IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 60197

ERICK BROWN

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Appeal From An Order Denying Post-Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County
The Honorable Donald M. Mosley, District Judge

APPELLANT'S APPENDIX TO APPELLANT'S FAST TRACK STATEMENT

Vol. I: Pages 1 to 185

Robert L. Langford
Nevada Bar No. 003988
ROBERT L. LANGFORD & ASSOCIATES
616 South 8th Street
Las Vegas, NV 89101
Tel. (702) 471-6535
Fax. (702) 471-6540
robert@robertlangford.com

CHRONOLOGICAL INDEX OF DOCUMENTS

Description	Vol.	Pages	Date
Judgment of Conviction (Jury Trial)	I	1-3	08/16/2006
Appellant's Fast Track Statement Appeal From Judgment of Conviction	I	4-21	03/07/2007
Appellant's Errata to Fast Track Statement Appeal From Judgment of Conviction	I	22-28	03/13/2007
Petition for Writ of Habeas Corpus (Post Conviction)	I	29-42	10/10/2008
Supplement to Petition for Writ of Habeas Corpus (Post Conviction)	I	43-55	05/22/2009
State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post Conviction) and Supplement to Petition for Writ of Habeas Corpus	I	56-63	07/17/2009
Reply to State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post Conviction) and Supplement to Petition for Writ of Habeas Corpus	I	64-69	08/21/2009
Amendment to Petition for Writ of Habeas Corpus N.R.S. 34.360-830 and Motion for Court Ordered Subpoena	I	70-73	11/19/2009
Amendment to Petition for Writ of Habeas Corpus N.R.S. 34.360-830 and Motion for Court Ordered D.N.A. and Forensic Laboratory Testing	I	74-77	01/27/2010
Reporter's Transcript of Evidentiary Hearing	I	78-173	01/27/2012
Notice of Appeal	I	174-175	02/07/2012
Findings of Fact, Conclusions of Law and Order	I	176-184	02/13/2012
Notice of Entry of Decision and Order	I	185	02/16/2012

ALPHABETICAL INDEX OF DOCUMENTS

Description	Vol.	Pages	Date
Amendment to Petition for Writ of Habeas Corpus N.R.S. 34.360-830 and Motion for Court Ordered D.N.A. and Forensic Laboratory Testing	I	74-77	01/27/2010
Amendment to Petition for Writ of Habeas Corpus N.R.S. 34.360-830 and Motion for Court Ordered Subpoena	I	70-73	11/19/2009
Appellant's Errata to Fast Track Statement Appeal From Judgment of Conviction	I	22-28	03/13/2007
Appellant's Fast Track Statement Appeal From Judgment of Conviction	I	4-21	03/07/2007
Findings of Fact, Conclusions of Law and Order	I	176-184	02/13/2012
Judgment of Conviction (Jury Trial)	I	1-3	08/16/2006
Notice of Appeal	I	174-175	02/07/2012
Notice of Entry of Decision and Order	I	185	02/16/2012
Petition for Writ of Habeas Corpus (Post Conviction)	I	29-42	10/10/2008
Reply to State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post Conviction) and Supplement to Petition for Writ of Habeas Corpus	I	64-69	08/21/2009
Reporter's Transcript of Evidentiary Hearing	I	78-173	01/27/2012
State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post Conviction) and Supplement to Petition for Writ of Habeas Corpus	I	56-63	07/17/2009
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JOC

FILED

Aug 16 4 13 PM '06

Shirley B. Parraguirre

CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERICK MARQUIS BROWN
#1895908

Defendant.

CASE NO. C189658

DEPT. NO. XIV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony), In violation of NRS 205.060, 193.165, COUNT 2 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AE OR OLDER RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony), NRS 200.310, 193.165, 193.167, 0.060, COUNT 3 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony), NRS 200.310, 193.165, 0.060, COUNT 4 – ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Category B Felony), NRS 200.380, 193.165, 193.167,

COUNT 5 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), NRS 200.380, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony), in violation of NRS 205.060, 193.165, COUNT 2 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony), NRS 200.310, 193.165, 193.167, 0.060, COUNT 3 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category A Felony), NRS 200.310, 193.165, 0.060, COUNT 4 – ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Category B Felony), NRS 200.380, 193.165, 193.167, COUNT 5 - ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), NRS 200.380, 193.165; thereafter, on the 8TH day of August, 2006, the Defendant was present in court for sentencing with his counsel, MICHAEL CRISTALLI, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO A MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-SIX (26) MONTHS; AS TO COUNT 2 - TO A MAXIMUM of FORTY (40) YEARS with a MINIMUM Parole Eligibility of FIFTEEN (15) YEARS, plus an EQUAL and CONSECUTIVE term of FORTY (40) YEARS MAXIMUM and FIFTEEN (15) YEARS MINIMUM, COUNT 2 to run CONCURRENT with COUNT 1; AS TO

COUNT 3 - TO A MAXIMUM of FORTY (40) YEARS with a MINIMUM Parole Eligibility of FIFTEEN (15) YEARS, plus an EQUAL and CONSECUTIVE term of FORTY (40) YEARS MAXIMUM and FIFTEEN (15) YEARS MINIMUM, COUNT 3 to run CONSECUTIVE to COUNT 2, and $143,327.00 Restitution; AS TO COUNT 4 - TO A MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-SIX (26) MONTHS, plus an EQUAL and CONSECUTIVE term of ONE HUNDRED TWENTY (120) MONTHS MAXIMUM and TWENTY-SIX (26) MONTHS MINIMUM, COUNT 4 to run CONCURRENT with COUNT 3; AS TO COUNT 5 – TO A MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole Eligibility of TWENTY-SIX (26) MONTHS, plus an EQUAL and CONSECUTIVE term of ONE HUNDRED TWENTY (120) MONTHS MAXIMUM and TWENTY-SIX (26) MONTHS MINIMUM, COUNT 5 to run CONCURRENT with COUNT 4; with ONE THOUSAND THREE HUNDRED FORTY-NINE (1,349) DAYS credit for time served.

DATED this 10 day of August, 2006

DONALD M. MOSLEY

DONALD D. MOSLEY
DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

***

ERICK M. BROWN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT NO. 47856

CASE NO. C189658
DEPT NO. XIV

APPELLANT'S FAST TRACK STATEMENT APPEAL FROM JUDGMENT OF CONVICTION

MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 386-2180

ATTORNEY FOR APPELLANT

DAVID ROGER, ESQ.
DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

CATHERINE CORTEZ MASTO, ESQ.
NEVADA ATTORNEY GENERAL
Criminal Justice Division
100 N. Carson
Carson City, Nevada 89701

ATTORNEYS FOR RESPONDENT

FAST TRACK OPENING

1. Name of party filing this fast track statement:

ERICK M. BROWN, Defendant below and Appellant.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

Michael V. Cristalli, Esq., Cristalli & Saggese Ltd., 732 S. Sixth Street, Suite 100, Las Vegas, Nevada 89101 Phone: (702) 386-2180.

3. Name, Law Firm, Address, and Telephone number of Appellate Counsel if different from trial counsel:

Same counsel.

4. Judicial District, County and District Court Docket Number of lower Court proceedings:

Eighth Judicial District Court, Clark County, Nevada, Department XIV, Case No: C189658.

5. Name of Judge issuing decision, judgment, or order appealed from:

The Honorable Judge Donald M. Mosley.

6. Length of trial. If this action proceeded to trial in the District Court, how many days did the trial last?

June 26, 2006-June 30, 2006.

7. Conviction(s) appealed from:

Judgement of Conviction entered on August 16, 2006, before the Honorable Judge Donald M. Mosley.

8. Sentence for each Count:

Count 1 (Burglary while in possession of a firearm)-a maximum term of 120 months with a minimum parole eligibility of 26 months; Count 2 (first degree

kidnapping with use of a deadly weapon victim 65 years of age or older resulting in substantial bodily harm)-a maximum term of 40 years with a minimum parole eligibility after 15 years plus an equal and consecutive maximum term of 40 years with a minimum parole eligibility after 15 years for victim over 65 years of age or older to run concurrent with count 1, and; Count 3 (first degree kidnapping with use of a deadly weapon resulting in substantial bodily harm)-a maximum term of 40 years with a minimum parole eligibility after 15 years plus an equal and consecutive maximum term of 40 years with a minimum parole eligibility after 15 years for the deadly weapon enhancement to run consecutive to count 2 and pay $143,327 restitution and; Count 4 (robbery with use of a deadly weapon victim 65 years of age)-a maximum term of 120 months with a minimum parole eligibility of 26 months plus an equal and consecutive maximum term of 120 months with a minimum parole eligibility of 26 months for victim 65 years of age or older, to run concurrent with count 3; and Count 5 (robbery with use of a deadly weapon)-a maximum term of 120 months with a minimum parole eligibility of 26 months, and plus an equal and consecutive term of 120 months with a minimum parole eligibility of 26 months for use of a deadly weapon, to run concurrent with count 4, with 1,349 days credit for time served.

9. Date District Court announced decision, sentence or order appealed from:

August 8, 2006.

10. Date of entry of written judgment or order appealed from:

Judgment of conviction entered on August 16, 2006.

(A) If no written judgment or order was filed in District Court, explain the basis of seeking appellate review.

N/A

11. If this Appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court:

N/A

(A) Specify whether service was by delivery or by mail:

N/A

12. If the time for filing the notice of appeal was tolled by a post-judgment motion; N/A

(A) Specify the type of motion, and the date filing of the motion, and; N/A

(b) Date of entry of written order resolving motion

N/A

13. Date notice of appeal was filed:

August 11, 2006.

14. Specify statute, rule governing the limit for filing the notice of appeal:

NRAP 3C.

15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from:

NRAP 3B; NRS 177.015-177.305.

16. Specify the nature of disposition below:

Appeal from judgment of conviction.

17. Pending and prior proceedings in this Court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

18. Pending and prior proceedings in other Courts. List the case name, number and Court of all proceedings in other Courts which related to this appeal:

None.

19. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this Court, of which you are aware, which raise the same issues you intend to raise in this appeal:

None.

20. Procedural History. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix, if any or to the rough draft transcript):

Appellant had entered a plea of not guilty to the crimes of Count 1- Burglary while in possession of a firearm (category B felony) in violation of NRS 205.060, 193.165; Count 2-First degree kidnapping with use of a deadly weapon, victim 65 years of age or older resulting in substantial bodily harm (category A felony) NRS 200.310. 193.165, 193.167,0.060; Count 3-First degree kidnapping with use of a deadly weapon resulting in substantial bodily harm (category A felony), NRS 200.310, 193.165, 0.060; Count4-Robbery with use of a deadly weapon, victim 65 years of age or older (category B felony), NRS 200.380, 193.165, 193.167; Count 5-Robbery with use of a deadly weapon (Category B Felony) NRS 200.380, 193.165; and the matter having been tried before a jury and the Appellant having been found guilty of the crimes of Count 1-5; the Defendant was present in court for sentencing with his counsel on August 8, 2006, and sentenced as set forth above (*see* Judgment of Conviction).

21. Statement of facts. Briefly set forth the facts material to the

issues on appeal:

On November 23, 2002, two men entered the Las Vegas Manufacturing Jewelers (LVMJ) for the purposes of robbing the facility. The perpetrators, armed with a gun, forced victim Connelly (Connelly) and victim Golsecker (Golsecker) to the floor of the back room. They tied the victims' hands together, using force, and repeatedly asked where money, keys, and surveillance were located. If the victims did not timely respond, the perpetrators continued to use force in order to ascertain the location of money.

In order to remove jewelry and monies from the victims' possession, the perpetrators continued to keep the victims bound by their hands, laying on the ground.

Blackwell was convicted of the crimes pertaining to the LVMJ incident. The victims were able to give an accurate description of the "shorter" 5'7 perpetrator (Blackwell), and positively identify Blackwell, at a photographic lineup, at the preliminary hearing, and at trial. Blackwell was referred to, at Appellant's trial, as the "shorter" perpetrator.

Appellant Brown was tried as being the "taller" perpetrator, though the description given by the victims was inconsistent with Appellant Brown's person, nor could either victim identify Appellant Brown at a photographic lineup, as Blackwell had previously been identified.

Connelly described the "taller" perpetrator as being "tall and thin," younger than 25, and with "longer" hair than the shorter perpetrator. Golsecker described the "taller" perpetrator as having a full head of hair. Connelly described the perpetrators as having been identified by the name of "Cal, Dean, Pete, Greg, or Craig." It was not until Connelly saw a subpoena with Appellant Brown's name that he stated recognition of the name "Erick." The victims' description also

included that the "taller" perpetrator had an earring.

Appellant Brown was 33 at the time of trial. He had consistently sported a shaven head, and did not wear an earring.

Though an identification was later made at the preliminary hearing, both victims admitted that they could not positively identify Appellant Brown when they were shown a 6 pack photographic lineup. Both victims admitted to having only a few seconds of interaction with the "taller" perpetrator (between 5-15 seconds).

Though the victims believed fingerprints were "all over," and samples were indeed taken, no latents matched Appellant Brown's fingerprints.

Appellant Brown took the stand and denied involvement with the incident at LVMJ. Though he was in possession of the victims' property, he stated that he was in receipt of the property only for the purposes of selling the property, and did not personally obtain said property from LVMJ.

At Appellant Brown's trial, evidence was brought forth that another individual was also found in possession of stolen property relating to the LVMJ incident. Williams closely matched the victims' description of the "taller" perpetrator, standing at 6'1. (Appellant Brown at 6'5, and Williams at 6'1, are both taller than Blackwell). Williams was known to have sported an earring. Finally, Williams also had a criminal history.

The victims' description of the "taller" perpetrator was weaker than the victims' description of Blackwell. Moreover, the victims were unable to identify Appellant Brown at a 6 pack photographic lineup, though they were able to identify Blackwell under these circumstances.

The State, for the alleged "purpose" of strengthening the victims' ability to identify, paraded Blackwell before the jury, in front a special agent with the FBI, Aimaro, and asked Aimaro to identify Blackwell as the "shorter" perpetrator.

Blackwell did not take the stand, nor did the defense have an opportunity to cross-examine him. The State argued that it was not error to parade Blackwell, a convicted felon, in front of the jury because he was simply a piece of "evidence," to prove accuracy for identification purposes.

Appellant Brown was convicted of the crimes relating to the LVMJ incident, as the "taller" perpetrator.

22. Issues on appeal. State concisely the principal issues(s) in this appeal:

1. Whether it was error for Defendant to be convicted of kidnapping charges, as any force used was incidental to the robbery.

2. Whether it was error for the State to parade Blackwell before the jury because, even if Blackwell was evidence, for which the Defense did not need cross-examination, the probative value of said evidence was substantially outweighed by its prejudicial effect.

3. Whether there was insufficient evidence to convict Defendant of the crimes of which he was charged.

23. Legal argument, including authorities.

I. **It was error for Defendant to be convicted of kidnapping charges, as any force used was incidental to the robbery.**

To sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure, or restraint substantially in excess of that necessary to its completion. *Mendoza v. State*, 130 P.3d 176, 181 (Nev. 2006).

If movement of victim is incidental to the robbery and does not substantially increase risk of harm over and above that necessarily present in

the crime of robbery itself, it would be unreasonable to believe that the legislature intended a double punishment; only when movement results in increased danger over and above that present in a crime of robbery, a kidnapping charge may also lie. *Wright v. State*, 581 P.2d 442 (Nev. 1978).

In *Mendoza*, Defendant entered Canon's residence with guns, tied him up, looted the premises, and robbed Cannon and his family. *Mendoza*, 130 P.3d at 178. An employee of Canon, Avilos, arrived at the scene, and Defendant severely beat and robbed him. The criminal information filed included charges of kidnapping of Canon and Avilos. The Nevada Supreme Court determined that the jury verdict, finding Defendant not guilty of kidnapping Canon, and guilty of kidnapping Avilos, would not be disturbed. *Id.*

In *Wright*, three men, including Defendant, entered a motel wherein they told the auditor and clerk to go to the back office. *Wright*, 581 P.2d at 443. The men told the auditor and clerk to lie on the floor, and then taped their hands and feet. The victims were threatened while lying on the floor. The robbers then left. *Id.*

On appeal, the Court set aside the kidnapping conviction because the movement appeared to be incidental to the robbery, without an increase in danger to the victims, and the detention was only for a short time necessary to consumate the robbery. *Id.* at 444.

In the case *sub judice*, Connelly and Golsecker were forced to the ground, for the purposes of detaining them, so that a robbery could be committed. Their hands were tied behind their back, in order to effectuate the robbery. Though they were physically touched, any touching occurred because the perpetrators were having difficulty with the victims responding to their questions regarding the location of money, and keys. Thus, the force being used was directly for the

purposes of continuing the robbery; the force was incidental to the robbery.

The present case is similar to *Mendoza*, where Defendant was not guilty of kidnapping Canon when they tied him up, looted the premises, and robbed him. In the present case, the perpetrators tied up the victims' hands, created disarray at the facility and removed property from the victims' persons, while they were tied up.

However, the present case is unlike *Mendoza*, where Defendant was guilty of kidnapping Avilos for severely beating him up and robbing him. In *Mendoza*, Defendant had absolutely no stated reason for severely beating Avilos. However, in the present case, the perpetrators used force against the victims in order to effectuate the robbery; the perpetrators used force to get the victims on the floor and tied their hands so that they could remove property from their persons. They used force when the victims were not responding to their questioning regarding the location of money and keys. Here, any force used was purely for the purposes of effectuating the robbery, and thus any force used, was incidental to the robbery.

The present case is also akin to *Wright*, where Defendant's kidnapping conviction was set aside because any force used was incidental to the robbery. In *Wright*, Defendant moved the victims into the back office, got them on the floor, bound their hands and feet, threatened them, and robbed them. In the present case, the perpetrators moved the victims to the back office, got them on the floor, bound their hands, used force against them to determine where money and keys were, and robbed their persons of jewelry and money. Because any force used was in furtherance of the robbery and for the direct purposes of effectuating the robbery, and therefore incidental to the robbery, Appellant's kidnapping conviction should be set aside.

II. It was error for the State to parade Blackwell before the jury because, even if Blackwell was evidence, for which the Defense did not need cross-examination, the probative value of said evidence was substantially outweighed by its prejudicial effect.

NRS 48.035 states that although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

In the case at bar, the victims' description of the "taller" perpetrator was weaker than the victims' description of Blackwell. Moreover, the victims were unable to identify Appellant Brown at a 6 pack photographic lineup, though they were able to identify Blackwell under these circumstances.

Thus the State, for the alleged "purpose" of strengthening the victims' ability to identify, paraded Blackwell before the jury, in front a special agent with the FBI, Aimaro, and asked Aimaro to identify Blackwell as the "shorter" perpetrator. Blackwell did not take the stand, nor did the defense have an opportunity to cross-examine him.

The State argued that it was not error to parade Blackwell, a convicted felon, in front of the jury because he was simply a piece of "evidence," to prove accuracy for identification purposes. Though its relevance is arguable, what is clear in this case is that the court should not have allowed the State to parade Blackwell, in front of the jury, as he was a convicted felon, who had pled guilty to the crimes regarding the LVMJ incident.

Even if displaying Blackwell as a "piece of evidence," was relevant for the purposes of asserting the victims' accuracy for identification purposes, displaying Blackwell, a convicted felon, was substantially more prejudicial to Appellant Brown than any probative value attributed to this display.

For the jury to see Blackwell, who had already been convicted of crimes related to the LVMJ incident created the effect of bootstrapping another

defendant's criminal conviction with the evidence before the Appellant's jury to improperly bolster their weak identification evidence.

The State's action unfairly influenced the jury; the State was essentially demonstrating that one perpetrator had already been successfully, and correctly "put away."

To show that one perpetrator charged had already been convicted, at the trial of the alleged second perpetrator created a substantial danger of misleading the jury that again, the State had already been "correct" once before, in a prior proceeding.

III. There is insufficient evidence to convict Appellant of the crimes charged.

The standard for reviewing the sufficiency of the evidence is not whether this Court is convinced of the Defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it considered. *Rossana v. State*, 113 Nev. 375, 383 (Nev. 1997). Whenever there are no witnesses presented to place the Defendant in the vicinity of the crimes, and no evidence found to connect the Defendant to the crimes, there is insufficient evidence to convict the Defendant of the crimes charged. *Id.* at 384.

In the case at bar, the description given by the victims was inconsistent with Appellant Brown's person, in terms of age (he was 33 at the time of trial, and the description stated he was "under 25), and in terms of hairstyle (Appellant Brown kept a shaven head, the victims stated that the "taller" perpetrator had

longer hair than Blackwell). The victims' description stated that the "taller" perpetrator sported an earring. Appellant Brown does not wear an earring. Furthermore, neither victim identify Appellant Brown at a photographic lineup, as Blackwell had previously been identified.

Connelly described the perpetrators as having been identified by the name of "Cal, Dean, Pete, Greg, or Craig." It was not until Connelly saw a subpoena with Appellant Brown's name that he stated recognition of the name "Erick."

Though an identification was later made at the preliminary hearing, both victims admitted that they could not positively identify Appellant Brown when they were shown a 6 pack photographic lineup. Both victims admitted to having only a few seconds of interaction with the "taller" perpetrator (between 5-15 seconds).

Though the victims believed fingerprints were "all over," and samples were indeed taken, no latents matched Appellant Brown's fingerprints.

At Appellant Brown's trial, evidence was brought forth that another individual was also found in possession of stolen property relating to the LVMJ incident. Williams closely matched the victims' description of the "taller" perpetrator, standing at 6'1. (Appellant Brown at 6'5, and Williams at 6'1, are both taller than Blackwell). Williams was known to have sported an earring, matching the victims' description of the "taller" perpetrator, whereas Appellant Brown did not. Finally, Williams also had a criminal history.

