ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 003988
ROBERT L. LANGFORD & ASSOCIATES
616 South Eighth Street,
Las Vegas, NV 89101
Attorney for Appellant
ERICK BROWN

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Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK BROWN, Appellant, vs. THE STATE OF NEVADA, Respondent.	Docket No. 60197 District Court No. C189658 Department XIV

FAST TRACK STATEMENT

1. Name of party filing this fast track statement: Appellant ERICK BROWN.

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

Robert L. Langford, Esq.
ROBERT L. LANGFORD & ASSOCIATES
616 S. Eighth Street
Las Vegas, Nevada 89101
(702) 471-6535

3. Name, law firm, address and telephone number of appellate counsel, if different from trial counsel: Appellant ERICK BROWN was represented by retained counsel, ANDREW FRITZ from February 10, 2003 to December 2, 2003; MICHAEL CRISTALLI from December 2, 2003 to June 17, 2008; from June 17, 2008 forward ROBERT L. LANGFORD, ROBERT L. LANGFORD AND ASSOCIATES, 616 South 8th Street, Las Vegas, NV 89101, (702) 471-6535.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District Court, Clark County, District Court No. C189658.

5. **Name of judge issuing decision, judgment, or order appealed from:** Honorable DONALD M. MOSLEY

6. **Length of trial:** 1 day hearing on Petition for Writ of Habeas Corpus (Post-Conviction)

7. **Order(s) appealed from:** The proceedings from which Appellant is appealing commenced from an Order Denying Appellant's Post-Conviction Writ of Habeas Corpus.

8. **Sentence for each count**: Appellant ERICK BROWN was adjudged guilty of Count 1 - burglary while in possession of a firearm, Count 2 - first degree kidnapping with use of a deadly weapon, victim 65 years of age or older resulting in substantial bodily harm, Count 3 - first degree kidnapping with use of a deadly weapon resulting in substantial bodily harm, Count 4 - robbery with use of a deadly weapon, victim 65 years of age, and Count 5 - robbery with use of a deadly weapon. On August 8, 2006, Mr. Brown was sentenced to the Nevada Department of Corrections on Count 1 - to a maximum of one hundred-twenty (120) months and a minimum of twenty-six (26) months, on Count 2 - to a maximum of forty (40) years and a minimum of fifteen (15) years, plus an equal and consecutive term of forty (40) years and a minimum of fifteen (15) years, concurrent with Count 1, on Count 3 - to a maximum of forty (40) years and a minimum of fifteen (15) years, plus an equal and consecutive maximum of forty (40) years and a minimum of fifteen (15) years, consecutive to Count 2, on Count 4 - to a maximum of one hundred twenty (120) months and a minimum of twenty-six (26) months, plus an equal and consecutive maximum of one hundred twenty (120) months and a minimum of twenty-six (26) months, concurrent

with Count 3, and on Count 5 - to a maximum of one hundred twenty (120) months and a minimum of twenty-six (26) months, plus an equal and consecutive maximum of one hundred twenty (120) months and a minimum of twenty-six (26) months, concurrent with Count 4.

9. Date of district court announced decision, sentence, or order: January 27, 2012.

10. Date of entry of written judgment or order: February 16, 2012.

(a) If not written judgment or order was filed in the district court, explain the basis for seeking appellate review: Not Applicable.

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: February 16, 2012.

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

(a) specify the type of motion, and the date of filing of the motion: Not Applicable.

(b) date of entry of written order resolving motion: Not Applicable.

13. Date notice of appeal filed: February 7, 2012.

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

NRAP 4(b).

15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from: NRAP 4(b).

16. Specify the nature of disposition below: Order Denying Post-Conviction Writ of Habeas Corpus.

17. Pending and prior proceedings in this court: Direct Appeal filed August 16, 2006, Docket No. 47856; Petition for Writ of Mandamus filed January

27, 2005, Docket No. 44588.

18. **Pending and prior proceedings in other courts:** None known to counsel.

19. Proceedings raising same issues: Not Applicable.

20. **Procedural history:**

On June 30, 2006, Appellant ERICK BROWN was found guilty by jury trial of Count 1 - burglary while in possession of a firearm, Count 2 - first degree kidnapping with use of a deadly weapon, victim 65 years of age or older resulting in substantial bodily harm, Count 3 - first degree kidnapping with use of a deadly weapon resulting in substantial bodily harm, Count 4 - robbery with use of a deadly weapon, victim 65 years of age, and Count 5 - robbery with use of a deadly weapon.

While Mr. Brown's appellate counsel filed a timely fast track appeal statement, **AA 0004-0028**, he omitted eleven claims which he then attempted to present in a late-filed (August 20, 2007) supplemental *Anders* Brief. The additional issues in the supplemental brief were rejected by the Nevada Supreme Court based solely on counsel's untimely filing. His direct appeal was ultimately denied.

