So that's why that was going to get
15 to my next point, was they -- my question to you was going to be:
16 Would they have had to have -- if that information was there, would
17 they have had to have gotten it from the census? That's --

18 MR. GASTON: As far as I'm aware, yeah. Because I don't
19 know what else tracks the demographics for the community.

20 And then final point, of all of these things that we're trying
21 to introduce into evidence, we're trying to introduce these into
22 evidence because we think if the Court rules against us, it's better to
23 have them into evidence before the appeal so that all the
24 documents are available.

25 But we also don't -- it's also not -- we're doing this

1 because I think it's the best way to do it. But it's certainly not a
2 necessary only when to do it, because the rule says expert
3 witnesses can rely on evidence that would otherwise be deemed
4 inadmissible in their opinion, as long as it's something that is
5 generally relied upon by other people in the community. So I think
6 it should be admitted, because it's important to have the numbers
7 and that's what we're all talking about anyways.

8 But even if the Court disagrees with me and excludes it,
9 that doesn't preclude my -- unless you do it as a sanction for
10 discovery motion, that doesn't preclude my expert from testifying
11 about all this anyways. All it does is just mean the census numbers
12 aren't actually in the record other than what my expert testified to.

13 THE COURT: Well, so I agree or disagree. I did say that
14 the expert couldn't testify to anything that I've -- any expert couldn't
15 testify to anything that the other side wasn't privy to look at,
16 inspect, do all of those things. So --

17 MR. GASTON: Sure. So it's a sanction for a discovery
18 violation, for example. But --

19 THE COURT: Basically, yeah. Okay.

20 Here's the thing. At the end of the day, we've got to get to
21 the bottom of this. And I do -- I have to have a basis in which to
22 compare the racial and ethnic background of our community, right?
23 Otherwise, I don't really know what my proper comparison is going
24 to be.

25 The DETR records and the JC master list, Ms. Botelho has

1 stated on the record she had those, she's had the opportunity to
2 look through those. She never had, like, a link or a PDF or anything
3 about a census. Mr. Gaston's position is, listen, we've talked about
4 this thoroughly in the original case, in the appeal, and we have
5 discussed it here in court. I apologize, I don't have any independent
6 knowledge in regards to that, but at the end of the day, like I said, I
7 do -- I have to have something to compare it to.

8 So we're going to go forward with the hearing. We're
9 going to start with a Hallmark hearing in regards to defense laying
10 the foundation for -- is it Mr. Martin or Dr. Martin? I can't
11 remember, I apologize -- Mr. Martin as an expert to lay the
12 foundation and hit the Hallmark Eldridge factors. And then we'll
13 move on from that.

14 So, Mr. Gaston, are you going to be doing the questioning
15 of the expert or is Ms. Dickenson?

16 MR. GASTON: I will be. I'll be questioning all the
17 witnesses today. I do have a quick question. So are -- is the Court
18 just reserving decision on the judicial notice of the three things that
19 we -- or the three or four things that we asked about?

20 THE COURT: So I think what I'm understanding from
21 Ms. Botelho's objection is that she just wants a foundation laid in
22 regards to -- she wants to make sure that the expert has the -- was
23 looking at the exact same things that she was.

24 MR. GASTON: Okay.

25 THE COURT: So as long as we can get that foundation

1 laid and she feels comfortable that she was given the same thing
2 the expert was, I don't have any objection to doing that.

3 MR. GASTON: Okay. So with the master list, one sort of
4 tricky thing --

5 THE COURT: Yeah?

6 MR. GASTON: -- with the master list.

7 THE COURT: Okay.

8 MR. GASTON: In terms of actually, literally getting it into
9 evidence is it's a gigantic thing. It has three and a half million
10 records. I spoke to the attorney for the Eighth Judicial District
11 Court --

12 THE COURT: Yeah.

13 MR. GASTON: -- that's been [indiscernible], Mr. Viesca.

14 THE COURT: Uh-huh.

15 MR. GASTON: He didn't have an issue with introducing
16 evidence or anything like that subject to a protective order that it's
17 not going to be disclosed to anybody else or whatnot.

18 THE COURT: Yeah.

19 MR. GASTON: But the question still remains of literally
20 how to do it.

21 And so I researched how people do it in civil cases with
22 extremely voluminous amounts of electronic discovery.

23 THE COURT: Yeah.

24 MR. GASTON: And while there are a lot of clever ideas,
25 the one that seems to make the most sense is when it was

1 originally provided to us by the jury commissioner and Mr. Viesca,
2 they gave us a link and it's how they access it, I believe. They go to
3 a website, it's a secure portal. They have a user name and a
4 password and that's how -- and then that accesses the master list.

5 So to the extent that it would work, what I think I would do
6 is I would just lay foundation to the jury commissioner that this is
7 what they gave us in response to our subpoena. This is the user
8 name and a link and a password. And then that would go into
9 evidence, and that way if someone in court or the Supreme Court or
10 whatever, if, ultimately, the Court disagrees with us and there's an
11 appeal, wanted to actually look at the master list documents,
12 subject to the protective order, they could, because they could put
13 the user name and password in.

14 It's not really practicable to -- or practical to introduce it in
15 a different format. I'm not really sure what a better way to do it. I
16 know that a flash drive, theoretically, could do it, right? Just
17 because flash drives are gigantic, I guess. But I think the evidence
18 vault doesn't, like, hold flash drives, is my understanding from
19 other trials over a long period of time.

20 MS. BOTEHO: I think they do.

21 MR. GASTON: I was told in another trial they don't. But I
22 believe you guys if they do.

23 THE COURT: Yeah, no, we --

24 MR. GASTON: But either way, that might be a little bit of
25 a moot point, because we would need someone to actually put it

1 onto a gigantic flash drive from the three and a half million records.

2 THE COURT: So you could provide me a link and then
3 I'd -- I would feel uncomfortable about having the name and the
4 password on the record. But we could put it on a court's exhibit --

5 MR. GASTON: Sure.

6 THE COURT: -- like a little piece of paper.

7 MR. GASTON: Sure.

8 THE COURT: And then we could admit that as a court's
9 exhibit.

10 MR. GASTON: Sure. And then the DETR records were
11 very difficult to print off, even though they're not -- just whatever
12 format it was, I couldn't figure out a way to print it in a way that
13 made sense and showed all the documents. So we burned those
14 onto a disc.

15 THE COURT: Okay.

16 MR. GASTON: Attachments that we've received, they're
17 the same things she had. But that's how, ultimately, if that works,
18 that's how we would be planning on introducing just as an actual --
19 on a CD drive. But --

20 THE COURT: Yeah, that's fine.

21 MR. GASTON: Okay.

22 MS. BOTELHO: And, Your Honor, I understand your
23 ruling considering, you know, all of these documents that they're
24 going to be admitting. However, I would just like to note, I don't
25 have the 2017 census.

1 THE COURT: Okay.

2 MS. BOTELHO: So I don't have those numbers. I don't
3 have anything like that. If you look at the Census website, it shows
4 the actual, you know, like sanctioned censuses are taken every 10
5 years. You have 2010 and 2020. And so this 2017 number, I don't
6 know where it is. I don't have it.

7 THE COURT: Okay.

8 MS. BOTELHO: And so, I mean, if I'm going to be
9 cross-checking with this expert to make sure that I received
10 everything that he relied on, I mean, that's going to be kind of an
11 impossibility at least with regard to the census.

12 THE COURT: Mr. Martin -- is it Mr. Martin or Dr. Martin? I
13 apologize, I want to call you by the correct term.

14 MR. MARTIN: Can you hear me?

15 THE COURT: I can. Thank you, sir.

16 MR. MARTIN: Yeah, just Mr. Martin.

17 THE COURT: Okay. Mr. Martin, I want to make sure that
18 the district attorney does have a copy of the 2017 census in which
19 to prepare for your cross-examination. How may I get her that
20 information? Where did you get --

21 MR. MARTIN: I can send some tables. Unfortunately, the
22 Census Bureau, they're not very user-friendly, but I can certainly
23 send those if that would be useful.

24 THE COURT: Where did you -- where -- what format do
25 you get them from or in?

1 MR. MARTIN: Okay. So I download files from the U.S.
2 Census Bureau's website.

3 THE COURT: Okay.

4 MR. MARTIN: And to be clear, these are the -- what's
5 called the U.S. Census Bureau's 2017 American Community Survey
6 Numbers. They're the same type numbers that are used in federal
7 courts and they're sort of the benchmark numbers, because
8 they're -- they come out every year, unlike the decennial censuses,
9 which only come out every 10 years. So --

10 THE COURT: So if the State wanted --

11 MR. MARTIN: -- that's what they are.

12 THE COURT: If the State wanted -- we all have our
13 computers out right now. If we -- can -- would we be able -- could
14 you walk us through us finding them on our computers?

15 MR. MARTIN: Yeah, it's a little tricky, I got to tell you. I
16 can print off some tables from the website. I can show you where
17 they are on the website. It's not a very user-friendly --
18 unfortunately, it's not very user-friendly.

19 THE COURT: Well, let's start with this. What are you
20 going to use in your examination in regards to the tables? Or --
21 what information are you going to use, so that I can make sure the
22 State has a copy before we get started?

23 MR. MARTIN: Okay. So it's called the 2017 American
24 Community Survey, that's from the U.S. Census Bureau. And it's
25 for persons age 18 and above who are also citizens of the United

1 States.

2 THE COURT: All right. And what does it look like,
3 though? Is it multiple tables, graphs, what?

4 MR. MARTIN: It's multiple tables. You can get -- there's
5 one table for each race and then one table for all races together.

6 THE COURT: All right. So how many --

7 MR. MARTIN: And it includes a --

8 THE COURT: Go ahead.

9 MR. MARTIN: I'm sorry.

10 THE COURT: No, that's okay. Go ahead.

11 MR. MARTIN: So I use the tables as downloaded in
12 number format, but you can print off a facsimile of them as well.

13 THE COURT: Okay. Ms. Clark, do you know if you guys
14 have those printed out or --

15 Ms. Dickenson, do you guys have those printed out so I
16 can just have them and so I can give a copy to the State?

17 Mr. Gaston stepped out.

18 MS. DICKENSON: I'm sorry, Ms. Clark, I didn't hear --

19 MS. CLARK: I didn't [indiscernible].

20 MS. DICKENSON: All right.

21 THE COURT: She just shook her head.

22 MS. DICKENSON: I do have a table of that U.S. Census.

23 THE COURT: Do you have the one that Mr. Martin's
24 referring to, though, the tables of one for each race and one table
25 for all the races?

1 MS. DICKENSON: I think I do.

2 THE COURT: Mr. Gaston, do you have -- Mr. Martin just
3 testified that he has multiple tables, one for each race, and then one
4 table for all races. Do you have that with you?

5 MR. GASTON: From the Census Bureau?

6 THE COURT: Yes.

7 MS. DICKENSON: Yes. I have the -- yes, I have the
8 [indiscernible] and censorship status, and then Black or
9 African-American and Hispanic.

10 MR. GASTON: Can I approach? Then I'll show the State
11 in a second.

12 THE COURT: Yeah.

13 MR. GASTON: But this is what Ms. Clark had in her file.

14 THE COURT: Okay. So, Mr. Martin, pull up those graphs
15 for me, because I want to make sure you and I have the same thing.
16 Okay? All right.

17 So the first one I'm looking at says sex by age, by nativity
18 and citizenship status, Black or African-American alone.

19 MR. MARTIN: One second, let me get to that.

20 MS. BOTELHO: And, Your Honor, while he's looking at
21 that, I would just like to note that, initially, when Mr. Gaston made a
22 record about the census, he indicated that he had nothing to
23 physically turn over, there was no way to, like, print or give me any
24 documentary evidence concerning the census. But just for the
25 record, he did just hand you some printed graphs with the census

1 information that I had requested be given to me and that you had
2 ordered to be turned over. And Ms. Dickenson had them, as well.

3 THE COURT: Okay. Mr. Martin, okay, so you have that
4 one, sex by age, by nativity, and citizenship status?

5 MR. MARTIN: That's correct.

6 THE COURT: Okay. Sex by age, Hispanic or Latino?

7 MR. MARTIN: That's correct.

8 THE COURT: Okay. And then I have one that's just sex,
9 age, by nativity, and citizenship status -- oh, yeah, so it's just -- I
10 don't -- this is -- just looks like it's -- it says universe total
11 population. So I --

12 MR. MARTIN: That would be the total population.

13 THE COURT: Okay. So are there any others that I need? I
14 have Hispanic, African --

15 MR. MARTIN: No.

16 THE COURT: -- American and total.

17 MR. MARTIN: No, that's all you need.

18 THE COURT: Okay. Why didn't we give these to them
19 earlier?

20 MR. GASTON: First, I stand by what I said with respect to
21 the census. My understanding, when asking about the -- getting
22 census documents to turn over, is that the census isn't really
23 exportable in a way that can be turned over. It looks like we did
24 have those tables to turn over. I checked -- or Ms. Clark, we were
25 checking our e-mail to see when we received those, because we

1 would have received them from him, he e-mailed them to us on
2 February -- or he e-mailed them to me on February 3rd, it looks like.

3 And, ideally, I would have immediately sent that over for
4 the State to have, but I didn't. But it wasn't on purpose. If
5 anything, it was -- in 1100 e-mails, I missed those tables. In fact, I
6 didn't have them in my file, Ms. Clark had them in hers. But it still
7 doesn't change, there still, ultimately, is no prejudice to the State
8 with any of this.

9 And if they wanted to know what specific numbers we
10 were using, those numbers and a breakdown is in the appeal that
11 Ms. Dickenson indicated. It's in the Mungai transcript, and if they
12 had any questions about -- so, technically, the State has been on
13 notice the entire time this case has existed of all the numbers that
14 we're going to be citing to, because they're exactly the numbers
15 that were cited to in the appeal.

16 MS. BOTELHO: That would actually be incorrect, because
17 they were referring to the 2013 census during the Valentine trial. I
18 have the transcripts from day one, which was July 24th of 2017,
19 page 12. It was the 2013 Clark County numbers showing the
20 population, so it would not be the exact same.

21 MR. GASTON: If I could finish. That's not --

22 MS. BOTELHO: We're talking about 2013 and 2017.

23 THE COURT: Go ahead, Mr. Gaston.

24 MR. GASTON: So that's not what I'm talking about.

25 In the appeal, the -- Ms. Dickenson indicated that the 2017

1 census numbers that we're talking about are the same numbers
2 that are in the appeal. And that's what I said earlier, when I was
3 talking about, at trial, citing to census numbers, when I was making
4 my initial objection to preserve this issue for appeal, that was
5 putting them on notice, if anything, that, of course, we are using
6 census numbers generally. But I also said I highly doubted that I
7 had the brand-new 2017 census in the middle of 2017, when maybe
8 it hadn't even come out yet, when I was using those numbers. I
9 was citing to whatever the most recent census numbers I had when
10 I was in the trial.

11 On appeal, Ms. Dickenson indicated -- included all of these
12 census numbers that we are talking about, is my understanding. So
13 the State would have had notice of all of these numbers ever since
14 the appeal.

15 They also have been on notice that we are using census
16 numbers. If she wanted census numbers more specifically or
17 couldn't find them or didn't know why I seemed to think that she
18 had the census numbers or wanted to know what I thought we were
19 comparing it to, et cetera, in order to actually be prepared for the
20 hearing, she could have asked instead of a black hole of
21 communication. She didn't do that, because the State is just
22 wanting to object to everything to try to keep things excluded so we
23 don't actually do the hearing.

24 There's no prejudice to the State. It's absolutely silly to
25 think the State didn't know we were going to be using census

1 numbers. If -- there's no -- the State has been aware on what those
2 census numbers are, at least in general, if not specifically, from the
3 appeal.

4 Yes, when I got these -- when the table was sent to me on
5 February 3rd, ideally, I should have sent them to the State. But
6 sanctioning me by excluding those and, essentially, if you exclude
7 in testifying to it, too, it's essential to hold a hearing, right? So we'll
8 have to appeal and see why that's an appropriate sanction or not.
9 And if it is, then we lost, and if it isn't, then we're back. Like,
10 there's -- that's no justice, there's no -- nothing there.

11 THE COURT: No, I know. Which is why it puts me in a
12 hard spot, right? Because it's, like, I understand the importance of
13 this hearing. I really want the hearing to go forward. And last time
14 when we were here, that's why I just tried to be, like, clear as
15 possible to you guys, because I want you to both to feel like you're
16 prepared. I want you both to feel like I'm on notice of everything. I
17 feel like I know everything, I feel like I can effectively cross-examine.

18 So then I -- you do have to somewhat understand. I know
19 what you're saying. You're saying, Look, they put it on notice, how
20 else would we have proven this? We've talked about it. But you
21 also have to turn it on -- look at it from their side as well, or maybe
22 it's just me that has to look at it from both sides. But from them,
23 it's, like, we wanted to be able to look at documents, because we
24 wanted to be prepared. We wanted to know the numbers we were
25 dealing with.

1 But I agree with you, at the end of the day, what's going to
2 happen is if I do sanction them, and then -- because, really,
3 sanctioning them for this discovery violation means this individual,
4 Mr. Martin, can't testify, because he has nothing to base any of his
5 numbers on. So then you guys go back up to the Supreme Court
6 and they're going to say, well, you guys didn't even get down to the
7 root of the matter, right? So it just -- it puts me in a really tough
8 spot.

9 And so this is what we're going to do. We're going to go
10 forward. However, if, by the end of Mr. Martin's testimony, the
11 State feels like we got these numbers today and I -- we feel like we
12 need more time to digest the numbers and more effectively be able
13 to cross-examine by asking questions that we weren't prepared for,
14 we are going to bring him back for a next-level of
15 cross-examination. And that's the best thing that I can do at this
16 point with keeping it moving forward.

17 Because in the end -- or maybe we could just continue it
18 again today and do it the next -- try to find another day that I'm not
19 in trial and -- so I think the best thing is to get it started today,
20 provide the State an opportunity to cross-examine later if need be.
21 Okay?

22 MR. GASTON: Thank you, Your Honor.

23 MS. BOTELHO: And, Your Honor.

24 THE COURT: Yeah.

25 MS. BOTELHO: I -- I'm sorry, I --

1 MS. DICKENSON: Your Honor --

2 MS. BOTELHO: -- don't --

3 MS. DICKENSON: -- Karen Dickenson.

4 THE COURT: Just -- sorry, Ms. Dickenson, just give me
5 one second, because Ms. Botelho started before you, so I'll hear
6 from her and then I'll hear from you. Okay?

7 MS. BOTELHO: Thank you, Your Honor.

8 It's -- I'm making a big deal about this because, as you can
9 imagine, we're dealing with numbers.

10 THE COURT: No, I --

11 MS. BOTELHO: And the numbers are really going to
12 matter. And I have tried, I mean, to do the numbers ahead of time
13 so that I can properly cross-examine.

14 THE COURT: Yeah.

15 MS. BOTELHO: But now that some numbers have
16 changed, I don't know what I'm dealing with.

17 THE COURT: Okay.

18 MS. BOTELHO: And so this was, like, hours of prep.
19 Adding the -- getting the correct numbers and plugging them in so
20 that I would not be sitting here trying to do math under the gun.

21 THE COURT: What numbers were you using?

22 MS. BOTELHO: Well, they talked about some of the -- I
23 used the DETR records when I did, you know, if you add DETR from
24 June of 2017, you have 4389. I did the calculations that we did from
25 Valentine at the time of trial. I made sure I had that. I used the 2020

1 census trying to get, you know, the comparative disparity and all of
2 that stuff to properly be prepared to cross-examine. But those
3 numbers are going to be different, because we're looking at
4 the 2020 census is actually including all kinds of other numbers,
5 whereas the projections are over 18 and citizens.

6 And so we're talking about different subsections now, and
7 the math matters. We're talking about numbers and the
8 comparative and absolute disparity is going to be very, very
9 important in terms of proving whether or not they've met this --
10 even the first -- before we get to the system exclusion, whether
11 they've made the prima facie case. And so the numbers and which
12 numbers we're using really matters.

13 THE COURT: Okay.

14 MR. GASTON: Respectfully, the numbers between all of
15 the -- first, the DETR records doesn't have anything to do with the
16 census. There's something different. That's just a source they were
17 required to use and didn't. And if they had, it would make a
18 difference. But the -- and those numbers haven't changed from
19 anything.

20 But with these numbers versus the other numbers she
21 was saying, the difference in change between demographics
22 between 2013, 2017, 2020, we're talking about, like, a percent.
23 Like 11.4 percent to 11 percent. 31.3 percent to 30 percent.

24 THE COURT: So a lot of large numbers.

25 MR. GASTON: We're not talking 39 percent down to 22

1 and a half percent and blah, blah, blah. Like, the numbers are very
2 similar, because the demographic of Clark County does not change
3 quite dramatically in three years. And so with all due respect to the
4 State's position -- and I actually have the Court's ruling
5 [indiscernible] if they want it -- but with all due respect, the
6 numbers are pretty identical between all of those things.

7 THE COURT: So --

8 MS. BOTEHO: Well, the only way I could have known
9 that, though, is if I had seen it.

10 THE COURT: Sure. I understand.

11 So we're going to do direct and then we're going to take a
12 break. We're going to allow the State to speak with one another
13 and decide if we're going into cross. Right?

14 MR. GASTON: Sure.

15 MS. DICKENSON: Your Honor, could I say something?

16 THE COURT: Yeah, I apologize, Ms. Dickenson. I'm sorry.
17 Yeah. I did tell you that you could speak. I apologize. Go ahead,
18 ma'am.

19 MS. DICKENSON: Page 26 of the opening brief of this
20 case, in Footnote 16, I indicate that the 2017 estimated race
21 population statistics for Clark County were being used. And I have
22 the HTTPS address to that. So the reason I am bringing this up is
23 because this was already litigated in the Nevada Supreme Court.
24 They used these records. I used these records. The State knew
25 they used these records. And we're talking about the same records.

1 So I just want to point that out, it's in my opening brief, and it's the
2 same thing.

3 THE COURT: Okay. All right. Thank you.

4 So, guys, give me just a second before we get started.

5 MR. GASTON: Does the Court also -- my original
6 intention was to call Mr. Martin last for the evidentiary hearing. I
7 mean, if you want me to call him first, I guess I can. But --

8 THE COURT: There's no -- your hearing, your order.

9 MR. GASTON: -- if that's the issue, it gives the State more
10 time too to prepare for what -- I was going to call the jury
11 commissioner first.

12 THE COURT: Yeah. Let's do -- I mean, like I say, your
13 hearing, your order.

14 MR. GASTON: Okay.

15 THE COURT: So however you want to do it is fine with
16 me.

17 MR. GASTON: Okay.

18 THE COURT: I just will be right back. Give me, like,
19 literally 60 seconds.

20 MR. GASTON: Thank you.

21 [Pause in proceedings.]

22 THE COURT: All right. So you're calling Ms. Witt first,
23 Mr. Gaston?

24 MR. GASTON: Yes, ma'am.

25 THE COURT: All right. Ms. Witt, whenever you're ready,

1 would you come up, please, ma'am?

2 MR. GASTON: And, also, Your Honor, to clarify, I know
3 Mr. Martin's an expert. Generally, experts are allowed to stay on
4 while other witnesses testify.