Thus, no witness could positively identify Appellant Brown in a photographic lineup, though they were both able to identify the other perpetrator in a photographic lineup. No witness could give a description consistent with Appellant Brown's person. No evidence was presented to definitively place the Defendant in the vicinity of the crimes. Though he was in receipt of stolen property, there was another individual, Williams, also African-American, in the same age range, "taller" than Blackwell (standing at 6'1, to Blackwell's 5'7 height), and sporting a hairstyle different from Appellant Brown.

The evidence brought forth at trial was not sufficient to prove, beyond a reasonable doubt, that Appellant Brown was the "taller" perpetrator, and not another individual, such as Williams, who also matched the same description, and was also found in receipt of stolen property.

24. Preservation of Issues. State concisely how each issue on appeal was preserved during trial. If the issue was not preserved, explain why this Court should review the issue:

Defendant moved, pre-trial, to have the kidnapping charges dismissed. He maintained, throughout the proceedings, that the kidnapping charges were unsupportable.

Defendant timely objected to the use of Blackwell at trial, and before the jury.

This Court has held that it must reverse a conviction whenever it

determines that a jury, acting reasonably, could not have been convinced of the Defendant's guilt beyond a reasonable doubt. *Rossana v. State*, 113 Nev. 375, 383 (Nev. 1997).

25. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest? If so, explain

N/A

DATED this 7 day of March, 2007.

Respectfully submitted by:

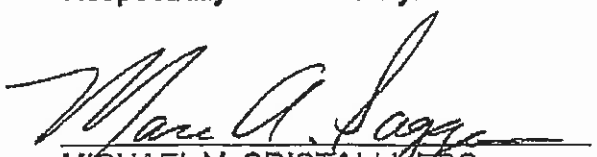
MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 386-2180
ATTORNEY FOR APPELLANT

VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with respondent counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 7 day of March, 2007.

Respectfully submitted by:



MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 386-2180
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

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

DATED this 7 day of March, 2007.

Respectfully submitted by:

MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 S. Sixth Street, Suite 100
Las Vegas, Nevada 89109
(702) 386-2180

ATTORNEY FOR APPELLANT

CERTIFICATE OF MAILING

I hereby certify that on the 7 day of March, 2007, I deposited a copy of the Appellant's FAST TRACK APPEAL in the United States Mail, in a sealed envelope with postage fully pre-paid, addressed to:

DAVID ROGER, ESQ.
DEPUTY DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

CATHERINE CORTEZ MASTO, ESQ.
NEVADA ATTORNEY GENERAL
Criminal Justice Division
100 N. Carson
Carson City, Nevada 89701

and that there is regular communication between the place(s) so addressed and the place(s) of mailing.

An employee of CRISTALLI & SAGGESE, LTD.

IN THE SUPREME COURT OF THE STATE OF NEVADA

***

ERICK M. BROWN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT NO. 47856

CASE NO. C189658
DEPT NO. XIV

APPELLANT'S ERRATA TO FAST TRACK STATEMENT APPEAL FROM JUDGMENT OF CONVICTION

MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 386-2180

ATTORNEY FOR APPELLANT

DAVID ROGER, ESQ.
DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

CATHERINE CORTEZ MASTO, ESQ.
NEVADA ATTORNEY GENERAL
Criminal Justice Division
100 N. Carson
Carson City, Nevada 89701

ATTORNEYS FOR RESPONDENT

FAST TRACK OPENING

21. Statement of facts. Briefly set forth the facts material to the issues on appeal:

On November 23, 2002, two men entered the Las Vegas Manufacturing Jewelers (LVMJ) for the purposes of robbing the facility. (AA p.5) The perpetrators, armed with a gun, forced victim Connelly (Connelly) and victim Golsecker (Golsecker) to the floor of the back room. (AA p.6-7) They tied the victims' hands together, using force, and repeatedly asked where money, keys, and surveillance were located. (AA p.7-8) If the victims did not timely respond, the perpetrators continued to use force in order to ascertain the location of money. (AA p.8)

In order to remove jewelry and monies from the victims' possession, the perpetrators continued to keep the victims bound by their hands, laying on the ground. (AA p.8-10)

Blackwell was convicted of the crimes pertaining to the LVMJ incident. The victims were able to give an accurate description of the "shorter" 5'7 perpetrator (Blackwell), and positively identify Blackwell, at a photographic lineup, at the preliminary hearing, and at trial. (AA p.11-12) Blackwell was referred to, at Appellant's trial, as the "shorter" perpetrator. (AA p.11)

Appellant Brown was tried as being the "taller" perpetrator, though the description given by the victims was inconsistent with Appellant Brown's person, nor could either victim identify Appellant Brown at a photographic lineup, as Blackwell had previously been identified. (AA 11-13, 23)

Connelly described the "taller" perpetrator as being "tall and thin," younger than 25, and with "longer" hair than the shorter perpetrator. (AA 14, 16) Golsecker described the "taller" perpetrator as having a full head of hair. (AA

p.22) Connelly described the perpetrators as having been identified by the name of "Cal, Dean, Pete, Greg, or Craig." (AA p.17) It was not until Connelly saw a subpoena with Appellant Brown's name that he stated recognition of the name "Erick." (AA p.17) The victims' description also included that the "taller" perpetrator had an earring. (AA p.18, 24)

Appellant Brown was 33 at the time of trial. (AA p.30) He had consistently sported a shaven head, and did not wear an earring. (AA p.34-35)

Though an identification was later made at the preliminary hearing, both victims admitted that they could not positively identify Appellant Brown when they were shown a 6 pack photographic lineup. (AA p.16, 24) Both victims admitted to having only a few seconds of interaction with the "taller" perpetrator (between 5-15 seconds). (AA p.15, 21)

Though the victims believed fingerprints were "all over," and samples were indeed taken, no latents matched Appellant Brown's fingerprints. (AA p.14, 19)

Appellant Brown took the stand and denied involvement with the incident at LVMJ. (AA p.30) Though he was in possession of the victims' property, he stated that he was in receipt of the property only for the purposes of selling the property, and did not personally obtain said property from LVMJ. (AA p.31)

At Appellant Brown's trial, evidence was brought forth that another individual was also found in possession of stolen property relating to the LVMJ incident. (AA p.36) Williams closely matched the victims' description of the "taller" perpetrator, standing at 6'1. (Appellant Brown at 6'5, and Williams at 6'1, are both taller than Blackwell). (AA p.33) Williams had short hair. (AA p.32) Williams was known to have sported an earring. (AA p.32) Finally, Williams also had a criminal history. (AA p.36)

The victims' description of the "taller" perpetrator was weaker than the

victims' description of Blackwell; moreover, the victims were unable to identify Appellant Brown at a 6 pack photographic lineup, though they were able to identify Blackwell under these circumstances. ((AA 11, 12, 16, 24)

The State, for the alleged "purpose" of strengthening the victims' ability to identify, paraded Blackwell before the jury, in front a special agent with the FBI, Aimaro, and asked Aimaro to identify Blackwell as the "shorter" perpetrator. (AA p.28) Blackwell did not take the stand, nor did the defense have an opportunity to cross-examine him. (AA p.28) Over Defense counsel's objection, the State argued that it was not error to parade Blackwell, a convicted felon, in front of the jury because he was simply a piece of "evidence," to prove accuracy for identification purposes. (AA p.26-27)

Appellant Brown was convicted of the crimes relating to the LVMJ incident, as the "taller" perpetrator. (*See* Judgment of Conviction, AA p.1-2).

DATED this 13th day of March, 2007.

Respectfully submitted by:

MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 386-2180
ATTORNEY FOR APPELLANT

VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with respondent counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 13th day of March, 2007.

Respectfully submitted by:

MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 386-2180
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

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

DATED this 13th day of March, 2007.

Respectfully submitted by:

MICHAEL V. CRISTALLI, ESQ.
Nevada Bar No. 006266
CRISTALLI & SAGGESE, LTD.
732 S. Sixth Street, Suite 100
Las Vegas, Nevada 89109
(702) 386-2180

ATTORNEY FOR APPELLANT

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of March, 2007, I deposited a copy of the Appellant's ERRATA TO FAST TRACK APPEAL in the United States Mail, in a sealed envelope with postage fully pre-paid, addressed to:

DAVID ROGER, ESQ.
DEPUTY DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

CATHERINE CORTEZ MASTO, ESQ.
NEVADA ATTORNEY GENERAL
Criminal Justice Division
100 N. Carson
Carson City, Nevada 89701

and that there is regular communication between the place(s) so addressed and the place(s) of mailing.

An employee of CRISTALLI & SAGGESE, LTD.

ROBERT L. LANGFORD & ASSOCIATES
ROBERT L. LANGFORD ESQ.
Nevada Bar No. 3988
616 South Eighth St.
Las Vegas, NV 89101
(702) 471-6535
Counsel for Petitioner:
MICHAEL ADKISSON

FILED

2008 OCT 10 P 3:53

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

ERIC M. BROWN,

Petitioner,

vs.

HOWARD SKOLNIK, Director Nevada State Prison, DWIGHT NEVEN, Warden Ely State Prison,

CATHERINE CORTEZ MASTO, Attorney General of Nevada.

Respondents.

Case No.: C189658
Dept. No.: XIV

PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

HEARING DATE: 12/18/08
HEARING TIME: 9AM

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison, White Pine County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Las Vegas, Nevada

3. Date of judgment of conviction: Judgement of Conviction (Jury Trial) filed on August 26, 2004

4. Case number: C189658

5. (a) Length of sentence: Count 1 (Burglary while in possession of a firearm) a maximum term of 120 months with a minimum parole eligibility of 26 months; Count 2 (first degree kidnaping with use of a deadly weapon victim 65 years of age or older resulting in substantial bodily harm) a maximum term of 40 years with a minimum parole eligibility after 15 years plus and equal and consecutive maximum term of 40 years with a minimum parole eligibility after 15 years for victim over 65 years of age

or older to run concurrent with count 1, and : Count 3 (first degree kidnaping with use of a deadly weapon resulting in substantial bodily harm) a maximum term of 40 years with a minimum parole eligibility after 15 years plus an equal and consecutive maximum term of 40 years with a minimum parole eligibility after 15 years for the deadly weapon enhancement to run consecutive to count 2 and pay $143,327 restitution and; count 4 (robbery with use of a deadly weapon victim 65 years of age) a maximum term of 120 months with a minimum parole eligibility of 26 months plus and equal and consecutive maximum term of 120 months with a minimum parole eligibility of 26 months for victim 65 years of age or older, to run concurrent with count 3; and count 5 (robbery with use of a deadly weapon) a maximum term of 120 months with a minimum parole eligibility of 26 months, plus an equal and consecutive term of 120 months with a minimum parole eligibility of 26 months for use of a deadly weapon, to run concurrent with count 4, with 1,349 days credit for time served.

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ___ No X

7. Nature of offense involved in conviction being challenged: ERIC M. BROWN was charged along with another perpetrator of the robbery of a jewelry store and was accused of tying the hands of the two victims and moving them to complete the robbery.

8. What was your plea? (check one)

(a) Not guilty X

(b) Guilty ___

(C) Guilty but mentally ill ___

(d) Nolo contendere ___

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X

(b) Judge without a jury ___

11. Did you testify at the trial? Yes x___ No __

12. Did you appeal from the judgment of conviction? Yes X No ___

12. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 47856

© Result: Order of Affirmance

(d) Date of result: September 17, 2007(attached as Exhibit "A") Remittitur issued October 12, 2007 (attached as Exhibit "B") [1]

13. If you did not appeal, explain briefly why you did not: N/A

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ___ No__ X_

15. If your answer to No. 15 was "yes," give the following information:

(b) As to any second petition, application or motion, give the same information: N/A

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach. N/A

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? N/A

16. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: No.

17. If any of the grounds listed in previous questions, or listed on any

---

[1] This Petition is timely filed, pursuant to N.R.S. 34.726, as the one year date, after issuance of the Nevada Supreme Court's Remittitur, is October 12, 2007.

additional pages attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. N/A

18. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? No.

19. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ___ No_X_

20. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

A. Michael V. Cristalli, Esq.
Nevada Bar No. 6266
732 South Sixth Street, Suite 100
Las Vegas, NV 89101 (Trial)

B. Michael V. Cristalli, Esq.
Nevada Bar No. 6266
732 South Sixth Street, Suite 100
Las Vegas, NV 89101 (Trial)

21. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ___ No X

22. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

Claim One:

Mr. BROWN was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, during his pre-trial and trial litigation by numerous actions and inactions of his defense counsel.

Supporting Facts:

Initially, it must be noted that Mr. BROWN's trial counsel did hire an investigator to help in the defense of Mr. BROWN since there were many tasks that were required to be completed by an investigator in order to provide effective assistance of counsel given the evidence that was disclosed through discovery by the State. The relationship

between the investigator and trial counsel and with Mr. BROWN broke down such that Mr. Brown did not receive all the investigation and evidence that he needed to support his defense prior to trial. Specifically, trial counsel did not adequately present evidence regarding finger prints that were found at the scene. Additionally trial counsel did not

Further, trial counsel acted as appellate counsel and was aware of issues that Mr. BROWN desired to have raised on direct appeal. Appellate counsel filed the original fast track statement on April 17, 2007 but did not file a motion for permission to file an Anders Brief until August 20, 2007. The motion for permission to file the Anders Brief was denied as not timely filed. See order denying motion attached EXHIBIT C.

Appellate Counsel also failed to cite any federal authority such that a reviewing federal court could assert jurisdiction over federal claims made in the direct appeal.

Habeas Counsel has sought all transcripts of all proceedings in this matter but has as of this date not received all of them. Therefore, counsel for Mr. BROWN would request leave of this court to file a supplement to this petition at a future time.

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Given the forgoing, Mr. BROWN was denied his constitutional rights, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, during the pre-trial, trial, and direct appeal litigation of the case at bar.

WHEREFORE, undersigned counsel prays that the Court grant Petitioner ADKISSON relief to which he may be entitled in this proceeding.

DATED this 10 day of October, 2008.

Respectfully Submitted,

Robert L. Langford, Esq.
LANGFORD & ASSOCIATES
Nevada Bar No. 3988
616 South Eighth St.
Las Vegas, NV 89101
(702) 471-6535
Counsel for Petitioner:
ERIC M. BROWN

Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

ERICK M. BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 47858
2007 OCT 12 P 1:53

District Court Case No. C189858

CLERK OF THE COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 13th day of September, 2007.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 9th day of October, 2007.

Janette M. Bloom, Supreme Court Clerk

By: _____
Chief Deputy Clerk

RECEIVED
OCT 11 2007
CLERK OF THE COURT

Exhibit B

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK M. BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 47856

District Court Case No. C189858

REMITTITUR

TO: Charles J. Short, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 9, 2007

Janette M. Bloom, Clerk of Court

By: _____
Chief Deputy Clerk

cc: Hon. Donald M. Mosley, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Cristalli & Saggese, Ltd.

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on OCT 12 2007.

HEATHER LOFQUIST
Deputy District Court Clerk

07-20380

Exhibit C

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK M. BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47856

FILED

SEP 11 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING MOTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm; one count of first-degree kidnapping with the use of a deadly weapon, victim 65 years of age or older, resulting in substantial bodily harm; one count of first-degree kidnapping with the use of a deadly weapon, victim 65 years of age or older; one count of robbery with the use of a deadly weapon, victim 65 years of age or older; and one count of robbery with the use of a deadly weapon. This appeal is subject to the provisions of Nevada Rule of Appellate Procedure 3C.

On August 20, 2007, appellant's counsel, Michael Cristalli, filed a motion to supplement the fast track statement in this appeal. In the motion, Cristalli informs this court that he represented appellant at trial, that appellant submitted ten additional claims of error for this court's consideration before the fast track statement was prepared, and

BY:
DATE:
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SUPREME COURT
OF
NEVADA

(O) 1947A

07-19984

that Cristalli did not include the issues in the fast track statement. Citing to Anders v. California,[1] Cristalli argues that that the ten claims addressed in the provisionally submitted supplemental fast track statement should be considered because they are meritorious.

NRAP 3C(g) provides that a supplemental fast track statement "may be filed by appellate counsel if appellate counsel differs from trial counsel and if appellate counsel can assert material issues which should be considered and which were not raised in the fast track statement." NRAP 3C(g) further provides that the supplemental fast track statement must be submitted to this court "no more than 20 days after the filing of the fast track statement or appellate counsel's appointment, whichever is later."

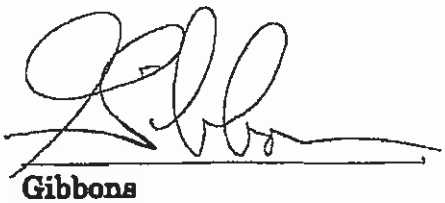
In this case, Cristalli has not satisfied the requirements set forth in NRAP 3C(g), allowing for the filing of a supplemental fast track statement. Cristalli represented appellant at trial and concedes that he was aware of the appellate issues before he prepared the fast track statement. Further, the motion to supplement the fast track statement is untimely. The fast track statement was filed on April 17, 2007, and any motion to supplement was due on or before May 7, 2007. Cristalli has not proffered any explanation for the three-month delay in submitting the

---

[1]386 U.S. 738 (1967) (appellate counsel's conclusion that an appeal had no merit was not an adequate substitute for a defendant's right to appellate review).

motion. Accordingly, we deny the motion to supplement the fast track statement.

It is so ORDERED.



J.
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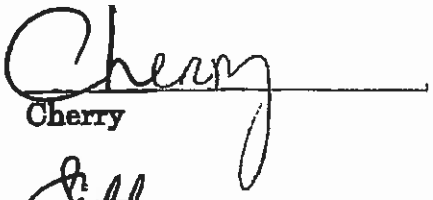

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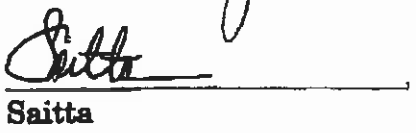
Cherry



J.
Saitta

cc: Cristalli & Saggese, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger

PWHC
ROBERT L. LANGFORD ESQ.
Nevada Bar No. 03988
ROBERT L. LANGFORD & ASSOCIATES
616 South Eighth St.
Las Vegas, NV 89101
(702) 471-6535
Counsel for Petitioner ERICK M. BROWN

DISTRICT COURT

CLARK COUNTY, NEVADA

ERICK M. BROWN,

Petitioner,

vs.

HOWARD SKOLNIK, Director Nevada State Prison, DWIGHT NEVEN, Warden Ely State Prison,

CATHERINE CORTEZ MASTO, Attorney General of Nevada.

Respondents.

Case No.: C189658
Dept. No.: XIV

PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

HEARING DATE:_____

HEARING TIME:_____

SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

MC

Comes now Petitioner, ERICK M. BROWN by and through his Attorney, ROBERT L. LANGFORD, ESQ, and supplements the above captioned Petition for Writ of Habeas Corpus (Post Conviction) which is incorporated by reference herein.

DATED this 22 day of May, 2009.

Respectfully Submitted,

ROBERT L. LANGFORD & ASSOCIATES

ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 03988
616 South Eighth St.
Las Vegas, NV 89101
(702) 471-6535
Counsel for Petitioner ERICK M. BROWN

ARGUMENT

I.

PETITIONER WAS DENIED HIS CONSTITUTIONAL FOURTH AMENDMENT PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE

On November 27, 2002, while exiting the elevator of the Hyatt Regency Hotel, in Los Angeles, California, the Petitioner, Mr. Erick Brown was surrounded by approximately Ten (10) law enforcement officials form the Los Angeles Police Department (LAPD) and Federal Bureau of Investigation (FBI) agents.

FBI special agent Darin McAllister testified under oath at trial that when he entered the area of the elevators in the hotel lobby, he observed a suspicious package (referring to a black backpack), approximately 10 feet or so from Mr. Brown. (See, 6/22/06, TT, Page 101, lines 1-6).

He further testified, that he immediately went to move the backpack to find out who it belonged to, and when he asked Mr. Brown, he responded that it was his. McAllister picked up the backpack from the side and in doing so, it's contents spilled out, at which time he observed numerous jewelry pieces in plastic bags, such as chains, bracelets, rings, trinket jewelry. He estimated the amount to be three, four hundred pieces. (See, 6/28/06, IT. Pages 101-102, 103, 121-122).

When McAllister was asked by defense counsel if he ever sought to execute some type of search warrant in order to look inside the bag, McAllister stated: "No, I did not." (TT 6/28/06, Page 122:7-10).

FBI special agent, Frank Aimaro, testified at trial that he first observed Mr. Brown as he was exiting the elevator. Aimaro approached Mr. Brown, introduced himself and asked Mr. Brown if his name was Erick Brown, to which he replied in the affirmative. Aimaro further stated that during this first contact, Mr. Brown had a black backpack on his shoulder.

As Aimaro was introducing himself to Mr. Brown and began asking him questions, ***FBI agent, Mark Wolfson, removed the bag from Mr. Brown's shoulder and placed it on the***

ground right at their feet for safety reasons.

Aimaro testified that FBI Special Agent McAllister was present during the entire encounter with Mr. Brown. As Aimaro was questioning Mr. Brown, "McAllister picked up the bag, which tumbled onto the floor and this jewelry fell out onto the hotel lobby floor." (TT 6/29/06, Pages 13:22 - 14:21). Upon seeing the jewelry, Aimaro arrested Mr. Brown.

The law regarding searches of property is quite specific. In Smith v. Ohio, 494 U.S. 541 (1990) the U.S. Supreme Court reversed a ruling of the Ohio Supreme Court.

