

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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3
4 JUSTIN JUG CAPRI PORTER,
5 Appellant,

6 vs.

7 THE STATE OF NEVADA,
8
9 Respondent.

NO. 54866 Electronically Filed
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11 **APPELLANT'S OPENING BRIEF**

12 (Appel from Judgment of Conviction)

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VS.

Respondent.

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1 Porter plead not guilty to all the charges (V: 1055).

2 After the Defense litigated a Petition for a Writ of Habeas Corpus (V: 1055-57) which
3 resulted in the dismissal of more counts, the State filed a Second Amended Information alleging
4 38 felony counts. (II: 355-65).

5
6 The State filed a Notice of Intent to Seek the Death Penalty, which was ultimately
7 dismissed after the United States Supreme Court issued Roper v. Simmons, 543 U.S. 551
8 (2005)(death penalty prohibited for defendants less than 18 years old when the crime occurred).
9 (V: 1075; X: 1494).

10
11 The Defense filed a Motion to Remand Case to Juvenile Court (IV: 882-94) and a
12 Motion to Sever Counts 30-32 (Burglary While In Possession of a Deadly Weapon, Attempt
13 Robbery With Use of a Deadly Weapon, and Murder With Use of a Deadly Weapon) from the
14 other charges in the case. (IV: 868-881). The District Court denied the motion to remand to
15 Juvenile, (IV: 977-78; V: 1095), but granted the severance of Counts 30-32 from the other
16 counts in the case. (IV: 975).

17
18 The State filed a Third Amended Information on April 30, 2009 alleging the three
19 severed counts (formerly Counts 30-32): Count 1, Burglary While in Possession of a Deadly
20 Weapon; Count 2, Attempt Robbery with Use of a Deadly Weapon; Count 3, Murder with Use
21 of a Deadly Weapon. (V: 1010).

22
23 A jury trial commenced May 4, 2009 (V: 1097), and the jury returned a verdict on May
24 8, 2009 (V: 1049-50, 1101) finding Porter not guilty of Burglary and Attempt Robbery, but
25 guilty of Second Degree Murder with Use of a Deadly Weapon.

1 On September 30, 2009, the District Court sentenced Porter to life in prison with parole
2 eligibility after 20 years. (V: 1052, 1103). A Judgment of Conviction was filed October 13,
3 2009 (V: 1051-52), and a timely Notice of Appeal was filed October 29, 2009. (V: 1053).

4
5 This appeal challenges the Judgment of Conviction for the crime of Second Degree
6 Murder with Use of a Deadly Weapon.

7 8 **STATEMENT OF THE FACTS**

9 On June 10, 2000, Las Vegas resident Jay Cleveland had plans to meet up with his
10 friend, Gyaltsso Lungtok. (XI: 2290). Because his friend failed to show up, Cleveland went to
11 Lungtok's apartment at 415 South Tenth Street, Las Vegas. (XI: 2295-97).

12
13 Cleveland found the deadbolt lock to the apartment disabled as though someone had
14 kicked the door open. (XI: 2302). He entered and found his friend dead on the floor of the
15 bedroom. (XI: 2304-05). Someone had shot Lungtok seven times.

16
17 Neighbors reported that they heard kicking on the door of that apartment and screams on
18 the night of June 8, 2000. (XI: 2256-58; 2319-2320; 2326-27).

19 Police responded to the scene and found a footwear impression of a Saucony tennis shoe
20 outside the apartment. (XI: 2432). More than 60 types of Saucony shoes could have made this
21 impression. (XII: 2494).

22
23 The police ultimately developed Justin Porter as a suspect in this killing. The evidence
24 introduced at trial does not explain how the police developed Porter as a suspect.¹

25 Police obtained a search warrant on Porter's residence at 208 North 13th Street,
26 Apartment 3, in the downtown Las Vegas area. (XII: 2500). The police found a pair of Saucony
27

28 ¹ Testimony at a hearing before a judge established that the police established Porter as a suspect
due to a DNA match in one of the charges severed from the charges in this case. (VI: 1304).