5 THE COURT: Yeah. Yep.

6 MR. GASTON: And then the other question, Your Honor, I
7 had was, so NRS 50.115, my position is that I should be able to do
8 it -- my direct -- by leading questions and the State on cross would
9 be limited to open-ended questions. And I would cite to
10 NRS 50.115(4). So:

11 Except when the prosecution calls the defendant, because
12 they can't -- a party is entitled to call an adverse party or a
13 witness identified with an adverse party and interrogate by
14 leading questions.

15 THE COURT: Uh-huh.

16 MR. GASTON: The attorney --

17 That would be me.

18 The attorney for the adverse party --

19 Them.

20 -- may employ leading questions in cross-examining the
21 party or witness so-called only to the extent permissible if the
22 attorney had called that person on direct.

23 That would be them.

24 And in this case, she is a witness identified with an
25 adverse party. I know she's not employed by the State of Nevada,

1 but she does work for the Eighth Judicial District Court. She's the
2 jury commissioner. Obviously, by definition, I'm arguing that her --
3 the procedures resulted in a violation of the Constitution that were
4 being employed at the time. So kind of by definition, she's friendly
5 to the State. So she's a witness associated with an adverse party.

6 THE COURT: I agree that that is what 50.115 says, but the
7 argument would be whether or not she would be considered
8 adversarial.

9 MS. BOTELHO: And we don't believe she would be. She
10 is not employed by the Clark County District Attorney's Office. She
11 has a separate function. She has a certain job that she has been
12 employed to do. She actually works for the court, which is an
13 unbiased department entity. And so there's been no showing that
14 she's adverse.

15 MR. GASTON: And to clarify, Your Honor, witness
16 associated -- identified with an adverse party. That's distinction
17 from hostile or -- it's not just she's hostile, therefore I can use
18 leading questions. That's not the analysis. It's is she a witness
19 identified with an adverse party.

20 THE COURT: Right.

21 MR. GASTON: And calling her neutral to this proceeding
22 is not accurate, because she's not neutral, right? She has a very
23 vested outcome. She, obviously, doesn't think that she was
24 violating the Constitution with the procedures that were used
25 in 2017. She is, by definition, friendly to the State and adverse to

1 me.

2 MS. BOTELHO: She's employed by the judicial branch.
3 We are with the executive branch. And so I don't see how she is
4 automatically adverse to their -- or how she's even an adverse
5 party.

6 MR. GASTON: She's not an adverse party. She's a
7 witness identified --

8 MS. BOTELHO: She's not affiliated with an -- the adverse
9 party is us.

10 MR. GASTON: She's a witness identified with an adverse
11 party because, by definition to the nature of the census, she's
12 hostile to my position, even if she's perfectly polite on the stand.
13 She's hostile to my position and she's friendly to the State's
14 position.

15 THE COURT: I understand and I'm well aware of 50.115
16 and the situation in which it's used. I don't think that this quite rises
17 to the level. You can renew the motion during questioning if you
18 find -- and I recognize that it's not really about -- it's not always
19 about hostility. But in the certain situation, that could also be used.
20 So I'm going to deny that motion and you can proceed with direct
21 examination --

22 MR. GASTON: Thank you.

23 THE COURT: -- and direct questions.

24 MR. GASTON: Thank you, Your Honor.

25 THE COURT: You're welcome.

1 **MARIAH WITT,**
2 [having been called as a witness and first duly sworn, testified as
3 follows:]

4 **THE CLERK:** Please be seated. Will you please state your
5 name and spell it for the record.

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

7 **THE CLERK:** Thank you.

8 **MR. GASTON:** Sorry. One second.

9 **THE COURT:** That's all right.

10 **DIRECT EXAMINATION**

11 **BY MR. GASTON:**

12 Q Good afternoon, Ms. Witt.

13 A Good afternoon.

14 Q How are you today?

15 A Okay.

16 Q How are you employed?

17 A I'm the jury commissioner for the Eighth Judicial District
18 Court.

19 Q And how long have you held that position?

20 A Since November of 2012.

21 Q And can you explain your job as a jury commissioner?

22 A Yes. I'm responsible for ensuring that we have enough
23 jurors to serve for a jury trial summoning them, and then I handle
24 the juror needs, take care of their attendance, payroll, parking, that
25 type of thing.

1 Q Okay. And I guess you're responsible for dealing with
2 summonses or making sure summonses are sent out to summon
3 jurors who come for jury duty?

4 A Yes.

5 Q And how do you oversee that process?

6 A Can you be a little more specific?

7 Q Sure. Are you familiar with the process that goes for
8 sending out summonses?

9 A Yes.

10 Q How does it work?

11 A Well, we summon jurors based on the volume that's
12 anticipated. So we kind of come up with established numbers that
13 we need based on our trial volume. And we summon people six
14 weeks in advance, six to seven weeks in advance. And I create the
15 pools in the jury management system and provide those to a print
16 vendor, who mails them out.

17 Q So if the trial here happened on July 24th, 2017, the
18 summonses for jurors who would have appeared in that trial would
19 have actually been sent out about six weeks before that?

20 A Correct.

21 Q Okay. Thank you.

22 And are you also technically in charge of the master list
23 from which jury summonses are issued?

24 A Yes. With the assistance of our IT division. It's a
25 computerized process.

1 Q Okay. And I understand you don't do the technical side of
2 things, but you are the person in charge of the actual maintenance
3 of the master list, right?

4 A Yes.

5 Q Okay. And at some point, you received a subpoena from
6 our office for the master list in 2017; is that right?

7 A I received a lot of subpoenas in 2017.

8 Q Do you remember trying to recreate the master list that
9 existed in 2017?

10 A No. We can't recreate the master list.

11 Q I understand. Do you remember having a conversation, a
12 phone call with Jeffrey Martin, the company that -- let me back up.

13 The company that -- we talked about the IT side of things,
14 that's from a private vendor called Avenue, right?

15 A Yes.

16 Q Do you remember having a conversation with a lady from
17 Avenue, our expert Jeffrey Martin, and yourself, when you guys
18 were trying to talk about creating the master list?

19 A Yes, it was a long time ago, I don't remember all the
20 details, but I do recall the phone call.

21 Q Okay. But you were on the phone call?

22 A Yes.

23 Q And your attorney, Mr. Viesca, was on the phone call as
24 well, right?

25 A Yes.

1 Q Okay. And the basis of that phone call was trying to see if
2 any master list from 2017 actually existed, right?

3 A Among -- yes.

4 Q Okay. And it was determined that the master list
5 from 2017 actually didn't exist, right?

6 MS. BOTELHO: Objection. Leading.

7 BY MR. GASTON:

8 Q Was it determined that the master list in 2017 wasn't --
9 didn't exist?

10 A The master --

11 MS. BOTELHO: Still leading, Your Honor. It really
12 suggests the answer in the question.

13 THE COURT: No, overruled and -- the first one I sustained.
14 That one was overruled.

15 And go ahead and answer.

16 BY MR. GASTON:

17 Q Was it -- all right. Was it determined that on that phone
18 call that the master list from 2017 no longer exists?

19 A Yes.

20 Q Okay. Was there a conversation about potentially seeing
21 if there might have been some backups?

22 A Okay. I need to make a -- distinguish the difference.
23 Because the master list is an ever-changing -- not even a document,
24 it's a resource. It's a database. It is constantly changing. And so I
25 believe they were trying to establish if there was an exact recreation

1 of the master list as it existed at that time.

2 Q Right.

3 A And it was determined that it does not.

4 Q Right. And was there any conversation about whether
5 backups might have existed or anything like that at the time?

6 A Yes.

7 Q Okay. And was it determined that there was no way to
8 ultimately recreate the master list from 2017 exactly?

9 A Yes.

10 Q Okay. On that phone call, did Jeffrey Martin and the IT
11 person from Avenue, the representative from Avenue discuss
12 possible ways to get close in recreating the master list from 2017?

13 A I don't recall.

14 Q You don't recall --

15 A I don't recall the specifics.

16 Q Okay. Do you remember testifying in a case called
17 Mungai? Mungai v. State?

18 A I do.

19 Q I'm sorry, I did ask you: You remember testifying in case
20 the State of Nevada versus James Mungai?

21 A Yes.

22 Q Okay. And that was in April of last year?

23 A If you say so. I couldn't tell you the exact date.

24 MR. GASTON: May I approach the witness?

25 THE COURT: Yes.

1 BY MR. GASTON:

2 Q Showing page 19 of the Mungai transcript.

3 A Uh-huh.

4 Q I'm showing you the transcript from the State of Nevada
5 versus James Mungai.

6 A Uh-huh.

7 Q And this is the attorney asking you:

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

11 Correct?

12 MS. BOTELHO: Your Honor, I would just object as to the
13 procedure, if he is refreshing her recollection or whether he is
14 impeaching.

15 MR. GASTON: I'm impeaching.

16 MS. BOTELHO: I mean, he's just reading, basically, she
17 hasn't -- he's just reading the transcript into the record at this point.

18 MR. GASTON: So evidentiary-wise, I'm not required to
19 refresh the recollection if someone says they don't know, Nevada
20 treats that as the same thing as saying no. So I'm impeaching her
21 with her prior testimony.

22 THE COURT: I agree.

23 MR. GASTON: Thank you.

24 BY MR. GASTON:

25 Q I'll repeat my question. This is you -- or this is a question

1 the attorney asked you:

2 But you would agree with me that Avenue and Mr. Martin
3 discussed ways that the list could be recreated as closely as
4 possible with caveats?

5 Correct? Is that what they asked you?

6 A Yes.

7 Q And your answer was yes?

8 A Yes.

9 Q Now, you mentioned that it's an ever-changing document.
10 You guys refer to a term called merge, a merge that happens?

11 A We do mergings, yes.

12 Q Can you explain to the Court what a merge is?

13 A A merge is when we obtain an updated list from the
14 various sources and then those are merged together in the
15 database so that we don't have duplicates and permanent
16 disqualifications and addresses are updated.

17 Q And so, generally, you guys do about two merges a year;
18 is that right?

19 A Typically.

20 Q Okay. In 2016 there were two merges?

21 A Yes.

22 Q In 2017 there were no merges?

23 A That's correct.

24 Q In fact, the next merge that happened after 2016 was
25 in 2018, correct?

1 A Correct.

2 Q And you mentioned that one of the things you do is
3 eliminate duplicates, try to eliminate duplicates; is that right?

4 A Yes. It's a very technological process that is -- I don't do
5 it. Our vendor does it and -- but, yes, it attempts to remove
6 duplicates or combines them into one record so that you don't
7 have -- because we have more than one source, we're trying to
8 have only one record for each person.

9 Q But you don't do anything regarding avoiding duplication
10 of names?

11 A I don't personally do it, no.

12 Q Are you aware of NRS 6.045, which says:

13 In compiling and maintaining the list of qualified electors,
14 the jury commissioner shall avoid duplication of names?

15 A Yes. But it also allows me to use a computerized system,
16 as long as random selection is assured --

17 Q Would it --

18 A -- and that's what we do.

19 Q Would it surprise you that there was almost 10 percent
20 duplicate names in the master list that you guys provided us?

21 A No.

22 Q Now, speaking of that, the master list itself, that is a --
23 we're calling it a master list, but the master list is really all of the
24 juror people in Nevada -- or in Clark County that you have, right?

25 A It's the database that has all those records, yes.

1 Q And it's comprised of millions of names?

2 A Yes.

3 Q Okay. And it's intended to represent the entire
4 jury-eligible population of Clark County?

5 A Yes.

6 Q And the names on the master list come from specific
7 sources?

8 A Yes.

9 Q For example, today the names on the master list come
10 from four sources: The Nevada Energy, Nevada DMV, the voter
11 registration rolls, and the Department of Training and
12 Rehabilitation?

13 A Yes.

14 Q And Department of Training and Rehabilitation we often
15 refer to as DETR?

16 A Yes.

17 Q Now, back before the -- in 2016, what sources was being
18 used to compile the names on the master list?

19 A Nevada DMV and Nevada Energy.

20 Q Okay. And because there are no merges in 2017, all of the
21 master lists -- the master lists in all the summonses that
22 [indiscernible] in 2017 would have been coming from a master list
23 that only used those two sources; that's right?

24 A Yes.

25 Q Okay. Because without a merge, there's no way to

1 incorporate new names?

2 A Yes.

3 Q Are you aware of Administrative Order 1607?

4 A Yes.

5 Q And in that order, Judge Barker, the chief judge of the
6 Eighth Judicial District Court, ordered that you were to begin using
7 voter registration also; is that correct?

8 A Yes.

9 Q Okay. And that order was dated November 22nd of 2016?

10 A Yes.

11 Q But the master list was not updated to include anything
12 from the voter registration rolls until that first merge in 2018, right?

13 A Yes.

14 Q So at the time of Valentine's trial on July 24th, 2017.
15 There was no names being used from the voter registration rolls?

16 A That's correct.

17 Q Okay.

18 MR. GASTON: Your Honor, I would move to admit
19 Administrative Order 1607 into evidence. I believe that it's a
20 self-authenticating document. It's a file-stamped copy from the
21 Court. I also ask the Court just take judicial notice of Judge Barker's
22 administrative order.

23 THE COURT: State?

24 MS. BOTELHO: No objection.

25 THE COURT: Okay. That'll be admitted as -- is that

1 Defense 1 -- or Defense A, I mean?

2 THE CLERK: It will be Defense A.

3 THE COURT: Okay. Great. That'll be admitted. Thank
4 you.

5 MR. GASTON: Thank you.

6 [Defendant's Exhibit Number A admitted.]

7 BY MR. GASTON:

8 Q I'll go ahead and do this while we're on it. But when you
9 guys provided -- the master list can't really just be downloaded,
10 right?

11 A No.

12 Q Because just a gigantic document?

13 A Correct.

14 Q You guys use a secure website and a link and a password
15 to be able to get on that?

16 A Yes.

17 Q Okay. And, ultimately, when complying with a subpoena
18 after we secure the protective order from the Court, you and
19 Mr. Viesca provided us a password and a user name in a link to that
20 website; is that right?

21 A Yes.

22 Q And that was a way for us to access the master list?

23 A Yes.

24 Q Okay.

25 MR. GASTON: Your Honor, at this time I would move to

1 admit into evidence the password and user name and the link that
2 we received from the jury commissioner and Mr. Viesca.

3 THE COURT: And, like I stated before, it would still be
4 under the protective order and I'd also prefer it to be a court's
5 exhibit. But I'd like to hear Ms. Botelho's position first before I
6 make a ruling.

7 MS. BOTELHO: I guess I need to be able to assure that
8 what they were -- that what they're giving you is what they gave
9 me.

10 MR. GASTON: It's up to you how you want us to do it.
11 But the only way I can think of to do that is just to do it right now,
12 log on and show that that's the link and the user name and
13 password that we received.

14 THE COURT: That's fine.

15 MR. GASTON: But then -- I mean, okay.

16 THE COURT: Yeah. You can do it that way.

17 MR. GASTON: Okay. And that doesn't violate a protective
18 order or anything that we have?

19 THE COURT: So I -- no, that's fine, because we can do it
20 as part of the hearing. If you could just pull it up for --

21 MR. GASTON: Okay.

22 THE COURT: -- Ms. Witt and Ms. Botelho. And then just
23 so everyone can verify it's all the same thing that you're giving to
24 the Court and that we can move it in.

25 MR. GASTON: That's fine.

1 [Pause in proceedings.]

2 MR. GASTON: I'm approaching with a laptop and on the
3 laptop -- if the record can reflect I'm approaching with a laptop?

4 THE COURT: Yeah.

5 BY MR. GASTON:

6 Q On the laptop, I'm showing an e-mail with the host link
7 and a user name and a password, I'm not reading those into the
8 record, but is this what you guys had sent us, the office?

9 A I would assume so, I don't --

10 Q I'm going to --

11 A I'm not on that e-mail, so I --

12 Q It's all right. I'm going to click on the link now.

13 A Okay.

14 MS. BOTELHO: May I approach, Your Honor?

15 THE COURT: Of course.

16 BY MR. GASTON:

17 Q Then after the user name and password are inputted -- are
18 input, this is the master list or what we refer to as the master list? I
19 need to highlight that, but is that [indiscernible]? It has names and
20 addresses and --

21 A Yes. That's what it looks like, yes.

22 Q Okay. Thank you.

23 MR. GASTON: Your Honor, I move to admit as a -- I move
24 to admit the link and user name and password into -- as an exhibit.

25 THE COURT: Ms. Botelho for the State?

1 MS. BOTELHO: I'm sorry, this is the master list from 2017
2 that was recreated?

3 MR. GASTON: No. This is the 2020 master list that they
4 provided us.

5 MS. BOTELHO: Okay. I would object. I object to the
6 admission of this particular --

7 THE COURT: Master list?

8 MS. BOTELHO: Yes.

9 THE COURT: So I want to go back for a second, because I
10 have some questions for Ms. Witt.

11 So my understanding from your testimony thus far is
12 they -- they're -- they weren't able to go back and recreate that list
13 that was used in 2017; is that correct?

14 THE WITNESS: Correct.

15 THE COURT: All right. So is there any, like, problem
16 solving or shooting that could be done that gives us an idea that
17 somewhere around those time parameters what the master list
18 looked like?

19 THE WITNESS: Well, the problem is that the master list is
20 constantly changing.

21 THE COURT: Yeah.

22 THE WITNESS: We don't know what those changes are
23 going to be.

24 THE COURT: Right.

25 THE WITNESS: You have people that move out of the

1 state, so they're no longer qualified, because they're out of
2 jurisdiction. You have people that may have been deceased or
3 permanently disqualified for a permanent medical reason. I mean,
4 there are a variety of things that can impact the master list --

5 THE COURT: Uh-huh.

6 THE WITNESS: -- and change it. And then address
7 updates that would have taken place.

8 THE COURT: So is --

9 MR. GASTON: And, Your Honor, if I can make a proffer?
10 I'm sorry. If I can make a proffer.

11 On the phone call between Ms. Witt, the Avenue
12 representative, and our expert Jeffrey Martin, they provided -- this
13 is what the document they provided us, the 2020 master list. And
14 during the phone call with her [indiscernible] and --

15 THE COURT: Her being Ms. Witt?

16 MR. GASTON: Ms. Witt, yes, and Mr. Viesca. And the
17 representative from Avenue. Mr. Martin and the representative
18 from Avenue had a lot of conversations. Ultimately, how best to try
19 to recreate --

20 THE COURT: Yes.

21 MR. GASTON: -- what the list would have done. And
22 that's what he did to use the numbers that he's going to use. And
23 he -- I think -- I was just intending on asking him the process on
24 how they -- because I think he's going to be best able to explain the
25 process that they went through to try to go from the 2020 master

1 list in order to recreate the list as best he could to approximate
2 what it would have been in 2017.

3 THE COURT: All right. So here's the deal. So I'm going
4 to allow it, because it goes -- I believe it goes more to weight and
5 not admissibility at this point. Is this the 2020 list? Yes, it's the --
6 this is the 2020 list. It'll be admitted for that purpose.

7 What information Mr. Martin can provide in regards to
8 what they do to give us a surety that the 2017 numbers or names or
9 whatever is reliable to be used at 2020, I'll take that consideration in
10 the end.

11 MR. GASTON: Thanks, Your Honor.

12 THE COURT: But this will be admitted for that purpose.

13 MR. GASTON: Thank you, Your Honor.

14 THE COURT: You're welcome.

15 [Defendant's Exhibit Number B admitted.]

16 BY MR. GASTON:

17 Q And, Ms. Witt, the merges that were done, I want to
18 clarify, the last merge that was done in 2016 was December 2016,
19 right?

20 A Yes.

21 Q And then in 2018, when was the first merge?

22 A March, I believe.

23 Q Okay.

24 A 2018.

25 THE COURT: In 2018?

1 THE WITNESS: Yes. Uh-huh.

2 BY MR. GASTON:

3 Q So it wasn't until March of 2018 that voter records were
4 introduced into the master list, right?

5 A Yes.

6 THE COURT: And then why was that? When the order
7 happened, tell me -- there's, obviously, a time lapse. So can you
8 explain to me what happened in the interim?

9 THE WITNESS: Yes. There was anticipation of the
10 passage of -- I forget which assembly bill it was, but it took effect in
11 July of 2017, which required us to incorporate the voter rolls and
12 also DETR. And so you can't just dump another source into the
13 database. It's a very complex technological process that has to be
14 conducted by our vendor, where they do specific matching and, like
15 I said, very technological, way above my head.

16 And so there were delays, because we were anticipating
17 the passage of that law and also whether or not Avenue would be
18 available. Avenue's our vendor. And so it's not something where
19 you can just -- okay, just add it in. It's a very complex process. And
20 so we were -- the hope was to be able to have all sources.

21 THE COURT: So to merge all the sources at the same
22 time?

23 THE WITNESS: Yes. Yes, because it's not an easy
24 process that you want to do every other day. You know, it's
25 something --

1 THE COURT: Understood.

2 THE WITNESS: -- that we were hoping to be able to do
3 them all at once.

4 THE COURT: Go it. Thank you.

5 Continue.

6 BY MR. GASTON:

7 Q And the law that you're talking about, that's the statute I
8 previously talked about, NRS 6.045, correct?

9 A Yes.

10 Q That became effective on July 1st, 2017?

11 A Yes.

12 Q And are you familiar with the four sources that it says that
13 a jury commissioner needs to use?

14 A Yes.

15 Q And what are those four sources?

16 A They are Nevada DMV, a utility, which in our case is
17 Nevada Energy, voter rolls, and DETR.

18 Q Okay. And so the administrative order was effective
19 November 22nd of 2016. The NRS 6.045 was effective July 1st
20 of 2017, mandating two additional sources for you to use, and -- but
21 neither of those were introduced into the master list until the merge
22 of March of 2018; is that correct?

23 A Yes.

24 Q And your testimony to the judge is that the reason it took
25 so long to do the -- to implement the voter records is because it's

1 difficult to do a merge and you knew there was going to be a fourth
2 source needed to be added anyways, so it just seemed more
3 efficient to wait and do it all at once; is that right?

4 A Yes.

5 Q Okay. With respect to the DETR records, you were aware
6 before NRS 6.045 became effective, that pretty soon there was a
7 good chance you were going to need to be using the DETR records;
8 is that correct?

9 A Yes.

10 Q And you had sent an e-mail to the -- to DETR to try to get
11 those records and get that process started back in, like, January of
12 that year; is that right?

13 A I don't remember the date. I do remember sending
14 e-mails.

15 Q Okay. Now, between the January period and --

16 THE COURT: January of what year?

17 MR. GASTON: January 2017.

18 BY MR. GASTON:

19 Q And -- sorry.

20 MR. GASTON: Court's indulgence one second.

21 THE COURT: Uh-huh.

22 BY MR. GASTON:

23 Q In March of 2018, when you guys did that merge, were the
24 DETR records actually being included during that merge?

25 A No.

1 Q Okay. So even when you did the merge almost a year and
2 a half after the administrative order process, you guys still did not
3 have DETR records introduced?
4 A That's correct.
5 Q And that --
6 THE COURT: But -- sorry -- with that merge, the voter
7 was?
8 MR. GASTON: The voter --
9 THE WITNESS: Yes.
10 MR. GASTON: I didn't ask that one yet.
11 BY MR. GASTON:
12 Q The voter was introduced in March of 2018; right?
13 A Yes.
14 Q But the DETR records were still [indiscernible]?
15 A That's correct.
16 Q And then there was a second merge in 2018; is that
17 correct?
18 A I'm trying to remember. Yes -- oh, I have notes. There -- I
19 think there was only one in 2018.
20 Q 2018?
21 A Uh-huh.
22 Q Okay. But, fair to say, between the passage of NRS 6.045
23 and March 8th of 2019, DETR records still had not been introduced
24 into the master list; is that correct?
25 A Yes.