> Although the Fourth Amendment may permit a brief detention of property on the basis of only "reasonable, articulable suspicion" that it contains contraband or evidence of criminal activity, *United States v. Place*, 462 U.S. 696, 702 (1983), it proscribes -- except in certain well-defined circumstances -- the search of that property unless accomplished pursuant to judicial warrant issued upon probable cause. See, e. g., *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz v. United States*, 389 U.S. 347, 357 (1967). That guarantee protects alike the "traveler who carries a toothbrush and a few articles of clothing in a paper bag" and "the sophisticated executive with the locked attache case." *United States v. Ross*, 456 U.S. 798, 822 (1982). The Ohio Supreme Court upheld the warrantless search of Mr. Brown's bag under the exception for searches incident to arrest. See *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977); *Chimel v. California*, 395 U.S. 752, 763 (1969). The court stated that Mr. Brown was not arrested until after the contraband was discovered in the search of the bag. 45 Ohio St. 3d, at 257, 258, 544 N. E. 2d, at 241, 242. It nonetheless held that the search was constitutional because its fruits justified the arrest that followed.
>
> As we have had occasion in the past to observe,"[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York*, 392 U.S. 40, 63 (1968); see also *Henry v. United States*, 361 U.S. 98, 102 (1959); *Rawlings v. Kentucky*, 448 U.S. 98, 111, n. 6 (1980). The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. Contrary to the Ohio Supreme Court's reasoning, it does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows.
> *Id.* at 543.

There is no dispute as to McAllister's actions according to the record. The bag was not "10 feet or so away" from Mr. Brown as he claimed, as noted in Aimaro's testimony. McAllister was apparently fishing for some excuse to search the backpack. He did not have a warrant and

wanted to see what was in the backpack, so he deliberately picked up the bag from the side, using the pretense that there was no handle, so that the contents would spill out. As stated above, Mr. Brown was arrested shortly after the jewelry spilled out of the bag.

Pursuant to *Smith* above, the most McAllister should have done at the time was to detain the bag so that a warrant could be obtained. No consent was ever given by Mr. Brown or requested by authorities to search the backpack. These are direct violations of Mr. Brown's right to be protected from an illegal search and seizure which is embodied in the Fourth Amendment to the U.S. Constitution as explained in *Smith* above.

Consequently, the black backpack and it's contents were illegally obtained by FBI Agents and LAPD Officers. Any evidenced obtained from this blatantly illegal search, or any mention of the jewelry being in Mr. Brown's possession is the fruit of a poisonous tree and should have been suppressed at trial.

II.

TRIAL/APPELLANT COUNSEL WAS INEFFECTIVE IN NOT RAISING THE ILLEGAL SEARCH AND SEIZURE ISSUE IN EITHER A MOTION TO SUPPRESS, A WRIT OF HABEAS CORPUS PRIOR TO TRIAL OR AS AN ISSUE ON APPEAL.

In the instant matter, MICHAEL V. CRISTALLI, ESQ. served as both trial and appellant counsel for Mr. Brown. Mr. Brown asserts that Mr. Cristalli was ineffective for not raising the above search and seizure issue in either a Pretrial Motion to Suppress, a Pretrial Writ of Habeas Corpus or as an issue on appeal.

The issue of ineffective assistance of counsel is well settled in Nevada Law. One such case is State v. Love, 109 Nev. 1136 (1993) wherein the Court reiterated the U. S. Supreme Court standard in Strickland v. Washington, 466 U.S. 668 (1984).

> The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review. *Strickland*, 466 U.S. at 698. This court reviews a claim of ineffective assistance of counsel under the "reasonably effective assistance" standard enunciated by the United States Supreme Court

> in *Strickland* and adopted by this court in *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984); see *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. *Strickland*, 466 U.S. at 687.
>
> "Deficient" assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. Id. at 688. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. Id. at 694.
>
> Under *Strickland*, defense counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691.
>
> *Love*, 109 Nev. at 1138.

Mr. Cristalli should have made an attempt to suppress the evidence of the jewelry which was illegally seized prior to Mr. Brown's arrest. There is conflict between the testimony of Special Agent Aimaro and Special Agent McAllister as to the circumstances leading up to the illegal search of the backpack.

As noted above Aimaro testified that while he was introducing himself to Mr. Brown, another agent named Wolfson removed the backpack from Mr. Brown's shoulder and placed it on the ground at "their" feet for "officer safety." If this is true, then McAllister's assertion that the backpack was ten feet from Aimaro, Wolfson and Mr. Brown, cannot be correct.

Moreover, after Wolfson had removed the backpack from Mr. Brown ostensibly for "officer safety," McAllister had no "reasonable, articulable suspicion" which allowed him to search the backpack. The laughable reason that McAllister proffers for the manner in which he picked up the backpack is highly suspicious and gives rise to the theory that he wanted the contents of the backpack to spill out in some sort of "oops!" scenario which as expected caused Aimaro to arrest Mr. Brown.

Additionally, there is no record that any attempt was made to subpoena agent Wolfson for his testimony to corroborate Aimaro's testimony to resolve the conflicts between the testimony of Aimaro and McAllister concerning the location of the bag and that McAllister was present during the exchange between Aimaro and Mr. Brown. If Aimaro's testimony is accurate,

Wolfson's testimony would have impeached McAllister's testimony and given further support to the fact that the search of the backpack was illegal.

Mr. Cristalli's representation of Mr. Brown fell below an objective standard of reasonableness, was deficient and prejudiced Mr. Brown pursuant to *Strickland* and *Love*. It is axiomatic that had the evidence of the search been suppressed, the jury verdict could have been quite different.

III.

TRIAL/APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE ISSUE ON APPEAL THAT THE COURT WOULD NOT ALLOW THE DEFENSE TO EXPLORE POLICE PROCEDURE AND TEST THE CREDIBILITY OF THOSE PROCEDURES AND THE EVIDENCE AT TRIAL

Calendar Call for the instant matter was held on June 20, 2006. The following is taken from that Hearing Transcript (HT) attached as Exhibit 1. At that hearing, Mr. Cristalli brought defense subpoenas to the Court's attention that had not been complied with. (HT Page 2).

The subpoena at issue was for a copy of the Henderson Police Department Policy and Procedures Manual. The Court inquired as to what the need of the document was. Mr. Cristalli responded that there were several documents which contain inconsistent dates which would suggest that there is either some type of mistake in terms of police procedure or there is some type of intentional mistake.

Mr. Cristalli was attempting to determine the proper chronology in terms of police procedure in identifying, and inputting information and generating reports.

Mr. Cristalli then informed the court that the defense believed there was evidence of another suspect , Martell Williams, who was ignored. He was intricately involved in the case and there is evidence that he had the proceeds of the crime in his possession. Mr. Cristalli informed the Court that none of that information was ever turned over to the defense. (HT Page 6).

The Court then inquires what another viable suspect has to do with the difference of the dates previously mentioned. Mr. Cristalli answers that he was reluctant to state without the necessary support, that even though the Henderson Police Department knew about this possible suspect they ignored it because at that time they believed they had the correct suspect, Erick Brown. It was believed that in an effort to try to conform the identification lineup and the police reports there may have been manipulation of some of the documents in order to make Mr. Brown the most viable suspect. (HT Page 8-9).

It was at this point that the following exchange occurred:

THE COURT: This isn't a fishing expedition. It's a trial.
Do you understand that you're not going to try the Henderson Police Department on the whim of your client.

MR. CRISTALLI: I understand. If I got the information and the information said nothing to me to suggest that the Henderson Police Department did anything wrong I wouldn't use it.

THE COURT: It's apparent to me you are trying to try the police department and focus the attention away from your client at trial which is not going to occur.
You'll approach and pick up your subpoenas. They will not be issued through this Court.
(HT Page 9)

The issue arose again later when Mr. Cristalli advanced a defense opinion that the signatures on three documents of three different people were made by the same person. Handwriting exemplars for members of the Henderson Police Department were requested for the purpose of identifying the signer of the documents. The following exchange then occurred:

THE COURT: Assuming that what [sic] is the import of it, someone falsifying these records? You can ask him on the witness stand.

MR. CRISTALLI: I can do that.

THE COURT: Again, we're not going to try the personnel in the lab over at the Henderson Police Department.

MR. CRISTALLI: No, I'm not trying the Henderson Police Department.

THE COURT: I would think you are. What else do you want?

(HT Page11-12)

Mr. Cristalli then asked for Internal Affairs records of two of the detectives in the instant case and the manual and other documents that describe the workings of the computer system utilized by the Henderson Police Department for reports and other documents to determine if it is possible to go in and backlog those reports and other things. The following exchange then occurs:

THE COURT: What do you think?

MR. CRISTALLI: - - altering documentation.

THE COURT: You mean the computer information has been addressed?

MR. CRISTALLI: I don't know. I'm trying to find out.

THE COURT: This is just a fishing expedition.

MR. CRISTALLI: No. I think I've indicated there are a couple reports that suggest to me it's more than a fishing expedition. There's something that suggests there may have been something that has occurred I'm trying to verify.

THE COURT: I don't think there's been a sufficient showing to justify your examination of the Henderson Police Department or the lab over there. The subpoenas will be declined.

(HT Page12-13)

At trial, on June 26, 2006, while questioning Crime Scene Analyst Maria Weir, Mr. Cristalli attempted to ask her if she had put the prints that were lifted from the crime scene into

Automated Fingerprint Identification System (AFIS) for comparison to that database, the following exchange occurred.

MR. CRISTALLI: There is also [sic] is there not a system wherein you could, if you have latent prints, that are of quality that you can do a comparison, you can put them in AFIS?

MS. WEIR: That's correct.

MR. CRISTALLI: For purposes of the jury, AFIS is a system wherein you could put them in a computer system, right?

MS. WEIR: Yes.

MR. CRISTALLI: And see whether or not they match anybody, anybody's prints that are already in the system?

THE COURT: Let me interrupt. We're going into an area we discussed on a previous occasion.

MR. CRISTALLI: Okay your Honor. I'm moving on pretty quickly here.

MR. CRISTALLI: That is a viable thing?

THE COURT: As I said, that's in an area I don't think we'll go into.

(TT 6/26/06, Page 165-166)

It is axiomatic that the State has the burden of proving beyond a reasonable doubt, the guilt of the defendant. As this Court is well aware, the jury is admonished of that fact at the beginning of trial and just before they deliberate.

However a statement from the Court that "we are not here to try the police department" even made outside the presence of the jury, could be viewed as criticizing the defense in this case for questioning the credibility of the police, and suggesting that a proper approach is to assume the police are credible unless the defense proves otherwise. These types of comments could indicate that the Court has effectively placed the burden on the defense to prove the police are not credible rather than on the prosecution to prove they are credible. These comments

combined with the Court's refusal to explore the credibility of evidence collected and processed by the Henderson Police Department could be construed as a bias on the Court's part to protect the Henderson Police Department, and should have been brought before the Nevada Supreme Court for that determination.

Mr. Cristalli's representation of Mr. Brown fell below an objective standard of reasonableness, was deficient and prejudiced Mr. Brown pursuant to *Strickland* and *Love*. Mr. Cristalli should have brought these matters before the Nevada Supreme Court on appeal.

IV.

TRIAL/APPELLATE COUNSEL WAS INEFFECTIVE BY FAILING TO RAISE THE ISSUE OF AN INCOMPLETE/INACCURATE POLICE INVESTIGATION IN A PRETRIAL MOTION TO SUPPRESS, A PRETRIAL PETITION FOR WRIT OF HABEAS CORPUS OR AS AN ISSUE ON APPEAL

When one of the victims in the instant matter, Mr. James Connely was shown a photographic lineup, he was unable to identify Mr. Brown. He did however, identify Mr. Blackwell, the other defendant. It wasn't until Mr. Brown was seated in prison garb by himself at the preliminary hearing that Mr. Connely was able to "identify" him. This is of course a foregone conclusion as there are no other choices or possibilities like there were when Mr. Connely was unable to identify Mr. Brown from a photographic lineup.

At the time of the preliminary hearing, it had been three years since the crime. Mr. Connely had seen Mr. Brown a number of times, he has looked at reports and seen a myriad of photographs and been repeatedly told by the State that they believed Mr. Brown was the perpetrator of the crime. There is no doubt that after all of this, Mr. Connely would have made an identification of Mr. Brown at trial.

Both victims stated that the "taller man" was wearing an earring which he took out and handed to Mr. Golsecker to be cleaned. Crime Scene Analyst Maria Weir collected an earring from the solution in an ultrasonic machine where Mr. Golsecker had placed it at the crime scene.

Ms. Weir did not extract any DNA from the earring but according to her testimony at trial, she would have submitted the entire object to the crime lab for processing. (TT 6/27/06, Page 160-161). It is unclear whether a DNA profile was ever extracted from the earring.

Ms. Weir also collected latent fingerprints from the crime scene that amounted to multiple prints on nine cards. However, only five of the cards were suitable for comparison. After comparing these prints to a known set from Mr. Brown, the results were negative. Ms. Weir generated a report with these findings which was dated November 25, 2002. When questioned about this report Ms. Weir stated that the date on the report was incorrect and that the report was actually generated sometime in January 2003. (TT 6/27/06 Page 167-170).

Ms. Weir admitted to another error on a laboratory report dated April 14, 2003, which stated that nine lift cards were compared with Martell Williams. Ms. Weir admitted that she had made an error and that there were actually only five lift cards that were suitable for comparison. (TT 6/27/06, Page 170).

A footwear impression in blood was processed at the crime scene by Ms. Weir. She was unaware if any comparison was done with the footwear Mr. Brown provided, which would have excluded him as a suspect. (TT 6/27/06, Page 171). This was not mentioned in Mr. Brown's appeal.

On April 6, 2009, Mr. Cristalli filed **AFFIDAVIT OF MICHAEL V. CRISTALLI ESQ. IN RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL AS ALLEGED WITHIN PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION).**

On Page two of the affidavit Mr. Cristalli states at line 17 and following:

"Petitioner is correct that the Anders brief was filed after the fast track appeal. Counsel did not believe that the issues contained in the Anders brief were meritorious. Permission to file the brief was denied by the Nevada Supreme Court as alleged by the Petitioner."

On August 20, 2007, Mr. Cristalli filed a Motion to Supplement the Fast Track Statement more than ninety days after the deadline of May 7, 2007 in which he states that the issues presented were meritorious. Mr. Brown also thought the issues were meritorious. However, in Mr. Cristalli's affidavit above he states that he did not believe the issues were meritorious. If Mr. Cristalli did not think the issues were meritorious, he should have explained his reasoning to Mr. Brown. After all, it is Mr. Brown's life that hangs in the balance.

Mr. Cristalli does not give the reason for the denial of his motion for permission to supplement the fast track appeal with the Anders Brief. The ORDER OF DENIAL filed by the Nevada Supreme Court on September 11, 2007 denied Mr. Cristalli's motion as being untimely.

Mr. Cristalli's representation of Mr. Brown fell below an objective standard of reasonableness, was deficient, and prejudiced Mr. Brown pursuant to *Strickland* and *Love*.

The Nevada Supreme Court requires High standards of diligence when pursuing appeals.

> We have previously stated that we expect that all appeals brought in this court will be pursued in a manner meeting high standards of diligence, professionalism, and competence. See *Cuzdey v. State*, 103 Nev. 575, 747 P.2d 233 (1987); SCR 151. Further, HN2Go to the description of this Headnote.a defendant in a direct appeal from a judgment of conviction has a constitutional right to the effective assistance of counsel. See *Evitts v. Lucey*, 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985).
> Burke v. State, 110 Nev. 1366 (1994)

CONCLUSION

It is apparent from the above that Mr. Brown's due process rights have been egregiously violated and therefore a new trial is required. Accordingly, it is requested that this Honorable Court grant Mr. Brown a new trial.

Respectfully submitted,

BY: _____

ROBERT L. LANGFORD, ESQ.
Nevada Bar #3988
616 South 8th Street
Las Vegas, Nevada 89101
(702) 471-6535

NOTICE OF MOTION

TO: DAVID ROGER, CLARK COUNTY DISTRICT ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) on the 21st day of August, 2009 in the above-entitled Court.

DATED this 22 day of May, 2009.

BY:
ROBERT L. LANGFORD, ESQ.
Nevada Bar #3988
616 South 8th Street
Las Vegas, Nevada 89101
(702) 471-6535

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing MOTION FOR MODIFICATION OF SENTENCE is hereby acknowledged this 22 day of May 2009.

Clark County District Attorney

BY:

Electronically Filed
07/17/2009 10:09:39 AM

CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
H. LEON SIMON
Chief Deputy District Attorney
Nevada Bar #000411
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERIC M. BROWN,
#1895908

Defendant.

CASE NO: C189658

DEPT NO: XIV

STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND SUPPLEMENT TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: August 21, 2009
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through H. LEON SIMON, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition For Writ Of Habeas Corpus And Supplement To Defendant's Petition For Writ Of Habeas Corpus.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On January 28, 2003, Defendant was charged by way of Information with BURGLARY WHILE IN POSSESSION OF A FIREARM, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON, VICTIM OVER 65 YEARS OF AGE OR OLDER RESULTING IN SUBSTANTIAL BODILY HARM, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM, ROBBERY WITH USE OF A DEADLY WEAPON VICTIM OVER 65 YEARS OF AGE OR OLDER and ROBBERY WITH USE OF A DEADLY WEAPON. An Amended Information was filed on June 26, 2006.

On June 30, 2006, a jury found Defendant guilt of all charges. On August 8, 2006, Defendant was sentenced as follows: As to Count 1 – to a maximum of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26) months; As to Count 2 - a maximum of forty (40) years with a minimum parole eligibility of fifteen (15) years, plus an equal and consecutive term of forty (40) years maximum with a minimum parole eligibility of fifteen (15) years, count 2 to run concurrent with count 1; As to Count 3 – to a maximum of forty (40) years with a minimum parole eligibility of fifteen (15) years, plus an equal and consecutive term of forty (40) years with a minimum parole eligibility of fifteen (15) years, count 3 to run consecutive to count 2; As to Count 4 – to a maximum of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26) months, plus and equal and consecutive term of one hundred (120) month with a minimum parole eligibility of twenty-six (26) months, count 4 to run concurrent to count 3; As to Count 5 – to a maximum of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26) months, plus and equal and consecutive term of one hundred (120) months and twenty-six months minimum, count 5 to run concurrent with count 4. The Judgment of Conviction was filed on August 16, 2006.

On August 11, 2006, Defendant filed a Notice of Appeal. On August 28, 2006, Defendant filed a Pro Per Notice of Appeal. On September 13, 2007, the Nevada Supreme

Court issued an Order of Affirmance. Remittitur issued on October 9, 2007.

On October 10, 2008, Defendant filed a Petition for Writ of Habeas Corpus. On December 3, 2008, Defendant filed a Stipulation and Order to Continue Briefing of Petition for Writ of Habeas Corpus. On March 24, 2009, Defendant once again filed a Stipulation and Order to Continue Briefing of Petition for Writ of Habeas Corpus. On May 22, 2009, Defendant filed a Supplement to Petition for Writ of Habeas Corpus. The State's Opposition follows.

ARGUMENT

I. DEFENDANT WAIVED THE ISSUE OF ILLEGAL SEARCH AND SEIZURE.

In his Supplement to Petition for Writ of Habeas Corpus, Defendant argues that he was denied his constitutional Fourth Amendment protection against illegal search and seizure. This argument is without merit.

Issues that have not been timely raised on direct appeal are deemed waived per NRS 34.810(1)(b)(2) and Franklin v. State, 110 Nev. 750 (1994). Here, the issue of illegal search and seizure should have been raised on direct appeal. Defendant's failure to raise the issue results in a waiver. Accordingly, Defendant's petition should be denied on this basis.

II. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

In Nevada, the appropriate vehicle for review of whether counsel was effective is a post-conviction relief proceeding. McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257, n.4 (1996). Nevada has adopted the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under Strickland, in order to assert a claim for ineffective assistance of counsel, the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying a two–pronged test. Strickland at 686–687; *see* State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show: first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability

that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687–688 & 694, 104 S.Ct. at 2065 & 2068. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

In considering whether trial counsel has met this standard, the court will first determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing, Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Once this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280; citing, Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; see also, Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)(emphasis added); citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the

possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing Cooper, 551 F.2d at 1166 (9th Cir. 1977). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694). The State will address Defendant's grounds of ineffectiveness by disposing of them individually.

A. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SHARE THE RESULTS OF HIS INVESTIGATION WITH DEFENDANT.

"A lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." Brookhart v. Janis, 384 U.S. 1, 8, 86 S.Ct. 1245 (1966). The client may make decisions regarding the scope and ultimate objectives of representation, but the trial lawyer alone is empowered to make decisions regarding legal tactics. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). In the case of court appointed counsel, "[o]nce counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate-and ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002), citing Wainright v. Sykes, 433 U.S. 72, 93, 97 S.Ct. 2497 (1977). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland v. Washington, 466 U.S. 688, 691, 104 S.Ct. 2052, 2066 (1984).

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Thus, whether or trial counsel or his investigator shared the results of their investigation with Defendant is of no consequence since pursuant to Rhyne, the presentation of the defense is for the attorney, not the Defendant to determine. As such, Defendant's claim fails on this basis.

B. DEFENDANT IS NOT ENTITLED TO A "RELATIONSHIP WITH TRIAL COUNSEL.

In so much as Defendant alleges that counsel's "relationship" with Defendant broke down – a defendant is not entitled to a "relationship" with counsel, just reasonably effective representation. Morris v. Slappy, *See Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610 (1983). As such, Defendant's claim fails on that basis.

C. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MAKE FUTILE OBJECTIONS.

Defendant argues that trial counsel was ineffective for failing to raise the issues of illegal search and seizure and incomplete/inaccurate police investigation in a pre-trial motion to suppress or writ of habeas corpus pre-trial. However, an attorney's failure to make futile motions or objections does not constitute ineffective assistance of counsel. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006). Here, Defendant fails to establish that either motion or writ would have been meritorious. As such, Defendant's claim fails on that basis.

III. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Defendant argues that appellate counsel was ineffective for failing to raise the issues of illegal search and seizure, incomplete/inaccurate police investigation and the district court's abuse of discretion for refusing to allow Defendant to explore police procedure and the credibility of those procedures, on direct appeal. Defendant further argues that appellate counsel was ineffective for failing to "federalize" the issues in his state appeal. His arguments are without merit.

There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990), citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Furthermore, while a defendant has the ultimate authority to make fundamental decisions regarding his case, the defendant does not have a constitutional right to "compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). In reaching this conclusion the Supreme Court recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

Thus, it is of no consequence that counsel did not raise the issues desired by Defendant on appeal because it is for counsel, not the Defendant, to decide which issues to raise on appeal. Furthermore, it is also of no consequence that counsel did not "federalize" the issues in Defendant's state appeal. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). As such, appellate counsel was not ineffective and Defendant's petition should be denied.

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CONCLUSION

Based on the aforementioned arguments, the State respectfully requests that Defendant's Petition for Writ of Habeas Corpus be DENIED.

DATED this 17th day of July, 2009.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/H. LEON SIMON
H. LEON SIMON
Chief Deputy District Attorney
Nevada Bar #000411

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 17th day of July, 2009, by facsimile transmission to:

ROBERT LANGFORD, ESQ.
FAX #471-6540

/s/A. HARDY
Secretary for the District Attorney's Office

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PWHC
ROBERT L. LANGFORD ESQ.
Nevada Bar No. 03988
ROBERT L. LANGFORD & ASSOCIATES
616 South Eighth St.
Las Vegas, NV 89101
(702) 471-6535
Counsel for Petitioner ERICK M. BROWN

FILED
2009 AUG 21 A 11:13
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ERICK M. BROWN,

Petitioner,

vs.

HOWARD SKOLNIK, Director Nevada State Prison, DWIGHT NEVEN, Warden Ely State Prison,

CATHERINE CORTEZ MASTO, Attorney General of Nevada.

Respondents.

Case No.: C189658
Dept. No.: XIV

PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

HEARING DATE: August 21, 2009

HEARING TIME: 9:00 a.m.

REPLY TO STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND SUPPLEMENT TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner, ERICK M. BROWN by and through his Attorney, ROBERT L. LANGFORD, ESQ, and Replies to the above captioned State's Opposition to Petition for Writ of Habeas Corpus (Post Conviction) and Supplement to Defendant's Petition for Writ of Habeas Corpus which is incorporated by reference herein.

DATED this 20th day of August 2009. Respectfully Submitted,

ROBERT L. LANGFORD & ASSOCIATES

ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 03988
616 South Eighth St.
Las Vegas, NV 89101
(702) 471-6535
Counsel for Petitioner ERICK M. BROWN

ARGUMENT

I

PETITIONER'S POST CONVICTION COUNSEL WAS INEFFECTIVE IN NOT RAISING SERIOUS CONSTITUTIONAL QUESTIONS

The State begins by asserting that Petitioner's argument that he was denied his rights under the Fourth Amendment protection against illegal search and seizure, is without merit. The State turns to NRS 34.810 (1)(b)(2) and Franklin v. State, 110 Nev. 750 (1994) for support for this argument.

NRS 34.810 (1)(b)(3) states that the Court shall dismiss a petition if the Court determines that the petitioners conviction was the result of a trial and the grounds for the petition could have been "raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner."

In the "Notes to Decisions" section of NRS 34.810, the statute references Crump v. Warden, Nev. State Prison, 113 Nev. 293, 934 P.2d 247 (1997).

Crump was convicted of first degree murder and robbery with use of a deadly weapon and was sentenced to death. The conviction and sentence was affirmed on direct appeal. Crump filed a petition for post-conviction relief and was appointed counsel pursuant to Nev. Rev. Stat. 177.345(1). After an evidentiary hearing, the post-conviction petition was dismissed. Crump then filed a petition for a writ of habeas corpus, which set forth several allegations of ineffective counsel during the post-conviction proceedings. The district court found that the petition was procedurally barred because the issues could have been raised on direct appeal or in the post-conviction petition. Crump claimed on appeal that ineffectiveness of post-conviction counsel established cause to preclude application of any procedural bar. The court agreed with Crump's claims. The court found that the record did not establish whether the appointed post-conviction counsel's failure to raise the claims were more than attorney ignorance or

inadvertence and that an evidentiary hearing was necessary to determine whether cause and prejudice existed to defeat a procedural default.

The court reversed the dismissal of Crump's petition for a writ of habeas corpus. The court ruled that Crump was entitled to effective assistance of counsel for his post-conviction petition and that an evidentiary hearing was necessary to determine if post-conviction counsel's failure to raise certain issues constituted ineffective assistance of counsel.

> To prove a claim of ineffective assistance of counsel, the petitioner must pass a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 690.[1] Second, he must demonstrate actual prejudice; that is, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. If Crump can prove that Schubel committed an error which rises to the level of ineffective assistance, then Crump will have established "cause" and "prejudice" under NRS 34.810(1)(b)(3) to overcome procedural default. See *Coleman*, 501 U.S. at 753-54.[2] Because we conclude that an evidentiary hearing is necessary to determine whether "cause" and "prejudice" exists to defeat procedural default, we need not specifically address Crump's other contentions that the current petition for post-conviction relief is not procedurally barred.
> *Id.* at 304-305

It should be axiomatic that post conviction counsel's failure to at least raise, a serious Constitutional issue amounts to ineffective assistance.

Moreover, the Petitioner's failure to raise a claim on direct appeal does not constitute a waiver of the claim for the purposes of post conviction proceedings. In Daniels v. State, 100 Nev. 579, 688 P.2d 315 (1984) the Court ruled on this very issue.

> A claim of ineffective trial counsel is generally based on factual allegations which must be explored at an evidentiary hearing. Consequently, a claim of ineffective trial counsel is properly raised in proceedings for post-conviction relief. See *Lewis v. State*, 100 Nev. 456, 686 P.2d 219 (1984); *Bolden v. State*, 99 Nev. 181, 659 P.2d 886 (1983); *Gibbons v. State*, 97 Nev. 520, 634 P.2d 1214

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[1] Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

[2] Coleman v. Thompson, 501 U.S. 722, 753-54, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1990).

> (1981). Because of the usual need for an evidentiary hearing to resolve a claim of ineffective counsel, ***the failure to raise the claim on direct appeal does not constitute a waiver of the claim for purposes of post-conviction proceedings.*** *Bolden* v. *State*, supra. *Id.* at 580, 688 p.2d at 315 *(emphasis added)*

Consequently, the instant petition should be granted, or at the very least, an evidentiary hearing should be convened to determine if post conviction counsel's performance amounted to ineffective assistance pursuant to *Crump*, *Strickland*, and *Daniels* as noted above.

II

A CONSTITUTIONAL QUESTION IS NOT A FUTILE OBJECTION

In its argument that trial counsel was not ineffective for failing to raise the issue of the illegal search and seizure conducted on the Petitioner, the State uses Ennis v. State 122 Nev. 694, 137 P.3d 1095 (2006) for support. On Page 6:15 of the State's Opposition to the instant Petition, the State offers: "However, an attorney's failure to make futile motions or objections does not constitute ineffective assistance of counsel."

In order to understand how inappropriate this argument is to the current Petition, the context of the statement referenced in *Ennis* is necessary.

> Ennis asserts that his counsel failed to object to the testimony of Emma Williams, the victim's maternal aunt. Emma testified, "I was on the phone talking to my mom, and all of a sudden she got real quiet, she wasn't saying anything. And I asked her what was wrong, and she told me that Glen had come in the house and he was jumping--." Ennis's attorney then stated, "Judge, if I may pose an objection. There is no foundation as to the hearsay that--in the record." The district court sustained the objection and then stated, "Let's back up a little bit." Williams then testified that "[m]y mom asked me to call the police, because she said Glen was there jumping on Michelle." Michelle's grandmother was present on the day of the killing and testified that she heard the altercation between Michelle and Ennis while she was on the phone with Williams. [Notably, Michelle's grandmother also testified directly prior to Emma's testimony. She was also called as a witness by Ennis but was not questioned regarding her statement made to her daughter over the phone.]
>
> Ennis's ineffective assistance of counsel claim lacks merit because he has failed to demonstrate he suffered any prejudice from Williams's testimony. Ennis admitted being at the house and killing Michelle, claiming it was done in self-defense. Therefore, Williams's testimony placing him at the scene did not prejudice him.

> Moreover, his attorney did object, a better foundation was laid, and Williams's testimony clearly falls within the excited utterance exception to the hearsay rule. Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims. Therefore, the district court did not abuse its discretion in permitting the statement to be admitted and counsel did not render ineffective assistance.
>
> *Ennis*, 137 P.3d at 1102-1103. (*Footnotes omitted*).

Here an objection was made and ruled on by the court. It would have been futile to again raise this issue in post conviction proceedings. The situation in *Ennis* is in no way presents a valid argument against Petitioner's claims for relief and certainly does not present a convincing mitigation explaining the ineffective assistance of counsel for failing to raise a constitutional question before, during, or after trial. Petitioner was certainly prejudiced by the failure to present this argument, wherein the outcome of the trial could have been totally different.

It is apparent from the above that Mr. Brown's due process rights have been egregiously violated and therefore a new trial is required. The States arguments contained in their opposition to the instant petition are completely inappropriate and should be disregarded.

CONCLUSION

Based on the foregoing, it is requested that the instant petition be granted and/or an evidentiary hearing be convened to determine the issue of ineffective assistance of counsel.

Respectfully submitted,

ROBERT L. LANGFORD & ASSOCIATES

BY: _____

ROBERT L. LANGFORD, ESQ.
Nevada Bar #3988
616 South 8th Street
Las Vegas, Nevada 89101
(702) 471-6535

NOTICE OF MOTION

TO: DAVID ROGER, CLARK COUNTY DISTRICT ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing REPLY TO STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND SUPPLEMENT TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS on the 21st day of August, 2009 in the above-entitled Court.

DATED this 20th day of August 2009.

BY: _____
ROBERT L. LANGFORD, ESQ.
Nevada Bar #3988
616 South 8th Street
Las Vegas, Nevada 89101
(702) 471-6535

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing REPLY TO STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND SUPPLEMENT TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS is hereby acknowledged this 21 day of August 2009.

Clark County District Attorney

BY: KH

FILED

NOV 19 2009

CLERK OF COURT

CASE No. C-189658
Dept No. 14

ERICK MARQUIS BROWN
#92713 Petitioner,

V.

STATE OF NEVADA
Respondent,

Amendment to Petition For Writ of Habeas Corpus N.R.S. 34.360-830 and Motion for Court Ordered Subpoena

COMES NOW, ERICK MARQUIS BROWN **and Relies on Nevada Constitution Article 1 & 8 (1) as follows: "to be heard and defend in person AND with counsel." In addition to all claims and grounds named in the original petition for Writ of Habeas Corpus filed by counsel of record:**

Atty. Robert L. Langford & Associates
Nevada State Bar No. 003988

Petitioner files these additional pleadings and grounds further validating his claims. Exculpatory evidence is located in the E-mail transmissions between L.A.P.D. Detectives Joe Williamson **P#26350 and** Mike Woodings P#20823, **and Henderson Detectives** Denise J. Price P#690 and Randy Allison P#0975.

The U.S. Constitutional Amendment VI provides for:
"To have compulsory process for obtaining witnesses in his favor"
A witness can be defined as any evidence physical or forensic that can corroborate testimony offered by the accused.

RECEIVED
NOV 16 2009
CLERK OF THE COURT

FACTS OF THE CASE

On 11-27-02 while in the custody of the L.A.P.D. detectives Joe Williamson and Mike Woodings, petitioner physically viewed and read several witness statements and handwritten reports from the Henderson Police Department that were E-mailed to L.A.P.D. to assist in there investigation of the Las Vegas Manufacturing Jewelers Robbery. Petitioner's trial attorney Michael V. Cristalli, Nevada Bar No. 006266, promised to subpoena the E-mail address of all the detectives involved. After these documents never surfaced in the case file, it is a proven fact that L.A.P.D. and the Henderson Police Department communicated through the Internet via E-mail; there were never any detective notes handed over by either departments and there were no witness statements provided by the victims, just the word of the police. Without the information contained in those E-mail Transcriptions, petitioner cannot conclusively present his claims and exculpate himself from the allegations that led to this wrongful conviction.

REQUESTED RELIEF

Petitioner requests the Honorable Court to grant the subpoenas, so this matter can be resolved.

PRAYER

Wherefore, premises considered, Petitioner prays that the forgoing Amendment/Motion for Court Ordered Subpoena be granted to bring the truth forward thereby preventing a miscarriage of justice and a denial of Due Process in the compulsory process.

Respectfully Submitted,

Erick Brown

ERICK MARQUIS BROWN

CERTIFICATE OF MAIL

I, ERICK MARQUIS BROWN, do hereby certify that true and correct copies of the forgoing have been served pursuant to N.R.S. 34.735(7), has been sent via U.S. Mail from HIGH DESERT STATE PRISON law library.

This, the 10th day of November 2009.

Erick Brown

ERICK MARQUIS BROWN

HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NEVADA 89018

ATTESTATION OF OATH

I, ERICK MARQUIS BROWN, Petitioner under Nevada Constitution Article I & (1) do, solemnly swear that the foregoing Amendment/Motion for Court Ordered Subpoena is true and correct in its entirety;

Under Penalty of Perjury Pursuant to:
N.R.S 171 and N.R.S. 208.165

This, the 10th day of November 2009.

Erick Brown
ERICK MARQUIS BROWN #92713
Petitioner,

AOR

FILED
JAN 27 2010
CLERK OF COURT

CASE No. 189658
Dept No. 14

January 25, 2010

ERICK MARQUIS BROWN
#92713 Petitioner,

V.

STATE of NEVADA
Respondent,

Amendment to Petition For Writ of Habeas Corpus N.R.S. 34.360-830 and Motion For Court Ordered D.N.A. and Forensic Laboratory Testing

COMES NOW, ERICK MARQUIS BROWN and relies on Nevada Constitution Article 1 & 8 (1) as follows: "to be heard and defend in person **AND** with Counsel." In addition to all claims and grounds named in the original petition for Writ of Habeas Corpus filed by Counsel of Record:

Atty. Robert L. Langford & Associates
Nevada State Bar No. 003988

Petitioner files these additional pleadings and grounds further validating his claims. Physical evidence was recovered by the Henderson Police Dept. and it was never tested for D.N.A. and the size of a bloody footprint was not determined or compared to the petitioner's foot size.

The U.S. Constitutional Amendment VI provides for: "to have compulsory process for obtaining witnesses in his favor." A witness can be defined as any evidence; physical or forensic that can corroborate testimony offered by the accused.

Facts Of The Case

On 11-24-02, Henderson Police Dept. Crime Scene Analyst, Maria Weir #1046, entered a sealed crime scene at Las Vegas Manufacturing Jewelers. While processing the crime scene, she recovered and impounded a diamond earring that was alleged to belong to the petitioner. The earring was located in a jewelry-cleaning device and the eyewitness testified that the petitioner removed said earring from his ear. petitioner's trial attorney Michael V. Cristalli assured the petitioner that he would have the earring processed for the presence of D.N.A., before a jury trial convened and once again on direct appeal. In addition to the earring recovered at the crime scene, a bloody footprint was photographed and measured by crime scene analyst Maria Weir. Neither of these two key pieces of forensic evidence was never tested by the prosecution and the petitioners trial and direct appeal counsel never followed through with his promises to have the evidence sent to a certified laboratory for processing. Mr. Brown is serving a 160-year prison sentence, a definite death sentence behind bars and this exculpatory evidence was never even tested or looked at. The prison sentence alone warrants this evidence to be tested not to mention a man and his family's life is at stake. Furthermore the division of parole and probation pre-sentencing report revealed no prior violent acts on the part of Mr. Brown and absent a extensive criminal history. These two unresolved issues are very serious and detrimental to the petitioner's defense.

Requested Relief

Petitioner request this Honorable Court to grant this amendment petition and Court ordered D.N.A. and Forensic Laboratory Testing, so that this matter can be resolved.

Prayer

Wherefore, premises considered, petitioner prays that the forgoing amendment/ motion be granted to bring the truth forward therefore preventing a miscarriage of justice and a denial of due process and the compulsory process.

Respectfully Submitted,

Erick M. Brown

Erick Marquis Brown

Certificate of Mail

I, **ERICK MARQUIS BROWN**, do hereby certify that true and correct copies of the forgoing have been served pursuant N.R.S. 34.735 (7) has been sent via U.S. Mail from High Desert State Prison Law Library.

This, the 25th day of January 2010.

Erick Brown

ERICK MARQUIS BROWN
HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NEVADA
89070

Attestation of Oath

I, **ERICK MARQUIS BROWN**, Petitioner under Nevada Constitution Article 1& (1) do, solemnly swear that the forgoing Amendment/motion for court ordered D.N.A. and Forensic Laboratory testing is true and correct in it's entirety;

Under penalty of perjury to:
N.R.S. 171.102 and N.R.S. 208.165
This, the 25th day of January 2010

Erick Brown

ERICK MARQUIS BROWN
Petitioner, #92713

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

STATE OF NEVADA,

Plaintiff,

vs.

ERICK MARQUIS BROWN,

Defendant.

Case No. C189658
Dept. XIV

REPORTER'S TRANSCRIPT
OF
EVIDENTIARY HEARING

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Friday, January 27, 2012

At 9:00 a.m.

APPEARANCES:

For the State: TIM FATTIG, ESQ.
Chief Deputy District Attorney

For the Defendant: ROBERT L. LANGFORD, ESQ.

Reported by: Maureen Schorn, CCR No. 496, RPR

LAS VEGAS, NEVADA. FRIDAY, JANUARY 27, 2012, 9:00 A.M.

* * * *

THE COURT: C189658, State of Nevada versus Erick Marquis Brown. The record will reflect the presence of Mr. Brown in custody. Mr. Langford is counsel, and we have Mr. Fattig for the State.

This is time set for an evidentiary hearing on the defendant's petition for a writ of habeas corpus alleging ineffective assistance of counsel primarily; is that correct?

MR. LANGFORD: That's correct, Your Honor.

THE COURT: Mr. Cristalli, would you come forward, please, and be sworn?

Whereupon,

MICHAEL V. CRISTALLI, ESQ.,

was called as a witness by the Defense, and having been first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name and spell it for the record?

THE WITNESS: Michael Vincent Cristalli, C-r-i-s-t-a-l-l-i.

THE COURT: Now, counsel, what I'd like to

do is take the issues in the order roughly that they were pled. I think that's probably what you've set up as well.

But let me address the first issue, and we'll ask questions in turn and then we'll go to the next issue. If I miss something later, we'll clean it up.

MR. FATTIG: Judge, if I could just inquire. Are you starting with the defendant's pro per? Or are you starting with Mr. Langford's supplement? Or do you know? Because I know there were numerous petitions and supplements and responses filed.

THE COURT: I think I can answer your question. Let me see what the notes say here. I have at the end of this list defendant's reply to your submittal, Mr. Fattig, so that would be at the end.

And I don't really know where my Clerk garnered the information I have on this sheet, but they're very specific so I think we'll be able to find it. And then we'll allow some time if we need to check the notes.

The first item I have here, it says ineffective assistance of counsel in that trial counsel hired an investigator during pretrial investigations. However, communications broke down, and the defendant did not receive all investigation or evidence needed for his defense.

And I take it from that, Mr. Langford, you're

saying that your client didn't receive all the evidence in the jail?

MR. LANGFORD: That's correct, Your Honor.

THE COURT: Well, I'm not sure there's a legal requirement of that, I know there's not a legal requirement for that but, certainly, I had a discussion.

MR. LANGFORD: I apologize, Judge. Is it okay for me to remain seated when I address the Court?

THE COURT: Yes. So you can go ahead and inquire.

MR. LANGFORD: Okay.

DIRECT EXAMINATION

BY MR. LANGFORD:

Q Mr. Cristalli, we're going to dispense Your Honor with his name, swearing him in.

THE COURT: We just did. He stated and spelled his name.

Q (By Mr. Langford) When were you admitted to practice law in Nevada?

A 1997.

Q During that time, have you had an opportunity to try felony cases in the Eighth Judicial District Court?

A Yes.

Q Approximately how many felony cases have you

tried, approximately?

A You know, Mr. Langford, it's hard for me to tell. Conservatively, I would say between 30 and 50. As to trial, I'm assuming?

Q Yes, through trial. And so is it your experience to hire an investigator prior to going to trial?

A It depends on the case, but it certainly wouldn't be unusual for me to hire an investigator in association with trying a case; so, yes.

Q Did there come a time when you represented Eric Brown?

A Yes, there was.

Q And that's the person seated in court next to me?

A Yes, it is.

Q When did you -- approximately when did you begin representing him?

A I'm assuming it's between 2004 and 2006, somewhere between those periods. I think the trial date was in '06, but I had been involved with the case prior to that period of time. But I'm not specifically sure as to when my first appearance was with him.

Q And during that time period, did you ever hire an investigator to assist you in preparing for trial in his case?

A It's my understanding that there may have been an

investigator already hired by Mr. Brown's family before he was court-appointed by this Court. It was Richard Frankie, and I believe Richard was hired by the family before he was court-appointed through my motion. I think chronologically that's how it happened.

Q Did Mr. Frankie generate reports for you?

A I don't know if he generated a report. We certainly spoke often in regard to the case. I haven't reviewed any reports on this case from Mr. Frankie.

Q Did you ever meet with Mr. Brown and Mr. Frankie at the jail?

A Mr. Langford, I don't know if we met together with Mr. Brown. I don't have a specific recollection of that. Certainly, we met with Mr. Brown, but I don't know that we met together with Mr. Brown. I could have, but I don't have a specific recollection.

Q Are there documents which would assist you in recalling whether you met with him?

A Are there documents?

Q Did you bring your case file with you today?