1 tennis shoes in a hall closet of Porter's residence. (XII: 2506, 2508). There was no evidence of
2 any blood on the shoes, and no evidence ever established that Porter's Saucony tennis shoes
3 actually made the imprint outside Lungtok's apartment.
4

5 The police did not find a gun or bullets or anything else connecting Porter to the crime
6 scene. (XII: 2520).

7 Aware that the police searched his residence, Justin Porter, visiting his father in Chicago,
8 called Las Vegas Metropolitan Police detective Barry Jensen. (XII: 2510). Porter allegedly told
9 the detective he had not committed any crimes in Las Vegas. (XII: 2510).
10

11 The Las Vegas detectives faxed an arrest warrant to Chicago police for other crimes
12 alleged against Porter. The Chicago police arrested Porter.

13 Detectives flew to Chicago to interview Porter, who was arrested by Chicago police on a
14 warrant from other charges in Las Vegas. Police detective LaRochelle testified Porter turned
15 pale when confronted with pictures of the crime scene. Porter allegedly said he had nothing to
16 do with the crime scene depicted in the photographs. (XII: 2547).
17

18 Detective LaRochelle testified Porter changed his story and said he had a gun with small
19 bullets which he gave to a friend named Dionne. (XII: 2547). Dionne allegedly told Porter he
20 was going to do a "lick," a street slang term for a robbery. Porter allegedly told the detective
21 Dionne went to a nearby apartment complex while Porter waited at a telephone booth. (XII:
22 2548). Dionne returned and said he had killed someone. Porter then told the detective,
23 allegedly, that he went to the apartment to check to see what happened.
24

25 At trial, the State elicited testimony from LaRochelle analyzing the truthfulness of the
26 story allegedly told to LaRochelle by Porter. LaRochelle concluded Porter was a liar because he
27 believed that "Dionne" did not exist. LaRochelle also states that no phone booth can be found
28

1 on South 10th Street. (XII: 2553). LaRochelle also told the jury he considered the conversation
2 between Dionne and Porter, as allegedly related by Porter, to be unreasonable and not
3 believable. (XII: 2553).

4
5 LaRochelle testified that he told Porter his story was not true. (XII: 2558). LaRochelle
6 testified that Porter started crying, then admitted he was running from the police and went to an
7 apartment he thought was empty, and he kicked in the door, entered the apartment, and was
8 approached out of the darkness by some person. (XII: 2558). And Porter allegedly said he
9 pointed the gun at the person in the darkness and fired multiple gunshots at him. (XII: 2558-59).

10
11 The State's witnesses admitted that no ransacking of the victim's apartment occurred,
12 which would be consistent with someone searching for property of value. (XII: 2574). The
13 witnesses admitted the apartment had many items of value which were worth money, but
14 nothing was apparently taken. (XII: 2575-76).

15
16 The police detectives made no effort to question "Dionne" even though they knew such a
17 person existed and they knew the person's whereabouts. (XII: 2585).

18 ARGUMENT

19 I. THE EVIDENCE AT TRIAL FAILED TO PROVE BEYOND A
20 REASONABLE DOUBT THAT JUSTIN PORTER KILLED THE MAN WHO
21 DIED IN THIS CASE, AND A CONVICTION NOT SUPPORTED BY THE
22 EVIDENCE VIOLATES FEDERAL AND STATE DUE PROCESS
23 GUARANTEES.

24 Federal and State Constitutions guarantee the presumption of innocence.

25 Nevada statutory law provides:

26 A defendant in a criminal action is presumed innocent until the
27 contrary is proved; and in the case of a reasonable doubt whether
28 his guilt is subsequently shown, he is entitled to be acquitted.

1 **NRS 175.191.** The standard of review for sufficiency of the evidence upon appeal is whether
2 the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a
3 reasonable doubt. **Kazalyn v. State**, 108 Nev. 67, 825 P.2d 578 (1992), **Ewish v. State**, 110
4 Nev 221, 871 P.2d 306 (1994).

5
6 Appellant recognizes the well-established rule that where substantial evidence in the
7 record supports the verdict, the verdict will not be overturned by an appellate court. **Nix v.**
8 **State**, 91 Nev. 613, 541 P.2d 1 (1975). But a guilty verdict should not be upheld merely
9 because some evidence supporting the conviction was present. The appellate court must
10 determine if there was evidence sufficient to justify a rational trier of fact to find "guilt beyond a
11 reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307 (1979).