1 Q So making sure I asked my questions here. Chief Judge
2 Administrative Order 1607 was November of 2016, and it took
3 approximately a year and a half to comply with that order and
4 introduce the voter records in the master list; is that correct?

5 A A year and a couple of months, yes.

6 Q Okay. NRS 6.045 became effective July 1st, 2017;
7 although you were aware of its likely passage as early as six
8 months before that. But by March of 2019, almost a full two years,
9 you guys were still not in compliance with NRS 6.045; is that
10 correct?

11 A We attempted to, but they're -- DETR would not turn over
12 the records.

13 Q So I want to talk about that. By attempted to, you're
14 referring to the e-mails that you sent to DETR asking for the
15 records, right?

16 A No, there was actually a statewide effort by the
17 Administrative Office of the Courts to get those records for all of the
18 courts in all of Nevada.

19 Q But when you're talking about those efforts, what you're
20 really talking about is the e-mails that were sent to the Department
21 of Employment Training and Rehabilitation, correct?

22 A No, there was more than that involved.

23 Q Do you remember --

24 A I mean, like I said, it would be -- it was a problem across
25 the state for everyone.

1 Q Do you remember --

2 A And so --

3 Q I'm sorry, I don't mean to interrupt.

4 MS. BOTELHO: Your Honor, I would ask that he allow the
5 witness to finish her answer.

6 THE COURT: That's fine.

7 MS. BOTELHO: Before he interrupts.

8 THE COURT: Yeah, I agree.

9 MR. GASTON: Go ahead, I didn't mean to --

10 THE COURT: Go ahead, Ms. Witt.

11 THE WITNESS: So it became known that DETR was not
12 cooperating due to reasons of confidentiality. And so that's why
13 the Administrative Office of the Courts undertook the effort to work
14 on behalf of all of the courts in Nevada. And so it was being
15 coordinated through them.

16 BY MR. GASTON:

17 Q Do you remember testifying in Mungai, the Mungai case
18 we talked about earlier?

19 A I remember testifying in that case, yes.

20 Q Do you remember there was a break in your testimony
21 where you and your attorney, Adrian Viesca, went back to your
22 offices and tried to locate all documents that would establish any
23 efforts made by you to try to obtain the DETR records?

24 A I remember looking for various e-mails and things, yeah.

25 Q Do you remember coming back on the record after

1 providing a few documents to Ms. Hojjat from my office and
2 testifying that that was the entire -- that the documents that you had
3 turned over was the entirety of the documents that you found that
4 would relate to you trying to secure the DETR records?

5 A Yes.

6 Q And do you remember that those documents included,
7 essentially, not two e-mails?

8 A Yeah. If that's what you say it is, yes.

9 Q Are you aware of statute NRS 612.265?

10 A Not off the top of my head.

11 Q If I told you that this was the statute that detailed
12 specifically how to obtain DETR records, does it -- would that make
13 it sound more familiar?

14 A Not off the top of my head, no.

15 Q Are you aware that, pursuant to NRS 612.365, the only
16 way to actually obtain the DETR records would be through a written
17 agreement request for information from you or the chief judge?

18 A Okay. Now I recall the -- yes.

19 Q And that agreement and request for information -- I'm
20 going to --

21 MR. GASTON: Can I approach?

22 THE COURT: Yes.

23 MR. GASTON: I'm going to show a copy of the juror list.

24 THE COURT: Yeah, you can move through the well freely.
25 You don't have to ask.

1 MR. GASTON: Thank you.

2 BY MR. GASTON:

3 Q I'm showing you a copy of the agreement and request for
4 information --

5 A Uh-huh.

6 Q -- between you and -- the Eighth Judicial District Court and
7 DETR; is that correct?

8 A Yes.

9 Q And I'm showing you your signature on the second page?

10 A Yes, I signed that.

11 Q And the date of that signature is March 8th, 2019?

12 A Yes.

13 Q Thank you.

14 After you guys submitted the agreement and request for
15 information is when you finally got the DETR records; is that
16 correct?

17 A Yes.

18 MR. GASTON: May I move to admit this as Defense
19 Exhibit B, I guess -- or C, wherever we're at.

20 THE COURT: Yeah. State, your position in regard to the
21 admission of the e-mails.

22 MS. BOTELHO: No objection.

23 THE COURT: Okay. Those will be admitted as Defense
24 next.

25 [Defendant's Exhibit Number C admitted.]

1 BY MR. GASTON:

2 Q So, fair -- just to -- NRS 612.265 doesn't allow you to get
3 the DETR records simply by e-mailing or requesting it, right?

4 A No.

5 Q You have to actually do a specific agreement and request
6 for information as shown?

7 A Yes.

8 Q All right. And that was not done until March of 2019,
9 almost two years after the passage of NRS 6.045?

10 A Yes.

11 Q And, actually, after -- more than two years after you were
12 first aware of the [indiscernible] passage of that bill; is that correct?

13 A Yes.

14 Q So to generate summons, you use a computer program
15 that auto-generates the summonses, essentially, by randomly
16 selecting the individuals from the master list?

17 A Doesn't auto-generate. I give it the dates and instruct it to
18 generate the summonses or the pools for the summonses, yes.

19 Q The program doesn't account for race or ZIP codes in any
20 way?

21 A No.

22 Q Okay. Now, the race that you have in the master list for
23 certain individuals, that racial date is only for individuals who have
24 previously appeared and indicated their race, correct?

25 A Yes. If we have historical data or when they respond to

1 the summons.

2 Q So at the time of Valentine's trial, you were not aware of
3 the racial makeup of the summoned jurors unless the juror had
4 previously served in the Eighth Judicial District Court?

5 A That's correct.

6 Q And in July of 2017, you did not compare the
7 demographics of Clark County to the demographics of the master
8 list; is that correct?

9 A You mean when I was creating the pools?

10 Q Just generally, I guess, in your job duties, would you
11 agree that you -- would you agree that it is rare for you to take a
12 look at the master -- rare, if ever, to take a look at the master list and
13 compare the racial data you have in the master list to the
14 demographics of Clark County at large?

15 A I don't look at the entire master list. It's 3.5 million
16 records.

17 Q Okay.

18 A But I do periodically look at the census data and I look at
19 the reports that we run on a daily basis and the reports that I run
20 from various cases.

21 MR. GASTON: Court's indulgence. Sorry. I was making
22 sure I had -- I didn't miss anything.

23 No more questions, Your Honor.

24 THE COURT: Ms. Witt, you said you periodically look at
25 the census data and then look at the reports that you're running --

1 THE WITNESS: Uh-huh.

2 THE COURT: -- for the various cases that you have for
3 trial. So, A, why do you do that? And B, if you don't think that they
4 are comparable, what do you do?

5 THE WITNESS: I do that just to kind of be aware and keep
6 in my head, to alert myself, if I feel like anything's an issue. And
7 then I can report it up the chain of command. But it's a random
8 process and the results are random. And that's what I expect.

9 THE COURT: Okay. Thank you.

10 All right. Cross by Ms. Botelho.

11 MS. BOTELHO: Yes.

12 **CROSS-EXAMINATION**

13 BY MS. BOTELHO:

14 Q Good afternoon, Ms. Witt.

15 A Good afternoon.

16 Q Ms. Witt, in speaking about jurors self-reporting their race,
17 okay, how do you get the racial information for potential jurors?

18 A When they respond to the questionnaires, they are able to
19 do that either online or through the automated phone system.

20 Q Okay.

21 A It asks for that information. And then that system or that
22 information is recorded in the database. And then when I create the
23 panel or whenever people are in a -- you know, depending on which
24 report I'm running, it pulls the information and by pool, by
25 attendant state, or by the case.

1 Q Okay. And so correct me if I'm wrong, but you sent out
2 questionnaires along with the summonses about six weeks prior to
3 the date the potential juror has to appear; is that right?

4 A Yes.

5 Q And so there's a questionnaire that the potential juror can
6 fill out online or in person and mail in or --

7 A It's online or through the automated phone system.

8 Q Okay. Okay. And so -- but that requires that particular
9 juror to actually report a race; is that right?

10 A To what?

11 Q The juror would have to choose to report their race --

12 A Yes.

13 Q -- is that right?

14 A Yes, they would have to choose to.

15 Q Okay. Could a juror or potential juror not designate a
16 race?

17 A Yes.

18 Q And would the nondesignation of their race preclude them
19 from, you know, going further into the jury selection process?

20 A No.

21 Q Okay. Are there instances where jurors do not report their
22 race?

23 A Yes.

24 Q Okay. Do you happen to know how many jurors,
25 potentially, if you could give us a percentage, actually don't report

1 their race?

2 A It varies. There's also another category that's other.

3 Q Okay.

4 A Which could be anything.

5 Q Okay. Like, people who are mixed races or --

6 A Yes.

7 Q -- who are -- I mean, but we'd be speculating at this point
8 as to why they wouldn't have picked a race --

9 A Yes.

10 Q -- to designate a race?

11 A Correct.

12 Q Okay.

13 THE COURT: If they don't report the race, does it
14 automatically put them in other or does it say nonreport?

15 THE WITNESS: I believe it shows unknown.

16 THE COURT: Unknown?

17 THE WITNESS: Yeah, we have the unknown.

18 BY MS. BOTELHO:

19 Q Okay. And so I kind of want to go back to 2017, and I
20 understand you had a lot of subpoenas from various cases
21 involving this particular time period, okay? So correct me if I'm
22 wrong, but at some point, July 1st of 2017, a new law was passed
23 asking the jury commissioner with court administration to include
24 two additional sources by which to select jurors; is that right?

25 A Yes.

1 Q Okay. And so what was added at that time would have
2 been the DETR records and the voter registration records; is that
3 right?

4 A That's what were supposed to --

5 Q What was mandated?

6 A Yes. Yes.

7 Q Yes. Yes.

8 A Yes.

9 Q Or what was added, at least, in the NRS, right?

10 A Yes.

11 Q Okay. Now, prior to that, you were drawing from DMV
12 records as well as Nevada Energy?

13 A Correct.

14 Q Okay. And so when Mr. Valentine's -- the master list that
15 Mr. Valentine's jury venire would have been selected from or the
16 summonses that would have been sent for the date encompassing
17 Mr. Valentine's trial, first day of trial, would have had DMV records
18 as well as the -- DMV records -- DMV records as well as NV Energy
19 records, right?

20 A Yes.

21 Q Okay. Mr. Gaston asked you a little bit about why these
22 merges didn't happen initially. And so I want to talk about the voter
23 records first. Okay.

24 A Okay.

25 Q So my understanding is those were added to the database

1 in March of 2018?

2 A Yes.

3 Q Okay. There was a delay in that; could you explain to us
4 what caused the delay, at least in terms of the voter records being
5 merged?

6 A Well, like I said, we -- our vendor -- again, it's a really
7 comprehensive process. So we were anticipating getting the DETR
8 list and hoping to be able to have all four sources. It's not -- like I
9 said, it's not something where you could just, okay, put in voter
10 rolls and then next week put in DETR. It's a very comprehensive
11 process that requires a lot of techno -- and, again, it's above my
12 head.

13 Q How long does it normally take, if you know, for Avenue
14 or whatever vendor you were using, to actually complete a merger?

15 MR. GASTON: Objection. Speculation.

16 THE COURT: If she knows, she can answer. If you don't
17 know, please don't answer.

18 THE WITNESS: I don't know specifically. It varies.

19 BY MS. BOTELHO:

20 Q Okay. And so in your experience, what have been the
21 variations of time?

22 A I've seen it take anywhere from a few days to months
23 depending on a variety of factors.

24 Q Okay.

25 A Yeah.

1 Q And so that's regarding the voter records, you were
2 waiting to -- in anticipation of the DETR records being added, I
3 mean, in July, you were going to wait for that big, big merger?

4 A To try to have all sources, yes.

5 Q Okay. And so then July 1st rolls around, July 1st of 2017
6 rolls around and it becomes law to add the DETR records; is that
7 right?

8 A Yes.

9 Q Okay. And through Mr. Gaston's questioning, you were
10 trying to tell the Court about the efforts that yourself and, actually,
11 the court administration undertook to get the information from
12 DETR so that you could provide that information to Avenue to
13 complete this really large merger. Can you tell us about -- I know
14 that that's Exhibit -- I believe it's B -- was admitted into evidence.
15 And this has e-mails --

16 MR. GASTON: That's just the agreement.

17 MS. BOTELHO: This is just the agreement? Okay.

18 THE COURT: Ms. Witt -- let me -- Ms. Botelho, let me ask
19 a question about that.

20 MS. BOTELHO: Yes.

21 THE COURT: So the -- Exhibit B is the actual form, you
22 know, the agreement?

23 THE WITNESS: The data-sharing agreement, basically.

24 THE COURT: How long after you sent that to them did
25 they provide you with the records?

1 THE WITNESS: The actually -- the format of that was
2 agreed upon, that's part of the reason for the delay. It was a lot of
3 going back and forth and through the administrative office of the
4 court. That's why I didn't have a lot of interaction. Court
5 administration was -- had some interactions with the Administrative
6 Office of the Courts, but it was --

7 THE COURT: So that's --

8 THE WITNESS: -- the Administrative Office of the Courts
9 that was coordinating and working back and forth with DETR. And I
10 believe that's the agreed-upon format that they came up with. And
11 I believe all the courts signed the -- a similar document, but specific
12 to their court.

13 THE COURT: And then it's because of that that DETR --
14 the agreement that DETR ultimately ended up getting sent over?

15 THE WITNESS: Yes.

16 THE COURT: But do you know -- sorry -- do you know,
17 after that was sent, do you know how long it took to get the records
18 after that, after they sent --

19 THE WITNESS: I don't know specifically -- exactly, no.
20 Our IT division secures all that information.

21 THE COURT: Okay.

22 THE WITNESS: It's all very technological.

23 THE COURT: Go ahead, Ms. Botelho.

24 BY MS. BOTELHO:

25 Q Okay. I would like to just kind of go through, as you just

1 indicated with Judge Bluth, kind of some of at least what you were
2 aware of, what efforts were being undertaken to obtain the
3 information from DETR. So my understanding from Defense
4 Exhibit B is that at some point an agreement and request for
5 information was drafted; is that right? And I'm showing you --

6 A Yes.

7 Q -- Defense B.

8 A Yes.

9 Q Okay.

10 A Uh-huh.

11 Q And you just told Judge Bluth that it actually took a little
12 bit of time to get that particular agreement even drafted?

13 A Yes.

14 Q Okay. And during the time before that was drafted and
15 ultimately agreed upon, in March, I believe, of 2019, were there
16 efforts made by yourself or court administration to obtain the
17 records?

18 A At that point, it was being handled by the Administrative
19 Office of the Courts.

20 Q Okay. But my question is: Prior to this actual agreement,
21 there were efforts to try to get this information, correct?

22 A Yes. I mean, I'm -- I believe they -- I couldn't tell you
23 specifically who talked to the AOC from court administration, but I
24 know there were conversations where they would check on the
25 progress, I believe.

1 Q Okay.

2 A Yeah.

3 Q And so [indiscernible].

4 MS. BOTELHO: I'm approaching your clerk, Your Honor --

5 THE COURT: Okay.

6 MS. BOTELHO: -- to have State's Proposed Exhibit 1
7 now -- thank you.

8 BY MS. BOTELHO:

9 Q Now, Mr. Gaston, during this direct, asked you about
10 taking part in the Mungai hearing.

11 A Yes.

12 Q And actually the hearing stopping and you looking for
13 some e-mails, which you acknowledged remembering; do you
14 remember that series of questions from Mr. Gaston?

15 A I believe it was after testifying --

16 Q After --

17 A -- that we -- yeah.

18 Q Okay. And you did locate some e-mails, at least, that you
19 had in your possession kind of showing some of the efforts that you
20 undertook to get the records; is that right?

21 A Yes.

22 Q Okay. I'm showing you what's been marked for
23 identification as State's Proposed Exhibit 1. If you could just kind of
24 thumb through those and let me know when you're done.

25 A Yeah, it was an ongoing effort by different people in IT,

1 court administration --

2 Q Okay.

3 A -- myself and, of course, the Administrative Office of the
4 Courts.

5 Q Okay. So let me --

6 MR. GASTON: Your Honor, I'm going to object to that --
7 I'm -- Your Honor, I'm going to object to the testimony that she's
8 testifying as to what she thinks other people did to try to get these
9 records, because that -- lack of foundation. I'm fine with the e-mails
10 generally -- to specifically her e-mail being introduced. But the
11 reason I didn't introduce the e-mails is because it's hearsay with
12 respect to what other people did or didn't try to do to try to get the
13 records. And also probably lacking foundation as to what others
14 tried to do in order to get this.

15 I think she can testify what she specifically tried to do or
16 didn't do, but I think just kind of guessing on what others may or
17 may not have done I think would be improper and also these
18 e-mails include, except for the e-mail specifically that she sent, I
19 think it includes a whole bunch of things that other people did.

20 THE COURT: All right. So I don't have them in front of
21 me, so can I see them, please, Ms. Botelho?

22 MS. BOTELHO: Yes.

23 THE COURT: So I know exactly what I'm ruling on. Thank
24 you.

25 All right. So Ms. Botelho, what's your position? I mean,

1 she's a part of a lot of these.

2 MS. BOTELHO: Yes.

3 THE COURT: But then there's some that she's not a part
4 of at all. So, I mean, I think that the record can clearly show and
5 state that she is sending e-mails directly to DETR as early as
6 May 10th of 2017, asking if, like, who do I contact? How can we get
7 this process started? But then within other parts of the exhibit, it
8 doesn't have, you know, anything to do with her --

9 MS. BOTELHO: Okay.

10 THE COURT: -- foundationally. On some of them, not all
11 of them.

12 MS. BOTELHO: I'm sorry.

13 THE COURT: There's --

14 MS. BOTELHO: Let me take those, Your Honor.

15 THE COURT: There's a bunch of them.

16 MS. BOTELHO: Okay. And, Your Honor, when you state
17 that it has nothing to do with her --

18 THE COURT: Sorry, I'm -- I shouldn't say nothing to do
19 with her. I mean she's not a part of it. There are some that are to
20 different people from different people and she's not cc'd or --

21 MS. BOTELHO: Oh. Okay. Your Honor, it's not being
22 offered -- at least -- it's not hearsay, because it's not being offered
23 to prove the truth of the matter asserted. Really, on direct
24 examination, semi-cross-examination by Mr. Gaston, he asked her
25 at length about all of the different efforts that she undertook or

1 what little -- I mean, it was more what little effort she undertook to
2 try to obtain these records. He mentioned some e-mails, so the
3 e-mails are located here. But her answer has always been that she
4 was not undertaking these efforts to try to merge this herself. I
5 mean, it was always with the help of court administration, who
6 oversee her in her capacity as jury commissioner.

7 So, really, this is being introduced to prove that there
8 were other efforts being made to obtain these records such that the
9 merger could have been done in a much quicker manner. And that
10 there were -- these are individuals who are employed with the
11 court. I mean, these are e-mails from the assistant court
12 administrator, Andres Moises [phonetic]. I mean, we have all of
13 these individuals who are -- who had everything to do with
14 obtaining these records. And that's what she testified to during
15 direct examination.

16 This was a statewide, like, launch or a statewide campaign
17 to obtain these records for all of the courts. And it was the court
18 administrator that actually undertook that effort. And so she's
19 knowledgeable about these efforts. She was able to obtain these
20 e-mails that didn't even have anything to do with her, because she
21 was kept in the -- no, she's the jury commissioner who was tasked
22 with putting together that list or at least sending off the list and
23 then adding sources to that list.

24 THE COURT: I think the documents, number one, are
25 self-authenticating. But I also think that they're generally reliable,

1 because you can just clearly see the individuals who are writing
2 them and then they're -- everyone is just saying how can we get
3 these lists? What information do you need? So I'm going to allow
4 them in as State's admitted 1 over the objections of the --

5 MS. BOTELHO: Thank you.

6 [State's Exhibit Number 1 admitted.]

7 BY MS. BOTELHO:

8 Q And, so, ma'am, just for the record, and I'm approaching
9 with State's Exhibit 1, now admitted, just going to find the e-mails
10 here. If you could help me thumb through this and identify for us
11 the date that you first attempted to try to get these records. Would
12 that have been May of 2017? Sorry, I don't have these in date
13 order.

14 A Yeah. It's right at the top.

15 Q Okay. So page 1 of State's Exhibit Number 1, does this
16 show you, actually, sending an e-mail to DETR on May 10th of 2017
17 requesting, you know, or at least requesting -- asking how you can
18 obtain these records to comply with the anticipated Assembly
19 Bill 207?

20 A Yes, that's correct.

21 Q Okay. And so is it your testimony that beginning
22 May 10th of 2017, all the way up until this particular agreement, as
23 shown in Defense Exhibit B, until that was signed and executed,
24 efforts were being made by yourself, by court administrator, to your
25 knowledge, to obtain these records, to obtain this information such

1 that it could be merged?

2 A Yes.

3 Q And up until that time, you all had not agreed, up until
4 March of 2019, DETR and the Eighth Judicial District Court had not
5 agreed upon a format or an agreement for the release of said
6 records; is that correct?

7 A Yes.

8 Q Okay. And immediately upon reaching that agreement,
9 were efforts made then, and did DETR subsequently release the
10 records?

11 A Yes.

12 Q And were they merged as soon as practicable?

13 A I don't know all the details of that because IT handled it,
14 but yes.

15 Q Okay. Ma'am, in 2017, and even up during the course of
16 your position at the jury commissioner, have you done anything
17 with regard to these lists such that you were trying to
18 systematically exclude one race?

19 A No.

20 Q Have you -- you, obviously, have access to the data; is that
21 right?

22 A Yes.

23 Q Okay. Do you have anything to do with the numbers that
24 actually -- or the names that actually show up on the master list?

25 A No.

1 Q Personally?

2 A No.

3 Q Okay. Does anyone at court administration have anything
4 to do with the inputting of the actual names into this master list?

5 A No.

6 Q Okay. To your knowledge and as jury commissioner
7 who's charged with maintaining this list and a qualified jury pool,
8 have you done anything with the list such that you were trying to
9 skew the numbers to underrepresent Hispanics in Clark County?

10 A No.

11 Q And have you done that with African-Americans?

12 A No.

13 Q Is there even a way for you or the administration to play
14 with the numbers such that you would be systematically trying to
15 exclude a specific race?

16 A No.

17 Q When you -- when different sources or additional sources
18 of information, for instance in this case, DETR or voter records are
19 included, is it fair to say that those sources are meant to include
20 more people into the jury pool?