A I did not. In fact, I think my case file has been turned over.

Q You didn't retain a copy?

A I do not know if my office retained a copy of Mr. Brown's file.

Q You have no specific recollection of meeting with Mr. Frankie and Mr. Brown?

A I do not have a specific recollection.

Q You think you might have?

A Sure.

Q Do you recall ever going to the evidence vault with Mr. Frankie?

A Sitting here today, I don't have a specific recollection of going to the evidence vault, but it certainly could have happened.

Q If Mr. Brown indicated that he believed you never met with him and Mr. Frankie, would that be different than what you recalled?

A Together?

Q Yes.

A It's possible.

Q Do you recall if Mr. Frankie ever located evidence that you thought was important to the case?

A You'd have to be little bit more specific on that one.

Q Was there any evidence, other than that given to you by the State of Nevada, that you came to possess as a result of Mr. Frankie's work?

A Unless you show me some information, I can't tell you, specifically, sitting here.

MR. LANGFORD: Pass the witness, Judge.

THE COURT: Questions?

MR. FATTIG: And, Judge, my understanding is, we're only asking about the narrow issue Your Honor brought up?

THE COURT: Yes.

MR. FATTIG: Thank you.

CROSS-EXAMINATION

BY MR. FATTIG:

Q Mr. Cristalli, I had faxed over a copy of an Affidavit that you had filed with the Court in this matter, correct?

A Yes.

Q Do you remember in reviewing that? I faxed it over yesterday?

A Yes. I did review it.

Q Do you remember that one of those affidavits indicates an Affidavit attached from Richard Frankie, or not an Affidavit, but billings of Richard Frankie were attached to the Affidavit as Exhibit A.

Do you remember that?

A A slight recollection. I can't recite specifically what that was, I'd have to look at it, but I know that it was attached.

Q So you haven't seen that particular exhibit, the attachment?

A I don't recall.

Q For number of years, fair to say?

A That's fair to say.

MR. FATTIG: Could I approach the witness, Your Honor?

THE COURT: You may. And the Affidavit and the exhibit that you allude to are filed with the Court.

MR. FATTIG: Correct.

THE COURT: So they're available to counsel, certainly. And, Mr. Langford, if there's anything mentioned here that you don't have copy of, we'll certainly cure that.

MR. LANGFORD: Thank you, Your Honor.

MR. FATTIG: Thank you, Your Honor.

Q (By Mr. Fattig) Showing you copy of a document titled, "Affidavit of Michael V. Cristalli in Response to Allegation of Ineffective Assistance of Counsel as alleged within Petition for Writ of Habeas Corpus Postconviction," correct?

A Yes.

Q And you recognize this document as an Affidavit that you filled out?

A Yes.

Q And attached to that is a letter that Mr. Frankie prepared, correct?

A Yes.

Q And could you just review that? It's kind of an extensive document, and then I'll ask you some questions about it.

Is it fair to say that attached to the letter is a memorandum that Mr. Frankie prepared in terms of the steps of his investigation in various areas?

A Yes. That's what I'm reviewing right now.

Q And that's a number of pages involving a number of different angles that he was working?

A That's correct.

Q So you've reviewed at least the letter. Does that help with your memory in terms of Mr. Frankie's role?

A It does help with my recollection. I did not review that prior to today's hearing.

Q Sure. Do you remember in that affidavit at the beginning of that you talked about how the investigator was used extensively by the Defense in this matter?

A That's correct.

Q So much more than the average case that you had?

A It is quite extensive. Mr. Frankie's involvement in this case was quite extensive, and would be on the upper end in terms of an investigator's involvement in a

case.

Q Again, he was hired by Mr. Brown's family initially, and then you got him court-appointed so eventually he was being paid by the State?

A I believe that's the chronology, yes.

Q Do you have specific memory of meeting with Mr. Brown over this case prior to trial?

A Yes.

Q About how many times?

A You know, it would be a complete guess and speculation for me to tell you how many times I met with Mr. Brown. It would have to be just a speculation based on a case and going to trial, and how often I would see a defendant in preparation.

But I know that between myself and other individuals within my office, we probably would have seen Mr. Brown conservatively at least a half dozen times but, I mean, that's just pure speculation.

Q Do you have a specific memory of meeting Mr. Frankie independent or outside of Mr. Brown about this case?

A Yes. I have a recollection after reviewing the memorandum that you have presented me. It does refresh my recollection in terms of Mr. Frankie's involvement in this case.

Q And it was extensive?
A It was.
Q But you just don't have any specific memories of meeting with Mr. Frankie and Mr. Brown at the same time?
A That's correct. I don't have a specific recollection of meeting with both of them at the same time.
Q But you certainly would have discussed issues when you're meeting with Mr. Frankie that Mr. Brown would have told you about, correct?
A That's correct.
Q And vice versa, when you're meeting with Mr. Brown, you would have discussed issues Mr. Frankie is discussing with you about the nature of his investigation?
A Both myself and my staff, correct.
Q So there would have been plenty of communication between all three parties?
A Yes. And it appears based on the memorandum that I'm reviewing that that, in fact, was the case.
Q Now, did you have a policy of necessarily sharing all of the discovery with your client prior to trial in terms of copying everything and giving it to him?
A I don't know if there is a policy in place but, certainly, we tend to give the client whatever the client requests. And so if there was a request made for certain

materials associated with his or her case, it would have been provided to them.

Q Okay. So if Mr. Brown was requesting specific documents to review, you would have provided it to him?

A Absolutely.

Q So when he's alleging you were ineffective because he didn't receive all of the investigation needed to support his defense, you would disagree with that?

A Well, yes, certainly as it relates to the investigation, because I know Mr. Brown had direct communication with Mr. Frankie who was deeply vested in the investigation associated with this case.

So I -- and this is the first time I've heard the allegation that Mr. Brown did not receive certain material as it related to his investigation.

Q That would surprise you? That allegation surprises you?

A Under the circumstances, with Mr. Frankie's work and the memorandum that was in support of the investigation.

Q And the memorandum talks about, fair to say, I don't know, is it two dozen different angles that Mr. Frankie was working on?

A The memorandum by Mr. Frankie to me in reference to this investigation is very extensive for this case. It

goes on for 12 pages and address at least 21 different items.

Q And is it fair to say you did what you could in terms of assisting Mr. Frankie with getting these items?

A Yes, that's correct.

Q When, ultimately, in June of 2006 when you announced ready for trial, you believed you were at a point where you were prepared to adequately represent Mr. Brown?

A That's correct.

Q Even despite a ruling by the Court that prevented certain follow-ups that you were looking into?

A Well, yeah. I think we at the time requested some relief from the Court for additional material in furtherance of the investigation. We were denied those requests.

But as far as our -- what we could have done at that time, we couldn't have done anything more than we did. So, certainly, we were prepared to go forward with the trial.

MR. FATTIG: I have nothing further on this particular allegation.

THE COURT: One point of clarification.

Mr. Cristalli, you indicated that you didn't have your file at this time, and I think you suggested that you

perhaps sent it to your client?

THE WITNESS: Yes. After completion of our case there was a request made for production of the file to Mr. Brown, I believe.

I don't know that there was a lawyer at that time representing him. If there was, it would have been turned over to the lawyer. If not, it would have been turned over to the client.

THE COURT: So as far as you know, it was either sent over to the lawyer, or Mr. Brown personally?

THE WITNESS: Upon their request; Yes, Your Honor.

THE COURT: Further questions?

MR. LANGFORD: Yes, Your Honor.

Q (By Mr. Langford) You don't recall though, Mr. Cristalli, what, if anything, you gave to Mr. Brown in the way of discovery?

A Sitting here today, Mr. Langford, I couldn't testify to that.

Q Okay. You indicated on examination by the State that there were some things that you requested of the Court, but were denied. Do you recall what those things were?

A There was material that was requested, I believe, from the Henderson Police Department after some rules of

transcripts associated with this case. You have to refresh my recollection though, Mr. Langford, for me to be more specific on that issue.

MR. LANGFORD: Your Honor, may my associate come and assist me at the table? It might assist me. I'll come back to this question.

THE COURT: That's fine.

Q (By Mr. Langford) Do you recall at the time of calendar call that you had subpoenas that you had issued to the Henderson Police Department?

A I do after reviewing transcripts of that proceeding.

Q And do you recall what those subpoenas were for?

A I would like to see those transcripts so I don't misspeak.

THE COURT: Before we go further, are you going into the different issue now?

MR. LANGFORD: It has to do with the investigation, Your Honor.

THE COURT: Let me kind of tailor this for a moment. The next thing I was going to suggest does, I think, speak in the same vane because it's close to this issue of investigation.

MR. LANGFORD: I'll withhold my question.

THE COURT: But we'll get to around to

everything. Specifically, it says here, "Trial counsel did not adequately present evidence regarding fingerprints that were found at the scene."

Now, when you say, "adequately present," that was the language I think my Clerk picked up out of the writ. Was that presented to the jury? Or presented to the defendant in custody so he could look at it?

MR. LANGFORD: No, Your Honor. That was presented to the jury as evidence.

THE COURT: Okay. Do you want inquire?

MR. LANGFORD: Yes.

Q (By Mr. Langford) Some of the issues that you were trying to raise had to do with fingerprints in this case; is that right?

A Yes.

Q That was part of your defense, is that the fingerprints had been improperly acquired and improperly checked against the AFIS database; is that right?

A I think that was one of Mr. Brown's issues. I mean, it was significant to him in order to develop potentially another suspect in this case.

There were no fingerprints that were developed, either latent prints or partial prints that were identified to Mr. Brown, so there was no incriminating evidence relating to fingerprints that hurt Mr. Brown in

this case.

Q Would you agree, however, that if those fingerprints had, in fact, come back to another person, that that would have been helpful in your defense?

A I think it could have been helpful. It could have been helpful.

Q And did you seek or order requesting that the Henderson Police Department run those prints against a national database?

A I want to say yes, and I believe there -- but I could be confused with other subpoenas, so I don't want to say yes, Mr. Langford, without knowing for certain that that was, in fact, done.

THE COURT: For clarification sake, what latent prints are we talking about? What were they taken from?

MR. LANGFORD: They were taken from the jewelry store itself, and from the glass -- my recollection is the glass cases that the jewelry was in, and they got partial prints off of those.

Some were able to run prints, they were sufficient to run prints, some were not.

THE COURT: I guess I'm somewhat wondering here. I mean, it's a public store with people coming in and out all the time. Why would any particular latent

print be important?

MR. LANGFORD: Because if you have a particular print that comes back to a particular person, then you can do investigation on when that person was at the store.

If it turns out that person says they were never at the store, they become a likely suspect. And if they can't say where they were on the date of the actual robbery, they're even a stronger suspect, so it leads to if you can find out who that person is that left the prints there.

I believe that there's also some testimony that said that the glass cases were cleaned on a regular basis. As the Court might expect in a jewelry store, it's important to keep those glass cases clean so people can get a good look.

And if you've got a grimy, nasty area, so you can isolate down to a fairly narrow time frame when those prints would have been put on the glass cases.

THE COURT: Well, I understand your position in that regard, and that was one of my questions. It could be literally hundreds of prints in the store, but you think that because they cleaned the cases and all that, it's likely that someone having to do with the crime left their prints. Is that your thinking?

MR. LANGFORD: Yes.

THE COURT: Continue, please?

MR. LANGFORD: I think that's all with the fingerprints, Your Honor.

THE COURT: Cross, please?

Q (By mr. Fattig) Mr. Cristalli, is it your memory that Maria Weir was the crime scene analyst that actually did the analysis at the scene in terms of lifting and finding evidence?

A That's my recollection.

Q And she testified at the trial, correct?

A That is correct.

Q And you had the chance to cross-examination her?

A I did. And I think we also had our own expert associated with fingerprint examination.

Q And your own expert went down to henderson and looked at the fingerprint cards?

A Yes. They actually allowed them to look at the original fingerprint cards.

Q Is that a bit unusual?

A It is a little unusual but, certainly, we accepted it because it's better evidence for us to review. But they did give us an opportunity to do that.

Q Do you remember that you applied for an order from the Court for the ability to look at the original not

just the fingerprint cards, but also all the original reports from Henderson PD with the original signatures on them by the detectives and officers?

Do you remember that?

A I believe that is the case.

Q Had you ever done that before?

A You know, I don't know, Mr. Fattig, if that's ever been done in the past. It certainly was

Q By your office?

A By my office. It certainly could have been requested on other -- we request as much as we possibly can, obviously. And if it's granted, then we certainly will take advantage of that convenience.

So in this case it was, and so we did.

Q And you hired your own fingerprint expert to go down there and double-check Henderson PD's work?

A Yes, we did.

Q And do you remember that Maria Weir testified that she tried to lift prints from numerous spots in the jewelry store where the robbery occurred, correct?

A Yes.

Q Like the back door where they left from, the safe, the zip ties that the victims were tied up in, any number of spots, correct?

A It's all consistent with my recollection.

Q And her testimony was that -- and she tried a number different techniques; super glue, magnetic powder, et cetera, correct?

A Yes.

Q And her testimony ended up being that the only places where she ended up finding any prints were nine different prints on the glass cases out in the front where the public has access, correct?

A That is correct.

Q Where the jewelry is stored and displayed?

A Yes.

Q And she testified that four of those nine prints were not of sufficient quantity or quality to compare with other known suspects?

A That's consistent with my recollection.

Q So that left five that were left that were of sufficient quality, correct?

A That is correct.

Q And is it your memory that three of those five were actually identified to one of the employees in the store, Mr. Connolly?

A That is correct. That's based on my review and my recollection of the evidence.

Q And those were actually identified by an AFIS search, correct?

A That is correct.

Q The Other two prints that were of sufficient quality but were not identified, were from the glass case area, correct?

A That is correct.

Q They were compared to Eric Brown, correct?

A Yes.

Q Alfred Blackwell, the codefendant?

A Yes.

Q And Martell Williams, the alternative suspect in your theory?

A That's what we developed, that there was another suspect, Martell Williams and, we requested that the analysis be done on him as well.

Q And it was?

A Correct.

Q And all three individuals were not identified to those two remaining prints?

A That is correct.

Q But those two remaining prints were run through the AFIS database and didn't come back to anyone, correct?

A That's my recollection.

Q Is it your recollection that there was also a fingerprint expert that was prepared to testify at trial; however, we ended up entering into a stipulating regarding

his testimony?

A Yeah. After the review of the record, I do acknowledge that. That is true.

Q And the stipulation, basically, laid out what I just asked you about, about the nine cards, the fact that five of them were of sufficient quality for comparison, the fact that three of those five were matched to Mr. Connolly through AFIS, and the fact that two of them were never matched to anyone, but they were compared specifically to the various defendants and/or suspects?

A That is correct.

Q That I mentioned?

A Yes.

Q Was it your memory that the Henderson Police Department did not have the exemplars of Mr. Goldchecker, the other clerk or owner, as well as his son Dan Goldchecker, who wasn't there at the time, but was also part-owner and deeply involved in the business?

A That's my recollection.

Q And do you remember that the State argued that it was quite possible that those two prints could have been either Mr. Goldchecker, the victim, or his son's prints, or any number of customers, correct?

A Yes. That's my recollection.

Q Did you feel that that was a rather effective

argument in front of the jury to rebut your arguments?

A Well, whether or not it was a sufficient rebuttal or not, I don't know that the evidence as it was presented was very persuasive as far as the defense was concerned anyway.

Q And what evidence are you talking about? Are you talking about persuasive of guilt?

A The evidence of the fingerprints, or the lack of development, I don't believe was a strong defense argument.

Q But you tried it?

A Sure.

Q And you investigated it fully?

A Absolutely.

Q And you also argued that in front of the jury, the fact that Mr. Brown's prints were never found at the scene?

A I thought that issue was certainly something that should be brought out in front of the jury, because it would be a piece of evidence that would exclude Mr. Brown as a suspect in the case.

Q In terms of the overall weight of the evidence in this case, would you view it in your professional opinion as strong for the State towards guilt?

A I strongly recommended Mr. Brown to take a plea

negotiation in this case in lieu of going to trial, because of my concerns about an acquittal.

Q Because of your concerns of?

A The State of the evidence against him.

Q You felt that it was unlikely he would gain an acquittal?

A I thought it was going to be difficult to obtain an acquittal in light of the identifications that were being made against him, in light of the evidence that was gathered against him in California in his presence.

I believed that it was going to be very difficult task in achieving an acquittal in this case.

Q The fact that both victims ended up identifying Mr. Brown?

A That is correct.

Q The fact that Mr. Brown was found with a vast majority of property on November 127th, just three-and-a-half days after the robbery and kidnapping in this case?

MR. LANGFORD: Judge, I'm going to object. We're getting pretty far afield on the issue. Seems like we're now on some other issues.

MR. FATTIG: This was my last question on this area.

THE COURT: Let's finish up.

THE WITNESS: Yes, Mr. Fattig.

MR. FATTIG: Nothing further.

THE COURT: Go ahead.

Q (By Mr. Langford) We've talked about you examined Ms. Weir during the jury trial?

A Yes.

Q Were you prevented from completely examining Ms. Weir by the Court?

A I believe I was.

Q Specifically, you were asking about the AFIS system and what it could and could not do; is that right?

A That's correct. I was limited in what I could ask on my examination.

Q And how were you limited, specifically? What was happening in your mind that prevented you from asking those questions?

A Well, I know that the Court made a specific ruling that I was going to be contained in the scope of my examination as it related to the Henderson Police Department, and what questions could be asked in regard to their investigation or development of evidence.

Q Okay. Do you recall the Court specifically telling that you we're not going to try the personnel in the lab over at the Henderson Police Department?

A Yes.

Q Then when you spoke with Ms. Weir you asked, and quote, "and see whether or not they match anybody or anybody's prints that are already in the system," and you were referring to AFIS; is that right?

A That's correct.

Q And the Court said, "Let me interrupt. We're going to an area we discussed on a previous occasion"?

A That's correct.

Q And your response was, "Okay, Your Honor, I'm moving on pretty quickly here."

Then you asked, "That is a viable thing" to the witness; is that right?

A That is the record, Mr. Langford, correct.

Q And the Court indicated, "As I said there's in an area I don't think we'll go into?

A Yes.

Q At that point you stopped questioning Ms. Weir with regards to the fingerprints; is that right?

A I'm assuming that was the case. I wasn't going to violate the Court's order.

MR. LANGFORD: I have nothing further on fingerprints, Your Honor.

THE COURT: Anything further?

MR. FATTIG: Briefly, Judge.

Q (By Mr. Fattig) You were aware, however, that

the prints had, in fact, been run through the AFIS system?

A We were aware of that, yes.

Q But you were trying to highlight to the jury and educate the jury about what that AFIS system was?

A And I can't remember the specifics of the examination that I wanted to get into at the time, but there was some further development of that examination that we wanted to go into, yes.

Q And do you remember when you were asking questions of another witness, either an FBI agent, or a detective with the Los Angeles PD, you were allowed to ask some questions, specifically Darren McAllister, you were allowed to ask some follow-up questions about AFIS explaining exactly what the system is.

Do you remember that?

A Yes. I do you remember that.

Q And you asked -- he actually worked for the FBI; specifically, you asked him, "As an individual who has worked with the FBI for such a long period and with the Los Angeles Police Department, are you familiar with the AFIS system?" And he said he was.

And you indicated, "It's a system where you can gather latent prints from somewhere, you can insert them into a computer or a network, and the computer will attempt to make a match?"

And he said, "Yes. It attempts to do that."

Do you remember that exchange?

A I do.

Q So you actually went into it a little bit with Ms. Weir, also with Mr. McAllister from law enforcement?

A That is correct.

MR. FATTIG: Nothing further.

THE COURT: Anything further?

MR. LANGFORD: Just briefly, Your Honor, on one issue.

Q (By Mr. Langford) You were, however, at the beginning of the trial it was your intent, was it not, to challenge the investigation that was done by the Henderson Police Department?

A Yes. I don't remember the specifics in terms of what evidence we wanted to develop in the course of the trial, Mr. Langford. But I know for certain there was a limiting order by the Court in terms of what we were going to be able to get into.

MR. LANGFORD: Nothing further, Your Honor.

THE COURT: Thank you. Now, on the last item I have here having to do with the defendant's brief before you filed your supplement, Mr. Langford, has to do with appellate issues that the defendant wanted the Defense attorney to bring on appeal.

Do you want to get into that now, or is it something that you contemplated in your brief?

MR. LANGFORD: It's something I contemplated in my brief, Your Honor.

THE COURT: All right. Let's move on to the supplement. And it says Defendant's Fourth Amendment right of unreasonable search and seizure was violated. This has to do with the situation in California, correct?

MR. LANGFORD: That's correct, Judge.

THE COURT: Go ahead and inquire, sir?

Q (By Mr. Langford) Did you ever file a motion to suppress the evidence that was seized from a duffle bag in California?

A You know, Mr. Langford, I want to say that we did not file a motion to suppress, but I don't recall, specifically, whether or not that was done or not.

Q So it wouldn't surprise you if you didn't?

A No. It would not surprise me.

Q Do you recall the specifics of the duffle bag in California?

A I could not tell you the specifics.

MR. LANGFORD: Court's indulgence, Judge.

Q (By Mr. Langford) Do you recall that Mr. Brown was alleged to have had a black backpack with him when he was in California?

A Well, that's the question. I mean, I know there was black bag that was in question. The issue was whether or not it was with Mr. Brown or not.

Q Okay. And do you recall whether or not it was searched?

A I believe it was searched.

Q Do you recall whether or not there was a search warrant?

A I do not recall whether or not there was a search warrant.

MR. LANGFORD: May I approach the witness, Your Honor?

MR. FATTIG: Could I see what page you're referring to?

MR. LANGFORD: June 28th.

Q (By Mr. Langford) I believe your questioning Of Detective McAllister is being questioned?

A Okay.