12
13 The Due Process clause of the United States Constitution protects the accused against
14 conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the
15 crime alleged by the State. **Origel-Candido v. State**, 114 Nev. 378, 956 P.2d 1378 (1998).

16
17 The Appellant submits the evidence in this case does not justify a rational trier of fact to
18 find "guilt beyond a reasonable doubt" for the crime of Second Degree Murder with Use of
19 Deadly Weapon.

20
21 There is no doubt that a man was killed and no one saw the killing happen. There is no
22 doubt that no one saw a person enter or leave the residence where the dead man lived.

23
24 We do know a footwear impression of a Saucony shoe was found outside the apartment
25 of the deceased, and Justin Porter owned a Saucony shoe, but no one could establish that his
26 shoe made the footwear impression. There was no blood evidence on his shoe, nor did any other
27 evidence connect his shoe to the footwear impression outside the apartment.

28
The State produced no evidence that Justin Porter had any motive to kill the deceased.

1 The State produced no evidence that Justin Porter had any property from the dead man's
2 apartment.

3 The State's entire case was built on the alleged statements of Justin Porter to Las Vegas
4 police detectives. Those statements were contradictory. In one statement, Porter said he
5 committed no crime in Las Vegas. In another statement, he said he knew someone named
6 "Dionne" who committed a robbery at the dead man's apartment. The police never made any
7 effort to find or interview "Dionne." In yet another statement, Porter said he was running from
8 the police and tried to take refuge in an apartment he thought to be vacant. When he obtained
9 entry into the apartment, a man approached him, and Porter shot the man.
10
11

12 Under these circumstances, the State can hardly claim they proved Porter's guilt beyond
13 a reasonable doubt. Therefore, the conviction for second degree murder should be vacated.

14 II. THE DISTRICT COURT VIOLATED PORTER'S FIFTH AMENDMENT
15 RIGHT AGAINST SELF-INCRIMINATION BY ALLOWING THE STATE TO
16 PRESENT EVIDENCE OF INVOLUNTARY STATEMENTS ALLEGEDLY
MADE BY PORTER TO POLICE DETECTIVES.

17 In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that
18 custodial interrogations can undermine the Fifth Amendment privilege against self-incrimination
19 by exposing a suspect to physical or psychological coercion. To guard against such coercion,
20 the Supreme Court established a procedural mechanism requiring police to give a warning to a
21 suspect before a custodial interrogation. If the police fail to provide the warning, the suspect's
22 statements are inadmissible at trial. Holyfield v. Townsell, 101 Nev. 793, 711 P.2d 845 (1985).
23

24 Because any waiver of the Miranda rights must be "voluntary, knowing, and intelligent,"
25 the United States Supreme Court has adopted a "totality of the circumstances" test in
26 determining whether an alleged waiver of the rights is valid. Davis v. United States, 512 U.S.
27 452 (1994). This test requires evaluation of the defendant's age, experience, education,
28

1 background, and intelligence in determining whether the defendant had the capacity to
2 understand the warnings provided to him. Fare v. Michael C., 442 U.S. 707, 724-25 (1979)
3 cited in United States v. Male Juvenile, 121 F.3d 34 (2d Cir. NY 1997). If a suspect or
4 defendant does not understand the Miranda rights, he cannot make a “voluntary, knowing, and
5 intelligent” waiver of those rights.
6

7 When questioning juveniles, the police should caution the juvenile that his statement can
8 be used against him in adult court. Quirkoni v. State, 96 Nev. 766, 616 P.2d 1111 (1980).
9 Marvin, a Minor, v. State, 95 Nev. 836, 603 P.2d 1056 (1979).
10

11 In this case, the Defense filed a Motion to Suppress Admissions or Confessions by
12 Defendant Porter. The motion and the accompanying hearing summarized the history of
13 Porter’s interaction with police. (II: 385-425).