21 A Yes.

22 Q Okay. And so with each source being added, the jury
23 commissioner, yourself, court administration is trying to cast a
24 wider net to catch as many potential jurors or qualified jurors to go
25 into that master list; is that right?

1 A Yes.

2 Q Okay. And so is it fair to say that, really, the goal is
3 inclusion as opposed to exclusion?

4 A Yes, that's correct.

5 Q Okay.

6 MS. BOTELHO: Court's brief indulgence.

7 Q You also mentioned during direct examination that, really,
8 one of your goals and one of your jobs statutorily is to assure some
9 random selection from a computerized list; is that right?

10 A Yes, that's what the law states.

11 Q Okay. So it's not -- you don't have a computerized list or
12 this master list isn't saying, hey, I need 15 African-Americans, 15
13 Hispanics, 200, you know, Caucasians, and then throw that into a
14 list; it's actually random, correct?

15 A Yes.

16 Q Okay. And that's what the law mandates?

17 A Yes.

18 Q And, to your knowledge, is that what the computerized
19 system that you were employing, is that what it was doing?

20 A Yes.

21 Q Concerning these sources that you use, okay, there was
22 some questions about duplicates. So in 2017, when Mr. Valentine
23 went to trial, presumably, anyone over 18 who has a driver's license
24 or an identification card would have been on the master list,
25 correct?

1 A Yes.

2 Q And so the addition of the NV Energy records would have
3 caught homeowners or, you know, apartment dwellers or other
4 individuals who would have had some sort of utility in their name?

5 A Yes.

6 Q Okay. Now, if you were to add voter registration records
7 as, you know, you were trying to do after the order, the
8 administrative order, fair to say that there's some overlapping
9 between jurors that would fit into any one of those sources? Does
10 that question make sense?

11 A Yes.

12 Q Okay. And so you already have DMV records, you have
13 the NV Energy records, and presumably, adding the voter
14 registration records, there would be some duplicates, correct?

15 A Yes.

16 Q Some of these voter people or people who are registered
17 to vote would have driver's licenses or ID cards, correct?

18 A Yes.

19 Q And these same voter people could also own a home or
20 an apartment or have a utility in their name, correct?

21 A Yes.

22 Q Okay. The same way with the addition of DETR records,
23 correct?

24 A Yes.

25 Q I mean, there will be some overlapping; is that correct?

1 A Yes.

2 Q All right. There's going to be someone who files an
3 unemployment claim, presumably would have a driver's license,
4 correct?

5 A Yes.

6 Q And presumably would have a job or a home or an
7 apartment that they would pay a utility for?

8 A Yes.

9 Q Or that would be registered to vote?

10 A Yes.

11 Q So by the very nature of this trying to include as many
12 people, there are going to be duplicates?

13 A Yes.

14 Q Okay. But with each addition of sources, you are just
15 trying to ensure to catch the people that may not necessarily fall
16 within the duplicate sources?

17 A Yes.

18 MS. BOTELHO: I have nothing further, thank you.

19 THE COURT: Redirect.

20 MR. GASTON: Can I see State's Exhibit 1, if that's okay?
21 Thank you very much.

22 **REDIRECT EXAMINATION**

23 BY MR. GASTON:

24 Q So you talked about the court administrator's office. Who
25 is that? Who -- what kind of people does that comprise?

1 A Court administration would be the chief judge, it would be
2 the court executive officer, it would be assistant court
3 administrators.

4 Q So you talked about that other people from the court
5 administrative office were trying to obtain the DETR records,
6 correct?

7 A Yes.

8 Q Again, just mentioning, you're aware that, pursuant to
9 NRS 612.265, it's a statute dealing with disclosure of information
10 from DETR, essentially, and it says that the only people who can
11 make a request pursuant to that statute for information are you, the
12 jury commissioner, and the chief judge, right?

13 A Yes. But I made that request and --

14 Q In 2019?

15 A And then court administration and IT and others
16 undertook it and went forward. I trust them to do their job.

17 Q Isn't it correct that you made that request pursuant to
18 NRS 612.265 for the first time on that date in March of 2019? That's
19 the agreement that we just saw.

20 THE COURT: Sorry, repeat the question.

21 MR. GASTON: Isn't it -- can I have Defense Exhibit --
22 wrong one, the DETR one? I think it's B or C.

23 THE COURT: Oh, it's up there.

24 THE WITNESS: It's here.

25 MR. GASTON: May I approach the witness?

1 THE COURT: Yeah.

2 BY MR. GASTON:

3 Q This exhibit, Exhibit B, isn't this the first time you've
4 actually made a request for this information pursuant to the
5 statute?

6 A No. I mean, I made those e-mailed requests early on.

7 Q Okay. Is -- does NRS 612.265, as far as you're aware, say
8 that you can request that information simply by sending an e-mail?

9 A No.

10 Q It says that you need to do an agreement or request for
11 information, drafted, just like this, which has a heading of:

12 Information as requested pursuant to this agreement and
13 request for information below is requested pursuant to the
14 provisions of Nevada Revised Statute 612.265.

15 Correct?

16 A Okay. Yes. According to that statute, yes. That was my
17 first effort to --

18 Q So this is the --

19 A -- in writing.

20 Q -- first time that you made a formal request --

21 A In --

22 Q -- pursuant to 612.265 to obtain the DETR information,
23 correct?

24 A Yes.

25 Q That request was signed and dated by you on

1 March 8th, 2019?

2 A Yes.

3 Q Okay. Prior to March 8, 2019, you never made a request
4 pursuant to NRS 612.265 to obtain that information, correct?

5 A No.

6 Q As far as you're aware, the chief judge never made a
7 request, right?

8 A I couldn't tell you.

9 Q Okay. And as far as you understand the statute, if the
10 other people in the Court Administrative Offices that you're talking
11 about made a request, DETR could just ignore them, because it's
12 not a request that complies with the statute, correct?

13 A I suppose.

14 Q Okay. Also, when you got the voter registration, you got
15 that by getting a court order to order the voting records be turned
16 over to you, correct?

17 A It was requested through IT. Our IT division secures the
18 list on our behalf.

19 Q You or your office for the voting records got a court order
20 to get the voting registration list; is that correct?

21 A We have the administrative order, yes. Uh-huh.

22 Q You or your office, in order to get the voter registration
23 people to give you their list so you could give it to Avenue to
24 implement it in their list, you got that voter registration info by first
25 getting a court order ordering them to give it to you; is that

1 information correct?

2 A I don't know how IT got it. I know IT secured the
3 information.

4 Q You're testifying is that some guy in the IT department got
5 the voter -- the Nevada voter rolls handed to them; is that your
6 testimony today?

7 A Our IT division secured the voter rolls, yes.

8 Q So the Eighth Judicial District Court's IT division or the
9 private vendor Avenue's IT division?

10 A Our IT division --

11 Q When you say our --

12 A -- was able to.

13 Q -- do you mean the Eighth Judicial District Court --

14 A Yes, Eighth Judicial District Court.

15 Q -- or do you mean the private vendor Avenue?

16 A Eighth Judicial District Court --

17 Q Okay.

18 A -- secured the list.

19 Q Okay.

20 A The lists were provided to Avenue, Avenue conducted the
21 merge.

22 Q So your understanding is that the IT department of Eighth
23 Judicial District Court are the ones that obtained the voting
24 registration rolls?

25 MS. BOTELHO: Objection. That's not what she's

1 testifying to.

2 MR. GASTON: Well, then she can answer my question.
3 Because I'm just asking.

4 THE COURT: Okay. So I thought the objection was going
5 to be asked and answered, because I actually think that she has said
6 that multiple times.

7 I -- it's your understanding that the way that the voter rolls
8 were secured was through the IT department?

9 THE WITNESS: Yeah, IT secured them.

10 THE COURT: Right. So you don't know how IT got them,
11 whether it was court order, whether the chief judge got them; you
12 just know --

13 THE WITNESS: No.

14 THE COURT: -- that IT had them, sent them to --

15 THE WITNESS: Yes.

16 THE COURT: -- Avenue.

17 THE WITNESS: That's correct.

18 BY MR. GASTON:

19 Q As jury commissioner, I want to talk about merges for a
20 minute. A merge is how people -- a merge -- mergers are how the
21 master list is regularly updated; is that correct?

22 A Yes.

23 Q So new names get added in or names are taken out or
24 whatever [indiscernible], right?

25 A Yes.

1 Q Okay. We've talked about how Avenue does a
2 technological side of things to introduce the new information that
3 they've received into the actual master list, right?

4 A Yes.

5 Q Okay. But the information they're receiving, essentially,
6 the list of names from the sources, Avenue, the private vendor, gets
7 that information from you, correct?

8 A From me indirectly, through IT, court administration,
9 when those are secure, they are provided --

10 Q Okay.

11 A -- through, like, a portal, I believe. But yes.

12 Q So you, as the jury commissioner, are supposed to
13 oversee this process, right?

14 A It names me, but because of the voluminous -- the
15 volume -- the volume of those lists, it's not something I can just
16 hand somebody a piece of paper and say, Here you go. It has to be
17 handled in a technological fashion.

18 Q I understand.

19 A So I require IT's assistance to do that.

20 Q Would you agree with me that NRS 6.045 says:

21 The jury commissioner shall compile and maintain a list of
22 qualified electors --

23 From those four sources that we mentioned before?

24 A Yes. But it -- I don't personally maintain 3.5 million
25 names. I --

1 Q I know.

2 A -- rely on IT position to do --

3 Q Okay.

4 A -- their job.

5 Q So when a merger happens --

6 A Yes.

7 Q -- it is you or your office overseen by you, because you're
8 in charge, who gets an updated list from Nevada Energy and
9 provides it to Avenue; is that correct?

10 A It's court administration, in reality.

11 Q So what do you do exactly? What -- do you have any
12 oversight at all of people who are obtaining new records and
13 providing it to the private vendor? Do you -- I'm just -- let me
14 rephrase that question if that was too broad.

15 Do you, as the jury commissioner, view it as your job duty
16 to oversee the collection of a list of names from the four sources
17 and make sure that those sources are regularly updated with new
18 names and provided to the private vendor Avenue to be
19 implemented into the master list, yes or no?

20 A The statute names me. I coordinate, in fact, regularly
21 check with my boss in court administration about securing those
22 lists and the merges and when they're going to happen. I've made
23 many inquiries about, okay, we obtained source lists, when are we
24 going to do the merge? I -- that is what I do. But they are obtained
25 and secured through court administration and IT. And then,

1 because DETR's statute, the way that law was written specifically
2 names me or the chief judge, I --

3 Q Would it surprise you if the statute just names you? The
4 NRS 6.045 just names you as the jury commissioner shall compile
5 and maintain a list of qualified electors from information provided
6 by the four things?

7 A No, I know that it -- that NRS 6.045 names me.

8 Q Okay. But, ultimately, Avenue, we agree the private
9 vendor Avenue does not get the list of names to be updated from
10 the master -- to the master list themselves?

11 A No, they don't obtain the names.

12 Q Those lists are provided to them by you or -- by you or,
13 according to the statute, overseen by you and the Eighth Judicial
14 District Court; is that correct?

15 A It's -- yes. But indirectly by me.

16 Q I know. And --

17 A It's through court administration and through IT division.
18 Again, you can't just hand over 3.5 million names. It has to be
19 computerized.

20 Q I understand.

21 So you believe that the IT department ultimately got a
22 court order to provide the -- to get the voting records and
23 implement that in the 2018 list; is that right?

24 A I don't know if they had an official court order to do it. I
25 just know that --

1 Q Okay.

2 A -- they -- the law was passed and they coordinated with
3 them to obtain those voter rolls.

4 Q Would it surprise you if they were required to get a court
5 order to do it? Would that information be surprising to you that
6 Nevada voting department didn't just hand it over to the IT guy, in
7 fact, the court had to sign an order to get that information?

8 A I'm not aware of its existence, but would it surprise me?
9 No.

10 Q Okay. Would it also surprise you that the U.S. Department
11 of Labor, another way that you could have gotten the DETR records
12 would be to get a court order the exact same way that the voting
13 records were provided. So you guys -- you or the chief judge can
14 make a request under NRS 612.265 or you could get a court order
15 ordering them to provide it to you; would that surprise you?

16 A No.

17 Q Do we agree that even though the statute, NRS 6.045,
18 went into effect July 1st of 2017, that in August of 2017, there was
19 still no request under NRS 612.265?

20 A No.

21 Q We agree there was still no court order filing?

22 THE COURT: Wait, no, we -- no, you disagree? Or --

23 THE WITNESS: No, I agree with it.

24 THE COURT: You agree?

25 Go ahead.

1 BY MR. GASTON:

2 Q Would you agree that there was still no court order sought
3 to try to get these records compiled?

4 A Not to my knowledge.

5 Q And I'm not going to go month by month, but August,
6 October, September, et cetera, all the way until for the first time
7 ever there was a request made in March of 2019 was either a court
8 order sought or a formal request by a named party in NRS 612.265?

9 A I'm sorry, say the question again?

10 Q March of 2019 was the first time that that was done, right?

11 A Yes.

12 Q Okay. Also, you testified today that there -- as far as your
13 understanding, there's a big statewide effort to try to obtain DETR
14 records; do you remember testifying to that?

15 A Yes.

16 Q Do you remember testifying in Mungai again, the same
17 case --

18 A Yes.

19 Q -- we were talking about earlier? And do you remember
20 being questioned extensively in Mungai to the point where you
21 guys actually took a break to talk further about efforts to get -- to
22 obtain the DETR records on what attempts you or the court
23 administrative office had made to try to obtain DETR records; do
24 you remember being questioned extensively about that?

25 A I do.

1 Q Would it surprise you if never anywhere ever in response
2 to anyone's questions in that transcript did you ever say that it was
3 a statewide effort to try to obtain DETR records?
4 A Would that surprise me?
5 Q Yeah.
6 A Yes.
7 Q Okay. Would you --
8 A I believe you, but it would surprise me.
9 Q Okay.
10 A Yeah.
11 Q Would it surprise you that today is the first time you've
12 ever testified under oath that there was a statewide effort to try to
13 obtain DETR records?
14 A That does surprise me.
15 Q Okay.
16 A I --
17 Q And when we talk -- again --
18 A I think I have talked about that before. But --
19 Q -- the State --
20 THE COURT: Hold on just one second. She's not done.
21 MR. GASTON: Oh, I'm sorry.
22 THE COURT: I'm sorry you said --
23 MR. GASTON: I didn't mean to interrupt you.
24 THE COURT: -- that would surprise me, I think that was?
25 Oh, I have talked about it before.

1 THE WITNESS: I think I have testified to that, maybe not
2 in these specific cases, but I could have sworn I had. But, I mean, I
3 don't know.

4 THE COURT: Okay.

5 MR. GASTON: Okay.

6 THE WITNESS: Yeah.

7 BY MR. GASTON:

8 Q And the State's exhibit that they introduced, the collection
9 of e-mails, I just want to clarify again that that's the same collection
10 of e-mails I was talking about before.

11 MR. GASTON: Actually, can I borrow the State's exhibit
12 again.

13 THE COURT: Yeah.

14 MR. GASTON: May I approach the witness again, Your
15 Honor?

16 THE COURT: Uh-huh. Yep.

17 BY MR. GASTON:

18 Q Showing you what's been marked as State's Exhibit 1.
19 This is a -- would you agree this is a collection of e-mails by you or
20 other people --

21 A Yes.

22 Q -- about trying to get the DETR stuff?

23 A Yes.

24 Q Okay. And the way that we got this collection of e-mails
25 was during that break that I mentioned earlier in the Mungai

1 testimony when you and your attorney, Mr. Viesca, went back to
2 obtain all records and documentary evidence related to trying to
3 obtain DETR records by you or court administrator's office; do you
4 remember that?

5 A So are you saying that we -- because, honestly, I don't --
6 we left and then came back to the hearing?

7 Q Yes. That's what it sounds like in the transcript.

8 A I --

9 Q I'm asking you, I wasn't there.

10 A I remember looking for e-mails, but to be honest with you,
11 I don't remember it being a break.

12 Q Okay.

13 A I really don't.

14 Q But do you remember being asked --

15 A I -- this --

16 Q Do you remember being asked --

17 A No.

18 Q -- in that testimony whether these documents were the
19 entirety of the documents that you guys were able to find?

20 A Yes.

21 Q Okay. And dour any reason to doubt that State's Exhibit
22 Proposed 1 is all of the documents that you guys provided us
23 earlier in that case?

24 A I'm sure that's what I could find at that time, yes.

25 Q Have you since found anything else that -- any other

1 efforts that you guys have done?

2 A I haven't been looking, so I --

3 Q Thank you.

4 MR. GASTON: Returning that State's Exhibit 1 to the
5 clerk.

6 Q So, again, just want to make sure I cleared up how
7 mergers work again, just in case I haven't. Merge -- a merger is
8 when Avenue, the private vendor, receives a list of names from you
9 or indirectly from you and then implements that into a master list;
10 is that, essentially, how a merger is?

11 A Yes.

12 Q Okay.

13 THE COURT: Mr. Gaston, what are you doing?

14 MR. GASTON: Sorry, I was consulting with
15 Ms. Dickenson. I wasn't texting.

16 THE COURT: Oh. Oh, okay. No, I thought that there
17 would be some type of reason that you were on your phone. I just
18 wanted to make sure. You can -- no, you can text Ms. Dickenson,
19 because she's not here.

20 MR. GASTON: Just confirming my tennis plans.

21 THE COURT: I just was looking to see if, like, I --
22 somebody was on there, like you know who that you were --

23 MR. GASTON: No, I was texting Ms. Dickenson and
24 asking if she had anything for me to add before I quit.

25 THE COURT: That's fair.

1 MR. GASTON: No more questions, Your Honor.

2 THE COURT: All right. Recross?

3 MS. BOTELHO: Yes, Your Honor.

4 THE COURT: Okay.

5 **RECROSS-EXAMINATION**

6 BY MS. BOTELHO:

7 Q Ma'am, I just want to clarify some of the questioning by
8 Mr. Gaston concerning these requests that were made for the DETR
9 records. Okay. So back to Defendant's Exhibit B, I'm going to show
10 it to you. What is that labeled?

11 A Oh, up here, you mean?

12 Q Up here.

13 A Agreement and request for information.

14 Q Okay. Now, you've testified previously during my first
15 cross-examination that it took quite a bit of back and forth for the
16 Court, the Eighth Judicial District Court, as well as DETR, the
17 higher-ups, to even come to an agreement concerning this
18 agreement and request.

19 A And the Administrative Office of the Courts, especially.

20 Q Okay.

21 A They were instrumental in working out these details.

22 Q Okay. So while this was the first written draft agreement
23 and request for information, this was just the first agreed-upon
24 agreement and request for information --

25 A Yes.

1 Q -- is that right?

2 A Yes.

3 Q Okay. So there were measures and efforts being taken to
4 even get to this agreement?

5 A Yes.

6 Q Okay. Now, let's talk about the people that undertook
7 these efforts, because I'm beginning to get the sense that it was not
8 just you. Okay. So let's talk about this briefly.

9 You're the jury commissioner for Clark County, correct?

10 A Yes.

11 Q Who do you report to? Who's your boss?

12 A Andres Moises or the assistant court administrator, but
13 also the court executive officer, the chief judge.

14 Q Okay. And so when you say, you know, it goes up the
15 chain, there are other individuals that are also going to help you
16 facilitate your particular job?

17 A Yes.

18 Q Okay. Or whatever it is that you need to do?

19 A Yes.

20 Q Such as get records to merge into a list?

21 A Yes.

22 Q Okay. Would it be fair to say that leading up to this final
23 agreed-upon agreement and request for information there were
24 other individuals above you, with you, also trying to request these
25 records?

1 A Yes.

2 Q Okay. You're not an attorney, are you?

3 A No.

4 Q Okay. And so when Mr. Gaston's asking you about, you
5 know, certain agreements or statutes wherein you're supposed to
6 request these agreements and things like that, is that something
7 that you, as the jury commissioner, would handle yourself, or is
8 there a legal liaison for him to kind of speak with?

9 A I do have a legal counsel that I consult.

10 Q Okay. And so was he assisting you, your legal counsel?
11 Is that Adrian Viesca?

12 A Yes.

13 Q Okay. Was that individual assisting you in also trying to
14 obtain these records within the confines of, like, the legal
15 requirements?

16 A Yes.

17 Q Okay. And that's as early as May of 2017, all the way up
18 until the final agreed-upon agreement and request for information
19 being signed by you?

20 A Yes.

21 Q Okay. And I notice also when Mr. Gaston was asking you,
22 you know, you indicated yes, a lot of the statutes name you,
23 specifically. You're the one that needed to sign this agreement and
24 request for information, because that's what the statute said; is that
25 right?

1 A Yes.

2 Q Okay. But does that mean that you are the only person
3 who was working on this actual agreement or who's working on
4 getting the DETR records?

5 A No.

6 Q Okay. You said a couple of times during your testimony,
7 both on direct and cross, that we're talking about 3.5 million
8 records.

9 A Yes.

10 Q Right? And so when you say voluminous, it is so
11 voluminous that we have to have access to these records by way of
12 a link and some password-protected information; is that right?

13 A Yes.

14 Q Okay. And so when we're talking about a merger and as
15 the jury commissioner, while you oversee compiling the jury list,
16 you yourself have testified just -- a lot during direct and cross that
17 in terms of the technical merger, that's not your division; is that
18 right?

19 A That's not me. No.

20 Q Okay. You actually have to get an outside vendor, right?

21 A Yes, we have an outside vendor.

22 Q And what is -- do you know what Avenue actually is? Is it
23 a data compilation agency? What do they do?

24 A They are a company that provides jury management
25 systems.

1 Q Okay. So we're talking this is a computerized system
2 dealing with millions of records?

3 A Yes.

4 Q Okay. So when we say -- or when you say, oh, there's
5 going to be a merger, you testified previously, sometimes it can
6 take a few days, sometimes it could take months, right?

7 A Yes.

8 Q Depending on so many things, including the number of
9 records; would that be fair to say?

10 A Yes.

11 MR. GASTON: Objection. Speculation. So I think she's
12 testified multiple times she has no idea what the technological
13 process behind the merger is. And while I understand the DA's
14 leading her to certain answers, I think it's beyond. It's -- according
15 to her testimony, it's beyond her scope of knowledge on how
16 Avenue actually does mergers.

17 THE COURT: So do you have independent knowledge in
18 regards to the last question that Ms. Botelho asked you?

19 THE WITNESS: Can you repeat it?

20 MS. BOTELHO: I've forgotten it, frankly.

21 MR. GASTON: If I can remind, it was does she think that --
22 it was some version of does she think that it takes a long time -- the
23 length of how long it takes to do a merger as based on a number of
24 records, that's the number of names that's actually supplied to the
25 Avenue. And my objection is that's beyond how she actually -- she

1 doesn't know how a merger takes in the first place.

2 THE COURT: Do you have an independent knowledge in
3 regards to that?

4 THE WITNESS: No.

5 THE COURT: Okay. So that's sustained. It'll be stricken --
6 answer will be stricken.

7 MS. BOTELHO: Okay.

8 BY MS. BOTELHO:

9 Q But you know this is voluminous in terms of records?

10 A Yes.

11 Q And there's some type of merger that happens and it's
12 dealing with the voluminous records being added to by other
13 records?