Q Does that refresh your recollection?

A Mr. Langford, what part of it do you want me to read? Where it's highlighted?

Q Yes.

A I have read it.

Q Do you recall whether or not a search warrant was ever executed for that to search the bag?

A No search warranty, based on my review of those transcripts.

Q If the search warrant had failed, if they'd failed to get a warrant to search the bag that they alleged was Mr. Brown's, and that evidence had been suppressed, that was a key -- there was evidence that was key to this case in the backpack, wasn't there?

A I believe so, yes.

THE COURT: Mr. Langford, let me interrupt you a moment because we have some input here that might help us. My Clerk tells me after perusal of his file, and this may comport with your understanding and Mr. Fattig's, or not.

For what it's worth, I was told that on the 16th of September of 2004, a motion to suppress was entertained by the Court. And I was on record as saying for some reason, and I don't know the thinking behind all this, that it could be recalendared if necessary.

Now, that suggests to me that there was no decision made. That's just my take on it, I don't recall it, certainly. But there was a motion supposedly the 16th of September of 2004, and somehow we past over it and said it could be recalendared if necessary.

MR. FATTIG: Do you know who filed that, Judge?

THE COURT: Well, I believe -- I don't to tell you exactly, but Mr. Cristalli was the attorney at the time, I believe. Go ahead.

MR. FATTIG: He testified that he came on the case between '04 and '06.

THE COURT: This would be September of '04.

Q (By Mr. Langford) You were not the first attorney on the case?

A I don't believe I was, but I don't remember who was on the case before I was.

Q Would it surprise you to know it was the Public Defender?

A No, it wouldn't surprise me.

Q Is it possible that the Public defender had filed a motion to suppress?

A It's possible. I don't have any knowledge.

MR. LANGFORD: I have no further questions, Judge.

THE COURT: Mr. Fattig?

MR. FATTIG: Sure. Thank you, Your Honor.

Q (By Mr. Fattig) Sir, do you remember reviewing one of the two Affidavits that I sent over to you?

A Yes.

Q And it talks about why you didn't file a motion to suppress?

A Yes.

Q Why was that?

A Because we didn't believe we had standing to initiate a motion to suppress on behalf of Mr. Brown, because he adamantly denied that the bag or the loot was his.

Q In fact, Mr. Brown testified at the trial, correct?

A That is correct.

Q And was his testimony consistent with the kind of things he was telling you in your preparation for trial in terms of his version of events?

A No, it was not.

Q At trial is it fair to say that he testified that --

MR. LANGFORD: Judge, I'm going to object to that question and ask that it be stricken. It goes into attorney/client privilege. There's nothing that's been challenged at this point that requires Mr. Cristalli to disclose anything that's been said to him by my client.

MR. FATTIG: Judge --

THE COURT: Well, I will hear Mr. Fattig, but I can tell you right now I disagree with what you just said. Go ahead.

MR. FATTIG: When you file an ineffective

assistance of counsel claim attacking your prior counsel, Judge, certainly your communications with the attorney become unprivileged.

It pierces the shield of the attorney/client privilege, because we need to get into the thoughts and processes that Mr. Cristalli went into, why he did or didn't do certain things.

And those are the result of communications he had with Mr. Brown so, certainly, the communications are highly relevant to what Mr. Cristalli's thinking was, and he needs to be able to explain that.

THE COURT: Well, not only is it relevant, but by statute admonitio you waive your attorney/client privilege when you file one of these writs. So that's the status of the law. Go ahead.

MR. LANGFORD: Your Honor, I don't think that you waive the attorney/client privilege in its entirety. I think with regards to specific issues, yes. So, for instance, if Mr. Brown told Mr. Cristalli: I do not want you talking to a particular witness, then I think that that is something that could be disclosed to the Court.

Because if we then -- and then we say: We told him to talk to that particular witness, that becomes an issue that's properly before the Court and the Court can

inquire about.

But it's a limited -- when you file a writ habeas corpus challenging ineffective assistance of counsel, it's a limit waiver of the attorney/client privilege.

THE COURT: Well, my take on it would be that the waiver is broader than you suggest; however, I will allow you to make objections as to relevance, which is akin to what you're talking about.

And let me give you an example just off the top of my head. Let's assume there was a conversation between the attorney and Mr. Brown, and Mr. Brown says: Well, I had an legitimate child down in LA when I was there.

It had nothing to do with anything and it's just surplusage, and it's certainly something that will be protected. That may be a an extreme example, but that kind of thing I would acknowledge. Go ahead.

Q (By Mr. Fattig) So in terms of the bag itself, is it your memory that police reports, the evidence in the case indicated that the police made contact with Mr. Brown at the Hyatt Hotel in Los Angeles on November 27th, correct?

A Yes.

Q And that he exited an elevator, and he fit the description of suspects from Henderson because the police and/or FBI agents were aware of the Henderson robbery at

the time, correct?

A That's correct.

Q And when he exited the elevator, they made contact with him in the lobby area, correct?

A Yes.

Q And the police reports indicate that Mr. Brown had a bag with him when he exited elevator, correct?

A I believe so, correct.

Q And that bag was put on the ground where they were making contact with Mr. Brown?

A Yes.

Q And at one point another agent picked up the bag and jewelry spilled out?

A Yeah. That's my recollection of the evidence without looking at the reports; but, yes.

Q And the jewelry in that bag was a lot of the jewelry from the robbery in Henderson three-and-a-half days earlier?

A That's my recollection.

Q So there was no search warrant for the bag?

A There was no search warrant for the bag.

Q So you analyzed whether or not a motion to suppress might have success, or might not. It was something you considered?

A We absolutely considered a motion to suppress,

yes.

Q And you made a decision not to file it based upon conversations you had with Mr. Brown in part at least?

A That is correct.

Q Because Mr. Brown was letting you know that none of that was true, but what the police were alleging him having a bag was true, correct?

A Partially, yes; that's correct.

Q Is it fair to say that at trial Mr. Brown testified that the agents and/or police officers from Los Angeles all made that up in terms of him carrying the bag?

A I believe that's correct, unless -- I don't have it in front of me, Mr. Fattig, but I do have a recollection of that.

MR. FATTIG: Court's indulgence.

May I approach the witness, Your Honor?

THE COURT: You may.

Q (By Mr. Fattig) Mr. Cristalli, I'm going to show you a trial transcript from June 30th of 2006; specifically, we'll start with Page 48 where Eric Marquis Brown testified. Do you remember your client testifying?

A I do.

Q And at the bottom of Page 48, right at the beginning of his testimony, you were asking questions about him being in Los Angeles on or about the 26th and

27th of November 2002, correct?

A That's correct.

Q And you asked him, "Why did you have that jewelry on you," correct?

A Right.

Q And could you read that to yourself, and then I'll ask you some follow-ups to his answer?

A Yes. That's right, fine.

Q Does that help with your memory in terms of exactly what your client was saying?

A It does.

Q And what was he saying about the jewelry and the bag?

A He said that it wasn't his jewelry and it wasn't his bag.

Q And he was saying that the officer said I had that bag, but I didn't have the bag, correct?

A That's correct.

Q And then you followed up with, "Well, you were at the Hyatt Hotel?" And he said, "Yes."

"And they had a room that was identified that belonged to you, right?" And he said, "Yes," right?

A Yes, that's correct.

Q And you said, "And you had knowledge of the jewelry, did or did you not?"

And his answer was, "I did not have knowledge that the jewelry was in the room."

And you asked "Did you have any knowledge the jewelry, or how the jewelry got to the Hyatt Hotel?"

And he said, "No, I do not."

A That's correct.

Q And then you asked, "Did you at any particular time become aware that the jewelry was at the Hyatt?"

And he answered, "After I was arrested."

A That's right.

Q So, in other words, his story to you directly contradicted what the officers said in their reports that you had in terms of him possessing the jewelry in the bag?

A Yes.

Q He said they were making all that up?

A That's correct.

Q And your understanding of Fourth Amendment law would be, you would need to claim a reasonable expectation of privacy in a particular item; in other words, standing in order to file a motion to suppress?

A You would have to have standing to initiate a motion to suppress, correct.

Q And you believe Mr. Brown, based upon his story to you, he didn't have that standing?

A That's right.

Q Because he didn't want to admit he even had the bag to begin with?

A That's correct.

Q He didn't even know the jewelry was in the room or in the bag?

A That's correct.

Q And it's fair to say the room that he was tied to, they found jewelry from the robbery in that room too, correct?

A That's my understanding, yes.

Q And also on the defendant's girlfriend, Brandi Ballard?

A That is my recollection.

Q And also on the codefendant Alfred Blackwell?

A Yes.

Q Do you remember the testimony of Officer McAllister in terms of how he discovered the jewelry?

A I don't, Mr. Fattig.

MR. FATTIG: Court's indulgence. May I approach the witness, again, Your Honor?

THE COURT: Yes, you may.

Q (By Mr. Fattig) Mr. Cristalli, showing you trial transcript June 28th of 2006, this would be testimony from Darren McAllister, who was employed with the FBI for a approximately ten years at the time, correct?

A Yes.

Q And, specifically, I want you to review some testimony on Page 101 that talks about how he discovered the contents of the bag Mr. Brown was carrying. If you could read that page to yourself.

A Okay.

Q Is it fair to say that Agent McAllister during this part of the testimony at the trial was talking about how he picked up the bag itself, or the backpack as it's described full of jewelry, correct?

A Yes.

Q And how the backpack wasn't zipped up, and when he picked it up some of the contents spilled out?

A That's correct.

Q And he did ask who the backpack belonged to, and Mr. Brown did indicate it was his at that point?

A That's what the transcript said, even though the bag was apparently ten feet away from him at the time.

Q According to that testimony?

A That's correct.

Q And Agent McAllister ended up -- testified that he didn't see a handle on the bag, so he picked it up on the side and some of those items fell out, and he observed them to be jewelry?

A Yes.

Q Correct?
A Correct.
Q So arguably it wasn't even a search of the backpack. You would agree with that?
A That's correct.
MR. FATTIG: I have nothing further.
THE COURT: If I might, Mr. Langford?
MR. LANGFORD: Thank you, Your Honor.
THE COURT: Mr. Cristalli, I believe you mentioned earlier that Mr. Brown testified?
THE WITNESS: He did, Your Honor.
THE COURT: Now, you've indicated here today that the reason that you didn't seek a motion to suppress because you didn't feel there was enough standing based on your client's tack, or his relating his story to you that the backpack was not his?
THE WITNESS: That is correct.
THE COURT: When he testified before the jury, did he maintain that position?
THE WITNESS: Yes.
THE COURT: So there was evidence given over to the jury from your client that it was not his backpack?
THE WITNESS: That is correct.
THE COURT: So he didn't abandon this view at any point prior to trial that you might initiate some

kind of a motion to suppress?

THE WITNESS: That's correct, Your Honor.

THE COURT: I was curious if this was the situation through the trial.

THE WITNESS: It was fluid; yes, Your Honor.

THE COURT: Further examination, Mr. Langford?

MR. LANGFORD: Nothing further, Judge.

THE COURT: The next item he have here is, trial counsel was ineffective for not raising on appeal. And, by the way, my Clerk's perusal of the pleadings gives us a little back and forth here as to appeal and then trial in a couple of areas. I think we can follow that, and if we need some time to look at our notes, that's fine too. This was an appellate issue.

Counsel was ineffective for not raising on appeal the issue that the Court would not allow Defense counsel to explore police procedure of the Henderson Police Department.

Do you care to inquire?

MR. LANGFORD: Thank you, Your Honor. We've already gone into that, Your Honor.

Q (By Mr. Langford) But, more specifically, also at the time of calendar call you had some subpoenas that you had sought with regards to the crime lab at the

Henderson Police Department; is that right?

A Yes.

Q And do you recall if the Court allowed you to give effect to those subpoenas, to enforce those subpoenas?

A Mr. Langford, I don't know, specifically, which ones you're talking about, but I do recall presenting certain requests to the Court regarding subpoena, and we were limited in terms of what information we were going to be able to address.

Q Okay. Do you recall the admonishing you that this was not a fishing expedition, this trial?

A Yes.

Q And that you're not going to try the Henderson Police Department on behalf of your client?

A Yes.

Q You stated, "I understand if I got the information and the information said nothing to me suggests that the Henderson Police Department did anything wrong, I wouldn't use it."

The Court then said to you that the Court believed you were trying to try the Police Department and focus the attention away from your client at trial, and that was not to occur; is that right?

A Yes.

Q At that point the Court said the subpoenas would not be issued through the Court. Is that also right?

A That is correct.

Q And that that was told to you repeatedly by the Court on at least three separate occasions; is that right?

A That sounds about right.

Q Do you believe that had a chilling effect on how you were able to challenge the Henderson Police Department and the work that they did?

A Well, it had an effect, there's no question about that because I wasn't able to examine them on those issues.

Q Did you raise that issue then on appeal direct appeal?

A I do not recall what issues were raised on direct appeal. I know a portion of the issues were raised, and then there was also an Anders brief filed in reference to some issues that Mr. Brown wanted to raise.

Q Was the Anders brief allowed to be filed by the Supreme Court?

A I don't remember, Mr. Langford.

MR. LANGFORD: Court's indulgence. May I approach, Judge?

THE COURT: You may.

THE WITNESS: I have read it.

Q (By Mr. Langford) Does that refresh your recollection as to the timing and procedural issues with regards to the Anders brief?

A It does.

Q And what took place?

A We requested subsequent to filing the fast track statement two trial issues that Mr. Brown requested to be in the appeal. We were not comfortable signing off on those, specifically, so we wanted to do it under Anders.

We were prohibited from doing that procedurally because of not only time frame, but also because we were trial counsel, as well as appellate counsel. So we were prohibited from filing those issues on behalf of Mr. Brown.

Q Backing up a little bit though having to do with the Court's limiting instruction to you as to how you could you try your case, you did not directly raise that issue on appeal?

A Correct. I was not comfortable raising that issue on direct appeal.

MR. LANGFORD: Nothing further.

THE COURT: Anything further, Mr. Fattig?

MR. FATTIG: Yes.

Q (By Mr. Fattig) The appeal was a fast track statement, correct?

A That is correct.
Q Because the defendant didn't get either a death sentence or a life without parole, correct?
A that's correct.
Q And a fast track statement necessarily limits you in terms of the amount of space you can use up, correct?
A That is true.
Q I believe it's 20 pages?
A I believe you're correct.
Q And so isn't it important to winnow out weaker arguments and put in your strongest arguments, especially when you have a limited amount of space?
A Certainly, we put in the most meritorious arguments we believe for the purposes of appeal.
Q And do you particularly remember the exact issues that you put in?
A I do not.
MR. FATTIG: Could I approach the witness, Your Honor?
THE COURT: You may.
Q (By Mr. Fattig) Showing you a document entitled, "Erick M. Brown versus the State of Nevada, Appellant's Fast Track Statement of Appeal from a Judgment of Conviction." Do you recognize that?
A Yes.

Q And this would be a copy of your appeal from Mr. Brown's trial?

A Yes.

Q Going through the issues, the first issue was what that you decided to focus the appeal on?

A The first issue was that error for the defendant to be convicted of kidnapping charges as any force used was incidental to the robbery, so we attacked the kidnapping charges.

Q Is part of the rationale you used for that the fact that the kidnapping charges in this case were the most significant sentence Mr. Brown is serving?

A I believe they were, yes.

Q In fact, he was convicted of first degree kidnapping with use of a deadly weapon resulting in substantial bodily harm, correct?

A That is correct.

Q For two victims?

A Yes.

Q And that carries a mandatory minimum 30 years in prison, correct?

A Yes.

Q And Judge Mosley chose to run them consecutive to each other, correct?

A That's my understanding.

Q Mr. Brown is serving a minimum 60-year sentence based upon those two kidnapping charges?

A That's correct.

Q And was that part of your analysis in making that issue number one in the appeal?

A Well, certainly, a sentence issue has a lot to do with it, but we felt that we had the best legal argument on that issue.

Q And you put forth your best efforts in terms of trying to indicate to the Supreme Court that the kidnapping was merely incidental to the robbery?

A That's correct.

Q What was issue number two?

A Issue number two, we argued that it was error for the State to parade Blackwell before the jury, because even if Blackwell was evidence for which the Defense did not need cross-examine, the probative value of said evidence was substantially outweighed by its prejudicial effect.

Q And do you remember that during the trial the Court allowed the State to bring in Mr. Blackwell and have him stand before the jury for a few moments?

A Yes.

Q And you would agree with me that was a little bit unusual?

A Yes.

Q And so you decided that that was something that might be fruitful for an appeal?

A Well, We objected to it during the course of the trial.

Q So you thought that it was important to include that in the appeal?

A We did.

Q And the third issue would be sufficiency of the evidence? Does that sound right?

A It is an insufficient evidence argument, correct.

Q And why did you include that in the appeal?

A Because Mr. Brown at all times maintained his innocence, and there were issues with regard to identification that we examined throughout the course of this case, and for which we felt necessary to continue to examine through the course of appeal.

Q So you consulted with Mr. Brown prior to filing the appeal?

A Yes.

Q And Mr. Brown certainly had his opinions in terms of which issues should be in the appeal?

A Yes.

Q And several of those issues were filed in an Anders brief later on?

A That is correct.

Q And you made the professional decision not to include them in the fast track statement?

A That is correct. It was a decision that I made. I wasn't comfortable raising those issues on direct appeal, correct.

Q Why was that?

A Because I could not substantiate those issues and, therefore, it's my obligation to make sure that whatever issues I raise, I could raise them in good faith and make sure they're not frivolous issues.

At that particular time, based on the information that I had, I was not comfortable raising those issues on direct appeal.

Q And Mr. Langford talked about the subpoenas that you offered to the Court, and the Court ended up denying them, correct?

A That is correct.

Q Certain issues?

A That is correct.

Q And it's fair to say those subpoenas surrounded some of the fingerprint evidence we talked about?

A Correct.

Q And other forensic parts of the case?

A Correct.

Q And so is it fair to say that during the trial, a lot of the concerns that you had before the trial about some of the inconsistencies in some of the reports were answered by the witnesses?

A To a certain extent that is true, yes.

Q And, specifically, I want to talk a little bit about the fingerprint report of Ms. Weir, because that's one of the items you discussed at the calendar call in terms of a subpoena for Judge Mosley.

Do you remember that?

A I do.

Q And, specifically, Ms. Weir's fingerprint report indicated a date of November 25th, 2002, correct?

A Yes.

Q And this was concerning to you prior to trial?

A It was; yes, it was.

Q And to your investigator?

A Correct.

Q And the reason it was concerning to you was, your client and Mr. Blackwell, the codefendant, hadn't been arrested or even known about it until November 27th, 2002, two days later, correct?

A That's right.

Q And so you were concerned that Ms. Weir was conducting a fingerprint examination of your client before

your client was even a suspect?

A That's what it suggested.

Q Based upon the erroneous date?

A That's right.

Q And you had the chance at trial to ask Ms. Weir about that?

A I did.

Q And she had an explanation for it?

A Yes, she did.

Q And so you felt it was a reasonable explanation and, I mean, it was something you argued to the jury, correct?

A It was.

Q Because it was in error?

A Correct.

Q But you didn't feel like it was fruitful for purposes of an appeal?

A That is correct.

Q Another of the subpoenas you asked for Judge Mosley to impose was a copy of the Policy and Procedures Manual for Henderson Crime Lab, correct?

A Yes.

Q And Judge Mosley refused to grant that?

A Yes.

Q After the trial you felt that not having that

Policy and Procedures Manual wasn't a sufficient issue to include in the fast track statement?

A That is correct.

Q Based upon the testimony and all the evidence that occurred in the case?

A That is true.

Q Another concern you had at the time of the calendar call in terms of the subpoenas you wanted Judge Mosley to issue was, you wanted to get handwriting exemplars of Detective Price and/or other officers with Henderson, correct?

A Correct.

Q You believed that certain signatures by certain officers were inconsistent on certain reports?

A That's right.

Q And Judge Mosley refused to make the Henderson Police detective do handwriting exemplars for your fingerprint expert, correct?

A That's correct.

Q But Judge Mosley did allow you to cross-examine Detective Price, correct?

A Yes.

Q So you were allowed to ask any questions you wanted about whether or not Detective Price forged some signature, correct?

A That's correct.

Q And so you were able you to explore that in front of the jury, and the jury rejected it?

A I believe I was. I don't believe I was limited on that.

MR. FATTIG: Court's indulgence. Nothing further.

THE COURT: Let me clarify something here. I wrote down here having to do with the Henderson Police that you wanted to subpoena fingerprint evidence.

Does that make sense to you?

THE WITNESS: Yes, Judge, it does.

THE COURT: Of whom?

THE WITNESS: I don't have a specific -- I know there was certain evidence that was developed. There was some further evidence that we wanted and I don't remember, specifically, what it was.

THE COURT: Does either counsel know what I'm referring to? Fingerprint evidence that was in the possession of Henderson police, and I disallowed it, evidently?

MR. LANGFORD: That's correct.

MR. FATTIG: Well, I think you actually ended up allowing his own expert to go look at the fingerprint cards.

THE COURT: To look at it?

MR. FATTIG: Correct. And do their own examinations, and they confirmed Ms. Weir's and/or the other expert's findings. So in the end I think you did allow them to do what they needed to do in terms of the fingerprint cards themselves.

THE COURT: Were those cards presented to the jury, do you recall, Mr. Cristalli?

THE WITNESS: Judge, I don't recall if they were presented to the jury.

MR. FATTIG: They were, Judge. They're Exhibit 85.

THE COURT: So my note doesn't suggest that I disallowed it, the inspection of the cards we're talking about?

MR. FATTIG: Yes. He's already testified that he was allowed to inspect the cards, and he hired his own fingerprint expert and they went down to Henderson and looked everything over.

THE COURT: Thank you. Any further inquiry on this subject, Mr. Langford?