On December 3, 2008, after the denial of his direct appeal, Mr. Brown timely filed his Petition for Writ of Habeas Corpus (Post Conviction) ("Petition") in which he asserted several claims that he was denied effective assistance of counsel, in violation of his rights guaranteed under the Sixth and Fourteenth Amendments the United States Constitution. **AA 0029-0042.** Mr. Brown was represented by the same attorney at trial and on direct appeal. His Petition included claims that his trial / appellate counsel failed to investigate and / or provide Mr. Brown with the results of investigation into issues critical to his defense, including critical fingerprint evidence. In addition, Mr. Brown asserted that his trial and appellate counsel was ineffective for failing to raise a host of issue Mr. Brown desired to present

in his direct appeal.

On May 22, 2009, Mr. Brown filed a supplement to his Petition which raised several additional claims: (1) that Mr. Brown's Fourth Amendment rights were violated by way of an illegal search and seizure conducted at the time of his arrest; (2) ineffectiveness assistance of trial and appellate counsel for not raising these Fourth Amendment issues; (3) ineffective assistance of trial and appellate counsel for failing to raise on direct appeal the trial court's refusal to permit exploration of police procedure; (4) ineffective assistance of trial and appellate counsel for failing to raise at trial and on direct appeal the issue of an incomplete and / or inaccurate police investigation. **AA 0043-0055.**

On January 27, 2012 an evidentiary hearing was held on Mr. Brown's petition. **AA 0078-0173.** The court denied his petition. **AA 0176-0184.** This appeal follows.

21. Statement of facts:

On November 23, 2002, two men entered the Las Vegas Manufacturing Jewelers (LVMJ) and robbed the facility. The perpetrators, armed with a gun, forced victim Connelly (Connelly) and victim Golsecker (Golsecker) to the floor of the back room, where they were bound. Mr. Brown was apprehended on November 27, 2002, while exiting the elevator of the Hyatt Regency Hotel, in Los Angeles, California. He was in possession of property taken during the LVMJ robbery, but has consistently maintained that he did not participate in the burglary in any manner.

On April 6, 2009, Mr. Brown's trial / appellate counsel filed an affidavit in this case, admitting that he did indeed late-file the *Anders* Brief which resulted in the issues in it not being considered by the Nevada Supreme Court. Attached to the Affidavit was a report from the investigator in the case demonstrating that Mr. Brown's trial / appellate

counsel was aware of a host of critical issues which he failed to follow up on or resolve before trial, despite having represented Mr. Brown for five and one-half years, since December 2, 2003.

22. Issues on appeal : The District Court erred by failing to find appellate counsel ineffective in not appealing the court's decision to limit questioning regarding the Henderson Police Department, and in failing to federalize any issues on appeal.

23. Legal Argument, including authorities:

I. THE DISTRICT COURT ERRED BY FAILING TO FIND APPELLATE COUNSEL INEFFECTIVE.

Mr. Brown was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established the standards used in determining when counsel is so ineffective that it violates the guarantee of effective assistance of counsel to criminal defendants set forth in the Sixth Amendment of the United States Constitution. Strickland set forth a two-prong test to determine the merits of a defendant's claim of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. Strickland, at 687; *see also* McConnell v. State, 125 Nev. Adv. Rep. 24, 212 P.3d 307, 313 (2009) (citing Strickland v. Washington, 466 U.S. 668 (1984)). Prejudice is demonstrated when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 687-89, 694.

"This Court reviews a claim of ineffective assistance of appellate counsel under the Strickland test. 'To establish prejudice based on the deficient assistance

of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal.'" Lara v. State, 120 Nev. 177, 183-84, 87 P.3d 528**,** 532 (2004) (quoting Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996)).

A. THE DISTRICT COURT ERRED BY FAILING TO FIND DEFENSE COUNSEL INEFFECTIVE IN NOT APPEALING THE COURT'S DECISION TO LIMIT QUESTIONING REGARDING THE HENDERSON POLICE DEPARTMENT.

The Supreme Court recognizes the challenge of the adequacy of the police investigation as a common and accepted defense. The Court has stated, "[w]hen, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." Kyles v. Whitley, 514 U.S. 419, 446 fn. 15 (1995). Further, in Kyles, the Court cited Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986), which states "A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." Kyles, 514 U.S. 446. The Court also referenced Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985), where the defendant was awarded a new trial because "withheld *Brady* evidence 'carried within it the potential...for the...discrediting...of the police methods employed in assembling the case.'" Kyles, 514 U.S. 446.

The Ninth Circuit agrees. In United States v. Sager, 227 F.3d 1138 (9th Cir. 2000), the court found that the district court committed plain error and abused its discretion when it instructed the jury to not "grade" the investigation and did not allow the defense to question the investigator further regarding a flaw in the investigation. The court reasoned, "[d]etails of the investigatory process potentially affected [the inspector's] credibility and, perhaps more importantly, the weight to be given to evidence produced by his investigation." Sager, 227 F.3d

1138, 1145; see also United States v. Bahamonde, 445 F.3d 1225 (9th Cir. 2006).