14 A Yes.

15 Q Okay. Did the defense request or ask you prior to this
16 hearing to provide them with documentation, any of -- any
17 documentation concerning request for DETR records by yourself or
18 anyone else in the court?

19 MR. GASTON: Going to object to vague to clarify. I'm
20 assuming she means me -- like, us specifically in this case.

21 THE COURT: Okay. So that --

22 MR. GASTON: Because as I mentioned before, some of
23 the discovery's all intertwined, because four of these cases got
24 reversed at the same time.

25 THE COURT: Okay. So let's talk about Valentine, if she

1 has independent memory of just that one.

2 BY MS. BOTELHO:

3 Q Did someone from the public defender's office make a
4 request under the heading of the Valentine case for records
5 concerning efforts to obtain the DETR records?

6 A Not that I specifically recall.

7 Q Okay. And so far, your recollection is, at least with regard
8 to those e-mails, at some point, they were disclosed to the defense
9 during the Mungai case?

10 A Yes. Uh-huh.

11 MS. BOTELHO: Brief indulgence, Your Honor.

12 Nothing further. Thank you.

13 THE COURT: Anything based on that? Check with
14 Ms. Dickenson.

15 MR. GASTON: Nothing else from the defense, Your
16 Honor.

17 THE COURT: All right. Thank you, Ms. Witt, appreciate
18 you being here today.

19 Guys, we're going to take a 10-minute recess. So we'll be
20 at 10 minutes. You can off the record. Thank you.

21 [Court recessed at 2:02 p.m., until 2:14 p.m.]

22 THE COURT: All right. We're back on the record in
23 C-316081, State of Nevada versus Keandre Valentine. Mr. Valentine
24 is present in custody with Ms. Clark as well as Mr. Gaston on his
25 behalf. Both district attorneys, Ms. Botelho as well as Mr. Dickerson

1 are present on behalf of the State.

2 The defense is just showing the State a copy of the DETR
3 records to make sure that we're all on the same page and looking at
4 the same documents. So we'll --

5 MR. GASTON: Your Honor, also, I know we are excluded
6 to talk about African-Americans from this hearing. But I would
7 want to make a proffer of if you had allowed us to talk about
8 African-Americans, what Mr. Martin would have been able to --
9 would have testified to, if that's okay?

10 THE COURT: Go for it. Yep.

11 MR. GASTON: He would have testified that in
12 Valentine, 10.33 percent of the master list was African-American.
13 But after accounting for duplicates, to be 9.76 percent.

14 MS. BOTELHO: Your Honor, I would actually object to the
15 making of this record, because, I mean, I guess he could make a
16 record of what he would have testified to, but it wouldn't have been
17 vetted, he wouldn't have been subjected to cross-examination. We
18 don't know, you know, the accuracy of this information.

19 THE COURT: So I will -- yeah, I mean, I'll -- it's going to be
20 a caveat, right? That's why it's a proffer.

21 MR. GASTON: Right. Just a proffer as to what I would
22 have been able to show and if they find that that, you know, if,
23 ultimately, if there's an appeal out of this, then they can decide
24 whether that would have persuasive to them or not.

25 THE COURT: And -- but when I use the term proffer, it's

1 what you believed he would have been able to show --

2 MR. GASTON: Correct.

3 THE COURT: -- and what you believe would have been
4 admissible. But with that understanding, go ahead.

5 MR. GASTON: Okay. And then the percentage of the jury
6 venire was 7-1/2 percent African-American. That's an absolute
7 disparity of African-Americans of 5.1 percent, and a comparative
8 disparity of 40.48 percent. And 19.56 percent of the DETR list was
9 African-American. Although, depending how you look at it, it could
10 be 21.62 percent. I'll leave that there, I guess, I'm not sure on that
11 one. But everything else that they would have testified to with
12 respect to African-Americans and the statistics would have been
13 similar in nature to the Mungai transcript of this court's exhibit, as
14 well.

15 So that's the proffer we had gone for to talk about
16 African-Americans, those are the numbers that we would have been
17 able to point out.

18 THE COURT: Understood. All right.

19 Are you prepared to call your witness now?

20 MR. GASTON: Yes.

21 THE COURT: All right. Please do so.

22 MR. GASTON: We call -- the defense calls Jeffrey Martin.

23 THE COURT: All right.

24 MR. GASTON: He's present on BlueJeans.

25 THE COURT: Mr. Martin, would you please join us via

1 computer at this point in time, sir, and unmute yourself. And just
2 raise your right hand, please.

3 **JEFFREY MARTIN,**

4 [having been called as a witness and first duly sworn, testified via
5 Blue Jeans as follows:]

6 THE CLERK: Please state your name and spell it for the
7 record.

8 THE WITNESS: Jeffrey Martin, that's J-E-F-F-R-E-Y,
9 M-A-R-T-I-N.

10 THE CLERK: Thank you.

11 THE COURT: Mr. Gaston, whenever you're ready.

12 MR. GASTON: Thank you, Judge.

13 **DIRECT EXAMINATION**

14 BY MR. GASTON:

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

16 A I work on statistical issues, like we were talking about
17 today, and I also do political consulting too.

18 Q And what is your educational background?

19 A I have an undergraduate degree in mathematics and
20 economics from Vanderbilt, and a master's degree in economics
21 from the University of Chicago.

22 Q In the course of your work as a mathematician and
23 statistician, have you analyzed jury lists?

24 A Yes.

25 Q And what types of jury lists have you analyzed in the

1 course of your work?

2 A All sorts. I've looked at superior court and state jury lists,
3 as well as federal court lists.

4 Q And when you're looking at these jury lists, are you doing
5 statistical analysis on this list -- on these lists?

6 A Yep.

7 Q And --

8 A Yes.

9 Q -- are you, specifically, with regards to the demographic
10 racial makeup of the jury lists?

11 A Yes.

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

14 A Hundreds.

15 Q Have you previously testified in regards to the analyses
16 that you have done on jury lists?

17 A Yes.

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

20 A Hundreds of times.

21 Q In all of these analyses and testimony all relates back to
22 your work as a mathematician and statistician and your analysis of
23 jury lists in regards to that?

24 A Yes, that's correct.

25 Q And you were qualified as an expert in another case on a

1 similar -- on an almost identical issue here in Clark County; is that
2 correct?

3 A That's correct.

4 MR. GASTON: Your Honor, at this time, I'd ask the Court
5 to qualify Mr. Martin as an expert statistician and an expert in data
6 analysis as it relates to jury lists and jury composition issues.

7 THE COURT: Expert in as -- sorry, expert --

8 MR. GASTON: As an expert statistician and expert in data
9 analysis as it relates to jury lists and jury composition issues.

10 THE COURT: State?

11 MS. BOTELHO: Your Honor, I don't think there's been
12 enough foundation concerning the jury analysis and lists.

13 THE COURT: So, clearly, he can opine as a statistician,
14 obviously.

15 MS. BOTELHO: Uh-huh.

16 THE COURT: Are you talking about merely just crunching
17 numbers in regards to jury lists? Is that what -- I need to know how
18 far the opinion goes when we're talking about specific jury lists.
19 Are we just crunching numbers and talking about percentages or --

20 MR. GASTON: Looking at the numbers of the jury lists
21 and the census numbers in the DETR records, doing mathematical
22 analysis of yes, figuring out what those totals are, but also
23 testifying to the conclusions that he can draw from some of the
24 math that that shows. So, for example, he can absolutely compare
25 the disparity and standard deviations and et cetera.

1 THE COURT: All right.

2 MR. GASTON: So it guess it's all number-related.

3 THE COURT: His opinions are numbers based, right?

4 MR. GASTON: Yes.

5 THE COURT: I mean -- okay.

6 State, did you want to be heard in regards to that?

7 MS. BOTELHO: Brief indulgence.

8 No objection.

9 THE COURT: All right. He can proceed with testimony

10 and the expert standard in regards to the parameters in which

11 we've just discussed on the record will be allowed.

12 MR. GASTON: Thank you.

13 BY MR. GASTON:

14 Q Mr. Martin, what data have you looked at for this hearing?

15 A I've looked at the master jury list that was supplied to me,

16 lists of persons summoned for the pool in this case, looked at

17 statistics on the -- what I call the panel in this case, I've looked at

18 census numbers that relate to Clark County, and looked at

19 summaries of DETR records from Nevada and lists of summons.

20 THE COURT: So just one second.

21 Can you -- when you say -- I need to know the years or the

22 approximate dates of what you are looking at, so the master jury

23 list, can you give me that date?

24 THE WITNESS: Okay. It was the current jury list as

25 of 2020. We had a meeting in November of 2020 and --

1 THE COURT: Okay. I need the list of persons summoned
2 for the pool in this case, for the actual -- that would be the 2017?

3 THE WITNESS: Correct.

4 THE COURT: Okay. Statistics on the panel indicate that
5 would still be 2017. The census numbers that relate to Clark County
6 in 2017. Summaries of the DETR records from Nevada, is that
7 2017?

8 THE WITNESS: Yeah, it has other dates, but I
9 concentrated on the 2017 numbers.

10 THE COURT: Okay. And I apologize, the last thing you
11 noted were and lists of -- and I stopped typing.

12 THE WITNESS: Okay. So I had lists of summons that
13 went out in 2017, as well. So the whole year. So I had summons
14 for this particular pool, but also the other pools in 2017.

15 THE COURT: Great. Thank you.

16 BY MR. GASTON:

17 Q Now, you mentioned you looked at census numbers; what
18 census numbers did you look at?

19 A I looked at the American Community Survey numbers
20 for 2017 for Clark County, and the -- all the numbers I looked at are
21 for persons age 18 and over, and who are citizens of the United
22 States.

23 Q And when you're talking about looking at the eligible
24 population of people over 18 who are citizens, are those the
25 numbers that are used for this analysis in other state courts and in

1 federal courts?

2 A Yes.

3 Q So according to those census numbers, what were the
4 demographics of Clark County with respect to individuals who
5 identified as Hispanic in 2017?

6 A The Census Bureau labels them as Hispanic or Latino.
7 And they were 20.70 percent of Clark County jury eligible
8 population.

9 Q Now, when you're looking at these numbers and doing
10 the statistical analysis on the jury lists, which list would you ideally
11 be using when you're doing your statistical analysis?

12 A So you would like to look at what I call the big list. In
13 other words, the list that summons are drawn from, ideally, at the
14 time that the persons were summoned.

15 Q Does the jury list that was used to randomly select jurors
16 in Mr. Valentine's trial exist today?

17 A No.

18 Q So what was done in order to try to get close to that jury
19 list?

20 A So there's pretty standard stuff. First of all, most jury lists
21 have to identify people, so they -- instead of using names, which, of
22 course, would be a problem, they'll use a randomly generated ID
23 number. And like most places, Clark County just assigns those
24 sequentially. So what we've got is a big list from 2020, which has a
25 whole bunch of ID numbers, which go from, you know, of the

1 lowest number up to the highest number.

2 And then you can split that list -- roughly split the list --
3 according to when new data is put into the list. The way you can
4 tell that most easily is that the youngest age of the person on the
5 list will jump up at certain break points, if that makes any sense.

6 THE COURT: No. Explain that.

7 THE WITNESS: So when you add in a new drivers list
8 in 2016, those put the youngest persons on those lists will be 18,
9 and likewise any other merger date, you can tell when the youngest
10 person on the list has been added.

11 MR. GASTON: Do you want to follow-up, Your Honor?

12 THE COURT: No, I just asked him to explain and he did.

13 MR. GASTON: Okay.

14 THE COURT: Thank you.

15 BY MR. GASTON:

16 Q And you're familiar with the folks at Avenue from other
17 cases, correct?

18 A Right.

19 Q Okay. And so --

20 A I can see any of you-all's faces, so let me know if what I'm
21 saying doesn't make any sense at all.

22 Yes, I've worked with the folks at Avenue Insights before.

23 Q Okay. And so you -- were you able to alternately, during
24 that conversation with Ms. Witt and the representative of Avenue,
25 recreate the jury list from 2017?

1 A Yes. We had three options. One was, was there -- you
2 know, did the list exist? No. The second option, were there any
3 backups along that time period? No. And the third option was to
4 recreate the list through the procedure that I talked about.

5 THE COURT: So quick question for you. This is the judge.
6 Thank you, Mr. Martin.

7 So you said we didn't -- you know, we didn't have any
8 other options, so the choice was to recreate the list. Did the three
9 of you discuss the best way to do that? Was that a way you came
10 up by yourself? Can you tell me a little bit more about that?

11 THE WITNESS: Sure. So like I said, I worked with Avenue
12 before. So Ms. Odenhall [phonetic] and I, who -- and she's from
13 Avenue Insights, discussed that third possibility of how to do it.
14 And, frankly, it's sort of a tedious computer-type discussion. So it
15 was mainly just between me and Ms. Odenhall to come up with that
16 thing. But that's not an unusual way to handle a situation like this.

17 You very rarely, in any -- looking at any jury list, you very
18 rarely get the exact list as of the date the summons were sent out.
19 So --

20 MS. BOTELHO: Your Honor, I'm sorry.

21 THE WITNESS: -- you're always trying to get close.

22 MS. BOTELHO: Your Honor, before we get --

23 THE COURT: Just one second, Mr. Martin.

24 Go ahead, Ms. Botelho.

25 MS. BOTELHO: Before we get too far into this 2017

1 recreation --

2 THE COURT: Yeah.

3 MS. BOTELHO: -- I would like to inquire, this is more of a
4 discovery thing, if he recreated the 2017 master list, that list hasn't
5 been disclosed to the State. The recreated list.

6 MR. GASTON: He never recreated a listing. He never
7 recreated a list of three and a half million names and provided it to
8 us or anything like that. There's no discovery that we had to give to
9 the State.

10 MS. BOTELHO: Okay. But he's going to be testifying to
11 his findings from recreating this list that no one's seen.

12 THE COURT: So let -- so --

13 MR. GASTON: And his findings aren't discoverable. To
14 be -- to -- just to be frank about it. Like, I think we've gone far above
15 and beyond. I know we're not actually citing the discovery rules,
16 but -- and I don't mean it as a slight against the Court's order. The
17 Court was also clear in its order about turning over documents.
18 But, like, our expert got the discovery that we received from the
19 [indiscernible].

20 THE COURT: Right.

21 MR. GASTON: He worked with Avenue to do analysis of
22 it, to try to approximate what he could get through 2017 to do
23 analysis of it. Our jury commissioner -- our expert's findings aren't
24 discoverable in advance like that. Although, to be honest, if they
25 wanted to know what they noticed that [indiscernible] with respect

1 to African-Americans, it's like the Mungai transcript.

2 But is his conclusions -- sorry, his conclusions from
3 looking at the 2020 list aren't discoverable if he created some kind
4 of -- I mean, there's just -- there -- his conclusions and findings are
5 his conclusions and findings from the discussions with Avenue.
6 There's no rule that cites to discovery, your court order doesn't cite
7 to discovery. Because that would, essentially, amount to us just
8 being, like, Hey, here's some stuff our expert told us, let me tell you
9 in advance what he's going to say. That's not -- I mean, that's not --

10 MS. BOTELHO: Okay. If the State could -- NRS 3.305
11 disclosure of facts and data, underline, expert opinion:

12 The expert may testify in the terms of opinion or inference
13 and give his or her reasons therefore without prior disclosure of
14 the underlying facts or data unless the judge requires otherwise.
15 The expert may, in any event, be required to disclose the
16 underlying facts or data on cross-examination.

17 Otherwise, if you hadn't already ordered it. You ordered it
18 here, Judge. I mean, in order for him to recreate a list, where is this
19 list? I -- how am I going to cross-examine him and call into
20 question the opinions and the conclusions therefrom when I don't
21 have the list?

22 THE COURT: Let me understand -- hold on. Let me
23 understand first from him, him being Mr. Martin, what they did with
24 the list, how it was created, how long he's had it. Let me get
25 through all that first, and then I'll deal with this issue.

1 So, Mr. Martin, can you tell me a little bit about that?

2 THE WITNESS: Sure. So what I have is -- and recreate is
3 a little bit of an ambiguous term to hear. What I did is split the list
4 into the 2020 list and determine who would have been on there as
5 of the 2017 date. So everybody's on that list --

6 THE COURT: Just by age?

7 THE WITNESS: -- I just split them.

8 THE COURT: That's okay. Just by age how -- because
9 you used that example earlier.

10 THE WITNESS: Yeah, a little bit more complicated than
11 just by age, because when you add people, you're going to be
12 adding people of all sorts of ages. I split it by ID number, which
13 was related -- the lowest ID number associated with an increase in
14 the youngest age, if that makes any sense.

15 THE COURT: No. Break that down.

16 THE WITNESS: I'm sorry. So every time we add people
17 to the master list, so if, you know, if we had people in there as
18 of 2015, and then we merged in another group of people as of the
19 end of 2016, the people who were merged in originally in 2015, they
20 would have gotten older by a year. And the youngest person
21 in 2015 would have been age 18 in 2015. But when we merge in
22 people in 2016, there's a whole new group of people who just
23 turned 18 between '15 and '16.

24 And so using that information, you can then go back to
25 the sequential ID numbers and tell, okay, starting at this ID number,

1 these were the people who were added on in the 2016 merge. And
2 these are the people who were already there as of the 2016 merge.

3 THE COURT: But that's purely by the people -- I
4 understand that it's more complex, but it does have to do with the
5 amount of people who were already 18 and the amount of people
6 who just turned 18, right?

7 THE WITNESS: Right. And the fact that 18 in 2015 is a
8 different -- person's turning 18 in 2015, that's a different date than a
9 person turning 18 in 2016.

10 THE COURT: Okay.

11 THE WITNESS: But like going into a liquor store, you
12 know how they have the calendar, it says you've got to be born by
13 this date to buy.

14 THE COURT: Okay. So -- all right. So then -- so you went
15 back and you basically took out all those people who hadn't
16 been 18 yet, right? By 2017 -- from the 2020 to the 2017?

17 THE WITNESS: Not exactly.

18 THE COURT: Why not?

19 THE WITNESS: So what that does, the 18-year-olds tell
20 me when the lowest number on the sequential ID number is
21 associated with the merge. So you started off with a hundred
22 people, and their ID numbers go from 1 to 100. And so you put
23 those in in 2015. When you do the next merge, you're going to
24 start at ID Number 101, and add some people.

25 THE COURT: Right.

1 THE WITNESS: So what the youngest person -- the first
2 person in is not necessarily age 18, but you use that date to
3 determine when the break in the ID numbers indicates that this is a
4 new group. This is -- I know it's sort of tedious. It's sort of standard
5 way people do that, because courts, of course, don't want to use
6 Social Security number as an ID number.

7 THE COURT: Right.

8 THE WITNESS: They make up their own ID number. It
9 happens that these ID numbers are made up sequentially. So the
10 earlier the ID number, the earlier that person was put on the list.

11 THE COURT: Right.

12 THE WITNESS: Except you do it in big chunks instead
13 of --

14 MR. GASTON: Hang on. If I can make a proffer real quick
15 to -- so, essentially, he was able to recreate -- he was able to
16 identify from the 2020 list, essentially when these mergers would
17 have happened --

18 THE COURT: Right.

19 MR. GASTON: -- by looking at the ID numbers.

20 THE COURT: Right.

21 MR. GASTON: And then he would use age, et cetera, to
22 exclude some of the people who wouldn't have been eligible
23 otherwise. And then he did a couple of other things to cross-check
24 it, which I'll go into when I'm [indiscernible] to cross-check his work
25 and to try and make sure that captured as many people as he did.

1 And then he also went in and started to look for duplicates. And I'll
2 talk about that process as well.

3 But so it wasn't just that he removed everyone who
4 wasn't 18 in 2017, he was also able to, essentially, sort of identify
5 here's where a merger happened, let's look at some changed
6 names, let's look at, say, see who would have been eligible in 2017,
7 who's new, et cetera. And then was able to kind of recreate
8 backwards a merger at a time, essentially.

9 But as far as the discovery objection, and this is off my
10 proffer, this is just a response to the discovery objection --

11 THE COURT: Yeah.

12 MR. GASTON: -- this is analysis that he did off the 2020
13 discovery. So underlying facts and data was disclosed, they had
14 access to the same facts and data that our expert did. There is no
15 discovery violation. This is just analysis that he did from the data
16 that was provided to him.

17 Also, the State could have obtained an expert to do this
18 themselves for the last two and a half years. I couldn't have put
19 them more on notice as to what happened when at the last hearing,
20 I made it very clear that we were pretty much just following line by
21 line what happened in the Mungai transcript. In fact, my questions
22 and his answers have almost been identical so far as to how the
23 Mungai transcript started.

24 So they would have been aware in Mungai, or at that last
25 hearing, that the 2020 list is obviously not going to be the 2017 list

1 we're talking about. They -- I'm sure they read Mungai transcript.
2 They were aware that our expert had recreated the 2017 list through
3 this process. Keep in mind they never once reached out to me and
4 asked ant questions about that. Although to be fair, even if they
5 had, I probably wouldn't have told them what our expert had
6 concluded with the 2017 list. But I guess it depends.

7 But they could have -- if they wanted to make sure that
8 our expert hadn't fudged his analysis in a way that's favorable to
9 the defendant, they could have got their own expert to do the same
10 analysis with the 2020 list and come back with their own numbers
11 for 2017 and come in with their own expert in this, and they chose
12 not to do that. We even gave them -- you even gave them a status
13 check in order to decide if they wanted to do an expert or not, after I
14 had told them how we were going to do this and how I was
15 intending on presenting our expert testimony, and they still chose
16 not to get an expert.

17 So, A, they had -- A, there was no discovery violation,
18 because any facts and data that our expert relied upon was
19 provided to us by the jury commissioner and we provide -- or, as
20 previously mentioned, and we provided all of that data to the State.

21 B, they're certainly not -- they are certainly on notice that
22 this kind of analysis was done in this case, and if they really had a
23 problem with it, instead of just objecting, trying to keep everything
24 out that they possibly can to preclude the hearing from being
25 concluded, they could have got their own expert to do their own

1 analysis. Instead, they chose not to, so they're relying on
2 cross-examining him as to his analysis and recreating that list to try
3 to poke holes in it and explain to the Court why you shouldn't give
4 that a lot of weight. But that's what they have to rely on is
5 cross-examination, because they chose not to get an expert to do it
6 themselves.

7 But there is no secondary report that was created. There's
8 no extra information that was provided. It is simply our expert
9 doing his analysis, as explained and going to be further explained,
10 from the data that was provided and has been provided to the
11 State.

12 THE COURT: So, Mr. Martin, what would you -- if the
13 Court had ordered, you know, you to turn over the list or the
14 analysis in which you were able to cut certain people from the list,
15 how long is the list? How would you have been able to do that?
16 Just so I can kind of have a grasp on what you would have done in
17 that scenario.

18 THE WITNESS: Not sure exactly what you're asking. So
19 yes, you would have gotten the whole list that I've got.

20 THE COURT: And then you create a new list, right? So
21 you have a 2020 list --

22 THE WITNESS: Well --

23 THE COURT: -- and then you created what you believed to
24 be the closest thing possible with the tools that you utilize to make
25 a replica of the 2017 to the best of your ability, right?