MR. LANGFORD: On this particular subject, yes, Judge, but not related to the fingerprints.

THE COURT: Fine.

MR. LANGFORD: Thank you.

Q (By Mr. Langford) Mr. Cristalli, it's been your testimony that you felt limited by the -- and correct me if I mischaracterize it -- that you felt limited by the length of the fast track statement, to include what you felt were the best issues to present to the Court?

Q Well, I don't know if limited is the right word. I mean, we put in the fast track statement the most meritorious claims that we were comfortable arguing in front of the Court of Appeals, and that's what we did.

Q And a fast track statement is a limited number of page; is that right?

A It is limited, yes.

Q And it's a limited amount of time that you have in order to file that?

A Yes.

Q And, in fact, it's also a limited transcript. It's not a full transcript, it's a rough draft transcript; is that right?

A Yes.

Q Are you aware of a procedure whereby you can petition the Supreme Court to allow for an expansion of the briefing?

A I am.

Q Did you file that in this case?

A I don't have a recollection whether or not we

requested the expanded briefing on this case.

Q Would it surprise you if you did not?

A No.

MR. LANGFORD: Nothing further, Your Honor.

THE COURT: Anything further?

MR. FATTIG: No.

THE COURT: Now, Mr. Langford, I have several things here that I think we've already covered, so let me just read what I have and exhaust this issue, if we haven't already.

As I mentioned earlier, there was a question of why there was not contained in the appeal the Court's prohibiting Defense counsel exploring the Henderson Police Department's procedures and policies.

Additionally, there was a suggestion that there was an incomplete and inaccurate police investigation, which is, I think, related. Have we covered that fully?

MR. LANGFORD: I believe we have, Judge.

THE COURT: Next I have during photographic lineup, the victim James Connolly could not identify the Defendant Brown, but was able to identify Blackwell. However, during the preliminary hearing, Mr. Connolly identified Mr. Brown when he was dressed in prison clothes three years after the day of the alleged crime.

That prompted in my mind the question of, was

this disclosed to the jury at trial? Do you recall?

Does the transcript suggest?

MR. LANGFORD: It was disclosed to the jury.

THE COURT: That there was this discrepancy?

MR. LANGFORD: It was argued to the jury.

THE COURT: Are there questions you wanted to ask?

MR. LANGFORD: I have no further questions on that issue, Judge?

MR. FATTIG: Briefly, Judge.

Q (By Mr. Fattig) What they're talking about when Mr. Connolly identifies Mr. Brown, it's actually not three years after the incident, it was a matter of weeks at the preliminary hearing, in other words.

Do you remember that?

A I don't remember the time frame, Mr. Fattig, but i have no reason to not believe that that's the case.

Q Okay. You would agree with me that Mr. Brown and Mr. Blackwell were arrested four days after the crime?

A That sounds correct.

Q So it wouldn't surprise you that the preliminary hearing was a matter of weeks, rather than three years later after the crime?

A No. It wouldn't surprise me that it was a matter of weeks versus years on the preliminary hearing, yes.

Q And do you remember that Mr. Brown entered the store after Mr. Blackwell, correct?

A I don't remember the chronology of the allegations.

Q Okay. Do you remember that Mr. Blackwell had more contact with one of the two victims, and Mr. Brown had more contact with the other victim?

A That's my recollection of the evidence.

Q Okay. And do you remember that one of the two victims, Mr. Goldchecker, did identify Mr. Brown in the photographic lineup?

A I believe that's correct.

Q And Mr. Goldchecker was actually the one that had more contact with Mr. Brown during the incident and right before he pulled the gun on Mr. Goldchecker?

A I think that is the state of the evidence.

Q So Mr. Connolly, who did not have as much contact with your client, was not able to identify Mr. Brown in the photographic lineup?

A That's correct.

Q But he was able to identify Mr. Blackwell, who he did have more contact with?

A That's correct.

Q But Mr. Connolly, even though he wasn't able to identify your client during the photographic lineup on

November 27th, correct?

A That's correct.

Q He did identify him both at preliminary hearing and at trial, correct?

A He did.

Q And Mr. Goldchecker identified your client not only in the photographic lineup four days after the incident, but also at the preliminary hearing and trial?

A That's right.

MR. FATTIG: Nothing Further.

THE COURT: Mr. Langford, I am surmising, and perhaps incorrectly, that since this discrepancy was brought out by Mr. Cristalli at the trial in front of the jury, that you abandoned the issue since he brought it out like he should have?

MR. LANGFORD: I'm going to abandon that issue, Judge.

THE COURT: Thank you. Now, next, again, this may be recapping some of the things we've talked about. It says Ms. Weir, the CSI analyst, collected defendant's earring but not obtain any DNA from the earring.

And, also, she erred when she stated that there were nine fingerprint cards when, in fact, there were only five. I thought there were nine, but only five of any

value?

MR. FATTIG: That's correct.

THE COURT: Last, she erred by not making a comparison of a footprint impression of blood at the crime scene to that of the defendant's foot.

So any questions regarding those?

MR. LANGFORD: None, Your Honor.

THE COURT: Anything from you, Mr. Fattig?

MR. FATTIG: Briefly, Judge.

Q (By Mr. Fattig) Mr. Cristalli, do you remember the earring itself that your client was alleged to have provided to Mr. Goldchecker right before the robbery began?

Do you remember him handing Mr. Goldchecker an earring and asking Mr. Goldchecker to clean it?

A I remember that there was an allegation that one of the suspects presented an earring. I don't remember sitting here whether or not it was Mr. Brown or Mr. Blackwell what was alleged. I can't remember, specifically.

Q Okay. Do you remember that the earring was actually placed inside a device meant to clean jewelry?

A I read that as part of the evidence, correct.

Q And it was actually turned on by the victim prior to the robbery?

A That's what's evidence states, correct.

Q So if there was DNA on that piece of jewelry, there's a good chance it was cleaned off and/or mixed with any number of other peoples' DNA in the solution?

A Certainly, it would have been compromised, there's no question about that.

Q In terms of the footwear, do you remember that there was some foot impressions in blood at the crime scene?

A I do have a recollection of that.

Q Do you remember that the victim that bled, Mr. Goldchecker, was attacked at the back of the store when he was putting the earring into the jewelry cleaner after that?

A I do.

Q And so he, in fact, bled on the floor in the back of the store?

A That's correct.

Q And do you remember that he was tied up and beaten and not allowed to move while the robbery was going on?

A You know, Mr. Fattig, I don't remember the specifics of the allegation as it relates to what happened in the back. It sounds familiar and it sounds like that would be my recollection of the evidence.

Q And the footprints that we're talking about were actually in the front of the store?

Does that sound familiar?

A That is correct.

Q Do you remember that this was addressed to the jury in the State's rebuttal by Mr. Digiacomo?

A I don't remember the specifics of that.

MR. FATTIG: Court's indulgence. May I approach the witness, Your Honor?

THE COURT: Yes.

Q (By Mr. Fattig) I'm going to ask you to look over one to two pages of this? This is the June 30th, 2006 transcript of the trial rebuttal by Mr. Digiacomo.

Could you read --

MR. LANGFORD: Judge, I'll lodge an objection at this point to the colloquy from Mr. Digiacomo to the jury is not evidence. And so I don't understand where the question could even go. I don't think it's relevant.

THE COURT: It's a transcript, it's in evidence. But what is your objection?

MR. LANGFORD: I don't understand how that's relevant.

THE COURT: What's the relevance?

MR. FATTIG: I'm asking to refresh his

recollection with the argument, and then I'm going to ask a follow-up question in terms of the placement of the footprints, and why Mr. Cristalli wouldn't have asked for testing of the footwear impressions and blood.

MR. LANGFORD: I'm satisfied with that foundation.

THE COURT: Appreciate it.

MR. LANGFORD: I was trying to save time.

THE COURT: Go ahead, Mr. Cristalli, read the transcript.

THE WITNESS: Thank you, Your Honor.

Q (By Mr. Fattig) Does that help refresh your memory as to the state of the evidence in this case?

A Yes.

Q So Mr. Brown is attacking you for failing to do any examinations with the footwear at the front of the store in terms of the foot impressions left in the blood, correct?

A Yes.

Q And is it fair to say that one of the rationales for you not doing that was the fact that Mr. Goldchecker was the person doing the bleeding, never moved to the front of the store until after Mr. Brown and Mr. Blackwell left the store?

A That statement is consistent with the evidence,

yes.

Q So in other words if, in fact, there was bloody footprints at the front of the store, it would have been after Mr. Goldchecker had been moved, because he woke up and they moved him to the front of the store when the paramedics and police came into the store, correct?

A That's a reasonable conclusion, correct.

Q And so the blood would have gotten on the floor after the point in time when the defendants had fled?

A Yes.

Q And so the footprints could have been Mr. Goldchecker's or Mr. Connolly's or police officers or paramedics, or any number of people?

A That's correct.

Q And that was all argued to the jury, correct?

A It was.

Q Did you feel like looking back at it, that that was an effective argument on behalf of the State of Nevada?

MR. LANGFORD: Objection. Calls for speculation.

THE COURT: His mind-set is relevant to the these proceedings. I'm going to allow that. Go ahead.

THE WITNESS: Well, certainly, an argument in regard to an explanation of that blood evidence.

Q (By Mr. Fattig) And you actually did argue prior to Mr. Digiacomo that the State should have tested that, correct?

A That's correct.

Q And Mr. Digiacomo came up with that as a rebuttal as to why it wouldn't have been fruitful?

A That is true.

Q And that comports with the evidence as you remember it in the case?

A It does.

Q So in summation on this issue, you didn't feel that it would have been very fruitful to include in the appeal an attack on the lack of DNA from the earring, the lack of comparison on the footprint, and any examination surrounding the fingerprint evidence based upon the testimony during the trial and/or responses by the State?

A Well, I think we did argue the State's failure to develop certain evidence, but we believed that that was the most persuasive way to attack the evidence under those circumstances.

Q So you did include a lot of these points in your sufficiency of the evidence issue to the Supreme Court?

A Correct.

Q The best you could?

A Yes.

MR. FATTIG: Nothing further.

THE COURT: Further questions, Mr. Langford?

MR. LANGFORD: No, Your Honor.

THE COURT: Now, the last thing I have here is the assertion on the defendant's reply that postconviction counsel was ineffective in not raising serious constitutional questions. And, in particular, it alludes to the search and seizure.

And in addition to that, it says trial counsel failed to subpoena e-mails from the Los Angeles Police Department to the Henderson Police Department depicting witnesses statements. The defendant claims the information and this correspondence is exculpatory.

Do you care to expand on that?

MR. LANGFORD: Not from Mr. Cristalli, Your Honor, because in order to do that, that was my last motion to the Court requesting that I get a forensic data expert which could more fully elucidate for the Court what could be found, and how that could be exculpatory.

That was my motion this last week, Judge, and I indicated that I would request. And I believe the totality of what we've seen here is that there were things happening at the Henderson Police Department that Mr. Cristalli wasn't able to fully go into.

And at this juncture I think if I had a forensic

data expert that could better tell us what those hard drives, you know, the e-mails could and should contain, I think that we'd be able to more fully explore this.

So at this point I'm going to renew my motion to allow me to retain a data expert, to continue this hearing until such time as I've generated a report from that expert, and to present that expert to the Court.

THE COURT: Now, you mention e-mails. Is that what we're talking about?

MR. LANGFORD: Yes, sir, Judge; e-mails between the Los Angeles Police Department and Henderson Police Department. Because the Los Angeles Police Department working with the FBI had custody of Mr. Brown, and were communicating about the investigation that was ongoing.

THE COURT: I guess I'm curious why we need an expert. Can't we read e-mails for ourselves?

MR. LANGFORD: I would ask then that the Henderson Police Department generate those e-mails.

THE COURT: Well, now your writ has to do with ineffective assistance of counsel. Are you chastising Mr. Cristalli for not developing this e-mail theory?

MR. LANGFORD: Correct.

THE COURT: Why don't you ask questions

about that?

Q (By Mr. Langford) Did you believe that there were e-mails that happened between Henderson Police Department and Los Angeles Police Department?

A You know, Mr. Langford, I have a slight recollection of that. Sitting here today after these years, I can't remember, specifically, what that was.

Q Would it make sense to you just sitting here today that when a person is in custody in Los Angeles wanted for a crime out of Nevada, and that the investigation is ongoing; in fact, not wanted, in fact he's a suspect of a crime in Nevada, that there would be e-mails between the two Police Departments about the state of the investigation?

A Yes. I believe there was sharing of information between the two jurisdictions.

Q And having those e-mails, would that have helped you to cross-examine either the FBI agents, or the Henderson Police Department investigators?

A It could have.

Q Did you subpoena those e-mails?

A I don't have a recollection of subpoenaing those e-mails. Sitting here I don't know what was subpoenaed in reference to that material.

THE COURT: Mr. Langford, again, I'm little

bit in a quandary here. What information did you have, or do you have that suggests that there would be relevant information and, more particularly, exculpatory information on behalf of your client in these e-mails?

MR. LANGFORD: If they were describing a particular individual by race or body type that did not match Mr. Brown, I believe that that could be exculpatory.

THE COURT: Well, you mean people they have developed as a suspect?

MR. LANGFORD: Correct. Or they had ideas about who the person was. And then if, in fact, Los Angeles is saying we have a person, here's who he is. And then Henderson says: Oh, well, that must be who it is.

Or if Henderson had said to the Los Angeles Police Department: We're looking for a particular individual, and it's not Mr. Brown, but then get Mr. Brown and it stops at that point, I believe that's exculpatory.

THE COURT: Well, that could be said to be true in any investigation, whether it's a communication between detectives.

MR. LANGFORD: That's true, Judge.

THE COURT: Or between different jurisdictions.

MR. LANGFORD: Which is why it's relevant and important for the Defense to have that prior to trial.

THE COURT: Well, I don't ever recall subpoenaing communications, e-mails or otherwise, between detectives and police chiefs and sheriffs or whomever during their investigation.

And I don't see anything in this instance that's particularly telling of exculpatory evidence, unless you have something more than you've indicated thus far.

MR. LANGFORD: Judge, unfortunately, again, I believe that investigative notes and e-mails between the two agencies are relevant, and because they could provide exculpatory evidence, and in my opinion are in constructive possession of the State of Nevada, I think that we're entitled to at least see what they are.

THE COURT: Do you have any questions of the witness concerning that, Mr. Fattig?

MR. FATTIG: Yes.

Q (By Mr. Fattig) Mr. Cristalli, there was testimony at trial about the communication between Henderson and Los Angeles law enforcement, either FBI and/or LAPD, correct?

A Yes.

Q And the testimony was that there was e-mail and a sharing of information, correct?

A Correct.

Q Part of the information shared was the general

identifiers of the suspects based upon the victims right after the crime, correct?

A Yes.

Q Black male adults, their height, their weight, approximately, et cetera, et cetera, correct?

A Yes.

Q And this went out on a database to law enforcement in general, correct?

A That's correct.

Q And that was part of the reason why in this jewelry market in Los Angeles which is known to be an area where people might try to sell stolen jewelry, that the FBI and LAPD was on the lookout for people matching the description from the Henderson case on November 26th, just a couple of days after the robbery, correct?

A That's correct.

Q And when they found suspects that matched, they shared information back with Henderson, correct, via e-mail?

A That's right.

Q In other words, they took photographs of the suspects, your client and Mr. Blackwell, and they e-mailed those photographs back to Henderson, correct?

A That's my recollection.

Q And they also took photographs of the jewelry

that they found on Mr. Brown and Mr. Blackwell and Mr. Brown's girlfriend and in the hotel room, correct?

A Yes.

Q And those were e-mailed back to Henderson, correct?

A Yes.

Q And then on November 27th, the Henderson detectives created photographic lineups with Mr. Brown in the photo array of six individuals, and Mr. Blackwell in another photo array of six individuals, correct?

A That's my recollection.

Q And they testified they took those photo arrays to the two victims, correct, on the 27th of November?

A I believe that was the evidence, yes.

Q And one of the victims was able to identify your client Mr. Brown, and one of them wasn't?

A Correct.

Q And they also took photos of the jewelry that was found and they showed that to the two victims, correct?

A That is right.

Q And they identified many of those pieces of jewelry found in Mr. Brown and/or Mr. Blackwell's possession?

A Yes.

Q So, certainly, you were aware of this exchange of

information that was ongoing?

A Yes, we were.

Q And Henderson then followed up with going down to Los Angeles and personally interviewing Mr. Brown and Mr. Blackwell, et cetera?

A That's correct.

Q So were you concerned that -- did you have any specific indicators that there might have been some Brady material in those communications?

Was that a concern of yours?

A No. I don't have a recollection that that was a concern of ours. I don't recall the specifics of our motion with regard to gathering evidence from the Court, but as far as those specific questions of inquiry; no, I do not.

Q It's not unusual for one law enforcement agency to communicate with another, right, over the same investigation?

A No. It wouldn't be unusual.

Q And share information?

A Correct.

Q Now, is it fair to say that Mr. Brown provided information to Detective Williamson with LAPD; in other words, he provided a statement on November 27th after he was arrested?

A I believe that's true.

Q And do you believe, do you remember that your client when he testified denied giving any information to Detective Williamson?

A I think that's correct.

Q And then in rebuttal the State, after the defendant testified, put Detective Williamson on the stand and he testified about what the defendant told him?

A Yes.

Q So the defendant's credibility in terms of the jewelry bag being on him, in terms of whether or not he even gave a statement to the police was directly contradicted by numerous law enforcement officers that testified during the trial?

A There was contradiction in the evidence through the testimony.

Q And directly the defendant's own credibility, because he was alleging these things on the stand?

MR. LANGFORD: Objection. Argumentative. I think he just said that -- he's asking him to talk about his client's credibility. It's just as likely that it could have been the credibility of the law enforcement agency, Judge.

THE COURT: Well, arguendo. I'll let you counter. Go ahead.

Q (By Mr. Fattig) So what I'm talking about is, your defendant said, for lack of a better analogy, black, and the detective got up on the stand and said white. They were directly in conflict, correct?

A There was contradiction.

Q In numerous areas?

A In different areas of inquiry, yes.

Q He wasn't saying: I didn't say that to Detective Williamson. He was saying: I didn't say anything to Detective Williamson?

A To the best of my recollection, Mr. Fattig, that's correct.

Q Now, did the defendant ever tell you that while they were interviewing him on November 27th after he had been taken into custody, that he had been shown a bunch of documents from Henderson discovery that you didn't have?

A I don't have a recollection as to that communication.

Q Did you believe you had all the discovery, the relevant discovery in the case?

A Aside from what ever else we asked of the Court, yes.

Q Aside from the Policy and Procedures Manual and some of the things we've already talked about?

A That's correct.

Q So you had no indication to believe that there were these other reports, these other mysterious statements that some law enforcement agency had and allegedly showed your client, Mr. Brown, but then never provided it to the DA's Office, or never provided to you in discovery?

A I have no evidence to support that position.

Q And you have no concern about that as you sit here today based upon your memory of representing Mr. Brown?

A I do not.

Q That anyone is trying to hide anything?

A Correct.

MR. FATTIG: Nothing further.

Q (By Mr. Langford) Mr. Cristalli, did there come a time when you developed another individual by the name of Martell Williams as a possible suspect?

A Yes.

Q Tell me about that?

A You know, Mr. Langford, I don't know that I could give you a specific recollection of the development of that evidence sitting here right now. I know that there was another alternative suspect developed, but I can't tell you the specifics of that.

Q Do you recall giving that information over to the

District Attorney?

A I certainly wouldn't be surprised if that happened.

Q Do you recall trying to communicate with the Henderson Police Department that there was another individual that they should be looking for?

A Once again, it would not surprise me if we attempted that.

Q If you had done that, would you suspect there would be e-mails between Los Angeles and Henderson Police Department about Martell Williams?

A It certainly could have occurred, in light of the fact that that name was developed and circulated.

MR. LANGFORD: Nothing further, Your Honor.

THE COURT: Anything further?

Q (By Mr. Fattig) And you attempted to argue that theory to the jury about Martell Williams being guilty in this case, rather than Eric Brown, correct?

A We did; yes, we did.

Q And that was one of the main tactics that you took, that Martell Williams and Alfred Blackwell committed these crimes, not Erick Brown and Alfred Blackwell?

A We thought that it was a viable defense strategy in light of Martell Williams and some of the information we had about him.

Q And you did the best you could with that?
A Yes, we did.
Q But, in fact, Martell Williams didn't fit the description that was given by the victims, as well as your client did of the taller suspect with the gun, did he?
A That's my recollection of how the evidence played out.
Q In fact, your client was 6'5, and the victim said, one said he was 6'4 and the other said he was 6'5, correct?
A Correct.
Q Your client was approximately 250 pounds, correct?
A Correct.
Q The victim and said he was between 200 and 225 pounds, correct?
A Correct.
Q Both of them. Your client testified that his waist was between 32 and 34 inches, so even though he was $250 pounds, he had a rather slim waist, you would agree with me?
A That's correct.
Q The testimony about Martell Williams indicated Mr. Williams was 6'1, correct?
A Based on my recollection, I don't disagree with

that.

Q And his hair was kept at about one inch length; in other words, short but not as short as Mr. Brown?

A That is the state of the evidence, yes.

Q And the victims testified about Mr. Brown's, or the taller individual's hair style, the man with the gun, and they indicated that it was shaved, but real short? One of them said kind of fuzzy, and the other one said about an eighth of an inch or so?

A Correct.

Q So all of that was presented to the jury and they still found your client guilty?

A That's correct.

MR. FATTIG: Nothing further.

THE COURT: Mr. Cristalli, did you at the time, or do you now, have any reason to believe that the Henderson Police Department or the Los Angeles Police Department suspected a third party, and for some reason kept it a secret?

THE WITNESS: I don't have evidence to support that, Your Honor.