14 The Chicago Police arrested Porter after Las Vegas police faxed to them an arrest
15 warrant for other charges pending against Porter. (VI: 1279). Las Vegas detectives flew to
16 Chicago to question Porter.
17

18 Las Vegas detectives Jensen and LaRochelle read the Miranda rights to Porter before
19 commencing their questioning of him. (VI: 1287).² When asked whether he understood his
20 rights, Porter replied, Hm, kinda I do, but sometimes I...you know, yes.”³ (II: 399; VI: 1359-
21 60). Porter later testified he was trying to say he did not understand. (VII: 1450). Detective
22 Jensen testified that Porter had trouble pronouncing the words when he read the card. (VI: 1287,
23 1350).
24
25
26

27 ² The Miranda warnings were not recorded for the transcribed statements. The only evidence of
the Miranda warnings derives from the testimony of the detectives. (VI: 1353).

28 ³ The audiotape of the interview has Porter stating, “Hm, kinda I do, but sometimes...I, I don’t,
yes.” (II: 394).

1 Porter's equivocal waiver can best be understood by considering the testimony of Dr.
2 John Paglini, a forensic psychologist, who tested Porter and found that he had a verbal I.Q. of
3 78, which placed him in the 7th percentile of people his age. (VII: 1402). His perception I.Q.
4 was 80 (9th percentile) and his full-scale I.Q. was 77 (6th percentile). (VII: 1402). Dr. Paglini
5 opined that Porter was not mentally retarded, but had "severely impaired" scores which
6 evidenced a borderline intelligence.
7

8 Paglini also administered achievement tests to Porter and discovered his reading skills
9 were equivalent to a second grader's skills. (VII: 1403). With spelling, he scored in the one
10 fifth of one percentile and had the skills of a beginning first grader. (VII: 1403).
11

12 Other achievement scores were comparable.

13 Dr. Gregory Brown, a forensic psychiatrist, evaluated the tests performed by Dr. Paglini
14 and the transcripts of the interviews Porter had with police, and he also administered a test to
15 ascertain whether Porter could comprehend and understand the Miranda rights which were
16 allegedly administered to him. (VII: 1426). Dr. Brown opined that Porter had "significant
17 difficulties with vocabulary, reading, verbal processing." (VII: 1433). Dr. Brown concluded by
18 stating, "To a reasonable degree of psychiatric certainty it's my professional opinion that he
19 [Porter] would have had significant difficult understanding the Miranda Rights, both with
20 regards to the vocabulary and the comprehension." (VII: 1434).
21

22 Justin Porter testified at a hearing on the suppression motion (VII: 1445) and explained
23 his history of special education classes and his long history of inferior academic progress. He
24 described his arrest by Chicago police, and the resulting interrogations by Chicago police and
25 Las Vegas detectives. (VII: 1447 et seq).
26
27
28

1 Porter said the Chicago detectives never discussed the Miranda warnings with him. (VII: 1448).
2 The Chicago detectives also threatened to beat him with a phone book. Porter said the Las
3 Vegas detectives did read the Miranda warning to him, but he did not understand what it meant.
4 (VII: 1450). He did not understand he had a right to an attorney, nor did he understand he did
5 not have to talk to the detectives. (VII: 1451). He did not understand a lawyer would be
6 appointed for him if he could not afford a lawyer. Porter said he had never been Mirandized
7 prior to this time.
8

9 The District Court denied the Defense motion to suppress the admissions or confessions.
10 (VII: 1609).
11

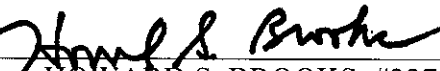
12 Under the "totality of the circumstances" test, the District Court erred and violated
13 Porter's rights against self-incrimination. Porter was only 17 years old, but had a reading ability
14 of someone in the first grade. Expert opinion established that Porter's "borderline" intelligence
15 probably prevented him from understanding the Miranda rights. Under these circumstances, the
16 District Court erred by denying the Defense motion to suppress the statements made to police
17 officers.
18

19 CONCLUSION

20 The State's entire case was built on admissions by Justin Porter allegedly made to police
21 detectives. But because Porter did not understand the Miranda warnings, those statements
22 should have been suppressed. The convictions in this case should be reversed.
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24 Respectfully submitted,

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26 CLARK COUNTY PUBLIC DEFENDER

27 By: 
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