1 THE WITNESS: There was a lot of stuff in there. I think I
2 agree with what you're saying in the sense that all I'm doing is
3 saying the people up to a certain ID number would have been
4 merged in before 2017, and the people after a certain ID number
5 would have been after 2017.

6 THE COURT: And you have that list that then -- that you
7 then worked off of?

8 THE WITNESS: Right. I always used just the big list. But
9 the 2020 master list that -- you're right.

10 THE COURT: Right. But what I'm asking you is then, after
11 you did your analysis, did you then have a list that you comprised
12 to be the 2017 list or as close as you could get it to be the 2017 list?

13 THE WITNESS: I think the wording's a little difficult and I
14 apologize for that. I always just used the 2020 list. But when
15 running the analysis, I would only look at the persons up to a
16 certain ID number.

17 THE COURT: Okay.

18 THE WITNESS: I didn't create a second list or anything. I
19 just used that ID number.

20 MR. GASTON: I think he just excludes names he's not
21 using for his analysis. But it's still the same product.

22 THE COURT: Okay. Ms. Botelho, do you want to be heard
23 anymore?

24 MS. BOTELHO: Yes.

25 THE COURT: Okay.

1 MS. BOTELHO: I think this is a violation, I don't know how
2 else to word this, in that they have some -- to say that he's only
3 working off of the 2020 list and then removing people, there would
4 be a printout or a record or whatever it is of the people that were
5 taken out or that were left in. Because what I need to be able to
6 know is -- I mean, basically, right now as it stands, he gets to just
7 testify to whatever. Because there's nothing in there. We're -- we
8 don't have a list, we don't have the numbers that actually he's
9 going to be proffering an opinion or giving percentages from.

10 So I have to sit here as a DA on this and rely on the
11 testimony that said, Hey, here's 2020, this is what I did, I did this for
12 this, and this is how I did these two things. And, oh, the numbers
13 that I came up with, which I didn't document in any kind of other list
14 or in a report or anything like that, these are the numbers that I
15 came up with. So, hey, DA, just rely on the accuracy of my
16 information of -- just rely on my methodology being reliable and
17 accurate, just rely on the accuracy of my conclusions and my
18 numbers. But without me having actually laid eyes on it and
19 actually seen the numbers, and there's no way for me to
20 cross-examine on that, Judge.

21 THE COURT: So that's why I think my original ruling
22 stays. I'm going to let him do direct today and then we're going to
23 regroup after that direct so I can assess what he did with this
24 information and then look at the State's ability to cross-examine
25 after that.

1 But because I don't have a firm grasp on exactly what it is
2 that he does it, I need to have a better understanding about that and
3 then I'll be able to make a decision on that ruling.

4 So continue on with your direct.

5 MR. GASTON: Can I take two minutes? I know we're all
6 here, can I take a two-minute bathroom break?

7 THE COURT: Yeah.

8 MR. GASTON: Go the bathroom and be right back.

9 THE COURT: Sure.

10 MR. GASTON: Thank you.

11 THE COURT: We'll just be at ease for a few minutes and
12 we can go off.

13 [Court recessed at 2:43 p.m., until 4:10 p.m.]

14 THE COURT: We re on the record in State of Nevada
15 versus Keandre Valentine, C-316081-1. He is present in custody.
16 Ms. Clark as well as Mr. Gaston present on his behalf.
17 Ms. Dickerson also present on his behalf via BlueJeans. Ms. Lexis
18 [sic] and Mr. Dickerson present on behalf of the State.

19 All right. You guys, let's take a step back for a second,
20 because we're in a little bit of new territory right now, or at least I
21 am, because I thought we were -- this hearing was going to be very
22 limited, just going to be on Prong 3. But I need to take a step back
23 and ask about -- it.

24 It's been a long time since I read the transcript in front of
25 Judge Scotti. And what were the number breakdown in front of

1 Judge Scotti?

2 MS. BOTELHO: I have the transcript, Your Honor.

3 THE COURT: Okay. What was it? Can you just tell me
4 all --

5 MS. BOTELHO: Yes. In number breakdown, did you want
6 the comparative disparity?

7 THE COURT: I guess any of the numbers that were given.

8 MS. BOTELHO: Okay. All right. So we started out with --
9 it was 2013 census. Okay.

10 THE COURT: Okay.

11 MS. BOTELHO: It just said 2013 Clark County Census.

12 THE COURT: Okay.

13 MS. BOTELHO: The population being 1,999,371. Of
14 those, 233,371 were African-American, so they got to an 11-1/2
15 percent of the population being African-American from that. And
16 so for Latinos, it was 608,794, which was 30 percent of the
17 population. And so -- and this -- and the actual jury pool or in our
18 jury venire, three of the 45 identified as African-American, which
19 was 6.7 percent, and Hispanics were at -- there were five who
20 identified as Hispanic out of the 45-person venire, which was 11.1
21 percent.

22 And so in terms of the comparative disparity for African --
23 or, excuse me, for African-Americans, it would have been 41.73
24 percent, and in terms of Hispanics, it was a 63 percent, that's by
25 taking 18.9 percent divided by 30 percent gives us the 63 percent

1 comparative disparity.

2 THE COURT: Wait, where did we get the 18.9? I'm sorry.

3 MS. BOTELHO: 18.9, okay, so the absolute disparity for
4 Hispanics would have been the 30 percent minus the 11.1 percent
5 to get us to the 18.9 percent absolute disparity.

6 THE COURT: And so -- okay. So because we are using
7 the two -- so the difference in the numbers is now because we're
8 using the 2017 census versus the 2013?

9 MS. BOTELHO: That and --

10 THE COURT: Or I can ask -- he's shaking his head no.

11 THE WITNESS: So I --

12 MS. DICKENSON: Your Honor?

13 MR. GASTON: May I?

14 THE COURT: Yes.

15 MR. GASTON: Do you want me to explain?

16 THE COURT: Let me ask him, since he's a statistician, and
17 then you can --

18 MR. GASTON: Sure.

19 THE COURT: -- so go ahead, Mr. Martin.

20 THE WITNESS: Sorry, I didn't mean to interject.

21 THE COURT: No, no, no. That's okay.

22 THE WITNESS: So the difference between the two
23 numbers is really this, the 30 percent numbers are using the total
24 population. So age zero and above. And also including non U.S.
25 citizens. So the comparable number for 2017 would be 31.25

1 percent Hispanic or Latino.

2 THE COURT: Using -- I'm sorry --

3 THE WITNESS: And then that gives you --

4 THE COURT: Go ahead, I didn't mean to interrupt you.

5 THE WITNESS: -- 60 -- that's okay.

6 THE COURT: That's okay.

7 THE WITNESS: I'm sorry, that gives you 64.45 percent as
8 a comparative disparity.

9 THE COURT: Got you, because we're using all ages.

10 MR. GASTON: And people who are not eligible --

11 THE WITNESS: And I just used the jury eligible numbers.
12 There's always arguments about which is the appropriate number.

13 MR. GASTON: So, again, this sort of goes back to my
14 point as to why I think it's, A, inappropriate to grant the State's
15 motion with respect to Prong 2 or revisiting Prong 2. But it's even
16 more inappropriate to do so when it's not subject to a written
17 motion, because we're not even agreeing with what the law is, and
18 there's some -- there's a lot of distinctions here and I think it
19 complicates everything and increases the risk of an erroneous
20 result.

21 So I think the proper mechanism is we would do the
22 evidentiary here, which is separate, and if the State feels like we
23 didn't need Prong 2 or whatever, they can file a written motion
24 asking this Court to revisit the Supreme Court's -- or Judge Scotti's
25 prior ruling that we already met Prong 2 based on their new

1 arguments. We would respond in writing with our case law, and
2 then it would all be out there in a nice, organized manner. But -- so
3 I just want that objection out there.

4 But with respect to the differences here, part of the
5 problems you're seeing is that because this was an evidentiary
6 hearing on Prong 3 alone, we are talking our expert used census
7 numbers that only capture people who are 18 and older, and U.S.
8 citizens. So that is less than the Hispanic population at large.
9 Which is why --

10 THE COURT: But, hold on. No. That seems much more
11 appropriate to me, though, right?

12 MS. BOTELHO: Yes.

13 THE COURT: Because --

14 MR. GASTON: Well, sure. Sure.

15 MS. BOTELHO: Yes.

16 THE COURT: Of course. I mean, why am I going to count
17 people under 18 --

18 MR. GASTON: Sure.

19 THE COURT: Seems much more appropriate and
20 accurate.

21 MR. GASTON: Sure. Which is why we're doing it this
22 way. It makes more sense.

23 THE COURT: Right.

24 MR. GASTON: The State is essentially -- and this is why,
25 again, it goes back to the motion aspect of things. The State is

1 relying very heavily on Williams. And their argument is going to be
2 to the Court that there's some absolute bar on considering any fair
3 cross-section claim where the comparative disparity does not
4 equal 50 percent.

5 THE COURT: Right.

6 MR. GASTON: There are several problems with that
7 generally as a legal proposition.

8 THE COURT: Okay.

9 MR. GASTON: A, disagree that that's what it means.
10 Well, we disagree that that's what it means.

11 B, even if you think that's what it means, it's based on
12 outdated statistical analysis, which I'll explain in a second.

13 And then C, even if you think that's what it means, and
14 you think it's reliable opinion based on -- with -- after I revisit
15 Prong 2, it doesn't really matter. Again, because it shouldn't be
16 binding or controlling on this Court, because while yes, we are
17 proceeding under a claim that the -- he -- we violated -- that the
18 Court violated the Nevada Constitution Protection of Fair
19 Cross-Section claim, but we are also proceeding under the U.S.
20 Constitution's Fair Cross-Section claim, and that's not actually the
21 test that's put out by the U.S. Supreme Court.

22 The U.S. Supreme Court has never said that there is an
23 absolute bar on a comparative disparity analysis, and if you're
24 above or beyond that, you've met it, you met your burden or you
25 didn't. Instead, they said courts are supposed to look at the facts

1 and decide if the presence of a certain population are likely not fair
2 and reasonable, or the underrepresentation is not fair -- likely fair
3 and reasonable with respect to that population at large.

4 There's a reason they don't use absolute bars, because it's
5 a silly way of doing analysis. We're really saying that -- as a side
6 note, just eagle-eye view, we're really saying 50 percent
7 comparative disparity means that it's statistically not likely and -- or
8 fairly and likely representative, but 46.33 is and we can't make a
9 conclusion based on that. That's sort of a silly kind of way of
10 thinking about things. And no U.S. Supreme Court case is ever
11 going to say that that's the way to do it.

12 And so to the extent that you think that's what the Nevada
13 Supreme Court case says, we certainly shouldn't follow it, because
14 it would be a silly ruling.

15 Now, coming back to the point, Williams, they're citing to
16 that footnote that talks about the 50 percent disparity. That does
17 not say that there's a rule in Nevada that has to be above 50 percent
18 comparative disparity. What they say is that it is 50 percent
19 comparative disparity, which indicates that it's not likely fair and
20 reasonable with relation to population. It doesn't propose some
21 big, complete bar.

22 Finally, and the reason we're talking about the jury list
23 aspect of things and the reason the numbers are a little different: In
24 the Williams case itself, they are relying on the 2000 census, which
25 includes -- that's the same 2013 census -- not the same numbers,

1 but the same capture of the demographics that I cited to in the 2013
2 census, when we litigated Prong 2 in the first place.

3 In the 2000 census, that is the numbers they are basing at
4 to get the 50-percent comparative disparity is the entire population,
5 the entire race, including people who aren't necessarily U.S. citizens
6 and aren't necessarily above age 18. They get a number, and then
7 they conclude about the -- it's above 50 percent, therefore it's likely
8 not fair and reasonable on relation. They don't say that it has to be
9 above 50 percent and don't you ever grant a motion if it's only 49.9
10 percent, because that would be a silly rule.

11 And even in that case, they relied on the census aspect of
12 things that we did here, likely because there was not some
13 fully-fledged adversarial hearing fleshing out all the weaknesses
14 and relying on the census that way.

15 It does seem to make sense that when we're talking about
16 trying to prove that something system -- systemic --

17 THE COURT: Systematic.

18 MR. GASTON: Systematically underrepresenting a certain
19 population, that we would look at the people who actually could
20 have been qualified for the jury in the first place. We agree. And if
21 you do that, you get that compared to the 2017 master list, you get
22 a comparative disparity of the 46.33 percent that the expert was
23 talking about.

24 But if you use the same type of census analysis that they
25 used in the Williams case, then you get the original numbers that

1 we talked about, because you have a 30 percent population instead
2 of the 20.7. And that's what they did in the Williams case.

3 So if we really are saying that Williams, even though it
4 was never intended to be taken this way, is somehow super
5 controlling and at point on this case, if we do the same analysis that
6 they did in Williams, we still get above 50 percent comparative
7 disparity.

8 This is why I think, to conclude in sum, this is why I think
9 this is not the appropriate vehicle to address this issue, because the
10 differences are somewhat nuanced, they are not an accurate
11 recitation of the case law that's out there, we disagree with the
12 points of law that the State is making. We disagree that they can
13 switch their position anyways. We disagree -- in the same
14 hearing -- we disagree that the Court has authority to even go
15 beyond and consider this claim. We think that this -- they would
16 have to relitigate this in front of the Nevada Supreme Court to see
17 what the scope of the evidentiary hearing, if they can change -- they
18 have -- the Nevada Supreme Court's holding that we met Prong 2.
19 Nevada Supreme Court in no way said we held -- we met Prong 2
20 and the court -- district court should now have an evidentiary
21 hearing to see if we've met all the prongs.

22 It's two prong three, which is why we didn't address
23 Prong 2, it's why we didn't come in with case law supporting our
24 analysis on Prong 2, it's why we didn't give you any citations to
25 other cases and other jurisdictions on the somewhat complicated

1 issue of absolute and comparative disparity and standard deviation
2 analysis and different jurisdictions and how to meet the statistically
3 significant underrepresentation for Prong 2. We didn't do any of
4 that because it's not relevant to this hearing.

5 But if the State thinks they have it, I think the proper
6 vehicle is before the Nevada Supreme Court at a minimum, it
7 should be a written motion in front of Your Honor where we get a
8 chance to research their cases, cite to cases that we think support
9 our point, and make nuanced distinctions, like I just pointed out
10 about Williams with the census numbers.

11 When they make a big motion like this --

12 THE COURT: Uh-huh.

13 MR. GASTON: -- in the middle of an evidentiary hearing,
14 that's beyond the scope of what the Nevada Supreme Court
15 referenced, mistakes can be made, such as, for example, if we
16 didn't take a two-minute break, I probably wouldn't have known -- I
17 didn't know the Williams thing off the top of my head. We found
18 that out by looking at it. But if --

19 THE COURT: Wait, which part are you talking about?

20 MR. GASTON: The part with the census that their 2000
21 census still relied on -- but that, if we hadn't taken a two-minute
22 break to look that up, I wouldn't have been able to supplement the
23 record with my argument as to why, if we're saying Williams
24 controls, well, let's do the analysis the exact way Williams said to
25 do it, and if we do it in this case, we still get above the 50 percent

1 comparative disparity, which isn't an absolute rule anyways.

2 And so my position, ultimately -- and, again, we haven't
3 talked about this since you came back on the bench, but nothing
4 being said here has anything to do with what the scope of the
5 hearing is if we're only limited to Prong 3 on the ZIP code versus
6 being able to show a violation due the -- due to not including the
7 other sources. They're unrelated questions, because one is what's
8 the scope of remand for the Nevada Supreme Court with respect to
9 Prong 3, and then -- which you've already ruled on and they haven't
10 made any additional arguments to.

11 And then the other one is, can the -- can we consider
12 Prong 2 for the claim? And if so, did they not need Prong 2? And
13 my response is, nothing changed the ZIP code argument, so we
14 should still be able to fully fledge out our other factual basis that we
15 discovered as to why we've met Prong 3. They shouldn't be able to
16 reopen Prong 2 for all the reasons that I've said. And even if they
17 reopen Prong 2, we still meet the disparity test, or we still meet the
18 burden of showing that the disparity between the Hispanics in the
19 population at large and Hispanics on our jury panel were not likely
20 fair and reasonable with what you would expect.

21 We've already met that. The stats still show it. And even
22 to the extent that you're going to over rely on Williams to -- or to
23 the extent the State's arguing that the Court should over rely on
24 Williams as some kind of absolute bar, it's the binding case of
25 everything in Nevada on whatever point, if we do the analysis the

1 exact way they did, they relied on a census that talks -- that includes
2 U.S., non-U.S. citizens, and non-18-and-younger people, which if
3 we do that same analysis here, we also get above the 50 percent.

4 And so, ultimately, I just think it's -- you should deny the
5 State's -- I think the Court should deny the State's renewed motion
6 with no extra arguments or case law as to the ZIP code issue. It
7 should also deny the State's argument, disagree with the State's
8 argument on reopening Prong 2. And if -- and if the State wants to
9 relitigate this issue or argue that they have some case law as to
10 why it can be relitigated or whatnot, it should be done via written
11 motion probably before the Nevada Supreme Court, but at a
12 minimum, before Your Honor. Instead of an oral motion in the
13 middle of an evidentiary hearing that was not intended by any party
14 to relitigate any other issue, especially when the State already told
15 us at evidentiary hearings or at motion hearings on two separate
16 occasions that the defense is limited to Prong 3 and cannot
17 relitigate Prong 2.

18 And then we come in today and now there's a new
19 argument as to why Prong 2 could be litigated. That reversal
20 position shouldn't be allowed, but even if it is, it should be done via
21 written motion before Your Honor.

22 THE COURT: Well, I don't think we knew, though, they
23 didn't know about the percentage of this, right? I mean, they didn't
24 know about the 46.33 until we walked in here today and heard it.

25 MR. GASTON: Sure, but they -- sure. But they should

1 still -- it can still be done via written motion. We can still finish
2 taking all of that testimony today, finish the evidence, and then they
3 can file a written motion with Your Honor or the Nevada Supreme
4 Court, depending whatever the parties think the right procedure is
5 to relitigate this issue.

6 But doing orally in the middle of the evidentiary hearing is
7 not appropriate.

8 THE COURT: I guess that that -- in the Valentine decision,
9 though, what throws me for a loop at 466 is it says, specifically:

10 In particular, it makes no sense to hold an evidentiary
11 hearing if the defendant makes only general allegations that are
12 not sufficient to demonstrate a prima facie violation or if the
13 defendant's specific allegations are not sufficient to
14 demonstrate a prima facie violation as a matter of law.

15 That's the part that --

16 MR. GASTON: So they're talking --

17 THE COURT: -- holds me up there.

18 MR. GASTON: They're not talking about Prong 2 or
19 Prong 1 on that. They're talking about the Prong 3. The specific
20 allegations that I said were about the ZIP codes. If true, that would
21 show why we're getting underrepresentation. The -- they're not
22 talking generally about, hey, but you can also revisit Prong 1 and
23 Prong 2. They're talking about what warrants getting an evidentiary
24 hearing when you come in and you make arguments about the
25 systematic exclusion.

1 If I just come in and I make general arguments of it's not
2 fair, look at how often we see that it's underrepresented, it's not
3 fair, that's just general things with no bases, so why do I need an
4 evidentiary hearing? What facts am I proffering that I'm going to be
5 able to show you?

6 THE COURT: Yeah. It's the comma. It's the second part.

7 MR. GASTON: The second part is --

8 THE COURT: Right.

9 MR. GASTON: -- let's say I say it's based on something
10 silly that even if I'm able to prove it also won't meet the element of
11 systemic -- systematic underrepresentation, then there's no need to
12 have an evidentiary hearing.

13 An analogy that happens all the time would be, again,
14 staying with Motions to Suppress. If I make a claim under a Motion
15 to Suppress as to a factual thing that occurred, and the State
16 disagrees that that fact occurred, however, they also argue it
17 doesn't matter, because if even if that fact occurred, the statement
18 is still valid, and Your Honor agrees with the State that even if the
19 fact I am alleging to have occurred to mean the statement should
20 be suppressed, even if that did occur, that is still not legally
21 sufficient to suppress the statement, then what's the purpose of
22 giving me an evidentiary hearing, even if I prove the fact that I'm
23 saying happened, we still agree or at least you have found that the
24 statement would be allowed in anyways.

25 It's the same argument here. That's all they're saying.

1 They're saying that if I just make general statements, it can't come
2 in. And even if make specific facts, if true, those don't amount to
3 actually meeting the burden, then why have an evidentiary hearing?
4 That's all it's saying.

5 THE COURT: Well, yeah, but it can be considered -- but
6 you're saying that that's only as to 3. That doesn't say anywhere in
7 this, it says that -- this last sentence:

8 If the defendant's specific allegations are not sufficient to
9 demonstrate a prima facie violation as a matter of law.

10 I mean, here, what they're saying is you made that prima
11 facie based on those percentage and statistics, and he failed to give
12 you a hearing. And I agree, with those numbers you were entitled
13 to a hearing.

14 Now we walk in here, there's new statistics. Had those
15 statistics been shown, Scotti ruled against you saying 46.33 doesn't
16 make a prima facie, you would not have -- you would have not got
17 this hearing.

18 MR. GASTON: Two different responses, I guess, to that.

19 THE COURT: Succinctly.

20 MR. GASTON: Sure. But two different responses.

21 Number one would be I don't think that's what they're
22 referring to when they say that language, because what
23 representation or what theory, what facts do I have to allege to be
24 given an evidentiary? Because they're talking about when to give --
25 when --

1 THE COURT: Right.

2 MR. GASTON: What the defendant has to do to be given
3 an evidentiary hearing.

4 THE COURT: Agree.

5 MR. GASTON: They're talking about if specific facts are
6 alleged, that would be -- that, if true, would make a difference, you
7 can get an evidentiary hearing.

8 If that's referring to Prong 1 and Prong 2, essentially, how
9 is that referring to Prong 1 and 2? Because I don't need an
10 evidentiary hearing to make Prong 1 or Prong 2. You just count
11 them up. You basically -- are they a reasonable group in the
12 population? That's one prong. The other prong is are they fairly
13 and not likely considered? That's also, you just count them up and
14 you do your statistical analysis on the venire compared to the
15 community. You don't necessarily need the evidentiary hearing to
16 establish those facts.

17 The evidentiary hearing issue was with respect to Prong 3.
18 So that would be my argument as to why the Court's mostly
19 referencing Prong 3, is because that doesn't really make sense, if
20 you look at it through as to referring to Prong 2.

21 And then finally, I --

22 THE COURT: We've got to stop there, because that's
23 where you and I disagree, is that the reason why you get to 3 is you
24 look at 2 and you see, hey, there's an issue here. And then the
25 person has to come in and explain why are we seeing this issue?

1 That's the whole point.

2 MR. GASTON: And that's fine, even if the Court disagrees
3 with me --

4 MS. DICKENSON: Your Honor --

5 MR. GASTON: -- it should still rule in my favor on this
6 issue, because that was one argument. The other argument is even
7 if you disagree with me, again, so what? Because under Prong 2,
8 we still meet Prong 2. The analysis has not changed. They're citing
9 to Williams as to why we don't meet Prong 2. And I've already
10 critiqued Williams in a certain way as not being an absolute bar,
11 how it can't restrict on the Constitution. But moreover, the analysis
12 done in Williams is the exact same analysis that was done in this
13 case that gets us over 50 percent comparative disparity anyways.