THE COURT: Anything further from any quarter?

MR. FATTIG: Just real quick.

Q (By Mr. Fattig) They did look at the

fingerprints of Martell Williams and compare them to the prints in this case, and it was a negative?

A I believe upon our request.

Q Correct; but it was done?

A Yes.

Q And they showed the victims a photographic lineup with Martell Williams, correct, both of them?

A Upon our request, correct.

Q And neither victim picked out Martell Williams as being involved?

A That's my understanding, yes.

Q There could have been a third suspect that took part in this case, correct, a wheel man, if you will?

A I have no evidence, I don't believe, of a third person. I have no recollection of that.

Q Well, two went in the store, we know that at least, right?

A Yes.

Q But there could have been another guy outside the store?

A Certainly.

Q Or more than that?

A Correct.

Q Do you remember testimony at one point by Mr. Connolly that during the robbery as he's tied up in

the back and the store is being disheveled, that he heard the buzz go off; in other words, the front door to the store was open during that time period?

A I have a slight recollection of that evidence, Mr. Fattig, not clear, but I do have a slight recollection of that evidence being presented, yes.

Q And he also testified that the individuals, after the robbery was all done, went out the back door, but they had entered through the front door?

A That's correct.

MR. FATTIG: Nothing further.

THE COURT: Anything further?

MR. LANGFORD: Not on this issue, Judge.

THE COURT: Now, that exhausts my list of issues. Is there something we missed, Mr. Langford?

MR. LANGFORD: I believe so, Your Honor. That's the question of federalization of the appellate brief.

THE COURT: Go ahead and inquire.

MR. LANGFORD: Thank you.

Q (By mr. Langford) Are you familiar with that term, "federalize?"

A Yes.

Q What does it mean, Mr. Cristalli?

A You want to articulate your appellate issues in a

way that the federal courts would review them for error, and that's by way of making a constitutional argument.

Q And what kind of a constitutional argument do you have to make?

A Well, it depends on what the issues are, but it could be a due process constitutional issue that may be raised.

Q And would you agree with me that you have to articulate a specific constitutional argument?

A I would agree with that.

Q And that you have to cite specific case law, whether it's the United States Supreme Court or some Federal Circuit Court case law, or even some Federal District Court case law to support that constitutional infringement violation?

A Yeah. I would agree with that. I think it could be federalized potentially without the citation, but correct.

Q Without making that argument, is it possible to file a writ of habeas corpus in Federal District Court?

A I think you would at the very least have to have some constitutional arguments to reference in the direct appeal.

MR. LANGFORD: May I approach, Your Honor?

THE COURT: Yes.

Q (By Mr. Langford) Mr. Cristalli, I'm going to ask you as you review that, if you will review it with an eye towards determining whether you had stated a constitutional argument, and/or cited appropriate federal case law in support of that argument?

THE COURT: For the record, what have you handed Mr. Cristalli?

MR. LANGFORD: I'm sorry, Your Honor. I handed him his fast track statement filed on behalf of Mr. Brown filed by Mr. Cristalli.

THE WITNESS: I mean, Mr. Langford, as far as federal case law. I don't believe there's any federal case law cited in the brief.

Q (By Mr. Langford) Do you make reference to any constitutional infringement? Any constitutional issue?

A I don't believe there's any constitutional issue referenced in this fast track brief.

MR. LANGFORD: I have no further questions, Judge.

THE COURT: Mr. Fattig?

MR. FATTIG: Real briefly.

Q (By Mr. Fattig) Mr. Cristalli, do you have an affidavit, one of the affidavits with you?

A I do.

MR. FATTIG: Could I approach the witness,

Your Honor?

THE COURT: Yes.

Q (By Mr. Fattig) Now, when you prepared the appeal to the Nevada Supreme Court, is that something that is paramount in terms of your decision of what issue to present, especially considering the fast track gives you 20 pages, as we discussed before, it limits the space?

A I'm not sure what you're asking me, Mr. Fattig.

Q Was that something that was paramount to your mind-set whether or not you, quote, unquote, "federalize" whether or not you include a constitutional issue when presenting a State Supreme Court appeal?

A I understand the question. Well, certainly, if I believed there was an issue to be federalized and should have been raised in the direct appeal, we would have raised it.

Q And so you didn't feel like it was something that needed to be in the fast track statement in terms of a constitutional issue?

A That's correct.

Q Did you consider those?

A We always consider whatever issue that may best suit our client in terms of getting some relief. Whether or not that would be a State or Federal claim, we certainly would have examined it.

Q So the State claims the way you presented were the best chance of success in your opinion?

A I believe so.

MR. FATTIG: Nothing further.

Q (By Mr. Langford) Well, you challenged the first degree kidnapping in terms of whether there was sufficient allegation of first degree kidnapping. Your argument was that the movement made was incidental to the arrest?

A That's correct.

Q Is that not a federal constitutional issue if you're convicted of something? Isn't that a due process violation?

A If you're wrongfully convicted of something?

Q Correct.

A Well, certainly, if you're wrongfully convicted of something it's a constitutional issue which should be able to be raised any time new evidence can be presented to contradict that.

Q And you indicated that he was wrongfully convicted here because of how the statute articulating what first degree kidnapping is, that there wasn't sufficient evidence for that; is that right?

A That's correct. Our analysis of the case law under these facts and circumstance, we alleged that the kidnapping was incidental to the robbery.

Q It was denied by the Supreme Court?

A That's right.

Q Now, isn't that something you'd also want to take up in federal court?

A To answer your question, I don't know, Mr. Langford. I don't know whether or not that would be something I would explore in the federal court system.

MR. LANGFORD: No further questions, Judge.

THE COURT: Anything further?

MR. FATTIG: No.

THE COURT: Anything further of this witness?

MR. LANGFORD: Nothing, Your Honor.

MR. FATTIG: No.

THE COURT: Thank you very much.

THE WITNESS: Thank you.

THE COURT: Additional witnesses?

MR. LANGFORD: No other witnesses, Judge.

THE COURT: Your closing remarks?

MR. LANGFORD: Judge, I'll submit it.

THE COURT: Mr. Fattig, do you wish to respond?

MR. FATTIG: I'll waive.

THE COURT: All right. Well, I will say this. This trial occurred almost six years ago, according

to my records here, and I think it's pretty well been thoroughly examined.

I'm a little surprised at how well everyone has remembered, although Mr. Cristalli had problems in some areas, but by and large it's a pretty good rendition of what occurred.

I have something of an unusually vivid memory of this trial in some areas, because I recall it was a horrendous beating that these two elderly men, as I recall, at this jewelry store took. It was rather unusual in that regard, and rather severe.

But in the order that we have examined these, let me make the following observations. The issue of not comparing the fingerprints on the glass in the jewelry store, and I'm referring to the ones that were of value and were not attributed to either of the known parties, I have to say is pretty much speculation.

I mean, if these prints somehow you put them in the AFIS system and somebody would surface, I won't say it's just totally without any possibility, but it's pretty remote. So I don't know I can fault Mr. Cristalli for not exploring that particular area, it being rather nebulous.

On the suppression motion, I had some questions, candidly, when I reviewed it. In fact, as you recall, counsel, I mentioned the fact that there was some sort of

a motion made the 16th of September of '04, and then abandoned. And I mentioned it could be recalendared and that sort of thing, but I had a question.

But Mr. Cristalli explained it in a way that I think is absolutely understandable; and that is, that his client took the position that the backpack wasn't his, so there can't be an expectation about his standing to challenge.

So if that's going to be the position the Defense takes or maintains, as the case turns out, a motion to suppress would not lie, so that explains it to my satisfaction.

Now, this issue of the Court's disallowing Defense counsel to subpoena Henderson police records and personnel and all that sort of thing, the handwriting exemplars and various other items within the keeping and custody of the Henderson Police Department.

I recall very vividly Mr. Cristalli's insistence on this tack, and I don't mean to be discourteous when I say tack, but it was his position. And this is not new to the Court, I see this more often than I care to, where Defense counsel persists in trying the Police Department.

And that's exactly the language I used in denying his request in that regard back in 2006. My reasoning prior to that date, my reasoning at that date and my

reasoning to this date is as follows:

There are two reasons that I disallow that kind of thing. Number one, it suggests to a jury, who is not privy to the police investigations and the workings of the court, that if police had just persisted in the investigation they would have found the real culprit, which is fantasy.

In any case that I have been able to observe in the last 35 years on the bench, I have yet to see a situation where shoddy police work has somehow failed to discover who was really responsible for particular crime.

And, secondly, when you try the Police Department it tends to divert the attention of the jury away from the defendant, away from his involvement or the evidence that's been supplied suggesting his involvement, and gets them all on this tangent on the police did or didn't do and should have done.

And then, of course, that begs the issue of what they saw on the latest TV show where they're supposed to have done this and supposed to have done that. If they had just turned over this one leaf and done a test on it, the whole case would have been solved.

So it's a slippery slope. It's one that almost is never-ending, because we can talk about what could have happened and what might have happened endlessly in any

kind of investigation.

So for those reasons I made it clear to Mr. Cristalli I would not allow him to pursue that line of inquiry. And I don't think he can be faulted, he was rather persistent about it. In fact, I gave him some latitude in a couple of instances which we discussed here in that regard.

As to the e-mails, evidently Mr. Cristalli made known to the Henderson Police Department this individual named Martell Williams, and they did a lineup and did a fingerprint analysis, one thing or another, and followed it up.

I don't mean to be discourteous to you, Mr. Langford, because I have the utmost respect for you and you know that. But it tends to take on the appearance of a fishing expedition; let me see what communication between these officers, and maybe something will surface that might militate in the favor of your client.

And I've never -- well, I don't think I've heard it asked for being done, but I've never heard of it being done. An internal communication, that's different from notes. We know the notes discovery.

But the actual communication between officers and the investigation, again, can be endless and I've never seen it done, and I wasn't inclined to do it in this

instance. I don't think of it as relevant to these proceeding.

And your request for an expert is going to be declined once again because, again, if I opened up this door, which I could I suppose, we could all look at this e-mail. We don't have to have an expert to read the e-mail. The availability at this time might be questionable, but I don't see it as relevant.

As to the federalization of the appellate issues, Mr. Cristalli didn't see a constitutional issue. You alluded to one that was nebulous, again, in my judgment, and I don't think there are any constitutional issues that are particularly evident in this case.

Certainly, that would be appealable to the federal system. The Supreme Court ruling on the kidnapping, that's an issue we've discussed many, many times. The moving of an individual increases their danger, or in some way is the whole part of the underlying offense, and that's an issue we ferreted through at the time.

So I don't see that there's any propriety here, and the petition is going to be denied. Thank you very much. Court is adjourned.

/ / /

/ / /

MR. LANGFORD: Thank you, Your Honor.

ATTEST: Full, true and accurate transcript of proceedings.

MAUREEN SCHORN, CCR NO. 496, RPR

ORIGINAL

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Feb 08 2012 01:31 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

NOTC
ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 003988
ROBERT L. LANGFORD & ASSOCIATES
616 S. Eighth Street
Las Vegas, Nevada 89101
(702) 471-6535
Attorney for Erick Brown

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ERICK BROWN,

Defendant.

CASE NO.: C189658

DEPT. NO.: XIV

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that ERICK BROWN, Defendant in the above entitled case, by and through his attorney, ROBERT L. LANGFORD, ESQ., of the law firm of ROBERT L. LANGFORD AND ASSOCIATES, hereby appeals to the Supreme Court of the State of Nevada from the Order Denying Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) decided in this action on January 27, 2012.

DATED this 5th day of February, 2012.

Respectfully Submitted:

ROBERT L. LANGFORD AND ASSOCIATES

By: _____
ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 003988
616 South 8th Street
Las Vegas, NV 89101
(702) 471-6535
Attorney for ERICK BROWN

C189658-1
NOASC
Notice of Appeal (criminal)
1763044

Docket 60197 Document 2012-03

CERTIFICATE OF MAILING

I hereby certify that I mailed a foregoing copy of Defendant ERICK BROWN'S NOTICE OF APPEAL, on the 6th day of February, 2012, by depositing a copy thereof in the United States Mail, postage prepaid, addressed to:

STEVEN B. WOLFSON, ESQ.
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

JOHN T. FATTIG, ESQ.
District Attorney's Office
200 Lewis Avenue.
Las Vegas, Nevada 89101

CATHERINE CORTEZ MASTO
Attorney General of the State of Nevada
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101

Freida Lynn Morin

An employee of
ROBERT L. LANGFORD AND ASSOCIATES

ORDR
MARY-ANNE MILLER
Interim Clark County District Attorney
Nevada Bar #001419
J. TIMOTHY FATTIG
Chief Deputy District Attorney
Nevada Bar #6639
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
ERIC M. BROWN,
#1895908
Defendant.

CASE NO: 03C189658-1
DEPT NO: XIV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: January 27, 2010
TIME OF HEARING: 1:30 P.M.

THIS CAUSE having come on for hearing before the Honorable Judge Donald Mosley, District Judge, on the 27th day of January, 2012, the Petitioner being present, Represented By Robert Langford, Esq., the Respondent being represented by MARY-ANNE MILLER, Interim Clark County District Attorney, by and through J. TIMOTHY FATTIG, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, the testimony of Defendant's former attorney, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 28, 2003, Defendant was charged by way of Information with BURGLARY WHILE IN POSSESSION OF A FIREARM, FIRST DEGREE

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KIDNAPPING WITH USE OF A DEADLY WEAPON, VICTIM OVER 65 YEARS OF AGE OR OLDER RESULTING IN SUBSTANTIAL BODILY HARM, FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM, ROBBERY WITH USE OF A DEADLY WEAPON VICTIM OVER 65 YEARS OF AGE OR OLDER and ROBBERY WITH USE OF A DEADLY WEAPON. An Amended Information was filed on June 26, 2006.

2. On June 30, 2006, a jury found Defendant guilty of all charges.

3. On August 8, 2006, Defendant was sentenced as follows: As to Count 1 – to a maximum of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26) months; As to Count 2 - a maximum of forty (40) years with a minimum parole eligibility of fifteen (15) years, plus an equal and consecutive term of forty (40) years maximum with a minimum parole eligibility of fifteen (15) years, count 2 to run concurrent with count 1; As to Count 3 – to a maximum of forty (40) years with a minimum parole eligibility of fifteen (15) years, plus an equal and consecutive term of forty (40) years with a minimum parole eligibility of fifteen (15) years, count 3 to run consecutive to count 2; As to Count 4 – to a maximum of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26) months, plus and equal and consecutive term of one hundred (120) month with a minimum parole eligibility of twenty-six (26) months, count 4 to run concurrent to count 3; As to Count 5 – to a maximum of one hundred twenty (120) months with a minimum parole eligibility of twenty-six (26) months, plus and equal and consecutive term of one hundred (120) months and twenty-six months minimum, count 5 to run concurrent with count 4. The Judgment of Conviction was filed on August 16, 2006.

4. On August 11, 2006, Defendant filed a Notice of Appeal. On August 28, 2006, Defendant filed a Pro Per Notice of Appeal. On September 13, 2007, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on October 9, 2007.

5. On October 10, 2008, Defendant filed a Petition for Writ of Habeas Corpus. On December 3, 2008, Defendant filed a Stipulation and Order to Continue Briefing of Petition for Writ of Habeas Corpus. On March 24, 2009, Defendant once again filed a Stipulation

and Order to Continue Briefing of Petition for Writ of Habeas Corpus. On May 22, 2009, Defendant filed a Supplement to Petition for Writ of Habeas Corpus.

6. On July 17, 2009, the State filed its Opposition.

7. On August 5, 2009, Defendant filed a Motion to Continue. On August 17, 2009, the Court granted Defendant's motion to continue.

8. On August 21, 2009, Defendant filed a Reply to State's Opposition to Defendant's Petition and Supplement to Petition and a Motion for Evidentiary Hearing.

9. On September 1, 2009, the State filed its Opposition to Defendant's Motion for Evidentiary Hearing.

10. On November 19, 2009, Defendant filed an Amendment to his Petition.

11. On December 4, 2009, the District Court ordered an Evidentiary Hearing.

12. On January 27, 2010, Defendant filed another Amendment to his Petition.

13. On March 18, 2010, Defendant filed a Motion for Discovery. The State filed its Opposition on April 5, 2010. On April 30, 2010, the District Court granted Defendant's Motion as it pertained to testing the earring for DNA and releasing the fingerprints.

14. The evidentiary hearing was continued on December 10, 2010; March 17, 2011; March 24, 2011; April 14, 2011; July 22, 2011; September 9, 2011; September 23, 2011; October 21, 2011; December 2, 2011.

15. On January 10, 2012, Defendant filed a Motion to Continue Evidentiary Hearing. On January 25, Defendant's Motion came before the Court and after oral argument, Defendant withdrew his Motion to Continue.

16. On January 27, 2012, an Evidentiary Hearing was finally held.

17. Defendant's issue regarding illegal search and seizure should have been raised on direct appeal and is therefore, waived.

18. Defendant received effective assistance of trial counsel.

19. Defendant's claim that his counsel was ineffective for not seeking to suppress the jewelry found in a backpack is denied because the defendant told his attorney that he never possessed the backpack and also testified in this manner. As such, Defendant never claimed

a privacy interest in the property so as to have standing to file such a motion. It was Defendant's strategy to deny any possessory interest in the property.

20. Defendant's claim that his counsel was ineffective for not sharing the results of his investigation with Defendant is meritless and thus, denied.

21. Defendant was not entitled to a "relationship" with counsel, only effective assistance of counsel.

22. Defendant's claim that trial counsel was ineffective for failing to raise the issues of illegal search and seizure and incomplete/inaccurate police investigation in a pre-trial motion to suppress or writ of habeas corpus pre-trial is unsupported and thus, denied.

23. The issues Defendant raised regarding the police department appears to be fishing attempts by Defendant, which do not warrant relief.

24. Defendant received effective assistance of appellate counsel.

25. Defendant's claim that his counsel was ineffective in filing his appeal because he did not sufficiently challenge the police investigation into the case is denied. Counsel did investigate numerous areas surrounding the police investigation into the case including having an investigator look into several areas of the case, hiring an independent expert to examine the fingerprint evidence and personally reviewing the fingerprint cards from the crime scene. Although nine prints were lifted at the scene only five of them were of sufficient value for comparison. Three of those five were identified to one of the victims and the remaining two prints were run through AFIS and compared to defendant, co-defendant Alfred Blackwell as well as the defense's alternative suspect Martell Williams with negative results. The prints were found in the public area of the store (on the display cases) and could have belonged to any number of random customers or other employees who were not in the AFIS system. Likewise, counsel was not ineffective for failing to test DNA that may have been present on an earring. DNA from the earring left by the taller suspect at the scene was unlikely to have had DNA of the suspect still on it as one of the two victim's had placed the earring into a jewelry cleaner and turned the cleaner on prior to the attack.

CONCLUSIONS OF LAW

1. Issues that have not been timely raised on direct appeal are deemed waived per NRS 34.810(1)(b)(2) and Franklin v. State, 110 Nev. 750 (1994).

2. In Nevada, the appropriate vehicle for review of whether counsel was effective is a post-conviction relief proceeding. McKague v. Warden, 112 Nev. 159, 912 P.2d 255, 257, n.4 (1996). Nevada has adopted the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under Strickland, in order to assert a claim for ineffective assistance of counsel, the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying a two-pronged test. Strickland at 686–687; *see* State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show: first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687–688 & 694, 104 S.Ct. at 2065 & 2068. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

3. In considering whether trial counsel has met this standard, the court will first determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing, Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Once this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280; citing, Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; see also, Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; State v. Meeker, 693 P.2d 911, 917

(Ariz. 1984).

4. The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)(emphasis added); citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

5. This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711; citing Cooper, 551 F.2d at 1166 (9th Cir. 1977). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

6. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694).

7. "A lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." Brookhart v. Janis, 384 U.S. 1, 8, 86 S.Ct. 1245 (1966). The client may make decisions regarding the scope and ultimate objectives of representation, but the trial lawyer alone is empowered to make decisions regarding legal tactics. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). In the case of court appointed counsel, "[o]nce counsel is appointed, the day-to-day conduct of

the defense rests with the attorney. He, not the client, has the immediate-and ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002), citing Wainright v. Sykes, 433 U.S. 72, 93, 97 S.Ct. 2497 (1977). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland v. Washington, 466 U.S. 688, 691, 104 S.Ct. 2052, 2066 (1984).

8. A defendant is not entitled to a "relationship" with counsel, just reasonably effective representation. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983).

9. An attorney's failure to make futile motions or objections does not constitute ineffective assistance of counsel. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

10. There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990), citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

11. The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In order to prove that appellate counsel's alleged error was prejudicial, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

12. While a defendant has the ultimate authority to make fundamental decisions regarding his case, the defendant does not have a constitutional right to "compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). In reaching this conclusion the Supreme Court recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313. In

particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby **denied.**

DATED this FEB 10 2012 day **of February, 2012.**

DONALD M. MOSLEY

DISTRICT JUDGE

MARY-ANNE MILLER
Interim Clark County **District Attorney**
Nevada Bar #001419

BY
J. TIMOTHY FATTIG
Chief Deputy District **Attorney**
Nevada Bar #6639

02FH1222A: hh/JTF/ckb

FILED
FEB 16 2012
CLERK OF COURT

NOED

DISTRICT COURT
CLARK COUNTY, NEVADA

ERICK M. BROWN,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 03C189658-1
Dept No: XIV

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that on February 13, 2012, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on February 16, 2012.

STEVEN D. GRIERSON, CLERK OF THE COURT

By: Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 16 day of February 2012, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the District Court Clerk of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:

Erick M. Brown # 92713
P.O. Box 208
Indian Springs, NV 89070

Robert L. Langford, Esq.
616 S. Eighth St.
Las Vegas, NV 89101

Heather Ungermann
Heather Ungermann, Deputy Clerk