The Massachusetts Supreme Court explains that challenging the adequacy of the investigation could raise reasonable doubt in the minds of the jurors. Commonwealth v. Reynolds, 429 Mass. 388 (1999). Where the trial court restricted cross-examination of the chief police investigator on deficiencies in the investigation, and denied the defense the ability to call a witness on that issue, the court granted a new trial. Id. The court reasoned that "[i]t is well settled that a defendant has a right to expose inadequacies of police investigation." Id. at 391.

The Kyles Court also appears to support the idea that officers may be questioned regarding witness statements to show the inadequacy of the investigation. In Kyles,514 U.S. 419, the police failed to investigate an informant who was eager to cast suspicion on Kyles. The Court reasoned that the defense could have supported the argument that the police were negligent by not even considering the informant as a suspect. "[T]he defense could have examined the police to good effect on their knowledge of [the informants'] statements and so have attacked the reliability of the investigation..." Id. at 446.

Here, defense counsel attempted to question the police investigation at trial, but was hindered by the court.

> Mr. Langford: Were you prevented from completely examining Ms. Weir by the Court?
> Mr. Cristalli: I believe I was.
> Mr. Langford: Specifically, you were asking about the AFIS stystem and what it could end could not do; is that right?
> Mr. Cristalli: That's correct. I was limited in what I could ask on my examination.
> Mr. Langford: And how were you limited, specifically? What was happening in your mind that prevented you from asking those questions?
> Mr. Cristalli: 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.
> Mr. Langford: Okay. Do you recall the Court specifically telling that you were not going to try the personnel in the lab over at the Henderson Police Department:
> Mr. Cristalli: Yes.

AA 0093. At the hearing on the writ, the court admitted to limiting defense counsel's inquiry into the Henderson Police Department's investigation.

> The COURT: 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 suppose 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.

AA 0169-0171. Though the court felt Mr. Cristalli could not be faulted, due to his persistence on the subject, Mr. Cristalli did fail to raise the issue on appeal. Clearly, the court did not allow Mr. Cristalli to put forth evidence that the Police Department did not conduct an adequate police investigation. This issue would have a reasonable probability of success on appeal. Therefore, Mr. Cristalli was ineffective in failing to address this issue on appeal.

B. THE DISTRICT COURT ERRED BY FAILING TO FIND DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO FEDERALIZE ANY ISSUES ON APPEAL.

Mr. Brown was prejudiced because no issues were federalized, limiting his appeal to the Nevada Supreme Court. Specifically, a due process argument should have been raised. At the hearing, Mr. Cristalli admitted he had a due process argument on appeal that he did not federalize.

> Mr. Langford: Is that not a federal constitutional issue if you're convicted of something? Isn't that a due process violation?
> Mr. Cristalli: If you're wrongfully convicted of something?
> Mr. Langford: Correct.
> Mr. Cristalli: 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.
> Mr. Langford: 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?
> Mr. Cristalli: That's correct. Our analysis of the case law under these facts and circumstance, we alleged that the kidnapping was incidental to the robbery.
> Mr. Langford: It was denied by the Supreme Court?
> Mr. Cristalli: That's right.
> Mr. Langford: Now, isn't that something you'd also want to take up in federal court?

AA 0166-0167. "The Due Process Clause of the Fourteenth Amendment prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. This constitutional requirement can be effectuated only if a federal habeas corpus court, in assessing the sufficiency of the evidence to support a state-court conviction, inquires whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Pilon v. Bordenkircher, 444 U.S. 1, 2 (1979). Therefore, the due process issue was not preserved for federal post-conviction remedies.

24. Preservation of issues: The issues were preserved via Petition for Writ of Habeas Corpus (Post-Conviction) and hearing on same.

25. Issues of first impression or of public interest: None.

VERIFICATION

I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track statement has been prepared in a proportionally spaced typeface using WordPerfect Office 14 in Times New Roman 14.

I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 15 pages.

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 appellate 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 18th day of April, 2012.

ROBERT L. LANGFORD & ASSOCIATES

BY: */s/ Robert L. Langford*
ROBERT L. LANGFORD, ESQ.
Nevada Bar No. 003988
616 S. Eighth Street
Las Vegas, Nevada 89101
(702) 471-6535
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am a person competent to serve papers, that I am not a party to the above-entitled action and that on the 18th day of April, 2012, I served a copy of the foregoing:

APPELLANT'S FAST TRACK STATEMENT

upon the following person, via the Nevada Supreme Court's EFLEX filing system:

Steven S. Owens, Esq.
Chief Deputy District Attorney
200 Lewis Avenue.
Las Vegas, Nevada 89101

Catherine Cortez Masto
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Robert L. Langford

Robert L. Langford, Esq.