14 So it seems a little unfair to say that Williams is an
15 absolute bar on 50 percent comparative disparity --

16 THE COURT: I don't think that.

17 MR. GASTON: Okay. Well -- okay. Well, then that -- that
18 makes another point, is that even if you do reopen a Prong 2, we've
19 still met Prong 2, because we have 46.33 percent comparative
20 disparity. When we do a more accurate and restricted analysis in
21 comparison, then what they did in Williams in the first place.

22 So even if you were to reopen Prong 2, you know, I
23 disagree with that, but also so what? We've still met Prong 2, even
24 by the facts solicited here.

25 THE COURT: Ms. Dickenson?

1 MS. DICKENSON: Thank you, Your Honor.

2 I did look at Williams again.

3 THE COURT: Okay.

4 MS. DICKENSON: And Williams Footnote 9 or Step 2 uses
5 the census takers, that includes those who are under 18. And our
6 expert has already testified using those census figures in this case,
7 there would be a comparative disparity of 6. -- 64.45, which is way
8 over the 50 percent.

9 That takes us to Step 3. In Step 3, when we're looking at
10 the census figures, our expert is only looking at those who could be
11 within the system. Those who are 18 and over. Because he's
12 looking at systematic exclusion. So it's two different tests.

13 The State is trying to say, well, Williams Footnote 9
14 applies to Step 3. And it doesn't. It wouldn't. Because what
15 Williams tells us is that when you're in trial, you grab those census
16 figures and you go ahead and use those to make your argument,
17 which is what Williams allows you to do, and we have an over-15
18 percent -- a 50-percent comparative disparity that takes us to Step 2.

19 Now, in Step 2, we're using the figures a little bit
20 differently to show how there is systematic exclusion. So I would
21 disagree if the State is arguing that we have to use the census
22 figures for Step -- that we're now using for Step 3 in Step 2, when
23 we're in trial. Those figures are generally not available.

24 THE COURT: So the -- this is all -- this has all become so
25 layered and complex, but in Williams, that is an issue right there.

1 MR. DICKERSON: Well, I --

2 THE COURT: They're using --

3 MR. DICKERSON: -- don't think it's that clear.

4 THE COURT: -- zero to --

5 MR. DICKERSON: I think that defense counsel relies on an
6 assumption that that's clear, right? So Williams, you look at
7 Footnote 9, they've referenced the numbers that they're getting
8 from the census, which refers you to Footnote 2, a PDF document
9 on the Census website. That is unavailable.

10 So we don't know. Right? We don't know --

11 MS. DICKENSON: Your Honor, can he speak into a
12 microphone? I can't barely hear him.

13 MR. DICKERSON: We don't know exactly what's
14 available, because those are unavailable. Because Footnote 2,
15 which is their cite for that, doesn't exist when you look it up.

16 Nonetheless, I think that the analysis goes through and
17 we're -- the analysis should be just what it is today in front of the
18 Court, what percentage of the population is eligible for jury service
19 and where do we fall? So I think that regardless, we've brought
20 down the numbers to exactly what they should be. So it's a more
21 exact analysis that we have here.

22 And even when you look at that, you look at the numbers
23 that are now before the Court with the master list that exists and
24 the master list being at 18.39 percent Hispanics as compared to the
25 population, which is overall just 20.7 percent. So even that alone,

1 we don't have exclusion.

2 So with that, the basis of defense counsel's objection or
3 opposition here is that, first of all, this should be in writing, or a
4 motion before the Supreme Court. Well, I remind the Court that
5 they brought an oral motion before this Court to expand this
6 hearing beyond what they conceded is no longer an issue, the ZIP
7 code issue. The whole reason that brought them here. And that it's
8 that same thing that we are doing now, is we're coming back before
9 the Court with this new information that has been put into the
10 record in evidence, sworn testimony, that shows there is no
11 exclusion, systematic -- or there's no prima facie case to even get
12 them to the point where they should be making the motion before
13 this Court to expand this hearing beyond that issue, which brought
14 them back here.

15 So I think that it's their own doing --

16 MS. DICKENSON: Your Honor, could I correct the
17 [indiscernible], I think the testimony --

18 MR. DICKERSON: -- describes a --

19 THE COURT: Just one second. Let him finish. Let him
20 finish.

21 Go ahead.

22 MS. DICKENSON: Oh, he's --

23 MR. DICKERSON: It's their own doing in seeking to
24 expand this hearing beyond the ZIP code issue, the issue that
25 they've conceded does not exist, that brings before this Court, is

1 there a basis to do that? Or are we looking at just a general
2 allegation of systemic -- or systematic exclusion? And that's exactly
3 what they've done.

4 I don't think that the Nevada Supreme Court had in mind
5 that they were going to send this back just for a general hearing on
6 all issues that could possibly exist in the world and give them, you
7 know, what do we have here, two years to get this thing together.

8 THE COURT: Go ahead, Ms. Dickenson.

9 MS. DICKENSON: Your Honor, I just wanted to correct his
10 figures. I believe that the 2017 master list of those Hispanics that
11 are eligible for the jury were 15.82 percent.

12 MR. DICKERSON: Well, that would be excluding --

13 MS. DICKENSON: And according to the census figures
14 that our expert had, it should have been 20.70 percent, which had
15 standard deviation of 33.95, which is very significant. And as I said
16 before, the test in Williams was for the overall population under
17 Step 2. In Step 3, we're only looking at those that are eligible to
18 serve.

19 MR. DICKERSON: Sure. Well, where defense counsel is
20 wrong there is that she's talking about the master list after their
21 expert excluded duplicates. So we know that duplicates exist in the
22 list that he got. With the duplicates, it's 18.39 percent. So those
23 duplicates are all people who have self-identified as Hispanic. So
24 that makes it more likely that Hispanic person is going to be called
25 to jury service.

1 And, moreover, we get to the fact that these are folks that
2 have self-identified. So the reasonable conclusion is that there's
3 people in there that have not self-identified in any race, let alone
4 Hispanic.

5 So the number that we're looking at is 18.39 for the
6 master list.

7 MS. DICKENSON: I disagree. You can't include
8 duplicates. That makes no sense to me.

9 MR. DICKERSON: Well, they exist in the master list --

10 MS. DICKENSON: I don't understand how you can --

11 MR. DICKERSON: -- so you can include them, because
12 those people are potentially getting called. They just have double
13 the chance of getting called.

14 MR. GASTON: But they can only get called once. So
15 when you're doing the math, they're overrepresented. They're
16 over -- yes, they're more likely to receive a summons, because
17 they're twice as likely to get a summons. But they can only appear
18 one time for an actual jury panel. So when you're actually figuring
19 out how many Hispanics there are, if -- let's just assume every
20 Hispanic gets doubled up and on the master list, yeah, they're twice
21 as likely to get a summons, but they can only appear one time.
22 So --

23 MR. DICKERSON: Well, they're going to get a summons --

24 THE COURT: Well --

25 MR. DICKERSON: -- it's going to be under a different ID

1 number, and they're going to show up, right? They're not going to
2 have a lawyer that's going to say, Hey, look, you must have two ID
3 numbers here.

4 MR. GASTON: So --

5 MR. DICKERSON: So the 18.39 percent is the number.

6 MR. GASTON: So what I was saying is that even though
7 they're twice as likely to get a summonses, they only show up once,
8 so it balances out. There's not a benefit to being a duplicate on a
9 list. You're not more likely, it doesn't mean that that's not an
10 accurate way of looking at it, but also, there's not -- it just cancels
11 each other out. That's all it is. It's just fluff.

12 MR. DICKERSON: It only --

13 MR. GASTON: You're double the -- if I can just finish.

14 THE COURT: Go ahead.

15 MR. GASTON: You're twice as likely to get called, but you
16 can only show up one time. So if two summonses goes out in
17 a 2000 summon list for the same person, you're only going to get
18 one show up. So they're twice as likely to show up, but can only
19 show up half the time on the double list. So they just can't --
20 duplicates just -- it's not a mathematically accurate way of looking
21 at it to the extent that the State's arguing because they're
22 duplicates, well, they were overrepresented anyways. They just --
23 that's not a good way of looking at duplicates. Duplicates is just
24 noise and fluff. It's just extras.

25 MR. DICKERSON: Not --

1 MR. GASTON: They cancel each other out. The presence
2 of a duplicate and the absence of a duplicate, they just cancel each
3 other out mathematically and how you're trying to calculate what is
4 represented by the list.

5 MR. DICKERSON: That's not true. Right? So he's
6 assuming that somebody's just not going to show up. Right? So
7 what we have is we had the system described by the jury
8 commissioner where they have these merges that try to merge
9 duplicates into one single profile. When you have a duplicate in the
10 master list, those are two different profiles that show up. So those
11 people are going to be getting subpoenas under both profiles.
12 They're going to show up.

13 MR. GASTON: But only one human being can be on the
14 master -- only one human being can sit on the panel. Like I -- is
15 that -- only one human being --

16 THE COURT: Right.

17 MR. GASTON: -- can sit on -- in a chair. So even though
18 that same human being gets two summonses, and, in fact, if they're
19 on the list twice, they're twice as likely to get a summons -- getting
20 a summons as you are --

21 THE COURT: Right.

22 MR. GASTON: -- if you're only on the list once. But only
23 one human being can show up.

24 So it doesn't mean they're overrepresented or under -- it's
25 just noise, because it cancels each other out. It's just noise.

1 THE COURT: Yes, if you're looking at the panel list.

2 MR. DICKERSON: Right. But -- yeah.

3 MR. GASTON: When we're talking about our
4 mathematical analysis of whether this is statistically representative
5 compared to the demographics, duplicates just cancel each other
6 out. They're not -- it's not a plus, it's not a minus, it's just noise.

7 THE COURT: It depends on which list you're looking at,
8 though, right?

9 MR. DICKERSON: And --

10 MR. GASTON: What do you mean?

11 THE COURT: Because if you're looking at the panel list,
12 only one of them shows up, I feel fine about that. But if you're
13 looking at the overall master, then we could be looking at different
14 numbers.

15 MR. GASTON: There were -- no. No. There were not
16 duplicates in 2017 for summons sent out. None of the 2000
17 summonses that were sent out for this panel was a duplicate and
18 the master list has duplicates on it, which, when we're asking him,
19 we asked him pre- and post-duplicates to do the math, but it's just
20 air -- it doesn't make -- it doesn't -- essentially, I think the State is
21 trying to argue that because there are duplicates that include
22 Hispanics, Hispanics are more likely to get called anyways. And
23 that is a facetious argument. It is not accurate. It's --

24 THE COURT: I want to hear it from Mr. Martin.

25 MR. GASTON: Okay.

1 MR. DICKERSON: And --

2 MR. GASTON: Oh, well, that -- okay.

3 MR. DICKERSON: I think the fallacy in his argument is,
4 Your Honor, that he is -- we have 52 weeks in the year? So --

5 THE COURT: What? Oh.

6 MR. DICKERSON: 52 weeks in the year?

7 THE COURT: Yeah.

8 MR. DICKERSON: So he is relying on an idea that it's just
9 one single week that both these -- the person and both their profiles
10 are getting subpoenas. There's 51 other opportunities within the
11 year for that person to be called as a -- to be subpoenaed or
12 summonsed as a juror. So that's the fallacy in their argument.

13 It does increase the numbers of self-identified, mind you,
14 Hispanics on that list. And so the assumption is clear, based upon
15 the testimony from the jury commissioner that there is more than
16 that.

17 THE COURT: Mr. Martin, you want to weigh in? Since
18 you are --

19 MR. MARTIN: Sure.

20 THE COURT: Here on this?

21 MR. MARTIN: I appreciate the fact that this is sort of
22 difficult. This is what I would say about duplicates. Duplicates
23 destroys the randomness of the list. And so Mr. Gaston's right, you
24 get two times the chances of being drawn.

25 So it messes up our analysis of the list just to start with,

1 because it's not a -- it's no longer a random draw.

2 THE COURT: Right.

3 MR. MARTIN: But it is true that only one person is going
4 to show up. And to the extent that your jury process allows you to
5 say, hey, listen, I just got called, I'm not sure if there's a time period
6 where the clerk would say, oh, yeah, he did just get called, you
7 don't have to come in again. That enters into it too.

8 But if you were looking at -- if the question is what does
9 this list -- what is really the demographics of the list, well, because
10 there's only one person in the duplicates, the demographics are the
11 list without the duplicates in it, in terms of what is it really -- how
12 representative is it really?

13 So you've got two prongs. You've got how representative
14 it is and whether it's a random draw. And so I'm not sure that
15 helped, but that's the way a statistician would have said it.

16 MR. DICKERSON: So --

17 MR. GASTON: And, Your Honor, I would just remind the
18 Court also that the legislature agrees with Mr. Martin's position,
19 because one of the requirements posed -- imposed upon the jury
20 commissioner in NRS 6.045 is that she's avoid -- she's to regularly
21 look through the [indiscernible] to avoid duplicates.

22 So to some extent there's a recognition that duplicates are
23 a bad thing to have on your master list, because they're noise,
24 they're fluff, and they destroy the randomness of the list. So that's
25 why she's under statutory obligation to avoid the duplicates, which

1 she wasn't doing also independently, because we have 9.3 percent
2 duplicates, according to Mr. Martin's testimony.

3 So the State's argument that my argument should fail
4 because the duplicates just make it more likely minorities are going
5 to show up anyways or get summoned is inaccurate, because we
6 don't know what percentage of duplicates were minorities versus
7 not minorities, because the same argument applies to duplicates
8 that were Caucasians. But second of all, it's also in contradiction of
9 the statute, because the point is that duplicates are to be avoided
10 regardless.

11 But I think we've perhaps gone too much into a rabbit
12 hole --

13 THE COURT: Yep.

14 MR. GASTON: -- on duplicates --

15 THE COURT: We think?

16 MR. GASTON: -- because this is also not really relevant to
17 the point that the State made, which is I guess A, does the defense
18 have the authority to talk about things that aren't the ZIP code,
19 although I would argue that the Court already ruled on that.

20 B, do they have the ability to reopen Prong 2 and ask the
21 Court to reconsider our evidence on Prong 2. I'd argue no, they say
22 yes.

23 And then if you do, they're saying we fail based on our
24 new statistics -- not new statistics, but our statistics citing the more
25 narrowed, rigorous census, which seems more accurately to display

1 the people who could have been qualified. They say that doesn't
2 meet the 50 percent, so they should win, because we don't meet
3 Prong 2. And we disagree that that should even be opened, but if it
4 is opened, we think we still meet the test on our Prong 2, which is
5 that the statistics of the Hispanics in the panel were not fair and
6 reasonable to what you expect, given the -- that their demographics
7 in the Clark -- in Clark County.

8 MR. DICKERSON: And the only reason defense counsel
9 got there with the Nevada Supreme Court was their argument on
10 the ZIP code, that they -- the Nevada Supreme Court found, based
11 upon the statistics that they showed to the Court to show prima
12 facie case that there may be validity to this ZIP code issue, which
13 they even cited case for.

14 And so them coming in here and orally moving to open
15 this hearing to some general proposition of unfairness and
16 unrandomness or unreasonableness is based on those issues, it's
17 based on them leading the Court to believe they had a prima facie
18 case and them leading the Court to believe that that -- the real issue
19 here was the ZIP code issue, which now they've conceded.

20 So, you know, we can all agree on Prong 1, the Hispanics
21 are a distinctive group in the community. But they fail on
22 everything else. And there's no reason for this hearing to go any
23 further.

24 THE COURT: Well, the issue, though, about the -- I'm --
25 what I was trying to do once the ZIP code thing was figured out was

1 there was so much information that was then, I don't know if you
2 want to use the term discovered, but -- that I felt we were going to --
3 no matter which way I rule, we can all agree that one side is going
4 to appeal me. Right? So I wanted to have a full fleshed-out
5 hearing, because I felt like we were just getting set right back down
6 to have the hearing.

7 What has thrown a wrench in this is this Prong 2 issue.
8 But when I'm reading Williams, and I see what you're saying,
9 Mr. Dickerson, in regards to the footnotes are unclear, Williams is
10 using the census of all people. And here, this 46.33 or whatever it
11 is, is using a much more narrow calculation. And if we -- if
12 Mr. Martin didn't use that narrowing -- I can't remember what
13 [indiscernible] about the 50?

14 MR. GASTON: 64, I believe.

15 THE COURT: 64, right. So, listen, we're going to just go
16 forward with the hearing. I'm going to be provided with all of the
17 information, because the information presented via Williams would
18 have still put them in ballpark of having this hearing. It would have
19 still put them -- I understand what we're saying, right, the 46.33
20 doesn't -- if you're talking about 50 percent being a hard line. But
21 the -- if you're using Williams and the census, that's different
22 numbers and that is putting us in the ballpark of we would need an
23 evidentiary hearing. So I'm going forward with the hearing.

24 Clearly, we're not doing that today, because --

25 MR. GASTON: I can actually finish my direct. I only have

1 a few --

2 THE COURT: You can finish your direct?

3 MR. GASTON: I was at the end. I'm just talking about --
4 I'm just asking about the DETR records and then the inclusion of
5 those would help make the list --

6 THE COURT: Okay. Yeah, if you can finish your direct,
7 I'm --

8 MS. BOTELHO: But, Your Honor, instead of that, can I get
9 an idea of -- since this is going to get continued anyway, when I'm
10 going to get the Court's ruling on the recreated list and whether the
11 State's going to get that data?

12 MR. GASTON: I mean, we're not sending anything unless
13 the Court specifically orders us to. There's no new list, there's no
14 nothing. It's just his analysis.

15 THE COURT: Okay. One second.

16 Ms. Botelho, my understanding, in speaking with
17 Mr. Martin, was that it wasn't -- it isn't a list, it's how he works on
18 the list and excludes. Right?

19 MS. BOTELHO: Yes.

20 THE COURT: So I don't think he has a separate document.
21 What I would think now is --

22 And he's shaking his head yes -- nodding his head yes.

23 And this is defense -- I mean, defense can order their
24 expert not to do this if they want, I mean, that's your purview, it's
25 your expert. But I think it would be appropriate if the State could

1 speak with Mr. Martin and kind of understand how those numbers
2 were gotten to so he can talk to them about -- and with them being
3 able to look at the master that they have and work out those
4 numbers.

5 Do you have an opposition to that, Mr. Gaston?

6 MR. GASTON: I mean, this -- I appreciate the Court's
7 suggestion. I mean this as respectfully as possible. But given the
8 way this hearing has progressed and et cetera, there's just no way
9 that that's a productive position for the defense to agree with. Like,
10 there -- I can already see how it's going to go. There's going to be a
11 conversation, then there's going to be a hundred million assertions
12 on the record by the State that expert said so and so when they
13 were having this private conversation --

14 THE COURT: Well, you're going to be present.

15 MR. GASTON: Whatever, we're still going to have the
16 same thing. I'm just going to say uh-uh, and the State's going to
17 say that is true, and we're going to call each other liars. I just can't
18 possibly imagine how that's productive and I don't think there's a
19 rule that requires us to do so.

20 So, respectfully, I do oppose that request.

21 MS. BOTELHO: I -- there's --

22 THE COURT: Well --

23 MS. BOTELHO: There's --

24 MR. GASTON: There's just no way that's good for us to
25 do.

1 MS. BOTELHO: What I'm really requesting -- I understand
2 there's not a list, Your Honor. Okay.

3 THE COURT: Yeah.

4 MS. BOTELHO: But what I'm saying is I don't even know
5 the numbers. I don't even know the numbers that he's working all
6 of this mathematical, you know, analysis on. Like, after he excludes
7 this person or this set of people or these people, what's the
8 underlying number that he got to?

9 THE COURT: Sure.

10 MS. BOTELHO: I don't have any of that.

11 THE COURT: Mr. Martin, would you -- do you have the --

12 MS. DICKENSON: Your Honor?

13 THE COURT: One second, Ms. Dickenson.

14 MS. DICKENSON: Your Honor, could I --

15 THE COURT: No, not right now. One second.

16 Would you -- are -- do you have the answers to the
17 questions the State's putting forth?

18 MR. MARTIN: A lot of different questions. But if you just
19 want me to split the list in two, which I haven't done, but I can do, I
20 can split it in two.

21 THE COURT: When you say split it in two, you're talking
22 post-2017, pre-2020?

23 MR. MARTIN: Right.

24 MR. GASTON: So I'm assuming he just means he'll -- he
25 just excludes all the names he's not using from the 2020 list and

1 then has whatever the final document is.

2 THE COURT: Yeah. Right? I mean --

3 MS. BOTELHO: And that's what I've always -- that's what I
4 assumed I was going to get when we say there's a recreated list, I
5 assumed I was going to get exclusion, exclusion, and then what
6 happens after all of these are excluded. Here are the numbers,
7 State. So we know how to do the calculations.

8 THE COURT: Yeah.

9 MS. BOTELHO: I did not receive that.

10 THE COURT: Okay.

11 MS. BOTELHO: Amongst other things.

12 THE COURT: Okay.

13 MS. BOTELHO: And so I think to properly prepare for
14 cross, I would like to get that as soon as possible.

15 THE COURT: That's fair.

16 MR. GASTON: Okay.

17 THE COURT: Okay?

18 MR. GASTON: May I finish there?

19 THE COURT: Yes.

20 MR. GASTON: Thank you.

21 MS. DICKENSON: Your Honor, is the Court saying --

22 THE COURT: Oh, yeah, I'm sorry --

23 MS. DICKENSON: I'm saying I believe a lot of what she's
24 asking for is work product. But if the Court is asking for us to split
25 the list and give it to her, I suppose we can do that.

1 THE COURT: Yeah, no, I mean, that's -- that is -- you are
2 able to -- each side is -- has the ability to effectively cross-examine.
3 And I was very clear -- listen, I feel like -- guys, I've got to be honest,
4 I feel like I have given the defense an incredible -- incredible amount
5 of leeway with this hearing. I think that with the whole thing with
6 the ZIP codes, I -- we're having a hearing, which is above and
7 beyond the hearing that I was told to do. And so now we're going
8 to really make sure we're playing fair. And so yeah, the State's
9 going to get that. That's not work product.

10 And even the rules, especially the one that Ms. Botelho
11 cited to at the beginning when it talks about expert witnesses and,
12 you know, being given the data and the statistics and the Court
13 even ordering it, I was very clear in my order that the State, by
14 however long ago, was going to have everything to properly
15 cross-examine. They still don't have it. So they're getting that.
16 And we're moving on.

17 So go ahead with the direct, Mr. Gaston.

18 MR. GASTON: Thanks, Your Honor.

19 **DIRECT EXAMINATION (CONT.)**

20 BY MR. GASTON:

21 Q So I already know -- asked a couple of questions about
22 this category, but I kind of just want to restart, Mr. Martin.

23 You received a list of DETR claims for the -- for Nevada
24 in 2017; is that correct?

25 A That's correct.

1 Q Okay. What -- and -- one sec. What percentage of Nevada
2 generally self-identifies as Hispanic on the DETR claims?

3 A The DETR claims? So I have three sources as DETR
4 claims. They all give the same number. The June 2017, that's the
5 month before, it was 24.97 percent. The spreadsheet I was given
6 doesn't have July, but it does have August. So the month after it
7 is 24.63 percent. And then a separate spreadsheet which did it by
8 date, and the date of July 31st, 2017, is the one I took, and it
9 was 24.25 percent.

10 Q Okay. Thank you.

11 And, again, just remind me, what was the percentage of
12 Nevada, according to the census, Clark County census of Hispanics?

13 A I'm sorry, of Hispanics or of the whole state?

14 Q For the census regarding Clark County that we talked
15 about earlier, what percentage --

16 A Yeah.

17 Q -- was Hispanic?

18 A 20.70.

19 Q So is it fair to say that Hispanics are actually
20 overrepresented on the DETR list?

21 A Absolutely.

22 Q Okay. Now, one thing I want to talk about is we're
23 referring to statewide DETR claims, right?

24 A That's correct.

25 Q Did it come to your attention that there's no way to parse

1 it out and look at it only by Clark County?

2 A Well, not in the information I was given.

3 Q Okay. However, what percentage of statewide DETR
4 claims did Clark County represent?

5 A Okay. Hang on one second. So 79 percent.

6 Q Okay.

7 A So -- and it varies a little bit by date. 79.12 percent in
8 June, and in August, it was 79.32.

9 Q Okay. So as -- your opinion as an expert and pursuant to
10 the law of large numbers, if we were to exclude the rest of the
11 State's claims from the numbers that you have so that we would
12 only have Clark County DETR claims, would you expect there to be
13 a significant difference in the numbers, the demographics that you
14 see?

15 A Not really. Mainly because Clark County makes up such a
16 high percentage of Nevada.

17 Q Thank you.

18 But as we were talking about, so Hispanics are
19 overrepresented on the DETR claims compared to their
20 demographics in the community; is that correct?

21 A That's correct.

22 Q So if the DETR names have been added into the master
23 list from 2017, would that have increased the statistics and the
24 demographics of Hispanics on that jury panel?

25 A It would -- to the extent that the person's on the DETR list,

1 are not in the Nevada Energy and not a driver, and to the extent
2 that those duplicates are handled correctly, it would increase
3 Hispanic representation.

4 Q So is it always true that adding a new source list of a -- of
5 major -- a major list of names in Clark -- in a city or a county usually
6 always helps make a list more representative?

7 A Of course, to be fair, depends on what list you're adding.

8 Q Okay.

9 A But, in general, adding more sources -- the whole idea
10 behind adding more sources, for instance, going to the four sources
11 that Nevada does, is to increase representativeness, is to catch as
12 many people as possible.

13 Q And so when you increase a list of major names, would
14 you agree that that increases representation of all race groups?

15 A Yes.

16 Q And when you have a list that's actually skewed towards
17 overrepresenting a certain ethnicity, does it help, when including
18 that list, then over and above increased that ethnicity's
19 representation on the master list?

20 THE COURT: Wait, go back. Rephrase that.

21 BY MR. GASTON:

22 Q When you have a source of names that is skewed towards
23 being overrepresented towards one -- towards a specific ethnicity,
24 what effect does including that in the master list have on that
25 ethnicity's representation in the master list?

1 A Mathematically, it has an effect, but I would put it
2 differently than the way you're putting it. To the extent that the
3 DETR list -- to the extent that drivers list implies some level of
4 income associated with needing a driver's license --

5 MR. DICKERSON: And, Your Honor, we'd object --

6 THE WITNESS: -- to drive a car --

7 MR. DICKERSON: -- to that assumption that it's a driver's
8 license. Because it's Nevada DMV, they issue identification cards,
9 they -- it's -- not everyone's a driver.

10 MR. GASTON: I think that would go to weight rather than
11 admissibility. It's his opinion, they can cross-examine on the --

12 THE COURT: No, I'm going to sustain it.

13 Go ahead. Next question?

14 MR. GASTON: Well, I don't think he finished --

15 BY MR. GASTON:

16 Q Would -- basically, let me just ask you this question: If
17 we -- if Clark County had included the DETR list in the master list
18 at 2017, would that have helped correct the disparity between the
19 observed Hispanics on the master list and their demographics in
20 the Clark County?

21 A Yes, I believe so.

22 Q Would including the voter rolls have helped alleviate that
23 disparity?

24 A Yes, I believe so.

25 Q And you've already testified about the 33 standard

1 deviations between the 2017 master list and the demographics as
2 indicating that it is not due to random chance. Would Clark -- in
3 your opinion, having looked at all of this, and -- would Clark County,
4 not including the Nevada voter rolls and the DETR records have
5 contributed to that problem of underrepresentation?

6 A Yes. Yes, the first place you look for underrepresentation
7 is what you have in your source list.

8 Q Thank you.

9 MR. GASTON: No more questions.

10 THE COURT: Okay. All right.

11 Mr. Martin, thank you so much. We appreciate your
12 testimony. We are going to have to select another day to do this for
13 your cross-examination and potential redirect, so the parties will be
14 in touch with you. Okay?

15 THE WITNESS: Okay. I'm gone February 18th through
16 February 22nd.

17 THE COURT: Okay.

18 THE WITNESS: So if you could avoid those dates, I'd
19 appreciate it very much.

20 THE COURT: Thank you for letting us know. I appreciate
21 that.

22 THE WITNESS: No problem.

23 THE COURT: All right, guys. So we will have to
24 reschedule. Trying to think of when we could -- first, let's talk about
25 how long -- I mean, we started today at 11:30. So what are we

1 thinking? Do we need a full day?

2 MR. GASTON: Well, if the DETR records are admitted, so I
3 don't have my third witness to testify, so it would be
4 cross-examination of the expert and then any redirect, and then I
5 guess oral argument, unless --

6 THE COURT: It'll be written.

7 MR. GASTON: -- you're going to order briefing on it.

8 THE COURT: Yeah.

9 MR. GASTON: You are ordering briefing on it?

10 THE COURT: Most of the time with something this
11 layered, yeah. I do a page limit and briefing.

12 MR. GASTON: So it should be however the State
13 ultimately thinks they need for cross-examination.

14 MS. BOTELHO: I'm not sure if I even have all the records
15 that he referred to today.

16 THE COURT: Okay. So, Ms. Botelho, we'll hopefully -- I
17 should have kept him on, but ask -- oh, Mr. Martin's still on.

18 Mr. Martin, are you still there?

19 MR. MARTIN: Yes, I am.

20 THE COURT: Thank you, sir. How long will it take you to
21 get the list to Ms. Botelho?

22 MR. MARTIN: That's not very hard at all.

23 THE COURT: Okay.

24 MR. MARTIN: So whenever she needs it.

25 THE COURT: All right. So by Friday, would you be able to

1 get that to her?

2 MR. MARTIN: Absolutely. I -- respectfully, I guess, I'll talk
3 to Mr. Gaston and Ms. Dickenson about exactly what they want me
4 to do. But if you're telling me to do it, I absolutely can do it by
5 Friday.

6 THE COURT: Yeah. Yeah, no, I'm definitely ordering that
7 that be done. I just wanted to make sure that by Friday it would be
8 a reasonable time for you to be able to get all that together. I don't
9 know what goes into doing that.

10 MR. MARTIN: Right. I just want to make sure everybody's
11 happy with whatever I'm doing.

12 THE COURT: Oh, I can assure you probably no one's
13 happy. But that's -- it's okay. That's just kind of the way this goes.

14 MR. MARTIN: I'll take that for what it's worth.

15 THE COURT: Yeah. All right. So Friday by 5:00, that'll go
16 over to the State.

17 Ms. Botelho, what would you say is a reasonable time
18 period in which you can review that?

19 MS. BOTELHO: Two weeks.

20 THE COURT: Okay. All right. So I will -- basically, what I
21 need you guys to do is provide some dates that work. Mondays
22 and Fridays are usually the best. That way it's easier for me to work
23 with jury trials on those dates. So you guys come up with some
24 lists of Mondays and Fridays that work for you, and then Crystal will
25 have to ask for a special setting so we can have Mr. Valentine here.

1 We were lucky this time and we got to have him here in
2 person, but I don't know if we'll be as lucky in the future.

3 And, Mr. Valentine, I remember last time you -- at the end
4 of the hearing, you -- I think you were frustrated, you're, like, I don't
5 want to be here. But you do want to be here for these hearings,
6 right?

7 THE DEFENDANT: Oh, man. Yeah.

8 THE COURT: Yeah. I just want you to know you have a
9 right -- you, of course, always have a right to be here. But last time
10 you were frustrated and you're, like, you clearly did not -- I think
11 you even said something to the effect of, like, I just want to get out
12 of here. So.

13 THE DEFENDANT: Well, I was trying to -- I was -- my bus
14 was leaving. Because I ain't even in CCDC. I'm, like, by the airport
15 base.

16 THE COURT: Right. Yeah.

17 THE DEFENDANT: So I was going to have to do in here all
18 night.

19 THE COURT: Got you.

20 THE DEFENDANT: But, I mean, yeah.

21 THE COURT: It was more about that, right? It was more
22 that you were worried you were going to miss your transportation
23 back?

24 THE DEFENDANT: Yeah.

25 THE COURT: Okay. All right. Okay, guys, so get me a list

1 of Mondays and Fridays post two weeks from today, and then
2 Crystal will get you guys on the setting. We'll work with the
3 departments in charge of the custody setting. Okay?

4 MS. BOTELHO: Okay.

5 MR. GASTON: Yes, ma'am.

6 THE COURT: Good. All right.

7 We can go off. Thank you for that.

8 [Proceeding concluded at 5:04 p.m.]

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

22 
Shawna Ortega, CET*562

ORIGINAL

IND

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Nevada Bar #001565

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FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN 29 2016

BY Nora Peña
NORA PEÑA, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KEANDRE VALENTINE,
#5090875

Defendant.

CASE NO: C-16-316081-1

DEPT NO: III

INDICTMENT

STATE OF NEVADA }
COUNTY OF CLARK } ss.

The Defendant above named, KEANDRE VALENTINE, accused by the Clark County Grand Jury of the crime(s) of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060 - NOC 50426); ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.330, 193.165 - NOC 50145); POSSESSION OF DOCUMENT OR PERSONAL IDENTIFYING INFORMATION (Category E Felony - NRS 205.465 - NOC 50697) and POSSESSION OF CREDIT OR DEBIT CARD WITHOUT CARDHOLDER'S CONSENT (Category D Felony - NRS 205.690 - NOC 50790), committed at and within the County of Clark, State of Nevada, on or between May 26, 2016 and May 28, 2016, as follows:

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C-16-316081-1
IND
Indictment
4560121



1 COUNT 1 - ROBBERY WITH USE OF A DEADLY WEAPON

2 did on or about May 26, 2016, willfully, unlawfully, and feloniously take personal
3 property, to-wit: gold chains, wallet and contents, from the person of MARVIN BASS, or in
4 his presence, by means of force or violence, or fear of injury to, and without the consent and
5 against the will of MARVIN BASS, with use of a deadly weapon, to-wit: a firearm.

6 COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

7 did on or about May 26, 2016, willfully, unlawfully, and feloniously enter, with intent
8 to commit larceny and/or assault and/or battery and/or a felony, to-wit: robbery, that certain
9 vehicle occupied by MARVIN BASS, located at 2901 West Washington, Las Vegas, Clark
10 County, Nevada, while possessing and/or gaining possession of a firearm, a deadly weapon,
11 during the commission of the crime and/or before leaving the vehicle.

12 COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON

13 did on or about May 28, 2016, willfully, unlawfully, and feloniously take personal
14 property, to-wit: lawful money of the United States, from the person of DARRELL
15 FAULKNER, or in his presence, by means of force or violence, or fear of injury to, and without
16 the consent and against the will of DARRELL FAULKNER, with use of a deadly weapon, to-
17 wit: a firearm.

18 COUNT 4 - ROBBERY WITH USE OF A DEADLY WEAPON

19 did on or about May 28, 2016, willfully, unlawfully, and feloniously take personal
20 property, to-wit: lawful money of the United States, from the person of DEBORAH
21 FAULKNER, or in her presence, by means of force or violence, or fear of injury to, and
22 without the consent and against the will of DEBORAH FAULKNER, with use of a deadly
23 weapon, to-wit: a firearm.

24 COUNT 5 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

25 did on or about May 28, 2016 willfully, unlawfully, and feloniously enter, with intent
26 to commit larceny and/or assault and/or battery and/or a felony, to-wit: robbery, that certain
27 building occupied by DARRELL FAULKNER and/or DEBORAH FAULKNER, located at
28 2605 Rising Legend, Las Vegas, Clark County, Nevada, while possessing and/or gaining

1 possession of a firearm, a deadly weapon, during the commission of the crime and/or before
2 leaving the structure.

3 COUNT 6 - ROBBERY WITH USE OF A DEADLY WEAPON

4 did on or about May 28, 2016, willfully, unlawfully, and feloniously take personal
5 property, to-wit: wallet and contents, from the person of JORDAN ALEXANDER, or in his
6 presence, by means of force or violence, or fear of injury to, and without the consent and
7 against the will of JORDAN ALEXANDER, with use of a deadly weapon, to-wit: a firearm.

8 COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON

9 did on or about May 28, 2016, willfully, unlawfully, and feloniously take personal
10 property, to-wit: cellular telephone and lawful money of the United States, from the person of
11 SANTIAGO GARCIA, or in his presence, by means of force or violence, or fear of injury to,
12 and without the consent and against the will of SANTIAGO GARCIA, with use of a deadly
13 weapon, to-wit: a firearm.

14 COUNT 8 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

15 did on or about May 28, 2016 willfully, unlawfully, and feloniously attempt to take
16 personal property, to-wit: lawful money of the United States and/or personal property, from
17 the person of JUAN CARLOS CAMPOS TORRES, or in his presence, by means of force or
18 violence, or fear of injury to, and without the consent and against the will of JUAN CARLOS
19 CAMPOS TORRES, by demanding said money and/or personal property from the said JUAN
20 CARLOS CAMPOS TORRES, with use of a deadly weapon, to-wit: a firearm.

21 COUNT 9 - ROBBERY WITH USE OF A DEADLY WEAPON

22 did on or about May 28, 2016, willfully, unlawfully, and feloniously take personal
23 property, to-wit: wallet and cellular telephone, from the person of LAZARO BRAVO-
24 TORRES, or in his presence, by means of force or violence, or fear of injury to, and without
25 the consent and against the will of LAZARO BRAVO-TORRES, with use of a deadly weapon,
26 to-wit: a handgun.

27 COUNT 10 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

28 did on or about May 28, 2016, willfully, unlawfully, and feloniously enter, with intent

1 to commit larceny and/or assault and/or battery and/or a felony, to-wit: robbery, that certain
2 vehicle occupied by LAZARO BRAVO-TORRES, located at 1104 Leonard, Las Vegas, Clark
3 County, Nevada, while possessing and/or gaining possession of a firearm, a deadly weapon,
4 during the commission of the crime and/or before leaving the structure.

5 COUNT 11 - ROBBERY WITH USE OF A DEADLY WEAPON

6 did on or about May 28, 2016 willfully, unlawfully, and feloniously take personal
7 property, to-wit: purse and/or wallet and/or cellular telephone, from the person of ROSA
8 VASQUEZ-RAMIREZ, or in her presence, by means of force or violence, or fear of injury to,
9 and without the consent and against the will of ROSA VASQUEZ-RAMIREZ, with use of a
10 deadly weapon, to-wit: a firearm.

11 COUNT 12 - POSSESSION OF DOCUMENT OR PERSONAL IDENTIFYING
12 INFORMATION

13 did on or about May 28, 2016, willfully, knowingly, and feloniously possess any
14 document or personal identifying information, to-wit: Nevada driver's license with the name,
15 date of birth and driver's license number belonging to JORDAN ALEXANDER, for the
16 purpose of establishing a false status, occupation, membership, license or identity for himself
17 or any other person.

18 COUNT 13 - POSSESSION OF CREDIT OR DEBIT CARD WITHOUT CARDHOLDER'S
19 CONSENT

20 did on or about May 28, 2016, willfully, unlawfully, and feloniously, have in his
21 possession, without the consent of the cardholder, a credit or debit card, to-wit: VISA card
22 ending in the numbers 8220, issued in the name of JORDAN ALEXANDER, with intent to
23 circulate, use, sell, or transfer said card, with intent to defraud the cardholder and/or the issuer
24 of said credit or debit card.

25 COUNT 14 - POSSESSION OF CREDIT OR DEBIT CARD WITHOUT CARDHOLDER'S
26 CONSENT


27 did on or about May 28, 2016, willfully, unlawfully, and feloniously, have in his
28 possession, without the consent of the cardholder, a credit or debit card, to-wit: VISA card

1 ending in the numbers 9521, issued in the name of ROSA VASQUEZ-RAMIREZ, with intent
2 to circulate, use, sell, or transfer said card, with intent to defraud the cardholder and/or the
3 issuer of said credit or debit card.

4 DATED this 28th day of June, 2016.

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

8 BY


9 AGNES LEXIS
10 Chief Deputy District Attorney
11 Nevada Bar #011064

12 ENDORSEMENT: A True Bill

13 
14 Foreperson, Clark County Grand Jury

Names of Witnesses and testifying before the Grand Jury:

ALEXANDER, JORDAN, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

BASS, MARVIN, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

BRAVO-TORRES, LAZARO, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

FAULKNER, DARRELL, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

GARCIA, SANTIAGO, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

LUDWIG, DEAN, LVMPD #12963

VASQUEZ, ROSA, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

Additional Witnesses known to the District Attorney at time of filing the Indictment:

BILYEU, RICHARD, LVMPD #7524

CUSTODIAN OF RECORDS, CCDC

CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS, LVMPD RECORDS

DOWLER, CHRISTOPHER, LVMPD #13730

ENDELMAN, DEREK, LVMPD #14025

FAULKNER, DEBORAH, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

HENSON, JASON, LVMPD #3918

MAJORS, WILLIAM, LVMPD #7089

RICHARDSON, COURTNEY, LVMPD #14739

SIMMS, JOSHUA, LVMPD #15111

SPRONK, CIERRA, LVMPD #15128

STOCKTON, DAVE, LVMPD #9989

UBBENS, ANDREW, LVMPD #13119

WATTS, DAVID, LVMPD #8463

WISE, DAVID, LVMPD #9838

16AGJ046X/16F08803X/mc-GJ
LVMPD EV# 1605281133;1605281116;
1605281129;1605281147;1605262109
(TK11)

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR No. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

THE STATE OF NEVADA,
Plaintiff,
v.
KEANDRE VALENTINE,
Defendant.

CASE NO. C-16-316081-1
DEPT. NO. II
NOTICE OF APPEAL

STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY,
NEVADA and DEPARTMENT NO. 11 OF THE EIGHTH JUDICIAL
DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE
COUNTY OF CLARK.

NOTICE is hereby given that Defendant, Keandre Valentine, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the judgment entered against said Defendant on the 16th day of October, 2017, whereby he was convicted of Ct. 1 - Robbery With Use of a Deadly Weapon; Ct. 2 - Burglary While in Possession of a Deadly Weapon; Ct. 3 - Robbery With Use of a Deadly Weapon; Ct. 4 - Robbery With Use of a Deadly Weapon; Ct. 5 - Burglary While in Possession of Deadly Weapon; Ct. 6 - Robbery With Use of a Deadly Weapon; Ct. 7 - Robbery With Use of a Deadly Weapon; Ct. 8 - Attempt Robbery With Use of a Deadly Weapon; Ct. 9 - Robbery With Use of a Deadly Weapon; Ct. 10 - Burglary While in Possession of a

1 Deadly Weapon; Ct. 11 - Robbery With Use of a Deadly Weapon; Ct.
2 12 - Possession of Document or Personal Identifying Information;
3 Ct. 13 - Possession of Credit or Debit Card Without Cardholder's
4 Consent; Ct. 14 - Possession of Credit or Debit Card Without
5 Cardholder's Consent and sentenced to \$25 Admin. Fee; \$1,000
6 restitution and \$150 DNA analysis fee; genetic markers plus \$3 DNA
7 collection fee; Ct. 1 - 2-5 years, plus a consecutive term of 1-3
8 years for the Use of a Deadly Weapon, total 3-8 years; Ct. 2 - 3-8
9 years to run concurrent with Ct. 1 and Ct. 3 - 2-5 years plus a
10 consecutive term of 1-3 years for Use of a Deadly Weapon to run
11 consecutive to Ct. 1, total 3-8 years. Ct. 4 - 2-5 years plus a
12 consecutive term of 1-3 years for Use of a Deadly Weapon to run
13 consecutive to Ct. 1 and 3, total 3-8 years; Ct. 5 - 3-8 years to
14 run concurrent with Cts. 1, 2, 3, and 4; Ct. 6 - 2-5 years plus a
15 consecutive term of 1-3 years for the Use of a Deadly Weapon; Ct.
16 7 - 2-5 years plus a consecutive term of 1-3 years for the Use of
17 a Deadly Weapon to run consecutive to Cts. 1, 3, 4, and 6, total
18 3-8 years; Ct. 8 - 3-8 years to run concurrent with Cts. 1, 2, 3,
19 4, 5, 6, and 7; Ct. 9 - 2-5 years plus a consecutive term of 1-3
20 years for the Use of a Deadly Weapon to run consecutive to Cts. 1,
21 3, 4, 6 and 7; total 3-8 years; Ct. 10 - 3-8 years to run
22 concurrent with Cts. 1, 2, 3, 4, 5, 6, 7, 8 and 9; Ct. 11 - 2-5
23 years plus a consecutive term of 1-3 years for the Use of a Deadly
24 Weapon, total 3-8 years to run concurrent with Cts. 1, 3, 4, 6, 7,
25 8, 9 and 10; Ct. 12 - 1-3 years to run concurrent with Cts. 1, 2,
26 3, 4, 5, 6, 7, 8, 9, 10 and 11; Ct. 13 - 1-3 years to run
27 concurrent with Cts. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; Ct.
28 14 - 1-3 years to run concurrent with Cts. 1, 2, 3, 4, 5, 6, 7, 8,

1 9, 10, 11, 12, and 13 with 489 days CTS. The aggregate total
2 sentence is 18-48 years.

3 DATED this 6th day of November, 2017.

4 PHILIP J. KOHN
5 CLARK COUNTY PUBLIC DEFENDER

6
7 By: /s/ Howard S. Brooks
8 HOWARD S. BROOKS, #3374
9 Deputy Public Defender
309 S. Third Street, Ste. 226
Las Vegas, Nevada 89155
(702) 455-4685

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing
was made this 6th day of November, 2017 by Electronic Filing to:

District Attorneys Office
E-Mail Address:

PDMotions@clarkcountydacountyda.com

Jennifer.Garcia@clarkcountydacountyda.com

Eileen.Davis@clarkcountydacountyda.com

/s/ Carrie M. Connolly
Secretary for the
Public Defender's Office

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Counsel for Respondent

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1 AARON D. FORD
2 ALEXANDER CHEN

SHARON G, DICKINSON
TYLER GASTON

3 I further certify that I served a copy of this document by mailing a true
4 and correct copy thereof, postage pre-paid, addressed to:

5 HONORABLE JACQUELINE BLUTH
6 DISTRICT COURT, DEPT. VI
7 Dept6lc@clarkcountycourts.us

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